IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION
Supreme Court No. 20120300

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

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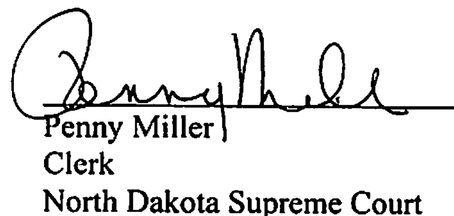
On July 25, 2012, the Joint Procedure Committee submitted a petition to approve proposed amendments to North Dakota Rules of Civil Procedure 4, 5, 8, 26, 33, 45 and 58; North Dakota Rules of Appellate Procedure 24, 32 and 40; North Dakota Rules of Criminal Procedure 3, 4, 4.1, 7, 9, 17, 32.2 and 41; North Dakota Rules of Juvenile Procedure 13; and North Dakota Rules of Court 5.1. On October 2, 2012, the Committee submitted additional proposed amendments to North Dakota Rules of Civil Procedure 45 and proposed amendments to North Dakota Rules of Court 3.1. A synopsis and the proposed Amendments are available at http://www.ndcourts.gov/Court/Notices/Notices.htm. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court considered the matter, and

ORDERED, that North Dakota Rules of Civil Procedure 4, 5, 8, 26, 33, 45 and 58; North Dakota Rules of Appellate Procedure 24, 32 and 40; North Dakota Rules of Criminal Procedure 3, 4, 4.1, 7, 9, 17, 32.2 and 41; North Dakota Rules of Juvenile Procedure 13; and North Dakota Rules of Court 3.1 and 5.1, as further amended by the Court, are ADOPTED, effective March 1, 2013.

The Supreme Court of the State of North Dakota convened this 30thst day of November, 2012, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, the Honorable Carol Ronning Kapsner, and the Honorable Daniel J. Crothers, Justices, directing the Clerk of the Supreme Court to enter the above order. The Honorable Carol Ronning Kapsner and the Honorable Daniel J. Crothers voted against adoption of the amendments to North Dakota Rules of Appellate Procedure 32.



Penny Miller
Clerk
North Dakota Supreme Court

RULE 3.1. PLEADINGS

(a) Legibility and Numbering. All pleadings and other documents must be typewritten, printed, or reproduced 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 81/2 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 the attorney's address, telephone number, 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 the party's 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 or 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 the original demand for change of judge.

(f) Lost Papers. If any original document is lost or withheld by any person, the court

23 may authorize a copy to be filed.

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

29 (h) Proof of Service Required. Proof of service must accompany pleadings and
30 documents submitted to the clerk for filing, unless a rule or statute requires a document to
31 be filed before it is served.

32 (i) Privacy Protection. Parties must follow privacy protection instructions in N.D.R.Ct.
33 3.4 when making filings with the court. Court personnel have no duty to review documents
34 for compliance with N.D.R.Ct. 3.4.

35 (j) Non-Conforming Documents.

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

37 (2) If a non-conforming document is filed by mistake, the court on motion or on its
38 own may order the pleading or other document reformed. If the order is not obeyed, the court
39 may order the document stricken and its service to be of no effect.

40 EXPLANATORY NOTE

41 Rule 3.1 was amended, effective January 1, 1988; March 1, 1996; March 1, 1999;
42 August 1, 2001; March 1, 2005; March 1, 2007; March 1, 2009; May 1, 2012; March 1,
43 2013.

44 Rule 3.1 was reorganized, effective May 1, 2012, to make it clear that all documents

45 presented for filing must conform to all applicable requirements of the rule.

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

48 A new subdivision (e) was added, effective March 1, 2005, to clarify that documents
49 must be filed with the clerk. Submitting a document to a judge or to court personnel other
50 than the clerk does not constitute filing. The first version of a given document submitted to
51 the clerk, regardless of what form it is in, will be filed and treated as the original. A party
52 seeking to correct the original or have another document treated as the original must obtain
53 an order from the court.

54 Subdivision (e) was amended, effective May 1, 2012, to specify that a party making
55 a demand for change of judge may file only one original. This provision supersedes the
56 requirement in N.D.C.C. 29-15-21 that a demand for change of judge be filed in triplicate.

57 Subdivision (h) was amended, effective March 1, 2013, to clarify that, unless a rule
58 or statute requires a document to be filed before it is served, proof of service must
59 accompany any document submitted for filing.

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

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

64 Sources: Joint Procedure Committee Minutes of September 27, 2012, page 14;
65 January 26-27, 2012, pages 16-17; January 24, 2008, pages 9-12; October 11-12, 2007, pages
66 28-30; April 26-27, 2007, page 31; September 22-23, 2005, pages 16-17; September 23-24,

67 2004, pages 3-5; April 29-30, 2004, pages 6-13, 17-25; January 29-30, 2004, pages 3-8;

68 September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12; January 29-30, 1998,

69 page 22; September 29-30, 1994, pages 6-7.

70 Statutes Affected: Superseded: N.D.C.C. § 29-15-21 (in part).

71 Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers);

72 N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with the Court); N.D.Sup.Ct.Admin.R.

73 41 (Access to Judicial Records).

RULE 3. THE COMPLAINT

(a) General. The complaint is a written statement of the essential facts constituting the elements of the offense charged. The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state and be presented to a magistrate. The complaint may be presented as provided in Rule 4.1.

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

(c) Amendment. The magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

EXPLANATORY NOTE

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

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

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

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

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

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

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

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

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

Statutes Affected:

Superseded: N.D.C.C. §§ 29-01-13(1), 29-05-02 to the extent that it requires a

45 complaint to be subscribed and sworn to before a magistrate, N.D.C.C. §§ 29-05-03, 33-12-

46 03, 33-12-04, 33-12-05, 33-12-16, 33-12-25.

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

48 05-01, 29-05-05.

49 Cross Reference: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone

50 or Other Reliable Electronic Means); N.D.R.Crim.P. 7 (The Indictment and the Information).

1 N.D.R.Crim.P.

2 RULE 4.1. COMPLAINT, WARRANT, OR SUMMONS BY TELEPHONE OR OTHER

3 RELIABLE ELECTRONIC MEANS

4 (a) In General. The magistrate may consider information communicated by telephone

5 or other reliable electronic means when reviewing a complaint or deciding whether to issue

6 a warrant or summons.

7 (b) Procedures. If the magistrate decides to proceed under this rule, the following

8 procedures apply:

9 (1) Taking Testimony Under Oath. The magistrate must place under oath – and may

10 examine – the applicant and any person on whose testimony the application is based.

11 (2) Creating a Record of the Testimony and Exhibits.

12 (A) Testimony Limited to Attestation. If the applicant does no more than attest to the

13 contents of a written affidavit submitted by reliable electronic means, the magistrate must

14 acknowledge the attestation in writing on the affidavit.

15 (B) Additional Testimony or Exhibits. If the magistrate considers additional testimony

16 or exhibits, the magistrate must:

17 (i) ensure the testimony is recorded verbatim by an electronic recording device, by

18 a court reporter or recorder, or in writing;

19 (ii) ensure any recording or notes are filed, transcribed on request, and any

20 transcription is certified as accurate;

21 (iii) sign any other written record and ensure it is certified as accurate and filed; and

22 (iv) ensure the exhibits are filed.

23 (3) Preparing a Proposed Duplicate Original of a Complaint, Warrant, or Summons.
24 The applicant must prepare a proposed duplicate original of a complaint, warrant, or
25 summons, and must read or otherwise transmit its contents verbatim to the magistrate.
26 (4) Preparing an Original Complaint, Warrant, or Summons. If the applicant reads the
27 contents of the proposed duplicate original, the magistrate must enter those contents into an
28 original complaint, warrant, or summons. If the applicant transmits the contents by reliable
29 electronic means, the transmission received by the magistrate may serve as the original.
30 (5) Modification. The magistrate may modify the complaint, warrant, or summons.
31 The magistrate must then:
32 (A) transmit the modified version to the applicant by reliable electronic means; or
33 (B) file the modified original and direct the applicant to modify the proposed duplicate
34 original accordingly.
35 (6) Issuance. To issue the warrant or summons, the magistrate must:
36 (A) sign the original documents;
37 (B) enter the date and time of issuance on the warrant or summons; and
38 (C) transmit the warrant or summons by reliable electronic means to the applicant or
39 direct the applicant to sign the magistrate's name and enter the date and time on the duplicate
40 original.
41 (c) Suppression Limited. Absent a finding of bad faith, evidence obtained from a
42 warrant issued under this rule is not subject to suppression on the ground that issuing the
43 warrant in this manner was unreasonable under the circumstances.
44 EXPLANATORY NOTE

45 Rule 4.1 was adopted, effective March 1, 2013.

46 Rule 4.1 is an adaptation of Fed.R.Crim.P. 4.1.

47 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 22-25;
48 Fed.R.Crim.P. 4.1.

49 Cross Reference: N.D.R.Crim.P. 3 (The Complaint); N.D.R.Crim.P. 4 (Arrest Warrant
50 or Summons Upon Complaint); N.D.R.Crim.P. 9 (Warrant or Summons Upon Indictment or
51 Information); N.D.R.Crim.P. 41 (Search and Seizure).

RULE 4. PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE

(a) Definition of person. As used in this rule, "person," whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state, includes:

(1) an individual, executor, administrator or other personal representative;

(2) any other fiduciary;

(3) any two or more persons having a joint or common interest;

(4) a partnership;

(5) an association;

(6) a corporation; and

(7) any other legal or commercial entity.

(b) Personal jurisdiction.

(1) Personal jurisdiction based on presence or enduring relationship. A court of this state may exercise personal jurisdiction over a person found within, domiciled in, organized under the laws of, or maintaining a principal place of business in, this state as to any claim for relief.

(2) Personal jurisdiction based on contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:

(A) transacting any business in this state;

23 (B) contracting to supply or supplying service, goods, or other things in this state;

24 (C) committing a tort within or outside this state causing injury to another person or

25 property within this state;

26 (D) committing a tort within this state, causing injury to another person or property

27 within or outside this state;

28 (E) having an interest in, using, or possessing property in this state;

29 (F) contracting to insure another person, property, or other risk within this state;

30 (G) acting as a director, manager, trustee, or officer of a corporation organized under

31 the laws of, or having its principal place of business within, this state;

32 (H) enjoying any other legal status or capacity within this state; or

33 (I) engaging in any other activity, including cohabitation or sexual intercourse, within

34 this state.

35 (3) Limitation on jurisdiction based on contacts. If jurisdiction over a person is based

36 solely on paragraph (2) of this subdivision, only a claim for relief arising from bases

37 enumerated in paragraph (2) may be asserted against that person.

38 (4) Acquisition of jurisdiction. A court of this state may acquire personal jurisdiction

39 over any person through service of process as provided in this rule or by statute, or by

40 voluntary general appearance in an action by any person either personally or through an

41 attorney or any other authorized person.

42 (5) Inconvenient forum. If the court finds, in the interest of substantial justice the

43 action should be heard in another forum, the court may stay or dismiss the action in whole

44 or in part on any condition that may be just.

45 (c) Process.

46 (1) Contents of summons. The summons must:

47 (A) specify the venue of the court in which the action is brought;

48 (B) contain the title of the action specifying the names of the parties;

49 (C) be directed to the defendant;

50 (D) state the time within which these rules require the defendant to appear and defend;

51 (E) notify the defendant that, if the defendant fails to appear and defend, default
52 judgment will be rendered against the defendant for the relief demanded in the complaint;
53 and

54 (F) be dated and subscribed by the plaintiff or the plaintiff's attorney and include the
55 post office address of the plaintiff or plaintiff's attorney.

56 (G) If the action involves real estate and service is by publication, include the
57 additional information required by Rule 4(e)(8).

58 (2) ~~Summons served with~~ Copy of Complaint. A copy of the complaint must be served
59 with the summons, except when service is by publication under Rule 4(e).

60 ~~(3) Summons served and complaint not filed: Demand to file the complaint. The~~
61 ~~defendant may serve a written demand on the plaintiff to file the complaint as follows:~~

62 ~~(A) service of the demand must be made under Rule 5(b) on the plaintiff's attorney~~
63 ~~or under Rule 4(d) on the plaintiff if the plaintiff is not represented by an attorney;~~

64 ~~(B) in cases with multiple defendants, service of a demand by one defendant is~~
65 ~~effective for all the defendants;~~

66 ~~(C) if the plaintiff does not file the complaint within 20 days after service of the~~

67 ~~demand, service of the summons is void; and~~

68 ~~(D) the demand must contain notice that if the complaint is not filed within 20 days,~~

69 ~~service of the summons is void under this rule, unless, after motion made within 60 days after~~

70 ~~service of the demand for filing, the court finds excusable neglect.~~

71 ~~(4) The defendant may file the summons and complaint, and the costs incurred on~~

72 ~~behalf of the plaintiff may be taxed as provided in Rule 54(e).~~

73 (d) Personal service.

74 (1) By whom service of all process may be made:

75 (A) within the state by any person of legal age and not a party to nor interested in the

76 action; and

77 (B) outside the state by any person who may make service under the law of this state

78 or under the law of the place where service is made, or by a person who is designated by a

79 court of this state.

80 (2) How service of process is made within the state.

81 (A) Serving an individual fourteen years of age and older. Service must be made on

82 an individual 14 or more years of age by:

83 (i) delivering a copy of the summons to the individual personally;

84 (ii) leaving a copy of the summons at the individual's dwelling or usual place of

85 residence in the presence of a person of suitable age and discretion who resides there;

86 (iii) delivering, at the office of the process server, a copy of the summons to the

87 individual's spouse if the spouses reside together;

88 (iv) delivering a copy of the summons to the individual's agent authorized by

89 appointment or by law to receive service of process; or

90 (v) any form of mail or third-party commercial delivery addressed to the individual

91 to be served and requiring a signed receipt and resulting in delivery to that individual.

92 (B) Serving an individual under the age of fourteen. Service must be made on an

93 individual under the age of 14 by delivering a copy of the summons to:

94 (i) the individual's guardian, if the individual has one within the state;

95 (ii) the individual's parent or any person or agency having the individual's care or

96 control, or with whom the individual resides, if the individual does not have a guardian

97 within the state; or

98 (iii) the person designated by court order, if service cannot be made under (i) or (ii).

99 (C) Serving an incompetent individual or appointed guardian. Service must be made

100 on an individual who has been judicially adjudged incompetent or for whom a guardian of

101 the individual's person or estate has been appointed in this state, by delivering a copy of the

102 summons to the individual's guardian. If a general guardian and a guardian ad litem have

103 been appointed, both must be served.

104 (D) Serving a corporation, partnership, or association. Service must be made on a

105 domestic or foreign corporation or on a partnership or other unincorporated association, by:

106 (i) delivering a copy of the summons to an officer, director, superintendent or

107 managing or general agent, or partner, or associate, or to an agent authorized by appointment

108 or by law to receive service of process on its behalf, or to one who acted as an agent for the

109 defendant with respect to the matter on which the plaintiff's claim is based and who was an

110 agent of the defendant at the time of service;

111 (ii) if the sheriff's return indicates no person upon whom service may be made can be
112 found in the county, then service may be made by leaving a copy of the summons at any
113 office of the domestic or foreign corporation, partnership, or unincorporated association
114 within this state with the person in charge of the office; or
115 (iii) any form of mail or third-party commercial delivery addressed to any of the
116 foregoing persons and requiring a signed receipt and resulting in delivery to that person.
117 (E) Serving a municipal or public corporation. Service must be made on a city,
118 township, school district, park district, county, or any other municipal or public corporation,
119 by delivering a copy of the summons to any member of its governing board.
120 (F) Serving the state and its agencies.
121 (i) State. Service must be made on the state, by delivering a copy of the summons to
122 the governor or attorney general or an assistant attorney general.
123 (ii) State agency. Service must be made on an agency of the state, such as the Bank
124 of North Dakota or the North Dakota Mill and Elevator Association, by delivering a copy of
125 the summons to the managing head of the agency or to the attorney general or an assistant
126 attorney general.
127 (G) Serving an agent not authorized to receive process. If service is made on an agent
128 who is not expressly authorized by appointment or by law to receive service of process on
129 behalf of the defendant, a copy of the summons and complaint must be mailed or delivered
130 via a third-party commercial carrier to the defendant with return receipt requested not later
131 than ten days after service by depositing a copy of the summons and complaint, with postage
132 or shipping prepaid, in a post office or with a commercial carrier in this state and directed to

133 the defendant to be served at the defendant's last reasonably ascertainable address.

