IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20210220

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

[¶1] On August 5, 2021, the Joint Procedure Committee submitted proposed amendments to North Dakota Rule of Civil Procedure 30, North Dakota Rules of Criminal Procedure 11, 12, 12.2, 15, 24, and 31, North Dakota Rules of Appellate Procedure 35.1, North Dakota Rules of Evidence 404 and 807, and North Dakota Supreme Court Administrative Rule 52. The proposal is available at https://www.ndcourts.gov/supreme-court/dockets/20210220. 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 allowed comment on the proposal. The Court considered the matter, and

[¶2] ORDERED that the amendments to North Dakota Rule of Civil Procedure 30, North Dakota Rules of Criminal Procedure 11, 12, 12.2, 15, 24, and 31, North Dakota Rules of Appellate Procedure 35.1, North Dakota Rules of Evidence 404 and 807, and North Dakota Supreme Court Administrative Rule 52 are ADOPTED effective March 1, 2022.

[¶3] The Supreme Court of the State of North Dakota convened this 13th day of October, 2021, with the Honorable Jon J. Jensen, Chief Justice, and the Honorable Gerald W. VandeWalle, the Honorable Daniel J. Crothers, the Honorable Lisa Fair McEvers, the Honorable Jerod E. Tufte, Justices, directing the Clerk of the Supreme Court to enter the above order.

/s/ Petra H. Mandigo Hulm
Clerk
North Dakota Supreme Court

RULE 30. DEPOSITIONS BY ORAL EXAMINATION

(a) When a Deposition May Be Taken.

(1) Without Leave. After commencement of the action, a party may, by oral questions, depose any person, including a party, except as provided in Rule 30(a)(2). A non-party deponent's attendance may be compelled by subpoena under Rule 45.

(2) With Leave.

(A) By Plaintiff. The plaintiff must obtain leave of court, granted with or without notice, to take a deposition less than 30 days after service of the summons and complaint on a defendant or service made under Rule 4(e). Leave is not required if:

(i) a defendant has served a deposition notice or otherwise sought discovery; or

(ii) special notice is given under Rule 30(b)(7).

(B) Of Prisoner. A party must obtain leave of court to take the deposition of a person confined in prison. The court may specify terms for the deposition.

(3) Court's Discretion. The court for cause shown may enlarge or shorten the time for taking the deposition. The court may regulate at its discretion the time and order of taking depositions as will best serve the convenience of the parties and witnesses and the interests of justice.

(b) Notice of the Deposition; Other Formal Requirements.

(1) Notice in General. A party who wants to depose a person by oral questions must give reasonable written notice to every other party. The notice must state the time

and place of the deposition and, if known, the deponent's name and address. If the name is unknown, the notice must provide a general description sufficient to identify the person or the particular class or group to which the person belongs.

(2) Producing Documents. If a subpoena duces tecum is to be served on a non-party deponent, the materials designated for production, as set out in the subpoena, must be listed in the notice or in an attachment. The notice to a party deponent may be accompanied by a request complying with Rule 34 to produce documents and tangible things at the deposition.

(3) Method of Recording.

(A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audiovisual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.

(B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

(4) By Remote Means. The parties may stipulate--or the court may on motion order--that a deposition be taken by telephone or other remote means.

(5) Officer's Duties.

(A) Before the Deposition. Unless the parties stipulate otherwise, a deposition

must be conducted before an officer appointed or designated under Rule 28. The officer may be present where the parties stipulate or the court orders. The officer must begin the deposition with an on-the-record statement that includes:

(i) the officer's name and business address;

(ii) the date, time, and place of the deposition;

(iii) the deponent's name;

(iv) the officer's administration of the oath or affirmation to the deponent; and

(v) the identity of all persons present.

(B) Conducting the Deposition; Avoiding Distortion. If the deposition is recorded nonstenographically, the officer must repeat the items in Rule 30(b)(5)(A)(i)-(iii) at the beginning of each unit of the recording medium. The deponent's and attorneys' appearance or demeanor must not be distorted through recording techniques.

(C) After the Deposition. At the end of a deposition, the officer must state on the record that the deposition is complete and must set out any stipulations made by the attorneys about custody of the transcript or recording and of the exhibits, or about any other pertinent matters.

(6) Notice or Subpoena Directed to an Organization. In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who

consent to testify on its behalf; and it may set out the matters on which each person designated will testify. Before or promptly after the notice or subpoena is served, the serving party and the organization must confer in good faith about the matters for examination. A subpoena must advise a nonparty organization of its duty ~~to make this designation~~ to confer with the serving party and to designate each person who will testify. The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

(7) Special Notice. A plaintiff seeking to depose a person is not required to obtain leave of court under Rule 30(a)(2)(A) if the deposition notice:

(A) states that deponent is about to leave the state and will be unavailable for a deposition unless it is taken before expiration of the 30-day period, and

(B) sets forth facts to support the statement; and

(C) is signed by the plaintiff's attorney.

