

State of North Dakota
JOINT PROCEDURE COMMITTEE

20150363

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December 21, 2015

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

DEC 21 2015

STATE OF NORTH DAKOTA

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

Re: Proposed Amendments to N.D.R.Civ.P. 11 (Signing of Pleadings, Motions and Other Papers; Representations to Court; Sanctions) and N.D.R.Ct. 11.2 (Withdrawal of Attorneys)

Dear Chief Justice:

In January 2015, the Minority Justice Implementation Committee requested that the Joint Procedure Committee consider proposed amendments to N.D.R.Civ.P. 11 and N.D.R.Ct. 11.2 regarding limited scope representation. The MJIC suggested that language developed by Nebraska on assisting in the preparation of pleadings, making a "limited appearance," and simplified withdrawal from limited scope representation could be a useful addition to the North Dakota rules.

In April 2015, the committee met with MJIC chair Judge Donovan Foughty to discuss the MJIC's proposal. Judge Foughty explained that, through the rule proposals, the MJIC was seeking to expand the use of limited scope representation because this could help minorities and the poor get better access to the legal system. He said the proposed rule changes were intended to make it easier for attorneys to provide limited scope representation.

After discussing the rule proposals extensively at the April 2015 meeting, the committee took up the proposals again at the September 2015 meeting, making several amendments. The committee decided that the proposals as amended should be sent directly to the Court because it believed they needed to be brought to the attention of other interested

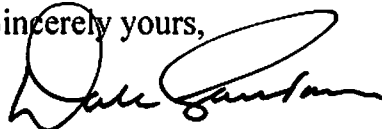
groups, in particular the Joint Committee on Attorney Standards. Copies of the committee's proposals to amend N.D.R.Civ.P. 11 and N.D.R.Ct. 11.2 are attached.

A requirement that a written agreement be obtained when there is a limited scope representation was included in the proposed amendments submitted by the MJIC to the committee. The committee decided not to include this requirement in its final proposals to the Court because N.D.R. Prof. Conduct 1.2 does not include a written agreement requirement for limited scope representation. The committee cross-referenced to Rule 1.2 in its proposal to encourage attorneys to refer to this provision before entering into limited scope representation.

The committee was unanimous in its belief that when an attorney and an otherwise self-represented party enter into a limited scope representation, there should be a written agreement that precisely defines the scope of the representation. The comment to N.D.R. Prof. Conduct 1.2 seems to encourage attorneys to obtain a written agreement when they enter into limited scope representation, but the text of the rule does not contain a writing requirement. Since the time the committee completed its work on the limited representation proposals, the ABA has issued Formal Opinion 472, which strongly recommends that lawyers who provide limited scope representation "confirm with the client the scope of the representation" in writing. The committee suggests that the Joint Committee on Attorney Standards be given the opportunity to examine the committee's proposals and to consider whether Rule 1.2 should require a written agreement when an attorney provides limited scope representation.

Thank you for your attention to the committee's proposals.

Sincerely yours,



Dale V. Sandstrom
Chair, Joint Procedure Committee

Attachments

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

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

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

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

17 (2) the claims, defenses, and other legal contentions are warranted by
18 existing law or by a nonfrivolous argument for extending, modifying, or reversing

19 existing law or for establishing new law;

20 (3) the factual contentions have evidentiary support or will likely have
21 evidentiary support after a reasonable opportunity for further investigation or
22 discovery; and

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

25 (c) Sanctions.

26 (1) In General. If, after notice and a reasonable opportunity to respond, the
27 court determines that Rule 11(b) has been violated, the court may impose an
28 appropriate sanction on any attorney, law firm, or party that violated the rule or is
29 responsible for the violation. Absent exceptional circumstances, a law firm must
30 be held jointly responsible for a violation committed by its partner, associate, or
31 employee.

32 (2) Motion for Sanctions. A motion for sanctions must be made separately
33 from any other motion and must describe the specific conduct that allegedly
34 violates Rule 11(b). The motion, brief, and other supporting papers must be served
35 under Rule 5, but must not be filed or be presented to the court if the challenged
36 paper, claim, defense, contention, or denial is withdrawn or appropriately corrected
37 within 21 days after service or within another time the court sets. The respondent
38 must have 10 days after a motion for sanctions is filed to serve and file an answer
39 brief and other supporting papers. If warranted, the court may award to the

40 prevailing party the reasonable expenses, including attorney's fees, incurred for the
41 motion.