134 (3) How service of process is made outside the state. Service on any person subject

135 to the personal jurisdiction of the courts of this state may be made outside the state:

136 (A) in the manner as service within this state, with the force and effect as though

137 service had been made within this state;

138 (B) under the law of the place where service is made for service in that place in an

139 action in any of its courts of general jurisdiction; or

140 (C) as directed by court order.

141 (e) Service by publication.

142 (1) When service by publication permitted. A defendant, whether known or unknown,

143 who has not been served personally under subdivision (d) of this rule may be served by

144 publication in one or more of the following situations only if:

145 (A) the claim for relief is based on one or more grounds for the exercise of personal

146 jurisdiction under paragraph (2) of subdivision (b) of this rule;

147 (B) the subject of the action is real or personal property in this state, and:

148 (i) the defendant has or claims a lien or other interest in the property, whether vested

149 or contingent,

150 (ii) the relief demanded against the defendant consists wholly or partly in excluding

151 the defendant from that lien or interest or in defining, regulating, or limiting that lien or

152 interest, or

153 (iii) the action otherwise affects the title to the property;

154 (C) the action is to foreclose a mortgage, cancel a contract for sale, or to enforce a lien

155 on or a security interest in real or personal property in this state;

156 (D) the plaintiff has acquired a lien on the defendant's property or credits within this

157 state by attachment, garnishment, or other judicial processes and the property or credit is the

158 subject matter of the litigation or the underlying claim for relief relates to the property or

159 credits;

160 (E) the action is for divorce, separation or annulment of a marriage of a state resident;

161 (F) the action is to determine parenting rights and responsibilities of an individual

162 subject to the court's jurisdiction; or

163 (G) the action is to award, partition, condemn, or escheat real or personal property in

164 this state.

165 (2) Filing of complaint and affidavit for service by publication. Before service of the

166 summons by publication is authorized, a complaint and affidavit must be filed with the clerk

167 of court where the action is venued. The complaint must set forth a claim in favor of the

168 plaintiff and against the defendant and be based on one or more of the situations specified

169 in paragraph (e)(1). The affidavit must be executed by the plaintiff or the plaintiff's attorney

170 and must state one or more of the following:

171 (A) that after diligent inquiry personal service of the summons cannot be made on the

172 defendant in this state to the best knowledge, information, and belief of the affiant;

173 (B) that the defendant is a domestic corporation that has forfeited its charter or right

174 to do business in this state or has failed to file its annual report as required by law;

175 (C) that the defendant is a domestic or foreign corporation and has no officer, director,

176 superintendent, managing agent, business agent, or other agent authorized by appointment

177 or by law on whom service of process can be made on its behalf in this state; or

178 (D) that all persons having or claiming an estate or interest in, or lien or encumbrance

179 on, the real property described in the complaint, whether as heirs, devisees, legatees, or

180 personal representative of a deceased person, or under any other title or interest, and not in

181 possession, nor appearing of record in the office of the register of deeds, the clerk of the

182 district court, or the county auditor of the county in which the real property is situated, to

183 have a claim, title or interest in the property, are proceeded against as unknown persons

184 defendant under N.D.C.C. Chs. 32-17 or 32-19 and stating facts necessary to satisfy the

185 requirements of those chapters.

186 (3) Number of publications. Service of the summons by publication may be made by

187 publishing the summons three times, once each week for three successive weeks, in a

188 newspaper published in the county where the action is pending. If no newspaper is published

189 in that county, publication may be made in a newspaper having a general circulation in the

190 county.

191 (4) Mailing or delivering summons and complaint. A copy of the summons and

192 complaint, at any time after the filing of the affidavit for publication and no later than 14

193 days after the first publication of the summons, must be deposited in a post office or with a

194 third-party commercial carrier in this state, postage or shipping prepaid, and directed to the

195 defendant to be served at the defendant's last reasonably ascertainable address.

196 (5) Personal service outside state is equivalent to publication. After the affidavit for

197 publication and the complaint in the action are filed, personal service of the summons and

198 complaint on the defendant outside the state is equivalent to and has the same force and

199 effect as the publication and mailing or delivery provided for in paragraphs (e)(3) and (4).

200 (6) Time when first publication or service outside state must be made. The first

201 publication of the summons, or personal service of the summons and complaint on the

202 defendant outside the state, must be made within 60 days after the filing of the affidavit for

203 publication. If not made, the action is considered discontinued as to any defendant not served

204 within that time.

205 (7) When defendant served by publication is permitted to defend.

206 (A) The defendant who is served by publication, or the defendant's representative, on

207 application and sufficient cause shown at any time before judgment, must be allowed to

208 defend the action.

209 (B) Except in an action for divorce, the defendant who is served by publication, or the

210 defendant's representative, on just terms, may be allowed to defend at any time within three

211 years after entry of judgment if the defendant files an affidavit with the court that states:

212 (i) the defendant has a good and meritorious defense to the action; and

213 (ii) the defendant had no actual notice or knowledge of the action to enable the

214 defendant to make application to defend before the entry of judgment.

215 (C) If the defense is successful and the judgment, or any part of the judgment, has

216 been collected or otherwise enforced, restitution may be ordered by the court, but the title to

217 property sold under the judgment to a purchaser in good faith may not be affected.

218 (D) A defendant is considered to have had notice of the action and of the judgment

219 if the defendant:

220 (i) receives a copy of the summons in the action by mail or delivery under paragraph

221 (e)(4); or

222 (ii) is personally served the summons outside the state under paragraph (e)(5).

223 (8) Additional information to be published for real property. In all cases in which

224 publication of summons is made in an action that the title to, or an interest in or lien on, real

225 property is involved, the publication must also contain a description of the real property and

226 a statement of the object of the action.

227 (f) Serving a person in a foreign country. Unless otherwise provided by law, an

228 individual, other than a minor or an incompetent person, may be served at a place not within

229 any judicial district of the United States:

230 (1) by any internationally agreed means of service that is reasonably calculated to give

231 notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial

232 and Extrajudicial Documents;

233 (2) if there is no internationally agreed means, or if an international agreement allows

234 but does not specify other means, by a method that is reasonably calculated to give notice:

235 (A) as prescribed by the foreign country's law for service in that country in an action

236 in its courts of general jurisdiction;

237 (B) as the foreign authority directs in response to a letter rogatory or letter of request;

238 or

239 (C) unless prohibited by the foreign country's law by:

240 (i) delivering a copy of the summons and the complaint to the individual personally;

241 or

242 (ii) using any form of mail or third-party commercial delivery that the clerk addresses

243 and sends to the individual and that requires a signed receipt; or

244 (3) by other means not prohibited by international agreement, as the court orders.

245 (4) Serving a minor or incompetent person. Unless otherwise provided by law, service
246 must be made on a minor or an incompetent person in a place not within any judicial district
247 of the United States in the manner prescribed by paragraphs (2)(A), (2)(B), and (3).

248 (5) Serving a foreign corporation, partnership, or association. Unless otherwise
249 provided by law, service must be made on a foreign corporation, partnership or other
250 unincorporated association, that is subject to suit under a common name, in a place not within
251 any judicial district of the United States in the manner prescribed for individuals in this
252 subdivision except personal delivery under paragraph (2)(C)(i).

253 (g) When service by publication or outside state is complete. Service by publication
254 is complete fifteen days after the first publication of the summons. Personal service of the
255 summons and complaint upon the defendant outside the state is complete fifteen days after
256 the date of service.

257 (h) Amendment of process or proof of service. The court may allow any process or
258 proof of service to be amended at any time on notice and just terms, unless it clearly appears
259 that the substantial rights of the party against whom the process was issued would be
260 materially prejudiced.

261 (i) Proof of service. Proof of service of the summons and the complaint or notice, if
262 any, accompanying the summons or of other process, must be made as follows:

263 (1) if served by the sheriff or other officer, by the officer's certificate of service;

264 (2) if served by any other person, by the server's affidavit of service;

265 (3) if served by publication, by an affidavit made as provided in N.D.C.C. § 31-04-06
266 and an affidavit of mailing or an affidavit of delivery via a third-party commercial carrier of
267 a copy of the summons and complaint under paragraph (e)(4), if the summons and complaint
268 has been deposited;
269 (4) in any other case of service by mail or delivery via a third-party commercial carrier
270 resulting in delivery under paragraph (d)(2) or (d)(3), by an affidavit of mailing or an
271 affidavit of delivery of a copy of the summons and complaint or other process, with return
272 receipt attached; or
273 (5) by the written admission of the defendant.
274 (j) Contents of proof of service.
275 (1) The certificate, affidavit, or admission of service mentioned in subdivision (i) must
276 state the date, time, place, and manner of service.
277 (2) If the process, pleading, order of court, or other paper is served personally by a
278 person other than the sheriff or person designated by law, the affidavit of service must also
279 state that:
280 (A) the server is of legal age and not a party to the action nor interested in the action,
281 and
282 (B) the server knew the person served to be the person named in the papers served and
283 the person intended to be served.
284 (k) Contents of affidavit of mailing or delivery via a third-party commercial carrier.
285 An affidavit of mailing or delivery required by this rule must:
286 (1) state a copy of the process, pleading, order of court, or other paper to be served

287 was deposited by the affiant, with postage or shipping prepaid, in the mail or with a third-
288 party commercial carrier and directed to the party shown in the affidavit to be served at the
289 party's last reasonably ascertainable address;
290 (2) contain the date and place of deposit;
291 (3) indicate the affiant is of legal age; and
292 (4) contain the return receipt, if any, attached to the affidavit.
293 (l) Effect of mail or delivery refusal. If a summons and complaint or other process is
294 mailed or sent with delivery restricted and requiring a receipt signed by the addressee, the
295 addressee's refusal to accept the mail or delivery constitutes delivery. Return of the mail or
296 delivery bearing an official indication on the cover that delivery was refused by the addressee
297 is prima facie evidence of the refusal. Service is complete on the date of refusal.
298 (m) Service under statute. If a statute requires service and does not specify a method of
299 service, service must be made under this rule.
300 EXPLANATORY NOTE
301 Rule 4 was amended, effective 1971; January 1, 1976; January 1, 1977; January 1,
302 1979; September 1, 1983; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1998;
303 March 1, 1999; March 1, 2004; March 1, 2007; August 1, 2009; March 1, 2011; March 1,
304 2013.
305 Rule 4 governs civil jurisdiction and service of process. In contrast, Rule 5 applies to
306 service of papers other than process.
307 Rule 4 was amended, effective March 1, 1999, to allow delivery via a third-party

308 commercial carrier as an alternative to the Postal Service. The requirement for a "third-party"
309 is consistent with the rule's requirement for personal service by a person not a party to nor
310 interested in the action. The requirement for a "commercial carrier" means it must be the
311 regular business of the carrier to make deliveries for profit. A law firm may not act as its own
312 commercial carrier service for service of process. Finally, the phrase "commercial carrier"
313 is not intended to include or authorize electronic delivery. Service via e-mail or facsimile
314 transmission is not permitted by Rule 4.

315 Originally, Rule 4 concerned process, with no mention of jurisdiction. In 1971, what
316 are now subdivisions (a) [Definition of Person] and (b) [Jurisdiction over Person] were
317 added. They were taken from the Uniform Interstate and International Procedure Act. Many
318 changes were also made to subdivision (d) [previously (c)] concerning personal service,
319 several of which were taken from that Act.

320 Subdivision (c) was amended, effective March 1, 1998, to provide a defendant with
321 the means to compel the plaintiff to file the action.

322 Paragraph (c)(2) was amended, effective March 1, 2007, to require the complaint to
323 be served with the summons under most circumstances.

324 Paragraph (c)(3) ~~was amended, effective March 1, 2007. The amendment allows a~~
325 ~~demand to file the complaint to be served on an attorney using N.D.R.Civ.P. 5 procedure.~~
326 ~~The amendment clarifies that, in a multiple defendant case, service of a demand by one~~
327 ~~defendant is effective for all defendants. The amendment provides an exception for excusable~~
328 ~~neglect in responding to a demand to file complaint.~~ on making a demand to file the
329 complaint was transferred to Rule 5, effective March 1, 2013.

330 Subdivision (d) was amended, effective March 1, 1998, to allow personal service by
331 delivering a copy of the summons to an individual's spouse. The time of service for an item
332 served by mail or third-party commercial carrier under subdivision (d) is the time the item
333 is delivered to or refused by the recipient. ~~A problem may arise with service by mail or~~
334 ~~delivery by third-party commercial carrier, under subdivisions (d)(2) or (d)(3)(C) when the~~
335 ~~person to be served refuses delivery. This refusal~~ Refusal of delivery is tantamount to receipt
336 of the mail or delivery for purposes of service. On the other hand, if the mail or delivery is
337 unclaimed, no service is made. Subdivision (l) was added in 1983, effective September 1,
338 1983, to make it clear that refusal of delivery by the addressee constitutes delivery.

339 Paragraph (d)(4) was deleted and subdivision (m) was added, effective March 1, 2004,
340 to clarify that, when a statute requires service and no method of service is specified, service
341 must be made under this rule. Statutes governing special procedures often conflict with these
342 rules. As an example, N.D.C.C. § 32-19-32 concerning the time period for mailing the
343 summons and complaint after publication in a mortgage foreclosure conflicts with Rule 4
344 (e)(4).

345 Paragraph (e)(4) was amended, effective March 1, 2011, to increase the time to
346 deposit a copy of the summons and complaint with a post office or third-party commercial
347 carrier from 10 to 14 days after the first publication of the summons.

348 A new subdivision (f) was added, effective March 1, 1996, to provide procedures for
349 service upon a person in a foreign country. The new procedures follow Rule 26(f),
350 Fed.R.Civ.P.

351 Rule 4 was amended, effective March 1, 2011, in response to the December 1, 2007,

352 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
353 were changed to make the rule more easily understood and to make style and terminology
354 consistent throughout the rules.

355 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 12-13;
356 April 29-30, 2010, pages 5-6; May 21-22, 2009, pages 44-45; April 27-28, 2006, pages 11-
357 14; January 30-31, 2003, pages 6-10; September 26-27, 2002, pages 15-18; April 30-May
358 1, 1998, pages 3, 8, and 11; January 29-30, 1998, pages 17-18; September 25-26, 1997, page
359 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996, pages 14-16; January 26-27,
360 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987, pages 1-4 and 11; May 21-22,
361 1987, page 5; November 29, 1984, pages 3-5; September 30-October 1, 1982, pages 15-18;
362 April 15-16, 1982, pages 2-5; December 11-12, 1980, page 2; October 30-31, 1980, page 31;
363 January 17-18, 1980, pages 1-3; November 29-30, 1979, page 2; October 27-28, 1977, page
364 10; April 8-9, 1976, pages 5-9; Fed.R.Civ.P. 4.

365 Statutes Affected:

366 Superseded: N.D.C.C. chs. 28-06, 28-06.1.

367 Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers),
368 N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 12 (Defenses and objections - When and how
369 presented - By pleading or motion - Motion for judgment on pleadings); N.D.R.Civ.P. 45
370 (Subpoena), and N.D.R.Civ.P. 81 (Applicability--In General); N.D.R.Ct. 8.4 (Summons in
371 Action for Divorce or Separation).

RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance.

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

(2) Summons. The magistrate may issue in lieu of a warrant if the magistrate has reason to believe that the defendant will appear in response to it, or if the defendant is a corporation.

(3) Failure of defendant to appear after summons. If a defendant fails to appear in response to a summons or if there is reasonable cause to believe that the defendant will fail

23 to appear, a magistrate must issue an arrest warrant. If a defendant corporation fails to appear
24 in response to a summons, a magistrate who is empowered to try the offense for which the
25 summons was issued must enter a plea of not guilty and may proceed to trial and judgment
26 without further process; a magistrate who is not so empowered must proceed as though the
27 defendant had appeared.
28 (4) Additional warrants or summonses. A magistrate may issue more than one warrant
29 or summons on the same complaint.
30 (5) Warrant or Summons by Telephone or Other Reliable Electronic Means. In
31 accordance with Rule 4.1, the magistrate may issue a warrant or summons based on
32 information communicated by telephone or other reliable electronic means.
33 (b) Form.
34 (1) Warrant. A warrant must:
35 (A) be in writing, in the name of the state of North Dakota;
36 (B) be signed by the issuing magistrate with the title of the magistrate's office;
37 (C) state the date of issuance and the municipality or county where issued;
38 (D) contain the defendant's name or, if it is unknown, a name or description by which
39 the defendant can be identified with reasonable certainty;
40 (E) describe the offense charged against the defendant; and
41 (F) command the defendant be arrested and brought before the nearest available
42 magistrate.
43 The warrant may also have endorsed upon it the recommended or acceptable amount
44 of bail if the offense is bailable.

45 (2) Summons. A summons must be in the same form as the warrant except that it must
46 require the defendant to appear before a magistrate at a stated time and place and must inform
47 the defendant that if the defendant fails to appear, an arrest warrant will issue.
48 (c) Execution; service.
49 (1) Execution of warrant. The warrant is directed to all peace officers of this State and
50 may be executed only by a peace officer. It is executed by the arrest of the defendant and
51 may be executed in any county of the State by any peace officer of this State. Upon arrest,
52 an officer possessing the original or a duplicate original warrant must show it to the
53 defendant immediately upon request. If the officer does not possess the warrant ~~or a copy~~ at
54 the time of the arrest, the officer must inform the defendant of the warrant's existence and of
55 the offense charged and, at the defendant's request must show the original or a duplicate
56 original warrant or a copy to the defendant as soon as possible.
57 (2) Service of summons. The summons must be served in the manner provided for
58 service of a summons in a civil action. Any person authorized to serve a summons in a civil
59 action may serve a summons.
60 (d) Return.
61 (1) After executing a warrant, the officer must return it to the magistrate before whom
62 the defendant is brought in accordance with Rule 5. The officer may do so by reliable
63 electronic means. At the request of the prosecuting attorney, an unexecuted warrant must be
64 returned to and canceled by the magistrate who issued it.
65 (2) The person to whom a summons is delivered for service must return it to the
66 magistrate before whom the summons is returnable on or before the return day.

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

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

74 EXPLANATORY NOTE

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

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

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

89 variations and sources of information and the opportunity of the informant to perceive
90 accurately the factual data which the informant furnishes.
91 Subdivision (a) makes clear that the magistrate may require the complainant to appear
92 personally and may examine the complainant or witnesses to determine whether probable
93 cause exists. If the magistrate does hear from the complainant or witnesses, the testimony
94 must be recorded. This is to insure that there exists an adequate basis for reviewing the
95 propriety of the issuance of the warrant, if, for example, its issuance should be attacked upon
96 a subsequent motion to suppress evidence seized incident to the arrest. Subdivision (a) is also
97 intended to make it possible for the magistrate to issue a summons in lieu of an arrest warrant
98 even though not requested to do so by the prosecuting attorney.
99 Subdivision (a) also provides that where the magistrate is someone other than a person
100 admitted to practice law in this State, the magistrate shall not issue a warrant until the
101 complaint has been approved by the prosecuting attorney. This provision is intended to guard
102 against non-law-trained magistrates, who because of their lack of legal expertise may have
103 a problem with the requirement of probable cause. Subdivision (a), however, does provide
104 that a warrant may be issued by such magistrate without the approval of the prosecuting
105 attorney where the magistrate reasonably believes that the accused is likely to abscond the
106 jurisdiction before the prosecuting attorney can approve the complaint, provided the
107 magistrate so certifies on the complaint.
108 Paragraph (a)(2) provides the magistrate with some latitude in the exercise of
109 discretion to issue the summons in cases where the magistrate reasonably believes that the
110 defendant will appear in response to the summons. Paragraph (a)(2) also provides for the

111 magistrate to issue a summons rather than a warrant where the defendant is a corporation. It
112 provides that a summons will issue to a corporate defendant because as a practical matter it
113 is not literally possible to make an arrest. Furthermore, the probability is that the corporation
114 will appear and that the crime is not one of violence.

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

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

125 Paragraph (a)(5) was added, effective March 1, 2013, to allow the magistrate to issue
126 a warrant or summons based on information communicated by telephone or other reliable
127 electronic means under the procedure set out in Rule 4.1.

128 Paragraph (b)(1) describes the form of the warrant. This paragraph requires that the
129 warrant be in writing, that it be in the name of the State of North Dakota, and that it be signed
130 by the issuing magistrate with the title of the magistrate's office. This differs from
131 Fed.R.Crim.P. 4(b), in that the federal rule does not provide for the warrant to be in writing
132 nor does it provide that it be in the name of the jurisdiction. The federal rule further differs

133 in that it does not require that the signature of the issuing officer bear that officer's title, nor
134 does it state the date when issued and the municipality or county where issued. The provision
135 for the issuance of a warrant contemplates that the warrant will be issued in counties other
136 than where the offense occurred.
137 The provision that the warrant be in the name of the State of North Dakota or in the
138 name of a municipality, if the violation of a municipal ordinance is charged, is consistent
139 with these rules in providing for the issuance of a warrant for violations of municipal
140 ordinances which are deemed criminal in nature. The provision for description of the offense
141 charged satisfies the constitutional requirement that notice be given to the defendant of the
142 offense charged.
143 The final provision of this paragraph (b)(1) indicates that bail may be endorsed upon
144 the warrant. The provision that a recommendation of an amount of bail acceptable be
145 included in the warrant reflects the notion that the magistrate issuing the warrant is in a better
146 position to determine the bail requirement than would be the nearest available magistrate to
147 whom the defendant is brought, if not the issuing magistrate. The requirement that upon
148 arrest the defendant be brought before the nearest available magistrate is adapted from the
149 criminal rules of Alaska.
150 Paragraph (b)(2) provides that a summons will be in the same form as a warrant (in
151 writing signed by the magistrate who issued it, etc.) and that it contain a warning that failure
152 to respond to it will establish grounds for the issuance of a warrant.
153 Subdivision (c) directs that the warrant shall be directed to all peace officers of this
154 State and further provides for its execution. The provision that the arresting officer need not

155 have the warrant in possession at the time of the arrest is rendered necessary by the fact that
156 a fugitive may be discovered and apprehended by any officer. It is impossible for a warrant
157 to be in the possession of every officer who is searching for a fugitive or who unexpectedly
158 might be in a position to apprehend a fugitive.

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

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

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

175 Subdivision (e) provides a remedy in cases where the warrant or summons is
176 defective. It permits the prosecution to cure a defect which is deemed an informality in the

177 warrant. There shall, however, be dismissal where the warrant is not sufficient on its face.

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

182 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 25-26;
183 January 29-30, 2004, pages 21-22; January 27-29, 1972, pages 7-17; November 20-21, 1969,
184 pages 15-16; May 3-4, 1968, pages 3-4; January 26-27, 1968, pages 4-7; Fed.R.Crim.P. 4.

185 Statutes Affected:

186 Superseded: N.D.C.C. §§ 29-05-06, 29-05-07, 29-05-08, 29-05-09, 29-05-28, 29-05-
187 29, 29-05-30, 33-12-06, 40-18-07, 40-18-08.

188 Considered: N.D.C.C. §§ 29-05-10, 29-05-23, 29-05-24, 29-05-25, 29-05-26, 29-05-
189 27, 29-05-31, 40-11-11, 40-18-18.

190 Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction--Process--Service);
191 N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable
192 Electronic Means).

RULE 5.1. INTERSTATE DEPOSITIONS AND DISCOVERY

(a) Definitions.

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

(b) Issuance of Subpoena.

(1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to a clerk of court in the county in which discovery is sought to be conducted in

23 this state. A request for the issuance of a subpoena under this rule does not constitute an
24 appearance in the courts of this state.
25 (2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk,
26 in accordance with that court's procedure, shall promptly issue a subpoena for service upon
27 the person to which the foreign subpoena is directed.
28 (3) A subpoena under Rule 5.1 (b)(2) must:
29 (A) incorporate the terms used in the foreign subpoena; and
30 (B) contain or be accompanied by the names, addresses, and telephone numbers of all
31 counsel of record in the proceeding to which the subpoena relates and of any party not
32 represented by counsel.
33 (c) Service of Subpoena. Depending on the type of case involved, a subpoena issued
34 by a clerk of court under Rule 5.1 (b) must be served in compliance with N.D.R.Civ.P. 45(b),
35 N.D.R.Crim.P. 17(d), or N.D.R.Juv.P. 13(b).
36 (d) Deposition, Production and Inspection. Depending on the type of case involved,
37 the discovery rules contained in the North Dakota Rules of Civil Procedure, Criminal
38 Procedure or Juvenile Procedure apply to subpoenas issued under Rule 5.1 (b).
39 (e) Application to Court. An application to the court for a protective order or to
40 enforce, quash, or modify a subpoena issued by a clerk of court under Rule 5.1 (b) must
41 comply with the rules or statutes of this state and be submitted to the court in the county in
42 which discovery is to be conducted.
43
44 EXPLANATORY NOTE

45 Rule 5.1 was adopted, effective March 1, 2013.

46 This rule is derived from the Uniform Interstate Depositions and Discovery Act. In
47 applying and construing this rule, consideration must be given to the need to promote
48 uniformity of the law with respect to its subject matter among states that enact it. Reference
49 to the uniform act and its commentary is appropriate when applying and construing this rule.

50 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 3-7;
51 September 30, 2011, pages 12-15; April 28-29, 2011, page 25.

52 Cross Reference: N.D.R.Civ.P. 45 (Subpoena); N.D.R.Crim.P. 17 (Subpoena);
53 N.D.R.Juv.P. 13 (Subpoena).

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service--When required.

(1) In general. Other than service of a summons and complaint under Rule 4, each of the following papers must be served under this rule on every party, unless the rules provide otherwise:

(A) an order, unless the court orders otherwise;

(B) a pleading served after the original summons and complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper; and

(F) every paper filed with the clerk or submitted to the judge.

(2) If a party fails to appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an answer, claim, or appearance must be made on the person who had custody or possession of the property when it was seized.

23 (b) Service -- How made.

24 (1) Serving an attorney. If a party is represented by an attorney, service under this rule

25 must be made on the attorney unless the court orders service on the party. If an attorney is

26 providing limited representation under Rule 11(e), service must be made on the party and on

27 the attorney for matters within the scope of the limited representation.

28 (2) Service in general. A paper is served under this rule by:

29 (A) handing it to the person;

30 (B) leaving it:

31 (i) at the person's office with a clerk or other person in charge, or, if no one is in

32 charge, leaving it in a conspicuous place in the office; or

33 (ii) if the person has no office or the office is closed at the person's dwelling or usual

34 place of abode with someone of suitable age and discretion who resides there;

35 (C) mailing it to the person's last known address, in which event service is complete

36 upon mailing;

37 (D) sending it by a third-party commercial carrier to the person's last known address,

38 in which event service is complete upon deposit of the paper to be served with the

39 commercial carrier;

40 (E) if no address is known, on order of the court by leaving it with the clerk of the

41 court;

42 (F) sending it by electronic means if the person consented in writing, in which event

43 service is complete on transmission, but is not effective if the serving party learns that is did

44 not reach the person to be served; or

45 (G) delivering it by any other means that the person consented to in writing.

46 (c) Serving numerous defendants.

47 (1) In general. If an action involves an unusually large number of defendants, the court

48 may, on motion or on its own, order that:

49 (A) defendants' pleadings and replies to them need not be served on other defendants;

50 (B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings

51 and replies to them will be treated as denied or avoided by all other parties; and

52 (C) filing any such pleading and serving it on the plaintiff constitutes notice of the

53 pleading to all parties.

54 (2) Notifying parties. A copy of every such order must be served on the parties as the

55 court directs.

56 (d) Filing.

57 (1) In general. Unless a statute, these rules, or court order provides otherwise, all

58 papers in an action must be filed with the clerk.

59 (2) Initiating pleading.

60 (A) <u>The Summons and Complaint.</u>

61 <u>(i)</u> The summons and complaint, or other initiating pleading, must be filed before a

62 subpoena may be issued. <u>Unless otherwise authorized by rule or statute, a party seeking to</u>

63 <u>file an initiating pleading must provide proof that the pleading was served under Rule 4. The</u>

64 <u>proof of service must be filed with the initiating pleading.</u>

65 ~~(B)~~ <u>(ii)</u> The plaintiff must serve notice of filing the complaint or initiating pleading

66 on the defendant or respondent.

67 (iii) The defendant may demand that the plaintiff file the complaint.

68 – Service of the demand must be made under Rule 5(b) on the plaintiff's attorney or

69 under Rule 4(d) on the plaintiff if the plaintiff is not represented by an attorney.

70 – In cases with multiple defendants, service of a demand by one defendant is effective

71 for all the defendants.

72 – If the plaintiff does not file the complaint within 20 days after service of the

73 demand, service of the summons is void.

74 – The demand must contain notice that if the complaint is not filed within 20 days,

75 service of the summons will be void, unless, after motion made within 60 days after service

76 of the demand for filing, the court finds excusable neglect.

77 (iv) The defendant may file the summons and complaint, and the costs incurred on

78 behalf of the plaintiff may be taxed as provided in Rule 54(e).

79 ~~(C)~~ (B) The Answer. Within a reasonable time after service of the notice of filing the

80 complaint or initiating pleading, the defendant or respondent must file the answer and notify

81 the plaintiff of the filing.

82 (3) Discovery materials. A party must not file discovery materials with the clerk

83 unless:

84 (A) the materials are being submitted to the court for disposition of a pending motion;

85 (B) the court orders them to be filed; or

86 (C) a party certifies that the filing is necessary for safekeeping of the papers or

87 exhibits pending case completion, in which event the party must state the reasons

88 safekeeping is necessary.

89 (4) Return of discovery materials.

90 (A) The clerk shall return the following documents to the filing party upon final

91 disposition of an appeal or, if no appeal is filed, upon expiration of the time for appeal:

92 (i) depositions;

93 (ii) interrogatories;

94 (iii) requests for admission;

95 (iv) requests for interrogatories;

96 (v) requests for production of documents; and

97 (vi) answers and responses to the above documents.

98 (B) If the filing party does not claim a filed document within 60 days after notification

99 to do so, the clerk may dispose of the document as directed by court order.

100 (C) The clerk must take a receipt for all documents returned.

101 (5) Papers to be used on hearing. Unless otherwise directed by the court, all affidavits,

102 notices, and other papers designed to be used on the hearing of a motion or order to show

103 cause must be filed at least 24 hours before the hearing.

104 (6) Failure to comply. If a party fails to comply with this subdivision, the court, on

105 motion of any party or its own motion, may order the papers to be filed. If the order is not

106 obeyed, the court may order them to be regarded as stricken and their service to be

107 ineffective.

108 (7) Rejection. Except as otherwise provided under Rules 13, 14, or 15, the clerk must

109 reject for filing any document that adds a party to an action or proceeding without a court

110 order. The clerk must endorse on the document a notation that it is rejected for filing under

111 this rule and return the document to the person who tendered it for filing.

112 (e) Removal of pleadings for service. Upon a filing party's request, an original
113 pleading or paper in any civil action, which by law is required to be filed in the clerk of
114 court's office where the action is pending, may be removed from the files for the purpose of
115 serving it either inside or outside the state but must be returned without delay.

116 (f) Proof of service. Proof of service under this rule is made as provided in Rule 4 or
117 by an attorney's or court personnel's certificate showing that service was made under
118 subdivision (b).

119 EXPLANATORY NOTE

120 Rule 5 was amended effective 1971, July 1, 1981; March 1, 1986; January 1, 1988;
121 March 1, 1990; March 1, 1992, on an emergency basis; March 1, 1994; January 1, 1995;
122 March 1, 1998; March 1, 1999; March 1, 2003; March 1, 2008; March 1, 2009; March 1,
123 2011; March 1, 2013.