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

45 (4) Nature of a Sanction. A sanction imposed under this rule must be
46 limited to what suffices to deter repetition of the conduct or comparable conduct
47 by others similarly situated. The sanction may include nonmonetary directives; an
48 order to pay a penalty into court; or, if imposed on motion and warranted for
49 effective deterrence, an order directing payment to the movant of part or all of the
50 reasonable attorney's fees and other expenses directly resulting from the violation.

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

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

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

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

59 (e) Limited Representation.

60 (1) Preparation of Pleadings. An attorney who complies with Rule 1.2 of the

61 N.D. Rules of Prof. Conduct, may prepare pleadings, briefs, and other documents
62 to be filed with the court by a self-represented party. The attorney’s preparation of
63 pleadings, briefs, or other documents does not constitute an appearance by the
64 attorney in the case and no notice under Rule 11(e)(2) is required. Any filing
65 prepared under this paragraph must be signed by the party designated as “self-
66 represented.”

67 (2) Limited Appearance.

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

71 ~~(H)~~ (B) Notice. An attorney who assists makes a limited appearance on
72 behalf of an otherwise self-represented party on a limited basis must serve a notice
73 of limited representation appearance on each party involved in the matter. The
74 notice must state precisely the scope of the limited representation appearance. An
75 attorney who seeks to act beyond the stated scope of the limited representation
76 appearance must serve an amended notice of limited representation appearance.
77 ~~The attorney must also serve a notice of termination of limited representation on~~
78 ~~each party involved in the matter~~ Upon completion of the limited appearance, the
79 attorney must file and distribute serve a “Certificate of Completion of Limited
80 Appearance” as required by N.D.R.Ct. 11.2(d).

81 ~~(2)~~ (C) Filing. If the action is filed, the party who received assistance of an

82 attorney on a limited basis must file the notice of limited ~~representation~~ appearance
83 with the court.

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

87 EXPLANATORY NOTE

88 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1,
89 1996; March 1, 1997; August 1, 2001; March 1, 2009; March 1, 2011; March 1,
90 2014; _____.

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

92 Rule 11 was revised, effective March 1, 1996, in response to the 1993
93 revision of Fed.R.Civ.P. 11. North Dakota's rule differs from the federal rule in the
94 following respects: 1) North Dakota's rule requires attorneys to cite their State
95 Board of Law Examiners identification number when signing papers; and 2) North
96 Dakota's rule does not require allegations or denials to be specifically identified
97 when immediate evidentiary support is lacking.

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

101 Subdivision (e) was added, effective March 1, 2009, to permit an attorney
102 to file a notice of limited representation indicating an intent to represent a party for

103 one or more matters in a case, but not for all matters. An attorney must also serve a
104 notice of termination of limited representation when the attorney's involvement
105 ends. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to
106 assist an otherwise self-represented party on a limited basis without undertaking
107 full representation of the party. Under N.D.R. Prof. Conduct 1.2 (c) a lawyer may
108 limit the scope of the representation if a client consents after consultation.

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

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

118 SOURCES: Joint Procedure Committee Minutes of September 24-25, 2015,
119 pages 2-11; April 23-24, 2015, pages 16-25; January 29-30, 2015, page 22; April
120 25-26, 2013, page 16; September 24-25, 2009, pages 13-14; January 24, 2008,
121 pages 2-7; October 11-12, 2007, pages 20-26; September 28-29, 1995, pages 2-3;
122 April 27- 28, 1995, pages 3-4; January 26-27, 1995, pages 8-10; September 29-30,
123 1994, pages 24-26; April 20, 1989, page 2; December 3, 1987, page 11; April 26,

124 1984, pages 25-26; January 20, 1984, pages 16-18; September 20-21, 1979, page
125 7; Fed.R.Civ.P. 11.