124 Rule 5 applies to service of papers other than "process." In contrast, Rule 4 governs
125 civil jurisdiction and service of process. When a statute or rule requiring service does not
126 pertain to service of process, nor require personal service under Rule 4, nor specify how
127 service is to be made, service may be made as provided in Rule 5(b).

128 Subdivision (a) was amended, effective March 1, 2008, to improve organization and
129 to make the subdivision easier to understand.

130 Paragraph (b)(1) was amended, effective March 1, 2009, to make it clear that, when
131 an attorney has served notice of limited representation under Rule 11(e), service of papers
132 on the attorney is not required except for papers within the scope of the limited

133 representation. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to
134 assist otherwise self-represented parties on a limited basis without undertaking full
135 representation of the party.
136 Paragraph (b)(2) was amended, effective March 1, 2009, to provide for service by
137 electronic means and to improve organization. Parties seeking to serve papers by electronic
138 means must consult N.D.Sup.Ct.Admin. Order 16 for electronic service instructions.
139 Subdivision (b) was amended, effective March 1, 1999, to permit service via a third-
140 party commercial carrier as an alternative to the Postal Service. The requirement for a "third-
141 party commercial carrier" means the carrier may not be a party to nor interested in the action,
142 and it must be the regular business of the carrier to make deliveries for profit. A law firm
143 may not act as or provide its own commercial carrier service with service complete upon
144 deposit. In addition, the phrase "commercial carrier" does not include electronic delivery
145 services.
146 Paragraph (d)(1) was amended, March 1, 2008, to delete a reference to the note of
147 issue and certificate of readiness.
148 Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to require that proof
149 of service be provided and filed by a party seeking to file an initiating pleading. Under Rule
150 3, an action is commenced on service of the initiating pleading, not on filing. Unless a rule
151 specifically provides otherwise, service under Rule 4 must be accomplished before any
152 pleadings in an action may be filed.
153 Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to include language
154 allowing the defendant to demand filing of the complaint or to file the complaint itself. This

155 language was transferred from Rule 4.

156 Subdivision (f) was amended, effective March 1, 2003, to permit proof of service to
157 be made by court personnel as well as by an attorney. Proof of service may also be made in
158 the same manner as provided by Rule 4(i).

159 Rule 5 was amended, effective March 1, 2011, in response to the December 1, 2007,
160 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
161 were changed to make the rule more easily understood and to make style and terminology
162 consistent throughout the rules.

163 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 13-16;
164 September 24-25, 2009, pages 12-13; April 24-25, 2008, pages 18-21; January 24, 2008,
165 pages 2-7; October 11-12, 2007, pages 20-27; April 26-27, 2007, pages 19-22; September
166 27-28, 2001, pages 11-12; April 30-May 1, 1998, page 3; January 29-30, 1998, page 18;
167 September 26-27, 1996, pages 16-17, 20; September 23-24, 1993, pages 19-20; April 29-30,
168 1993, pages 20-21; November 7-8, 1991, page 3; October 25-26, 1990, pages 10-12; April
169 20, 1989, page 2; December 3, 1987, page 11; May 21-22, 1987, pages 17-18; February 19-
170 20, 1987, page 4; September 18-19, 1986, page 8; November 30, 1984, pages 26-27; October
171 18, 1984, pages 8-11; November 29-30, 1979, page 2; September 20-21, 1979, pages 4-5;
172 Fed.R.Civ.P. 5.

173 Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction -- Process --
174 Service), N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 77 (District Courts and Clerks);
175 N.D.R.Crim.P. 49 (Service and Filing of Papers); N.D.R.Ct. 3.1 (Pleadings); N.D.R.Ct. 6.4
176 (Exhibits), N.D.R.Ct. 7.1 (Judgments, Orders and Decrees).

N.D.R.Crim.P.

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) When used.

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

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

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

(c) Nature and contents.

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

23 defendant is alleged to have violated.

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

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

29 (e) Amending an information. Unless an additional or different offense is charged or
30 a substantial right of the defendant is prejudiced, the court may permit an information to be
31 amended at any time before the verdict or finding.

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

39 (g) Names of witnesses to be endorsed on indictment or information. When an
40 indictment or information is filed, the names of all the witnesses on whose evidence the
41 indictment or information was based must be endorsed on it before it is presented. The
42 prosecuting attorney, at a time the court prescribes by rule or otherwise, must endorse on the
43 indictment or information the names of other witnesses the prosecuting attorney proposes to
44 call. A failure to endorse those names does not affect the validity or sufficiency of the

45 indictment or information, but the court in which the indictment or information was filed
46 must direct the names of those witnesses to be endorsed on application of the defendant. The
47 court may not allow a continuance because of the failure to endorse any of those names
48 unless the application was made at the earliest opportunity and then only if a continuance is
49 necessary in the interests of justice.

50 EXPLANATORY NOTE

51 Rule 7 was amended effective March 1, 1990; January 1, 1995; March 1, 1996; March
52 1, 2006; March 1, 2007; August 1, 2011<u>; March 1, 2013</u>.

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

56 Subdivision (a) was amended, effective January 1, 1995, in response to county court
57 elimination. The amendment allows misdemeanors to be charged by complaint in district
58 court, and for the inclusion of misdemeanor charges with felony charges in an indictment or
59 information.

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

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

67 or when a grand jury indictment is returned."

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

75 The language of subdivision (c), "must be carried on in the name * * * of the State of
76 North Dakota," does not mandate a change in the style of prosecution before municipal
77 courts. The purpose of the indictment or information is to inform the defendant of the precise
78 offense of which the defendant is accused so that the defendant may prepare the defendant's
79 defense and further that a judgment will safeguard the defendant from subsequent
80 prosecution for the same offense. The language employed in subdivision (c) is intended to
81 provide the defendant with the Sixth Amendment protection to "be informed of the nature
82 and the cause of the accusation * * * ." With this view in mind, subdivision (c) is established
83 for the benefit of the defendant and is intended simply to provide a means by which the
84 defendant can be properly informed of the proceedings without jeopardy to the prosecution.

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

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

89 charged.

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

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

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

100 Sources: Joint Procedure Committee Minutes of September 30, 2011, pages 18-19;
101 April 28-29, 2011, pages 17-18; January 26, 2006, page 3; January 29-30, 2004, pages 24-25;
102 January 26-27, 1995, pages 3-5; January 27-28, 1994, pages 8-9; September 23-24, 1993,
103 pages 8-10; April 20, 1989, page 4; December 3, 1987, page 15; March 23-25, 1972, pages
104 3-11; December 11-12, 1968, pages 1-2; July 25-26, 1968, pages 1-4.

105 Statutes Affected:

106 Superseded: N.D.C.C. §§ 29-09-01, 29-09-03, 29-09-04, 29-09-05, ch. 29-11.

107 Considered: N.D.C.C. §§ 29-04-05, 29-09-02, 29-09-06, 29-09-07, 40-18-06.2.

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

RULE 8. GENERAL RULES OF PLEADING

(a) Claims for relief. A pleading that states a claim for relief - whether an original claim, a counterclaim, a crossclaim, or a third-party claim - must contain:

(1) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(2) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) Defenses and denials.

(1) In general. In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) Denials - responding to the substance. A denial must fairly respond to the substance of the allegation.

(3) General and specific denials. A party that intends in good faith to deny all the allegations of a pleading may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) Denying part of an allegation. A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) Lacking knowledge or information. A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has

23 the effect of a denial.

24 (6) Effect of failing to deny. An allegation - other than one relating to the amount of

25 damages - is admitted if a responsive pleading is required and the allegation is not denied.

26 If a responsive pleading is not required, an allegation is considered denied or avoided.

27 (c) Affirmative defenses.

28 (1) In general. In responding to a pleading, a party must affirmatively state any

29 avoidance or affirmative defense, including:

30 -accord and satisfaction:

31 -arbitration and award:

32 -assumption of risk:

33 -contributory negligence:

34 -discharge in bankruptcy:

35 -duress:

36 -estoppel:

37 -failure of consideration:

38 -fraud:

39 -illegality:

40 -injury by fellow servant:

41 -laches:

42 -license:

43 -payment:

44 -release:

45 -res judicata:

46 -statute of frauds:

47 -statute of limitations: and

48 -waiver.

49 (2) Mistaken designation. If a party mistakenly designates a defense as a counterclaim,
50 or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though
51 it were correctly designated, and may impose terms for doing so.

52 (d) ~~[Transferred to Rule 8(b)(6)]~~

53 ~~(e)~~ Pleading to be concise and direct; Alternative statements; Inconsistency.

54 (1) In general. Each allegation must be simple, concise, and direct. No technical form
55 is required.

56 (2) Alternative statements of a claim or defense. A party may set out two or more
57 statements of a claim or defense alternatively or hypothetically, either in a single count or
58 defense or in separate ones. If a party makes alternative statements, the pleading is sufficient
59 if any one of them is sufficient.

60 (3) Inconsistent claims or defenses. A party may state as many separate claims or
61 defenses as it has, regardless of consistency.

62 ~~(f)~~ (e) Construing pleadings. Pleadings must be construed so as to do justice.

63 EXPLANATORY NOTE

64 Rule 8 was amended, effective March 1, 1990; March 1, 2011; March 1, 2013.

65 This rule is based on Fed.R.Civ.P. 8.

66 Rule 8 was amended, effective March 1, 2011, in response to the December 1, 2007,

67 revision of the Federal Rules of Civil Procedure. The language and organization of the rule

68 were changed to make the rule more easily understood and to make style and terminology

69 consistent throughout the rules.

70 <u>The content of former subdivision (d) was moved to paragraph 8(b)(6), effective</u>

71 <u>March 1, 2011. The rule was relettered accordingly, effective March 1, 2013.</u>

72 ~~Subdivisions (a), (b), and (e) were amended, effective March 1, 1990. The~~

73 ~~amendments are technical in nature and no substantive change is intended.~~

74 Sources: Joint Procedure Committee Minutes of <u>January 26-27, 2012, page 12;</u>

75 January 24, 2008, page 16; April 20, 1989, page 2; December 3, 1987, page 11; April 26,

76 1984, page 17; November 29-30, 1979, pages 3-4; September 20-21, 1979, page 6; ~~Rule~~

77 <u>Fed.R,Civ.P.</u> 8, ~~FRCivP~~.

78 Statutes Affected:

79 Superseded: N.D.C.C. § 28-01.1-03.

80 Cross Reference: N.D.R.Civ.P. 7 (Pleadings Allowed - Form of Pleadings),

81 N.D.R.Civ.P. 11 (Signing of Pleadings), N.D.R.Civ.P. 12 (Defenses and Objections - When

82 and How Presented - By Pleading or Motion - Motions for Judgment on Pleadings),

83 N.D.R.Civ.P. 15 (Amended and Supplemental Pleadings), N.D.R.Civ.P. 38 (Jury Trial of

84 Right), and N.D.R.Civ.P. 44.1 (Determination of Foreign Law).

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

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

(b) Form.

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

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

(c) Execution or service; and return.

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

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

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

26 EXPLANATORY NOTE

27 Rule 9 was amended, effective March 1, 2006; March 1, 2013.

28 Rule 9 is an adaptation of Fed.R.Crim.P. 9, and provides for the issuance of a warrant
29 or summons upon indictment or information. The Fourth Amendment provides that "no
30 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and
31 particularly describing... persons...to be seized." If an indictment has been returned, the
32 Fourth Amendment is satisfied and the warrant can issue on request without more, since the
33 indictment is made on the oath of the grand jury. The provision for showing of the "probable
34 cause" as required in Rule 4(a) makes explicit the fact that a warrant or summons can issue
35 on the basis of an information only if the information or affidavit filed with the information
36 shows probable cause for the arrest warrant or summons. Generally, prosecution on
37 information has as a prerequisite a determination of probable cause at a preliminary
38 examination. Exceptions are listed in N.D.C.C. § 29-09-02.

39 Subdivision (b) incorporates by reference the provisions of Rule 4(b) concerning the
40 form of the warrant or summons. The minor ~~differences~~ additional requirements of this rule
41 reflect the different stage in the proceeding at which the warrant or summons is being issued.
42 ~~The warrant upon an indictment or information must be signed by the clerk and must~~
43 ~~describe the offense charged in the indictment or information.~~ The amount of bail may be
44 fixed by the court and endorsed on the warrant. See Rule 46 (Release from Custody).

45 ~~Subsection~~ Paragraph (c)(1) incorporates by reference portions of Rule 4(c) dealing
46 with the execution of a warrant and service of a summons.
47 ~~Subsection~~ Paragraph (c)(2), dealing with return, is virtually the same as Rule 4(d),
48 providing for return of a warrant or summons issued on the complaint. At the request of the
49 prosecuting attorney, any unexecuted warrant must be returned and canceled. On or before
50 the return day, the person to whom a summons was delivered for service must make a return
51 to the court.
52 Subdivision (d) was added, effective March 1, 2013, to allow the magistrate to issue
53 a warrant or summons based on information communicated by telephone or other reliable
54 electronic means under the procedure set out in Rule 4.1.
55 Rule 9 was amended, effective March 1, 2006, in response to the December 1, 2002,
56 revision of the Federal Rules of Criminal Procedure. The language and organization of the
57 rule were changed to make the rule more easily understood and to make style and
58 terminology consistent throughout the rules.
59 Sources: Joint Procedure Committee Minutes of April 26-27, 2012, pages 9-10;
60 January 26-27, 2012, page 26; January 29-30, 2004, page 26; March 23-25, 1972, pages 16-
61 20; May 15-16, 1969, page 7; May 3-4, 1968, page 7; Fed.R.Crim.P. 9.
62 Statutes Affected:
63 Superseded: N.D.C.C. §§ 29-12-03, 29-12-04, 29-12-06, 29-12-08.
64 Cross Reference: N.D.R.Crim.P. 4 (Arrest Warrant or Summons Upon Complaint);
65 N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable
66 Electronic Means); N.D.R.Crim.P. 46 (Release from Custody)~~;~~. N.D.C.C. § 29-09-02

67 (Prosecution on Information -- In what cases).

RULE 13. SUBPOENA

(a) Content.

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

(2) The attorney for a party to any proceeding may issue a subpoena, or a subpoena for the production of documentary evidence or objects, in the court's name. A subpoena issued by an attorney has the same effect as a subpoena issued by the clerk or magistrate. The subpoena must state the attorney's name, office address, and the party for whom the attorney appears.

(b) Service. A peace officer or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the prosecution or an indigent party has requested the subpoena. Before the subpoena is served, a notice must be served on each party.

(c) Place of Service.

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

23 (2) Witness Outside State. Service on a witness outside this state may be made only
24 as provided by law.
25 (3) Subpoena in Out-of-State Action. N.D.R.Ct. 5.1 defines the procedure for
26 discovery or depositions in an out-of-state action.
27 (d) Producing Documents and Objects. A subpoena may order the witness to produce
28 any books, papers, documents, data, or other objects the subpoena designates. The court may
29 direct the witness to produce the designated items in court before the adjudication or
30 disposition or before the items are to be offered in evidence. When the items arrive, the court
31 may permit the parties and their attorneys to inspect all or part of them.
32 (e) Subpoena for Deposition.
33 (1) Issuance. An order to take a deposition authorizes the clerk of court or a magistrate
34 to issue a subpoena for any witness named or described in the order.
35 (2) Place. After considering the convenience of the witness and the parties, the court
36 may order, and the subpoena may require, the witness to appear anywhere the court
37 designates.
38 (f) Objection to Subpoena. A witness may object to a subpoena if compliance would
39 be unreasonable or oppressive. The objection must be received before the earlier of 24 hours
40 before the time specified for compliance or ten days after the subpoena is served. On motion,
41 the court may quash or modify the subpoena.
42 (g) Contempt. Failure by any witness without adequate excuse to obey a subpoena
43 served upon that witness may be a contempt of the court from which the subpoena issued.
44 (h) Information Not Subject to Subpoena. No party may subpoena a statement of a

witness or of a prospective witness under this rule. Rule 12 governs the production of a statement.

EXPLANATORY NOTE

Rule 13 was adopted effective March 1, 2010; March 1, 2013.

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

Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 3-7; September 30, 2011, pages 12-15; April 28-29, 2011, page 25; Juvenile Policy Board Minutes of February 20, 2009; December 5, 2008; August 8, 2008; May 9, 2008; February 29, 2008; September 21, 2007; April 20, 2007.

Statutes:

Superseded: N.D.C.C. § 27-20-18.

Cross Reference: N.D.R.Juv.P. 12 (Discovery); N.D.R.Ct. 5.1 (Interstate Depositions and Discovery).

RULE 17. SUBPOENA

(a) Content.

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

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

(b) [Deleted.]

(c) Producing documents and objects.

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

(2) Quashing or modifying the subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

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

28 (e) Place of service.

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

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

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

35 (f) Issuing a deposition; subpoena.

36 (1) Issuance. An order to take a deposition authorizes the clerk of court or a magistrate
37 to issue a subpoena for any witness named or described in the order.

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

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

43 (h) Information not subject to subpoena. No party may subpoena a statement of a
44 witness or of a prospective witness under this rule. Rule 16 governs the production of a

45 statement.

46 EXPLANATORY NOTE

47 Rule 17 was amended September 1, 1983; March 1, 1990; March 1, 2006; June 1,
48 2006; March 1, 2008; March 1, 2013.

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

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

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

59 Paragraph (a)(1) follows Fed.R.Crim.P. 17(a) except that subpoenas may be issued
60 by the magistrate as well as the clerk of court. The fact that some of the lesser state courts
61 are without the benefit of a clerk necessitates this requirement.

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

64 Subdivision (b), which provided assistance for indigent defendants seeking to
65 subpoena persons, was deleted, effective June 1, 2006. As of January 1, 2006, the North
66 Dakota Commission on Legal Counsel for Indigents became responsible for providing

defense services, including subpoenas, to indigent defendants.

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

Subdivision (d) was amended, effective March 1, 2006, to simplify service instructions for a subpoena and to eliminate outmoded methods of service. Subdivision (d) was amended, effective March 1, 2008, to eliminate an obsolete cross-reference.

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

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

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

89 discovery.

90 Subdivision (f) follows Fed.R.Crim.P. 17(f), with appropriate changes to satisfy the
91 requirements of North Dakota. Paragraph (f)(1) provides that a court order for the taking of
92 depositions gives authority to the clerk of court or magistrate to issue subpoenas for the
93 persons named or described therein.

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

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

98 Subdivision (h) was adopted, effective September 1, 1983, to provide that statements
99 made by witnesses or prospective witnesses are not subject to subpoena under Rule 17 but
100 are subject to production in accordance with Rule 16. This correlates to Rule 16's provisions
101 relating to production of statements.

102 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 3-7;
103 September 30, 2011, pages 12-15; April 28-29, 2011, page 25; April 26-27, 2007, pages 22-
104 23; April 27-28, 2006, pages 2-5, 15-17; January 27-28, 2005, pages 13-14; April 20, 1989,
105 page 4; December 3, 1987, page 15; November 18-19, 1982, pages 10-13; October 15-16,
106 1981, pages 6-10; October 12-13, 1978, page 8; June 26-27, 1972, pages 14-20; July 25-26,
107 1968, pages 6-10; Fed.R.Crim.P. 17.

108 Statutes Affected:

109 Superseded: N.D.C.C. §§ 31-03-04, 31-03-07, 31-03-08, 31-03-09, 31-03-13, 31-06-
110 07, 40-18-09.

111 Considered: N.D.C.C. §§ 29-10.1-19, 31-03-01, 31-03-15, 31-03-16, 31-03-17, 31-03-

112 18, 31-03-25, 31-03-26, 31-03-27, 31-03-28, 31-03-29, 31-03-30, 31-03-31.

113 Cross Reference: N.D.R.Civ.P. 45. (Subpoena); N.D.R.Ct. 5.1 (Interstate Depositions

114 and Discovery).

RULE 24. SUPPLEMENTAL BRIEF OF INDIGENT DEFENDANT

(a) In General.

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

(2) Length and Legibility. The statement may not exceed ~~20~~ 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 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 must serve all parties with the statement of additional grounds for review.

(2) Additional Briefing; Oral Argument by Indigent Defendant. The court may, in the exercise of its discretion, allow additional briefing to address issues raised in the indigent defendant's statement. Participation in oral argument by the indigent defendant is permitted only by order of the court on its own motion in exceptional cases.

EXPLANATORY NOTE

23 Rule 24 was adopted, effective March 1, 2010; amended March 1, 2013.

24 Paragraph (a)(2) was amended, effective March 1, 2013, to decrease the page volume

25 allowed in a supplemental brief.

26 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 8-9;

27 September 30, 2011, pages 11-12; April 28-29, 2011, pages 18-20; September 25, 2008,

28 pages 7-12; Wash.R.App.P. 10.10, 18.3.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

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

(1) depositions on oral examination or written questions;

(2) written interrogatories;

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

(4) physical and mental examinations; and

(5) requests for admission.

(b) Discovery Scope and Limits.

(1) In General.

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

23 information as the date sent, date received, author, and recipients. The phrase does not
24 include other metadata unless the parties agree otherwise or the court orders otherwise upon
25 motion of a party and a showing of good cause for the production of certain metadata. All
26 discovery is subject to the limitations imposed by Rule 26(b)(1)(B).
27 (B) Limitations on Frequency and Extent.
28 (i) When Required. On motion or on its own, the court must limit the frequency or
29 extent of discovery otherwise allowed by these rules if it determines that:
30 – discovery sought is unreasonably cumulative or duplicative, or it can be obtained
31 from some other source that is more convenient, less burdensome, or less expensive;
32 – the party seeking discovery has had ample opportunity to obtain the information by
33 discovery in the action; or
34 – the burden or expense of the proposed discovery outweighs its likely benefit,
35 considering the needs of the case, the amount in controversy, the parties' resources, the
36 importance of the issues at stake in the action, and the importance of the discovery in
37 resolving the issues.
38 (ii) Specific Limitations on Electronically Stored Information. A party need not
39 provide discovery of electronically stored information from sources that the party identifies
40 as not reasonably accessible because of undue burden or cost. On motion to compel
41 discovery or for a protective order, the party from whom discovery is sought must show that
42 the information is not reasonably accessible because of undue burden or cost. If that showing
43 is made, the court may nonetheless order discovery from such sources if the requesting party
44 shows good cause, considering the limitations of Rule 26(b)(2)(A). The court may specify

45 conditions for the discovery.

46 (2) Insurance Agreements. If a person carrying on an insurance business might be

47 liable to satisfy part or all of a judgment in an action or to indemnify or reimburse for

48 payments made to satisfy the judgment, a party may obtain discovery of the existence and

49 contents of the insurance agreement. Disclosure of the insurance agreement is not reason for

50 its admission in evidence at trial. An application for insurance may not be treated as part of

51 an insurance agreement.

52 (3) Trial Preparation=:Materials.

53 (A) Documents and Tangible Objects. Ordinarily, a party may not discover documents

54 and tangible things that are prepared in anticipation of litigation or for trial by or for another

55 party or its representative (including the other party's attorney, consultant, surety,

56 indemnitor, insurer, or agent). But, subject to Rule 26(b)(5), these materials may be

57 discovered if:

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

59 (ii) the party shows that it has substantial need for the materials to prepare its case and

60 cannot, without undue hardship, obtain their substantial equivalent by other means.

61 (B) Protection Against Disclosure. If the court orders discovery of those materials, it

62 must protect against disclosure of the mental impressions, conclusions, opinions, or legal

63 theories of a party's attorney or other representative concerning the litigation.

64 (C) Previous Statement. Any party or other person may, on request and without the

65 required showing, obtain the person's own previous statement about the action or its subject

66 matter. If the request is refused, the person may move for a court order and Rule 37(a)(4)

67 applies to the award of expenses. A previous statement is:

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

69 or

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

71 transcription of it, that recites substantially verbatim the person's oral statement.

72 (4) Trial preparation-Experts.

73 (A) Expert Who May Testify. Discovery of facts known and opinions held by experts,

74 otherwise discoverable under Rule 26(b)(1) and acquired or developed in anticipation of

75 litigation or for trial, may be obtained only as follows:

76 (i) a party may through interrogatories require any other party to identify each person

77 whom the other party expects to call as an expert witness at trial to state:

78 -- the subject matter on which the expert is expected to testify;

79 -- the substance of the facts and opinions to which the expert is expected to testify;

80 -- a detailed summary of the basis and reasons for them;

81 (ii) a party may depose any person who has been identified as an expert witness whose

82 opinions may be presented at trial unless the court finds, on motion, that the deposition is

83 unnecessary, overly burdensome, or unfairly oppressive.

84 (B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by

85 interrogatories or deposition, discover facts known or opinions held by an expert who has

86 been retained or specially employed by another party in anticipation of litigation or to

87 prepare for trial and who is not expected to be called as a witness at trial. But a party may do

88 so only:

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

90 (ii) on showing exceptional circumstances under which it is impracticable for the party

91 to obtain facts or opinions on the same subject by other means.

92 (C) Payment. Unless manifest injustice would result, the court must require that the

93 party seeking discovery:

94 (i) pay the expert a reasonable fee for time spent in responding to discovery under

95 Rule 26 (b)(4)(A) or (B); and

96 (ii) for discovery under (A) the court may require, and for discovery under (B) the

97 court must require the party seeking discovery to pay the other party a fair portion of the fees

98 and expenses it reasonably incurred in obtaining the expert's facts and opinions.

99 (5) Claiming Privilege or Protecting Trial Preparation Materials.

100 (A) Information Withheld. When a party withholds information otherwise

101 discoverable by claiming that the information is privileged or subject to protection as trial-

102 preparation material, the party must:

103 (i) expressly make the claim; and

104 (ii) describe the nature of the documents, communications, or tangible things not

105 produced or disclosed, and do so in a matter that, without revealing information itself

106 privileged or protected, will enable other parties to assess the claim.

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

108 a claim of privilege or of protection as trial-preparation material, the party making the claim

109 may notify any party that received the information of the claim and the basis for it. After

110 being notified, a receiving party must promptly return, sequester, or destroy the specified

111 information and any copies it has and may not use or disclose the information until the claim

112 is resolved. A receiving party may promptly present the information to the court under seal

113 for determination of the claim. If the receiving party disclosed the information before being

114 notified, it must take reasonable steps to retrieve it. The producing party must preserve the

115 information until the claim is resolved.

116 (c) Protective Orders.

117 (1) In General. A party or any person from whom discovery is may move for a

118 protective order in the court where the action is pending, or as an alternative on matters

119 relating to a deposition, in the court in the district where the deposition will be taken. The

120 court may, for good cause shown, issue an order to protect a party or person from annoyance,

121 embarrassment, oppression, or undue burden or expense, including one or more of the

122 following:

123 (A) forbidding the discovery;

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

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

126 discovery;

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

128 certain matters;

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

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

131 (G) requiring that a trade secret or other confidential research, development, or

132 commercial information not be revealed or be revealed only in a specified way; and

133 (H) requiring that the parties simultaneously file specified documents or information
134 enclosed in sealed envelopes to be opened as the court directs.
135 (2) Ordering Discovery. If a motion for a protective order is wholly or partially
136 denied, the court may, on just terms, order that any party or person provide or permit
137 discovery.
138 (3) Awarding Expenses. Rule 37(a)(4) applies to the award of expenses.
139 (d) Sequence and Timing of Discovery. Unless, on motion, the court orders otherwise
140 for the parties' and witnesses' convenience and in the interests of justice, methods of
141 discovery may be used in any sequence and discovery by one party does not require any
142 other party to delay its discovery.
143 (e) Supplementing Responses.
144 (1) In General. A party who has responded to an interrogatory, request for production,
145 or request for admission, must supplement or correct its response:
146 (A) in a timely manner if the party learns that in some material respect the response
147 is incomplete or incorrect, and if the additional or corrective information has not otherwise
148 been made known to the parties during the discovery process or in writing; or
149 (B) as ordered by the court.
150 (2) Witnesses. A party has a duty to timely supplement a response about:
151 (A) the identity and location of persons having knowledge of discoverable matters,
152 and
153 (B) the identity of each person expected to be called as an expert witness at trial, the
154 subject matter on which the person is expected to testify, and the substance of the person's

155 testimony.

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

157 ~~(1) Conference Timing. At any time after an action has been filed, the court may order~~

158 ~~the parties' attorneys to appear for a discovery conference.~~

159 ~~(2) Motion for Conference. On motion, the court must order a discovery conference~~

160 ~~if the motion includes:~~

161 ~~(A) a statement of the issues;~~

162 ~~(B) a proposed discovery plan and schedule;~~

163 ~~(C) proposed limitations on discovery;~~

164 ~~(D) other proposed discovery orders; and~~

165 ~~(E) a statement that the moving party has made a reasonable effort to reach agreement~~

166 ~~with opposing attorneys on the matters set forth in the motion.~~

167 ~~(3) Discovery Plan. If a party proposes making a discovery plan, each party has a duty~~

168 ~~to participate in good faith in the framing of the plan.~~

169 ~~(4) Discovery Order. Following the discovery conference, the court must enter an~~

170 ~~order tentatively:~~

171 ~~(A) identifying the discovery issues;~~

172 ~~(B) establishing a discovery plan and schedule;~~

173 ~~(C) setting discovery limits, if any; and~~

174 ~~(D) determining matters, including the allocation of expenses, necessary for the proper~~

175 ~~management of discovery in the action.~~

176 ~~A discovery order may be altered or amended if justice requires.~~

177 ~~(5) Discovery and Scheduling Conference. Subject to the right of a party who properly~~
178 ~~moves for a discovery conference to a prompt convening of the conference, the court may~~
179 ~~combine the discovery conference with a pretrial conference under Rule 16.~~
180 (1) Discovery Meeting. No earlier than 40 days after the complaint is filed in an
181 action, any party's attorney or a self-represented party may request in writing a meeting on
182 the subject of discovery, including the discovery of electronically stored information. If such
183 a request is made, the parties must meet within 21 days, unless agreed otherwise by the
184 parties or their attorneys or another time for the meeting is ordered by the court. Even if the
185 parties or their attorneys do not seek to have a discovery meeting, at any time after the
186 complaint is filed the court may direct the parties or their attorneys to appear before it for a
187 discovery conference.
188 (2) Matters for Consideration. During a discovery meeting held under Rule 26(f)(1),
189 the attorneys and any self-represented parties must:
190 (A) consider the nature and basis of the parties' claims and defenses and the
191 possibilities for promptly settling or resolving the case, and
192 (B) discuss the preparation of a discovery plan as set forth in Rule 26 (f)(3).
193 (3) Conduct of Meeting. Attorneys for the parties, and any self-represented parties,
194 that have appeared in the case are jointly responsible for arranging the meeting, for being
195 prepared to discuss a discovery plan, and for attempting in good faith to agree on a discovery
196 plan. The meeting may be held by telephone, by videoconference, or in person, or by a
197 combination of methods, unless the court, on motion, orders the attorneys and the self-
198 represented parties to attend in person.

199 (4) Discovery Plan or Report.

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

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

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

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

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

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

221 or focused on particular issues;

222 (v) when discovery should be completed; and

223 (vi) if appropriate under the circumstances of the case, any limitations or conditions

224 under Rule 26 (c) regarding protective orders.

225 (5) Discovery Conference. If the parties are unable to agree to a discovery plan at a

226 meeting held under Rule 26 (f)(1), they must, on motion of any party, appear before the court

227 for a discovery conference at which the court must order the entry of a discovery plan after

228 consideration of the report required to be submitted under Rule 26 (f)(4)(A) and the position

229 of the parties. The order may address other matters, including the allocation of discovery

230 costs, as are necessary for the proper management of discovery in the action. An order may

231 be altered or amended as justice may require. The court may combine the discovery

232 conference with a pretrial conference authorized by Rule 16.

233 (g) Signing ~~of~~ Discovery Requests, Responses, and Objections.

234 (1) Signature Required; Effect of Signature. Every discovery request, response, or

235 objection must be signed by at least one attorney of record in the attorney's individual name,

236 or by the party personally, if self-represented, and state the signer's address, e-mail address,

237 telephone number, and State Board of Law Examiners identification number, if applicable.