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

RULE 11.2. WITHDRAWAL OF ATTORNEYS

1 (a) Notice of Withdrawal. An attorney's appearance for a party may only be
2 withdrawn upon leave of court. Reasonable notice of the motion for leave to
3 withdraw must be given by personal service, by registered or certified mail, or via
4 a third-party commercial carrier providing a traceable delivery, directed to the
5 party at the party's last known business or residence address. If the notice is
6 undeliverable, the attorney must submit an affidavit to the court reciting the efforts
7 made to give notice.

8 (b) Motion to Withdraw. The motion for leave to withdraw must be in
9 writing and, unless another attorney is substituted, must state the last known
10 address, e-mail addresses and telephone numbers of the party represented.

11 (c) Withdrawal on Appeal. If a notice of appeal is filed in a matter, any
12 attorney seeking leave to withdraw must file the motion with the supreme court
13 clerk.

14 (d) Limited Appearance. ~~This rule does~~ Rule 11.2 (a), (b), and (c) do not
15 apply to attorneys representing a party under a notice of limited representation
16 appearance served under N.D.R.Civ.P. 11(e) unless the attorney seeks to withdraw
17 from the limited representation itself appearance prior to its completion. Upon
18 completion of the limited appearance, the attorney must within 14 days file a
19 “Certificate of Completion of Limited Appearance” with the court. Copies of the

20 certificate must be provided to the client and served upon opposing counsel or
21 opposing party if unrepresented. After the filing, the attorney has no further
22 obligation to represent the client. The filing of the certificate is considered to be
23 the attorney's withdrawal of appearance and does not require court approval.

24 EXPLANATORY NOTE

25 Rule 11.2 was amended, effective March 1, 1999; March 1, 2000; March 1,
26 2006; March 1, 2009; March 1, 2015;_____.

27 The March 1, 1999, amendments allow notice via a commercial carrier
28 providing a traceable delivery service.

29 The March 1, 2000, amendments are stylistic.

30 Subdivision (a) was amended, effective March 1, 2015, to require the
31 attorney, when notice of withdrawal cannot be delivered, to submit an affidavit
32 regarding the efforts made to provide notice.

33 Subdivision (b) was amended, effective March 1, 2015, to require the
34 attorney to provide the court with any known party e-mail addresses or telephone
35 numbers.

36 Subdivision (c) was added, effective March 1, 2006, to make it clear that an
37 attorney seeking to withdraw from representation in a matter that is on appeal must
38 file a motion for leave to withdraw with the supreme court clerk. The supreme
39 court clerk will refer withdrawal motions involving court appointed attorneys to
40 the trial court for decision and appointment of new counsel.

41 Subdivision (d) was added, effective March 1, 2009, to make it clear that an
42 attorney who serves a notice of limited representation to represent a party for one
43 or more matters in a case is not required to formally withdraw upon completion of
44 activity covered by the notice. Under N.D.R.Civ.P. 11(e), however, the attorney
45 must serve a notice of termination of limited representation when the attorney's
46 involvement ends. Rule 11.2 and N.D.R.Civ.P. 5 and 11 were amended to permit
47 attorneys to assist otherwise unrepresented parties on a limited basis without
48 undertaking full representation of the party.

49 Subdivision (d) was amended, effective _____, to clarify
50 the attorney's responsibilities upon completing a limited appearance and to clarify
51 that court approval is not required when the attorney completes the limited
52 appearance and withdraws.

53 SOURCES: Joint Procedure Committee Minutes of September 24-25, 2015,
54 pages 11-12; April 23-24, 2015, pages 16-25; January 29-30, 2015, page 22;
55 September 25-26, 2014, pages 3-4; April 24-25, 2014, pages 26-27; January 24,
56 2008, pages 2-7; October 11-12, 2007, pages 20-26; September 23-24, 2004, page
57 29; May 6-7, 1999, pages 15-16; January 29-30, 1998, page 22.

58 Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and
59 Other Papers), N.D.R.Civ.P. 11 (Signing of Pleadings, Motions and Other Papers;
60 Representation to Court; Sanctions); N.D.R. Prof. Conduct 1.2 (Scope of
61 Representation).