238 By signing, the attorney or party certifies that the signer has read the request, response, or

239 objection, and that to the best of the signer's knowledge, information, and belief formed after

240 a reasonable inquiry it is:

241 (A) consistent with these rules and warranted by existing law or by a good faith

242 argument for extending, modifying or reversing existing law;

243 (B) not interposed for any improper purpose, such as to harass, cause unnecessary
244 delay or needlessly increase in the cost of litigation; and
245 (C) neither unreasonable nor unduly burdensome or expensive, considering the needs
246 of the case, prior discovery in the case, the amount in controversy, and the importance of the
247 issues at stake in the litigation.
248 (2) Failure to Sign. Other parties have no duty to act on an unsigned request, response,
249 or objection until it is signed, and the court, on motion or on its own, must strike it unless a
250 signature is promptly supplied after the omission is called to the attorney's or party's
251 attention.
252 (3) Sanction for Improper Certification. If a certification violates this rule, without
253 substantial justification, the court, on motion or its own, must impose an appropriate sanction
254 on the signer, the party on whose behalf the signer was acting, or both. The sanction may
255 include an order to pay the reasonable expenses, including attorney's fees, caused by the
256 violation.
257 EXPLANATORY NOTE
258 Rule 26 was amended, effective July 1, 1981; March 1, 1986; March 1, 1990; March
259 1, 1996; March 1, 2008; March 1, 2011; March 1, 2013.
260 Rule 26 is derived from Fed.R.Civ.P. 26.
261 As amended, effective March 1, 1996, a party deposing another party's expert witness
262 under subdivision (b)(4)(A)(ii) must pay the expert a reasonable fee under subdivision
263 (b)(4)(C), even though a court order has not been obtained authorizing the deposition or
264 commanding payment of expert witness fees.

265 Rule 26 was amended, effective March 1, 2008, to implement changes related to
266 discovery of electronically stored information. The changes reflect the 2006 amendments to
267 Fed.R.Civ.P. 26. Subdivision (b) was amended to incorporate a new subparagraph (b)(2)(B)
268 on limitations to discovery of electronic information. A new paragraph (b)(6) was also added
269 to address claims of privilege or protection of trial preparation materials.

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

274 Subparagraph (b)(1)(A) was amended, effective March 1, 2013, to include a definition
275 of "electronically stored information" and to designate what types of metadata may be
276 discovered.

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

280 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, page 17-19;
281 January 29-30, 2009, page 6; September 25, 2008, pages 21-22; January 25, 2007, pages 9-
282 10; September 28-29, 2006, pages 18-20; January 26-27, 1995, pages 10-12; September 29-
283 30, 1994, pages 21-22; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984,
284 page 28; January 20, 1984, pages 23-31; December 11-12, 1980, page 2; October 30-31,
285 1980, pages 9-10; September 20-21, 1979, page 19; Fed.R.Civ.P. 26.

286 Cross Reference: N.D.R.Civ.P. 16 (Pretrial Procedure - Formulating Issues),

287 N.D.R.Civ.P. 28 (Persons Before Whom Depositions May Be Taken), N.D.R.Civ.P. 29

288 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 30 (Depositions Upon Oral

289 Examination), N.D.R.Civ.P. 30.1 (Uniform Audio-Visual Deposition Rule), N.D.R.Civ.P.

290 31 (Depositions of Witnesses Upon Written Questions), 33 (Interrogatories to Parties),

291 N.D.R.Civ.P. 34 (Production of Documents and Things and Entry Upon Land for Inspection

292 and Other Purposes), N.D.R.Civ.P. 35 (Physical and Mental Examination of Persons), 36

293 (Requests for Admission), N.D.R.Civ.P. 37 (Failure to Make Discovery - Sanctions),

294 N.D.R.Ev. 507 (Trade Secrets), N.D.R.Ev. 510 (Waiver of Privilege by Voluntary

295 Disclosure), and N.D.R.Ev. 706 (Court-Appointed Experts).

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; ~~and~~

23 (D) that the defendant pay specified fees or costs;

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

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

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

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

34 (d) Termination of Agreement; Resumption of Prosecution. The court may order the
35 agreement terminated and the prosecution resumed if, upon motion of the prosecuting
36 attorney stating facts supporting the motion and upon hearing, the court finds:

37 (1) the defendant or defense counsel misrepresented material facts affecting the
38 agreement, if the motion is made within six months after the date of the agreement; or

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

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

45 (1) there is probable cause to believe the defendant committed a violation of the
46 agreement; and
47 (2) there is a substantial likelihood that the defendant otherwise will not attend the
48 hearing. In any case the court may issue a summons instead of a warrant to secure the
49 appearance of the defendant at the hearing.
50 (f) Termination of Agreement; Dismissal. If no motion by the prosecuting attorney to
51 terminate the agreement is pending, the agreement is terminated and the complaint,
52 indictment, or information must be dismissed by order of the court 60 days after expiration
53 of the period of suspension specified by the agreement. If such a motion is then pending, the
54 agreement is terminated and the complaint, indictment, or information must be dismissed by
55 order of the court upon entry of a final order denying the motion. Following a dismissal
56 under Rule 32.2(f) the defendant may not be further prosecuted for the offense involved.
57 (g) Modification or Termination and Dismissal upon Defendant's Motion. If, upon
58 motion of the defendant and hearing, the court finds that the prosecuting attorney obtained
59 the defendant's consent to the agreement as a result of a material misrepresentation by a
60 person covered by the prosecuting attorney's obligation under Rule 16, the court may:
61 (1) order appropriate modification of the terms resulting from the misrepresentation;
62 or
63 (2) if the court determines that the interests of justice require, order the agreement
64 terminated, dismiss the prosecution, and bar further prosecution for the offense involved.
65 (h) Pre-Charge Diversion. This rule does not preclude the prosecuting attorney and
66 defendant from agreeing to diversion of a case without court approval if charges are not

67 pending before the court.

68 EXPLANATORY NOTE

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

70 Rule 32.2 was adopted effective March 1, 2009.

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

72 Subdivision (a) was amended, effective March 1, 2013, to include payment of fees or

73 costs as an additional condition to a pretrial diversion agreement.

74 Sources: Joint Procedure Committee Minutes of September 30, 2011, pages 19-20;

75 October 11-12, 2007, pages 15-20; April 26-27, 2007, pages 23-27.

RULE 32. FORM OF BRIEFS, APPENDICES, AND OTHER PAPERS

(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.

(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. 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.

23 (4) Paper Size, Line Spacing, and Margins. The brief must be on 81/2 by 11 inch
24 paper. Margins must be at least one and one-half inch at the left and at least one inch on all
25 other sides. Pages must be numbered at the bottom, either centered or at the right side.

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

27 (A) A proportionally spaced face must be 12 point or larger with no more than 16
28 characters per inch. The text must be double-spaced, except quotations may be single-spaced
29 and indented. Headings and footnotes may be single-spaced and must be in the same typeface
30 as the text.

31 (B) A monospaced face must be a 12-point font having ten characters per inch. The
32 text, including quotations and footnotes, must be double-spaced with no more than 27 lines
33 of type per page. Headings and footnotes must be in the same typeface as the text.

34 (6) Type styles. A brief must be in a plain, roman style, although italics or boldface
35 may be used for emphasis. Case names must be italicized or underlined.

36 (7) Page and type-volume limitations.

37 (A) Word limit for proportional typeface. If proportionately spaced typeface is used,
38 a principal brief may not exceed ~~10,500~~ 8,000 words, and a reply brief may not exceed ~~2,500~~
39 2,000 words, excluding words in the table of contents, the table of citations, and any
40 addendum. Footnotes must be included in the word count.

41 (B) Page limit for monospaced typeface. If monospaced typeface is used, a principal
42 brief may not exceed ~~40~~ 32 pages, and a reply brief may not exceed ~~ten~~ eight pages,
43 excluding the table of contents, the table of citations, and any addendum.

44 (C) Word and Page Limit for N.D.R.Civ.P. 54(b) Certification. If proportionately

45 spaced typeface is used, an argument on the appropriateness of N.D.R.Civ.P. 54(b)
46 certification may not exceed 1,250 words. If monospaced typeface is used, an argument may
47 not exceed five pages. Word and page limits for Rule 54(b) certification are in addition to
48 the limits set forth in (7)(A) and (7)(B).
49 (b) Form of an appendix. An appendix must comply with paragraphs (a)(1), (2), (3),
50 and (4), with the following exceptions:
51 (1) the cover of a separately bound appendix must be white;
52 (2) an appendix may include a legible photocopy of any document found in the record
53 of a printed judicial or agency decision;
54 (3) pages in the appendix must be consecutively numbered;
55 (4) an appendix may be prepared with double sided pages. The appendix must be 81/2
56 by 11 inches in size. Documents of a size other than 81/2 by 11 inches may be included in
57 the appendix but must be folded or placed in a file or folder within the 81/2 by 11 inch
58 appendix.
59 (c) Form of other papers.
60 (1) Motion. Rule 27 governs motion content. The form of all motion papers must
61 comply with the requirements of paragraph (c)(3) below.
62 (2) Petition for rehearing. Rule 40 governs petition for rehearing content.
63 (3) Other papers. Any other paper must be reproduced in the manner prescribed by
64 subdivision (a), with the following exceptions:
65 (A) a cover is not necessary if the caption and signature page together contain the
66 information required by subdivision (a);

67 (B) Paragraph (a)(7) does not apply.

68 (d) Non-compliance. Documents not in compliance with this rule will not be filed.

69 EXPLANATORY NOTE

70 Rule 32 was amended, effective March 1, 1996; amended effective September 11,
71 1996, subject to comment; final adoption on October 23, 1996; amended effective August
72 1, 2001; March 1, 2003; March 1, 2007; March 1, 2008; March 1, 2010; March 1, 2013.

73 Rule 32 was amended, effective September 11, 1996, with respect to the allowable
74 characters per inch with proportionally spaced typeface in subparagraph (a)(5)(A).

75 Rule 32 was revised, effective March 1, 2003, in response to the December 1, 1998,
76 amendments to Fed.R.App.P. 32. The language and organization of the rule were changed
77 to make the rule more easily understood and to make style and terminology consistent
78 throughout the rules.

79 Paragraph (a)(2) was amended, effective March 1, 2007, to specify the cover color for
80 a petition for rehearing.

81 Paragraph (a)(3), effective March 1, 2003, requires a brief to be bound in a secure
82 manner, however, this is not intended to allow staples or slide-lock or slide-grip bindings.

83 Paragraphs (a)(6) and (a)(7), which include type style requirements and page and type-
84 volume limitations, were adopted, effective March 1, 2003. These limitations were moved
85 to this rule from Rule 28 and generally do not follow the federal formal requirements. As
86 used in paragraph (a)(6), "plain, roman style" does not include italicized, bold, or cursive
87 type-styles.

88 Paragraph (a)(7) was amended, effective March 1, 2013, to decrease the page and type

89 volume allowed in a primary brief and a response brief.

90 Paragraph (a)(7), effective March 1, 2003, limits the length of a brief. A person may

91 rely on the word or line count of the word-processing system used to prepare the brief.

92 Subparagraph (a)(7)(C) was adopted, effective March 1, 2010, to limit the length of

93 an argument on the appropriateness of N.D.R.Civ.P. 54(b) certification.

94 Paragraph (b)(3), effective March 1, 2003, provides an exception to the size

95 requirement for odd-sized documents in an appendix. This exception is intended to allow

96 inclusion of technical or other documents, such as maps or charts, which may not be clear

97 or legible if reduced to meet the size requirement.

98 Paragraph (c)(2) was amended, effective March 1, 2008, to transfer length

99 requirements for petitions for rehearing to Rule 40.

100 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 8-9;

101 September 30, 2011, pages 11-12; April 28-29, 2011, pages 18-20; September 24-25, 2009,

102 pages 15-16; April 26-27, 2007, page 18; January 25, 2007, page 19; September 22-23, 2005,

103 page 27; January 24-25, 2002, pages 7-9; September 27-28, 2001, pages 23-25; April 26-27,

104 2001, page 8; April 27-28, 1995, pages 15-17; May 25-26, 1978, pages 17-18; January 12-13,

105 1978, pages 20-22. Fed.R.App.P. 32, §§ 3.13(e) and 3.31, ABA Standards Relating to

106 Appellate Courts (Approved Draft, 1977).

107 Statutes Affected:

108 Superseded: N.D.C.C. § 29-28-19.

109 Cross Reference: N.D.R.App.P. 27 (Motions); N.D.R.App.P. 28 (Briefs);

110 N.D.R.App.P. 29 (Brief of an Amicus Curiae); N.D.R.App.P. 30 (Appendix to the Briefs);

111 N.D.R.App.P. 40 (Petition for Rehearing).

RULE 33. INTERROGATORIES TO PARTIES

(a) In general.

(1) Timing. A party may serve written interrogatories on the plaintiff after commencement of the action and on any other party after service of the summons and complaint on that party.

(2) Scope. An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.

(3) Number. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 50 written interrogatories, including all discrete subparts. Leave to serve additional interrogatories may be granted to the extent consistent with Rule 26(b)(1)(B).

(b) Answers and objections.

(1) Responding party. The interrogatories must be answered:

(A) by the party to whom they are directed;

(B) if that party is a public or private corporation, a partnership, an association, a governmental agency, or any other organization, by any officer or agent, who must furnish the information available to the party.

(2) Time to respond. The responding party must serve its answer and any objections

23 within 30 days after being served with the interrogatories, but a defendant is not required to
24 serve its answer and any objections until 45 days after service of the summons and complaint
25 on it. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.
26 Any stipulated extension of time applies to interrogatory answers and objections.

27 (3) Answering each interrogatory. Each interrogatory must, to the extent it is not
28 objected to, be answered separately and fully in writing under oath. A party must restate the
29 interrogatory being answered immediately preceding its answer to the interrogatory.

30 (4) Objections. The grounds for objecting to an interrogatory must be stated with
31 specificity. Any ground not stated in a timely objection is waived unless the court, for good
32 cause, excuses the failure.

33 (5) Signature. The person who makes the answers must sign them, and the attorney
34 who objects must sign any objections.

35 (6) Repetitive question. A party is not required to answer an interrogatory that is
36 repetitive of any interrogatory it has already answered. An interrogatory served by one party
37 is considered to be served by all parties.

38 (c) Use. An answer to an interrogatory may be used to the extent allowed by the Rules
39 of Evidence.

40 (d) Option to produce business records. If the answer to an interrogatory may be
41 determined by examining, auditing, compiling abstracting, or summarizing a party's business
42 records (including electronically stored information), and if the burden of deriving or
43 ascertaining the answer will be substantially the same for either party, the responding party
44 may answer by:

45 (1) specifying the records that must be reviewed, in sufficient detail to enable the
46 interrogating party to locate and identify them as readily as the responding party could; and
47 (2) giving the interrogating party a reasonable opportunity to examine and audit the
48 records and to make copies, compilations, abstracts, or summaries.

49 EXPLANATORY NOTE

50 Rule 33 was amended, effective January 1, 1981; September 1, 1983; March 1, 1992
51 on an emergency basis; July 14, 1993; March 1, 1997; March 1, 2004; March 1, 2008; March
52 1, 2011; March 1, 2013.

53 Rule 33 was amended, effective March 1, 2011, in response to the December 1, 2007,
54 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
55 were changed to make the rule more easily understood and to make style and terminology
56 consistent throughout the rules.

57 Paragraph (a)(3) was added, effective March 1, 2013, to limit the number of
58 interrogatories a party may serve. Each party is allowed to serve 50 interrogatories on any
59 other party, but must obtain leave of court (or a stipulation from the opposing party) to serve
60 a larger number. Parties cannot evade this limitation by joining as "subparts" questions that
61 seek information about discrete separate subjects. However, a question asking about
62 communications of a particular type should be treated as a single interrogatory even though
63 it requests that the time, place, persons present, and contents be stated separately for each
64 such communication.

65 Paragraph (b)(2) was amended, effective March 1, 2004, to clarify that any stipulated
66 extension applies to answers and objections.

67 Subdivision (d) was amended, effective March 1, 2008, in response to the 2006 federal revision. The amendments clarify that electronically stored information is a type of business record.

70 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, page 20-22; January 29-30, 2009, page 28; September 28-29, 2006, page 20-22; January 30-31, 2003, pages 13-15; September 28-29, 1995, page 14; November 7-8, 1991, page 5; October 25-26, 1990, pages 17-18; February 17-18, 1983, pages 12-14; October 30-31, 1980, pages 19-20; November 29-30, 1979, page 7; Fed.R.Civ.P. 33.

75 Cross Reference: N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), and N.D.R.Civ.P. 37 (Failure to Make Discovery - Sanctions); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure).

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 petition for rehearing may not exceed ~~2,500~~ 2,000 words, excluding words in the table of contents, the table of citations, and any addendum. Footnotes must be included in the word count.

23 (2) Page Limit for Monospaced Typeface. If monospaced typeface is used, a petition
24 for rehearing may not exceed ~~ten~~ eight pages, excluding the table of contents, the table of
25 citations, and any addendum.
26 (c) Service and filing. Copies of a petition for rehearing must be served and filed as
27 prescribed by Rule 31(b).
28 EXPLANATORY NOTE
29 Rule 40 was amended, effective March 1, 2003; March 1, 2004; March 1, 2008;
30 March 1, 2013.
31 This rule is derived from Fed.R.App.P. 40.
32 Subdivision (b) was amended, effective March 1, 2003, to specify that a petition for
33 rehearing must comply with the requirements of Rule 32.
34 Subdivision (b) was amended, effective March 1, 2004, to specify that a petition for
35 rehearing must contain the elements specified in Rule 28(b) that apply to the given petition.
36 For example, a petition for rehearing that cites legal authorities must include a table of
37 authorities as described in Rule 28(b)(2).
38 Subdivision (b) was amended, effective March 1, 2008, to include length requirements
39 for a petition for rehearing.
40 Subdivision (b) was amended, effective March 1, 2013, to decrease the page and type
41 volume allowed in a petition for rehearing.
42 Subdivision (c) was added, effective March 1, 2003, to clarify petition service and
43 filing requirements.
44 Rule 40 was amended, effective March 1, 2003, in response to the December 1, 1998,

45 amendments to Fed.R.App.P. 40. The language and organization of the rule were changed
46 to make the rule more easily understood and to make style and terminology consistent
47 throughout the rules.

48 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 8-9;
49 September 30, 2011, pages 11-12; April 28-29, 2011, pages 18-20; January 25, 2007, page
50 19; April 24-25, 2003, page 14; April 25-26, 2002, page 25; May 25-26, 1978, pages 19-20;
51 March 16-17, 1978, pages 8-9. Fed.R.App.P. 40.

52 Statutes Affected:

53 Superseded: N.D.C.C. § 28-27-30.

54 Cross Reference: N.D.R.App.P. 28 (Briefs); N.D.R.App.P. 31 (Filing and Service of
55 Briefs); N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Papers).

RULE 41. SEARCH AND SEIZURE

(a) Authority to issue a warrant. A state or federal magistrate acting within or for the territorial jurisdiction where the property or person sought is located, or from which it has been removed, may issue a search warrant authorized by this rule.

(b) Persons or property subject to search and seizure. A warrant may be issued for any of the following:

(1) property that constitutes evidence of a crime;

(2) contraband, the fruits of crime, or things criminally possessed;

(3) property designed or intended for use, or which is or has been used as the means of, committing a crime;

(4) a person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuing the warrant.

(1) Warrant on affidavit or sworn recorded testimony.

(A) In general. A warrant other than a warrant on oral testimony under Rule 41 (c)(2) may issue only on an affidavit or affidavits sworn to or sworn recorded testimony taken before a state or federal magistrate and establishing the grounds for issuing the warrant.

(B) Examination. Before ruling on a request for a warrant, the magistrate may require the affiant or other witnesses to appear personally and may examine under oath the affiant and any witnesses the affiant may produce. This examination must be recorded and made part of the proceedings.

(C) Probable cause. If the state or federal magistrate is satisfied that grounds for the

23 application exist or that there is probable cause to believe they exist, the magistrate must
24 issue a warrant identifying the property or person to be seized and naming or describing with
25 particularity the person or place to be searched. The finding of probable cause may be based
26 upon hearsay evidence in whole or in part.

27 (D) Command to search. The warrant must be directed to a peace officer authorized
28 to enforce or assist in enforcing any law of this state. It must command the officer to search,
29 within a specified period of time not to exceed ten days, the person or place named for the
30 property or person specified.

31 (E) Service and return. The warrant must be served in the daytime, unless the issuing
32 authority, by appropriate provision in the warrant, and for reasonable cause shown,
33 authorizes its execution at times other than daytime. It must designate a state or federal
34 magistrate to whom it must be returned.

35 (2) Warrant ~~on remote communication~~ by Telephonic or Other Reliable Electronic
36 Means.

37 ~~(A) In general. When reasonable under the circumstances, a state or federal magistrate~~
38 ~~may issue a warrant based on sworn oral testimony communicated by telephone or other~~
39 ~~appropriate means.~~

40 ~~(B) Application. The person requesting the warrant must prepare a duplicate original~~
41 ~~warrant and must read the duplicate original warrant, verbatim, to the magistrate. The~~
42 ~~magistrate must enter, verbatim, what is so read to the magistrate on the original warrant. The~~
43 ~~magistrate must direct the warrant to be modified.~~

44 ~~(C) Issuance. If the magistrate is satisfied that grounds for the application exist or that~~

45 ~~there is probable cause to believe that they exist, the magistrate must order the issuance of~~

46 ~~a warrant by directing the person requesting the warrant to sign the magistrate's name on the~~

47 ~~duplicate original warrant. The magistrate must immediately sign the original warrant and~~

48 ~~enter on the face of the original warrant the date and time when the warrant was ordered to~~

49 ~~be issued. The finding of probable cause for a warrant on oral testimony may be based on the~~

50 ~~same kind of evidence as is sufficient for a warrant on affidavit.~~

51 ~~(D) Recording and certifying testimony. If a caller informs the magistrate that the~~

52 ~~purpose of the call is to request a warrant, the magistrate must immediately place under oath~~

53 ~~each person whose testimony forms the basis of the application and each person applying for~~

54 ~~that warrant. If a voice recording device is available, the magistrate must use the device to~~

55 ~~record the call. Otherwise a stenographic or longhand verbatim record must be made. If a~~

56 ~~longhand verbatim record is made, the magistrate must file a signed copy with the court.~~

57 ~~(E) Contents. The contents of a warrant on oral testimony are the same as the contents~~

58 ~~of a warrant on affidavit.~~

59 ~~(F) Additional rules for execution. The person who executes the warrant must enter~~

60 ~~the exact time of execution on the face of the duplicate original warrant.~~

61 ~~(G) Motion to suppress precluded. Absent a finding of bad faith, evidence obtained~~

62 ~~under a warrant issued under Rule 41 (c)(2) is not subject to a motion to suppress on the~~

63 ~~ground that it was not reasonable under the circumstances to issue the warrant on oral~~

64 ~~testimony.~~

65 ~~(3) Warrant by electronic transmission.~~

66 ~~(A) General rule. An affidavit in support of a warrant may be submitted by electronic~~

67 ~~transmission. A warrant may be transmitted by electronic transmission.~~

68 ~~(B) Application. The magistrate must orally administer the oath or affirmation to the~~

69 ~~affiant over the telephone. The affiant must sign the affidavit and submit the affidavit to the~~

70 ~~magistrate by electronic transmission. An affidavit sworn to a magistrate over the telephone~~

71 ~~is sworn to before a magistrate for the purposes of Rule 41(c).~~

72 ~~(C) Issuance. The magistrate must note on the warrant the date and time of issuance~~

73 ~~of the warrant, and indicate on the warrant that the supporting affidavit was sworn to over~~

74 ~~the telephone. The electronic transmission has the same effect as the original.~~

75 ~~(D) Execution. The person who executes the warrant must enter the date and time of~~

76 ~~the execution on the face of the warrant.~~

77 In accordance with Rule 4.1, the magistrate may issue a warrant based on information

78 communicated by telephone or other reliable electronic means.

79 ~~(4)~~ (3) Warrant seeking electronically stored information. A warrant under Rule 41(c)

80 may authorize the seizure of electronic storage media or the seizure or copying of

81 electronically stored information. Unless otherwise specified, the warrant authorizes a later

82 review of the media or information consistent with the warrant. The time for executing the

83 warrant refers to the seizure or on-site copying of the media or information, and not to any

84 later off-site copying or review.

85 (d) Execution and return with inventory.

86 (1) Execution. The person who executes the warrant must enter the date and time of

87 the execution on the face of the warrant.

88 ~~(1)~~ (2) Inventory. An officer present during the execution of the warrant must prepare

89 and verify an inventory of any property seized. The officer must do so in the presence of the
90 applicant for the warrant and the person from whom, or from whose premises, the property
91 was taken. If either one is not present, the officer must prepare and verify the inventory in
92 the presence of at least one other credible person. In a case involving the seizure of electronic
93 storage media or the seizure or copying of electronically stored information, the inventory
94 may be limited to describing the physical storage media that were seized or copied. The
95 officer may retain a copy of the electronically stored information that was seized or copied.

96 ~~(2)~~ (3) Receipt. The officer taking property under the warrant must:

97 (A) give a copy of the warrant and a receipt for the property taken to the person from
98 whom or from whose premises the property was taken; or

99 (B) leave a copy of the warrant and receipt at the place from which the officer took
100 the property.

101 ~~(3)~~ (4) Return. The officer executing the warrant must promptly return it--together
102 with a copy of the inventory--to the magistrate designated on the warrant. The officer may
103 do so by reliable electronic means. The magistrate on request must give a copy of the
104 inventory to the person from whom, or from whose premises, the property was taken and to
105 the applicant for the warrant.

106 (e) Motion for return of property. A person aggrieved by an unlawful search and
107 seizure of property or by the deprivation of property may move the trial court for the
108 property's return. The court must receive evidence on any factual issue necessary to decide
109 the motion. If it grants the motion, the court must return the property to the moving party,
110 although the court may impose reasonable conditions to protect access and use of the

111 property in later proceedings. If a motion for return of property is made or heard after an
112 indictment, information, or complaint is filed, it must be treated also as a motion to suppress
113 under Rule 12.

114 (f) Motion to suppress. A motion to suppress evidence may be made in the trial court
115 as provided in Rule 12.

116 (g) Return of papers to clerk. The magistrate to whom the warrant is returned must
117 attach to the warrant a copy of the return, inventory and all other related papers and must file
118 them with the clerk of the trial court.

119 (h) Scope and definitions.

120 (1) Scope. This rule does not modify any statute regulating search or seizure, or the
121 issuance and execution of a search warrant in special circumstances.

122 (2) Definitions. The following definitions apply under this rule:

123 (A) "Property" includes documents, books, papers and any other tangible objects.

124 (B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to local time.

125 EXPLANATORY NOTE

126 Rule 41 was amended, effective September 1, 1983; March 1, 1990; March 1, 1992;
127 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012<u>; March 1, 2013</u>.

128 Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement the
129 provisions of Article I, Section 8, of the North Dakota Constitution and the Fourth
130 Amendment to the United States Constitution, which guarantee, "The right of the people to
131 be secure in their persons, houses, papers and effects against unreasonable searches and
132 seizures shall not be violated; and no warrant shall issue but upon probable cause, supported

133 by oath or affirmation, particularly describing the place to be searched and the persons and
134 things to be seized." To implement this constitutional protection, an illegal search and seizure
135 will bar the use of such evidence in a criminal prosecution. The suppression sanction is
136 imposed in order to discourage abuses of power by law enforcement officials in conducting
137 searches and seizures.

138 Subdivision (a) provides that a search warrant be issued by a magistrate, either state
139 or federal, acting within or for the territorial jurisdiction. The provision which permits a
140 federal magistrate to issue a search warrant is the reciprocal of the federal rule, which permits
141 a state magistrate to issue a search warrant pursuant to a federal matter. It is contemplated
142 that a search warrant will be issued by a federal magistrate only on the nonavailability of a
143 state magistrate.

144 Subdivision (a) does not require that the individual requesting the search warrant be
145 a law enforcement officer. There appears to be common-law support for the use of the search
146 warrant as a means of getting an owner's property back. The primary purpose of the rule,
147 however, is the authorization of a search in the interest of law enforcement and as a practical
148 matter the request for issuance of a search warrant by someone other than a law enforcement
149 officer is virtually nonexistent.

150 Subdivision (b) describes the property or persons which may be seized with a lawfully
151 issued search warrant. Issuance of a search warrant to search for items of solely evidential
152 value is authorized. There is no intention to limit the protection of the Fifth Amendment
153 against compulsory self-incrimination, so items that are solely "testimonial" or
154 "communicative" in nature might well be inadmissible on those grounds.

155 Paragraph (c)(1) follows the federal rule except that North Dakota's rule permits the
156 issuance of a warrant on sworn recorded testimony without an affidavit. Probable cause for
157 the issuance of a search warrant should be assessed under the totality-of-circumstances test.

158 The provision for examination of the affiant before the magistrate is intended to assure
159 the magistrate an opportunity to make a careful decision as to whether there is probable cause
160 based on legally obtained evidence. The requirement that the testimony be recorded is to
161 insure an adequate basis for determining the sufficiency of the evidentiary grounds for the
162 issuance of the search warrant if a motion to suppress is later filed.

163 The language of subparagraph (c)(1)(E), "for reasonable cause shown," is intended
164 to explain the necessity for executing the warrant at a time other than the daytime. This
165 provision is intended to be a substantive prerequisite to the issuance of a warrant that is to
166 be executed at a time other than daytime, although it is not necessary that the quoted
167 language ("for reasonable cause shown") be defined in subdivision (h).

168 ~~Paragraph (c)(2) establishes a procedure for the issuance of a search warrant when it~~
169 ~~is not reasonably practicable for the person obtaining the warrant to present a written~~
170 ~~affidavit to a magistrate as required by paragraph (c)(1). A warrant may be issued on the~~
171 ~~basis of an oral statement of a person not in the physical presence of a magistrate. Telephone,~~
172 ~~radio, interactive television, or other electronic methods of communication are contemplated.~~

173 ~~Subparagraph (c)(2)(D) was amended, effective March 1, 2006, to delete a sentence~~
174 ~~requiring immediate transcription of the record of a remote communication.~~

175 ~~Paragraph (c)(3) was added, effective January 1, 1995, to provide for the issuance of~~
176 ~~warrants by facsimile transmission without the personal appearance of the affiant. Paragraph~~

177 ~~(c)(3) was amended, effective March 1, 2006, to substitute the term "electronic" for~~
178 ~~"facsimile." This change was intended to expand the means available for obtaining a warrant~~
179 ~~without the personal appearance of the affiant to include facsimile, e-mail, and other~~
180 ~~electronic transmission methods.~~

181 Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph (c)(2) was
182 added, effective March 1, 2013, to allow the magistrate to issue a warrant based on
183 information communicated by telephone or other reliable electronic means under the
184 procedure set out in Rule 4.1.

185 Paragraph (c)~~(4)~~(3) was added and paragraph (d)(1) was amended, effective March
186 1, 2012, to provide guidelines for warrants authorizing the seizure of electronic storage media
187 and electronically stored information and for the inventory of seized electronic material. The
188 amendments were based on the December 1, 2009, amendments to Fed.R.Crim.P. 41.

189 Subdivision (d) is intended to make clear that a copy of the warrant and an inventory
190 receipt for property taken shall be left at the premises at the time of the lawful search or with
191 the person from whose premises the property is taken if he is present.

192 Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer to make
193 a return by reliable electronic means.

194 Subdivision (e) requires that the motion for return of property be made in the trial
195 court rather than in a preliminary hearing before the magistrate who issued the warrant. It
196 further provides for a return of the property if: (1) the person is entitled to lawful possession,
197 and (2) the seizure is illegal. However, property which is considered contraband does not
198 have to be returned even if seized illegally. The last sentence of subdivision (e) provides that

199 a motion for return of property, made in the trial court, shall be treated as a motion to
200 suppress under N.D.R.Crim.P. 12. The purpose of this provision is to have a series of pretrial
201 motions disposed of in a single appearance, such as at a Rule 17.1, Omnibus Hearing, rather
202 than in a series of pretrial motions made on different dates causing undue delay in
203 administration.

204 Subdivisions (a), (b), and (c) were amended in 1983, effective September 1, 1983, to
205 add persons as permissible objects of search warrants. These amendments follow 1979
206 amendments to Fed.R.Crim.P. 41 and are intended to make it possible for a search warrant
207 to issue to search for a person if there is probable cause to arrest that person; or that person
208 is being unlawfully restrained.

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

211 Subdivision (e) was amended, effective March 1, 1992, to track the federal rule.

212 Rule 41 was amended, effective March 1, 2006, in response to the December 1, 2002,
213 revision of the Federal Rules of Criminal Procedure. The language and organization of the
214 rule were changed to make the rule more easily understood and to make style and
215 terminology consistent throughout the rules.

216 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 26-27;
217 April 28-29, 2011, page 17; September 23-24, 2010, page 32; April 29-30, 2010, page 20,
218 25-26; April 28-29, 2005, pages 5-8; January 27-28, 2005, pages 33-34; April 28-29, 1994,
219 pages 22-23; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20,
220 1989, page 4; December 3, 1987, page 15; October 15-16, 1981, pages 12-15; December 7-8,

221 1978, pages 23-26; October 12-13, 1978, pages 15-19; April 24-26, 1973, page 14;
222 December 11-15, 1972, pages 31-37; November 18-20, 1971, pages 3-9; September 16-18,
223 1971, pages 11-32; March 12-13, 1970, page 3; November 20-21, 1969, pages 19-24; May
224 15-16, 1969, pages 21-23; Fed.R.Crim.P. 41.

225 Statutes Affected:

226 Superseded: N.D.C.C. §§ 29-29-02, 29-29-03, 29-29-04, 29-29-05, 29-29-06, 29-29-
227 07, 29-29-10, 29-29-11, 29-29-12, 29-29-13, 29-29-14, 29-29-15, 29-29-16, 29-29-17.

228 Considered: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3), 29-29-01, 29-29-
229 08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02. N.D.C.C. ch. 28-29.1.
230 N.D.C.C. ch.19-03.1.

231 Cross References: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by
232 Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12 (Pleadings and Pretrial
233 Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and Pretrial Conference); N.D.R.Ct. 2.2
234 (Facsimile Transmission); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).

N.D.R.Civ.P.

[Alt. A]

RULE 45. SUBPOENA

(a) In General.

(1) Form and Contents.

(A) Requirements. Every subpoena must:

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

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

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

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

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

23 electronically stored information is to be produced.

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

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

32 (3) Subpoena in Out-of-State Action.

33 ~~(A) “State” Defined. “State” means a state of the United States, the District of~~
34 ~~Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe,~~
35 ~~or any territory or insular possession subject to the jurisdiction of the United States.~~

36 ~~(B) In General. The clerk, may issue a subpoena under seal of the court to a party~~
37 ~~involved in a civil action pending in another state if:~~

38 ~~(i) the party's attorney files proof of service of notice under Rule 45(b)(2); or~~

39 ~~(ii) the party files a letter of request from a court of the other state.~~

40 ~~(C) Requirements. The subpoena must be issued in the name of the court for the~~
41 ~~county where the subpoena will be served. The subpoena may be used and discovery~~
42 ~~obtained within this state in the same manner and subject to the same conditions and~~
43 ~~limitations as if the action were pending within this state. Any dispute regarding the~~
44 ~~subpoena, or discovery demanded, needing judicial involvement must be submitted to the~~

45 ~~court for the county where the subpoena issued.~~

46 N.D.R.Ct. 5.1 defines the procedure for discovery or depositions in an out-of-state

47 action.

48 (b) Service; Notice.

49 (1) Service of Subpoena.

50 (A) A subpoena to a named person must be served under Rule 4(d). A subpoena may

51 be served at any place within the state.

52 (B) If the subpoena requires the person's attendance, fees for one day's attendance,

53 mileage and travel expense allowed by law must be tendered. If fees, mileage and travel

54 expense are not tendered with the subpoena, the person need not obey the subpoena. Fees,

55 mileage and travel expense need not be tendered if they are to be paid by the state or a

56 political subdivision.

57 (2) Service of Notices.

58 (A) Notice of Deposition. If the subpoena commands a person to attend, give

59 testimony and produce documents, electronically stored information or tangible things at a

60 pretrial deposition, then before the subpoena is served, a notice to take a deposition must be

61 served on each party.

62 (B) Notice of Demand for Production or Inspection. If a deposition notice has not been

63 served, and if the subpoena commands the production of documents, electronically stored

64 information, or tangible things or the inspection of premises before trial, then before it is

65 served, a notice of demand for production or inspection must be served on each party.

66 (C) Notice Mandatory Before Service of Subpoena. The notice required by Rule

67 45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a subpoena for a
68 pretrial deposition, for pretrial production of documents, electronically stored information,
69 or tangible things or for the inspection of premises may be served.

70 (c) Protecting a Person Subject to a Subpoena.

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

76 (2) Command to Produce Materials or Permit Inspection.

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

81 (B) Objections. A person commanded to produce documents or tangible things or to
82 permit inspection may serve on the party or attorney designated in the subpoena a written
83 objection to inspecting, copying, testing or sampling any or all of the materials or to
84 inspecting the premises or to producing electronically stored information in the form or forms
85 requested. The objection must be received before the earlier of 24 hours before the time
86 specified for compliance or ten days after the subpoena is served. If an objection is made, the
87 following rules apply:

88 (i) At any time, on notice to the commanded person, the serving party may move the

89 issuing court for an order compelling production or inspection.

90 (ii) These acts may be required only as directed in the order, and the order must

91 protect a person who is neither a party nor a party's officer from significant expense resulting

92 from compliance.

93 (3) Location.

94 (A) Resident Witness. A subpoena may require a resident of this state to attend a

95 deposition only in the county where the person resides, is employed or transacts business in

96 person, or at a convenient place ordered by the issuing court. A resident may be required to

97 attend a hearing or trial any place within this state.

98 (B) Nonresident Witness. A subpoena may require a nonresident of this state who is

99 served with a subpoena within this state to attend a deposition ,hearing or trial in any county

100 of this state.

101 (4) Quashing or Modifying a Subpoena.

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

103 subpoena that:

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

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

106 (iii) requires disclosure of privileged or other protected matter, if no exception or

107 waiver applies; or

108 (iv) subjects a person to undue burden.

109 (B) When Permitted. To protect a person subject to or affected by a subpoena, the

110 issuing court may, on motion, quash or modify the subpoena if it requires:

111 (i) disclosing a trade secret or other confidential research, development, or commercial
112 information; or
113 (ii) disclosing an unretained expert's opinion or information that does not describe
114 specific occurrences in dispute and results from the expert's study that was not requested by
115 a party.
116 (C) Specifying Conditions as an Alternative. In the circumstances described in Rule
117 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance
118 or production under specified conditions if the serving party:
119 (i) shows a substantial need for the testimony or material that cannot otherwise be met
120 without undue hardship; and
121 (ii) ensures that the subpoenaed person will be reasonably compensated.
122 (d) Duties in Responding to a Subpoena.
123 (1) Producing Documents or Electronically Stored Information.
124 (A) Documents. A person responding to a subpoena to produce documents shall
125 produce them as they are kept in the ordinary course of business or shall organize and label
126 them to correspond to the categories in the demand.
127 (B) Form for Producing Electronically Stored Information. If a subpoena does not
128 specify a form for producing electronically stored information, the person responding must
129 produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable
130 form or forms.
131 (C) Electronically Stored Information Produced in Only One Form. The person
132 responding need not produce the same electronically stored information in more than one

133 form.

134 (D) Inaccessible Electronically Stored Information. The person responding need not
135 provide discovery of electronically stored information from sources that the person identifies
136 as not reasonably accessible because of undue burden or cost. On motion to compel
137 discovery or to quash, the person from whom discovery is sought must show that the
138 information sought is not reasonably accessible because of undue burden or cost. If that
139 showing is made, the court may nonetheless order discovery from such sources if the
140 requesting party shows good cause, considering the limitations of Rule ~~26(b)(2)(A)~~
141 26(b)(1)(B). The court may specify conditions for discovery.

142 (2) Claiming Privilege or Protection.

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

145 (i) expressly make the claim; and

146 (ii) describe the nature of the withheld documents, communications, or tangible things
147 in a manner that, without revealing information itself privileged or protected, will enable the
148 parties to assess the claim.

149 (B) Information Produced. If information is produced in response to a subpoena that
150 is subject to a claim of privilege or of protection as trial-preparation material, the person
151 making the claim may notify any party that received the information of the claim and the
152 basis for it. After being notified, a receiving party must promptly return, sequester, or destroy
153 the specified information and any copies it has; must not use or disclose the information until
154 the claim is resolved; must take reasonable steps to retrieve the information if the receiving

155 party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

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

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

165 "You may object to this subpoena by sending or delivering a written objection, stating your valid reason, to [Insert the name and address of the party, or attorney representing the party seeking production of documents, electronically stored information, or tangible things or the inspection of premises]. Any objection must be received within ten days after you receive the subpoena. If the time specified in the subpoena for compliance is less than ten days, any objection must be received at least 24 hours before the time specified for compliance.

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

176 Failure to obey this subpoena, without making a timely objection, and stating a valid

177 reason, may be contempt of court."

178 EXPLANATORY NOTE

179 Rule 45 was amended, effective July 1, 1981; January 1, 1988; January 1, 1995;
180 March 1, 1997; March 1, 1999; March 1, 2007; March 1, 2008; March 1, 2009; March 1,
181 2012; March 1, 2013.

182 Rule 45 was revised, effective January 1, 1995, in response to the 1991 federal
183 revision. Significant changes to North Dakota's rule include the following: (1) An action
184 must be filed before a subpoena may issue; (2) A subpoena may compel a non-party to
185 produce evidence independent of any deposition; (3) A subpoena may compel the inspection
186 of premises in the possession of a non-party; and (4) Notice must be printed on a subpoena
187 advising of the right to object when pretrial or prehearing production or inspection is
188 commanded. The scope of discovery under Rule 26 is not intended to be altered by the
189 revision.

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

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

197 Subparagraph (a)(1)(A)(iii) was amended, effective March 1, 2013, to clarify that the
198 notice required by subdivision (f) must be made part of the subpoena when the subpoena

199 seeks only pretrial or prehearing production of documents, electronically stored information,

200 or tangible things or the inspection of premises.

201 (Paragraph (a)(3) was amended, effective ~~March 1, 2012, to define "state" to include~~

202 ~~the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally~~

203 ~~recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of~~

204 ~~the United States~~ March 1, 2013, to direct persons to N.D.R.Ct. 5.1 for information about

205 how to proceed with discovery in this state in an action pending in an out-of-state court.

206 N.D.R.Ct. 5.1 outlines procedure for interstate depositions and discovery.

207 Subdivision (b) was amended, effective March 1, 2007, to eliminate the requirement

208 for parties to serve a separate notice for production when commanding a person to attend a

209 deposition to give testimony and produce documents or things.

210 Paragraph (b)(2) was amended, effective March 1, 2009, to make it clear that notice

211 must be served on each party in a matter before a subpoena to take testimony or for

212 production is served.

213 Subdivision (f) was amended, effective March 1, 1999, to allow an objection to a

214 subpoena to be sent via a commercial carrier as an alternative to mail.

215 Sources: Joint Procedure Committee Minutes of September 27, 2012, pages 8-10;

216 January 26-27, 2012, pages 3-7; September 30, 2011, pages 12-15; April 28-29, 2011, page

217 25; September 23-24, 2010, pages 32-33; April 24-25, 2008, pages 22-25; September 28-29,

218 2006, pages 25-27; April 27-28, 2006, pages 14-15; January 29-30, 1998, page 20; January

219 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8,

220 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987,

221 pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P.

222 45.

223 Statutes Affected:

224 Superseded: N.D.C.C. § 31-05-22

225 Cross Reference: N.D.R.Civ.P. 26 (General Provisions Governing Discovery),

226 N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), and N.D.R.Civ.P. 31 (Depositions

227 of Witnesses Upon Written Questions); N.D.R.Crim.P. 17 (Subpoena); N.D.R.Ev. 510

228 (Waiver of Privilege by Voluntary Disclosure); N.D.R.Ct. 5.1 (Interstate Depositions and

229 Discovery).

RULE 58. ENTRY AND NOTICE OF ENTRY OF JUDGMENT

(a) Entry of Judgment. ~~Upon~~

(1) Appropriate Judgment. On the filing of an order for judgment, the prevailing party must submit to the clerk an appropriate form of the judgment. The clerk must sign and file the judgment and enter it in the register of civil actions, at which time the judgment becomes effective.

(2) Failure to Submit Judgment. If the prevailing party fails to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.

(3) Judgment for Sum Certain. If the judgment directs the payment of money for a sum certain, or a sum that can be made certain by calculation, the clerk must also docket the judgment in the judgment docket as provided by law.

(b) Notice of entry of judgment.

(1) In General. A notice of entry of judgment must identify the docket number and the date the judgment was signed.

(2) Service. Within 14 days after entry of judgment in an action in which an appearance has been made, notice of entry of judgment in compliance with Rule 58(b)(1)~~, and a copy of the judgment or a general description of the nature and amount of relief and damages granted,~~ must be served by the prevailing party on the opposing party ~~and filed~~. A copy of the judgment must be served with the notice of entry.

23 (3) Filing. The prevailing party must file the notice of entry of judgment. The copy

24 of the judgment may not be filed.

25 (4) Post Judgment Motion or Appeal. Service of notice of entry of judgment is not

26 required to begin the time for filing a post-judgment motion or an appeal if the record clearly

27 evidences actual knowledge of entry of judgment through the affirmative action of the

28 moving or appealing party.

29 EXPLANATORY NOTE

30 Rule 58 was amended, effective January 1, 1988; December 19, 1990; March 1, 2000;

31 March 1, 2011; March 1, 2013.

32 Subdivision (a) was amended, effective January 1, 1988, to change the document

33 where the judgment must be entered from the judgment book to the register of civil actions.

34 Subdivision (b) was adopted, effective March 1, 2000. Subdivision (b) was formerly

35 subdivision (d) of Rule 77.

36 Although subdivision (b) only refers to a judgment, Rule 54(a) defines a judgment as

37 including "any order from which an appeal lies."

38 ~~Subdivision~~ Under paragraph (b)(4), ~~incorporates the case law exception holding~~

39 service of notice of entry of judgment is not required to start the time running for filing a

40 post-judgment motion or an appeal if the record clearly evidences actual knowledge of entry

41 of judgment by the affirmative action of the moving or appealing party. ~~See Gierke v. Gierke,~~

42 ~~1998 ND 100, Paras 6-12, 578 N.W.2d 522, 525-26; Thorson v. Thorson, 541 N.W.2d 692,~~

43 ~~694-95 (N.D. 1996).~~

44 Subdivision (b) was amended, effective March 1, 2011, to increase the time to serve

45 and file the notice of entry of judgment from 10 to 14 days after entry of judgment.

46 Subdivision (b) was amended, effective March 1, 2013, to require the prevailing party

47 to identify the docket number and the date the judgment was signed in the notice of entry of

48 judgment; to serve a copy of the judgment with the notice of entry; and to file the notice of

49 entry of judgment, but not a copy of the judgment.

50 Rule 58 was amended, effective March 1, 2011, in response to the December 1, 2007,

51 revision of the Federal Rules of Civil Procedure. The language and organization of the rule

52 were changed to make the rule more easily understood and to make style and terminology

53 consistent throughout the rules.

54 Sources: Joint Procedure Committee Minutes of April 26-27, 2012, pages 3-7, 18-19;

55 January 26-27, 2012, pages 9-12; September 30, 2011, pages 22-27; April 29-30, 2010, page

56 15; January 28-29, 2010, page 10; September 24-25, 1998, page 16; September 18-19, 1986,

57 pages 3-4; September 26-27, 1985, pages 3, 9; November 29-30, 1979, pages 17-18.

58 Cross Reference: N.D.R.Civ.P. 54 (Judgment Costs); N.D.R.Civ.P. 77 (District Courts

59 and Clerks); N.D.R.Ct. 7.1 (Judgments, Orders and Decrees).