If a party shows that, when the party was served with a special notice the party was unable through the exercise of diligence to obtain counsel to represent the party at the deposition, the depositions may not be used against the party.

(c) Examination and Cross-Examination; Record of the Examination; Objections; Written Questions.

(1) Examination and Cross-Examination. The examination and cross-examination of a deponent proceed as they would at trial under the North Dakota Rules of Evidence.

After putting the deponent under oath or affirmation, the officer must record the testimony by the method designated under Rule 30(b)(3)(A).

(2) Objections. An objection at the time of the examination--whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the deposition must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection. An objection must be stated concisely in a nonargumentative and nonsuggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(2).

(3) Participating Through Written Questions. Instead of participating in the oral examination, a party may serve written questions in a sealed envelope on the party noticing the deposition, who must deliver them to the officer. The officer must ask the deponent those questions and record the answers verbatim.

(d) Sanction; Motion to Terminate or Limit.

(1) Sanction. The court may impose an appropriate sanction--including the reasonable expenses and attorney's fees incurred by any party--on a person who impedes, delays, or frustrates the fair examination of the deponent.

(2) Motion to Terminate or Limit.

(A) Grounds. At any time during a deposition, the deponent or a party may move to terminate it on the ground that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party. The motion may

be filed in the court where the action is pending or the deposition is being taken. If the objecting deponent or party so demands, the deposition must be suspended for the time necessary to obtain an order.

(B) Order. The court may order that the deposition be terminated or may limit its scope and manner as provided in Rule 26(c). If terminated, the deposition may be resumed only by order of the court where the action is pending.

(C) Award of Expenses. Rule 37 applies to the award of expenses.

(e) Review by Deponent; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party made before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period. If the deposition is not signed by the deponent within 30 days after its submission to the deponent, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the deponent or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a

motion to suppress under Rule 32(d)(4) the court holds the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Delivery; Exhibits; Copies of the Transcript or Recording; Filing.

(1) Certification and Delivery. The officer must certify in writing that the deponent was duly sworn and that the deposition accurately records the deponent's testimony. The certificate must accompany the record of the deposition. Unless the court orders otherwise, the officer must seal the deposition in an envelope or package bearing the title of the action and marked "Deposition of [deponent's name]" and must promptly send it by registered or certified mail or a traceable third-party commercial delivery service to the party or attorney who arranged for the transcript or recording. The party or attorney must store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

(2) Documents and Tangible Things.

(A) Originals and Copies. Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition. Any party may inspect and copy them. If the person who produced them wants to keep the originals, the person may:

(i) offer copies to be marked, attached to the deposition, and then used as originals--after giving all parties a fair opportunity to verify the copies by comparing them with the originals; or

(ii) give all parties a fair opportunity to inspect and copy the originals--in which event the originals may be used as if attached to the deposition.

(B) Order Regarding the Originals. Any party may move for an order that the originals be attached to the deposition pending final disposition of the case.

(3) Copies of the Transcript or Recording. Unless otherwise stipulated or ordered by the court, the officer must retain the stenographic notes of a deposition taken stenographically or a copy of the recording of a deposition taken by another method. When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.

(g) Failure to Attend a Deposition or Serve a Subpoena; Expenses. A party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees, if the noticing party failed to:

(1) attend and proceed with the deposition; or

(2) serve a subpoena on a nonparty deponent, who consequently did not attend.

EXPLANATORY NOTE

Rule 30 was amended, effective January 1, 1980; July 1, 1981; March 1, 1986; March 1, 1990; March 1, 1999; March 1, 2000; March 1, 2011; _____.

Rule 30 was amended, effective March 1, 1999, to allow an original deposition transcript to be shipped via a commercial delivery service offering a traceable means of shipping similar to registered or certified mail.

Rule 30 was amended, effective March 1, 2011, in response to the December 1,

2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Rule 30 was amended, effective March 1, 2011, to incorporate the procedures from former Rule 30.1 for taking audio-visual depositions.

Paragraph (b)(6) was amended, effective _____, to require a party serving a deposition notice or subpoena on an organization to promptly contact the subject organization to confer about who will be designated to testify.

Subdivision (d) was amended, effective March 1, 2011, to provide for sanctions against a party who impedes, delays or frustrates a deposition.

Subdivision (e) was amended, effective March 1, 2011, to eliminate the requirement that the deponent review and sign the deposition. Instead, a deponent or party may review the deposition and submit a statement of changes on request.

SOURCES: Joint Procedure Committee Minutes of January 28, 2021, pages 22-23; January 29-30, 2009, pages 20-26; September 24-25, 1998, page 16; January 29-30, 1998, page 19; April 27-28, 1995, pages 5-7; April 20, 1989, page 2; December 3, 1987, page 11; November 30, 1984, pages 27-29; October 18, 1984, page 11; December 11-12, 1980, pages 1, 5-6; October 30-31, 1980, pages 11-16; November 29-30, 1979, pages 5-6; April 26-27, 1979, pages 9-14; Fed.R.Civ.P. 30.

CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction--Process Service), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 27

(Depositions Before Action or Pending Appeal), N.D.R.Civ.P. 28 (Persons Before Whom Depositions May be Taken), N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written Questions), N.D. R.Civ.P. 32 (Use of Depositions in Court Proceedings), N.D.R.Civ.P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), N.D.R.Civ.P. 37 (Failure to Make Discovery--Sanctions), and N.D.R.Civ.P. 45 (Subpoena); N.D.R.Ev. 611 (Mode and Order of Interrogation and Presentation). Rules Civ. Proc., Rule 30, ND R RCP Rule 30.

RULE 11. PLEAS

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty or guilty.

(2) Conditional Plea. With the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. The defendant, any defendant's attorney, and the prosecuting attorney must consent in writing to a conditional plea filed with the court. If the court accepts the conditional plea, it must enter an order. The resulting judgment must specify it is conditional. A defendant who prevails on appeal must be allowed to withdraw the plea.

(3) Failure to Enter a Plea. If a defendant refuses to enter a plea, the court must enter a plea of not guilty.

(b) Advice to Defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands the following:

(A) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(B) the right to a jury trial;

(C) the right to be represented by counsel at trial and at every other stage of the

proceeding and, if necessary, the right to have the counsel provided under Rule 44;

(D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(E) the defendant's waiver of these trial rights if the court accepts a plea of guilty;

(F) the nature of each charge to which the defendant is pleading;

(G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;

(H) any mandatory minimum penalty;

(I) the court's authority to order restitution; and

(J) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the court must address the defendant personally in open court, unless the defendant's presence is not required under Rule 43(b)(2) or (c), and determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant's willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant's attorney.

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(4) Acknowledgment by Defendant. Before entering judgment on a guilty plea, the court must determine that the defendant either:

(A) acknowledges facts exist that support the guilty plea; or

(B) while maintaining innocence, acknowledges that the guilty plea is knowingly, voluntarily and intelligently made by the defendant and that evidence exists from which the trier of fact could reasonably conclude that the defendant committed the crime.

(c) Plea Agreement Procedure.

(1) In General. The prosecuting attorney and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty to either a charged offense or a lesser or related offense, the plea agreement may specify that the prosecuting attorney will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence is appropriate; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case.

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that, to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court:

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(6) Time of Plea Agreement Procedure. Except for good cause shown, notification to the court of the existence of a plea agreement must be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(d) Withdrawing a Guilty Plea.

(1) In General. A defendant may withdraw a plea of guilty:

(A) before the court accepts the plea, for any reason or no reason; or

(B) after the court accepts the plea, but before it imposes sentence if:

(i) the court rejects a plea agreement under Rule 11(c)(5); or

(ii) the defendant can show a fair and just reason for the withdrawal.

(2) Finality of a Guilty Plea. Unless the defendant proves that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court has imposed sentence.

(3) Prosecution Reliance on Plea. If the prosecution has been substantially prejudiced by reliance on the defendant's plea, the court may deny a plea withdrawal request.

(e) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by N.D.R.Ev. 410.

(f) Recording the Proceedings. A verbatim record of the proceedings at which the defendant enters a plea must be made. If there is a plea of guilty, the record must include the court's inquiries and advice to the defendant required under Rule 11(b) and (c).

(g) Defendant's Presence at Plea Proceeding. A plea of guilty may be made only by the defendant, in open court, unless the defendant is a corporation, in which case it may be made by counsel; or in a non-felony case, the defendant may petition to enter a plea of

guilty as provided in Rule 43(b).

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 2006; June 1, 2006; March 1, 2010; March 1, 2016; March 1, 2017; March 1, 2019. The explanatory note was amended, effective _____.

Rule 11 is similar to Fed.R.Crim.P. 11. The rule is designed to accomplish a number of objectives: (1) it prescribes the advice that the court must give to ensure the defendant who pleads guilty has made an informed plea; and (2) it provides for a plea agreement procedure designed to give recognition to the propriety of plea discussions between counsel, to bring the existence of a plea agreement out in open court, and to provide methods for court acceptance or rejection of the plea agreement.

Rule 11 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) provides for the various alternative pleas which the defendant may enter. This subdivision does not permit a defendant to enter a plea of nolo contendere and differs from the federal rule in that respect.

Paragraph (a)(2) was adopted effective March 1, 1986. This provision allows the defendant, with the approval of the court and the consent of the prosecuting attorney, to enter a conditional plea of guilty and reserve in writing the right, on appeal of the adverse

determination of any specified pretrial motion. The conditional plea procedure is intended to conserve prosecutorial and judicial resources and advance speedy trial objectives by avoiding the necessity of a trial simply to preserve pretrial issues for appellate review.

Paragraph (a)(2) was amended, effective March 1, 2017, to clarify the procedure for entering a conditional plea of guilty.

Subdivision (b) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The court is required to determine that a plea is made with an understanding of the nature of the charge and the consequences of the plea. Subdivision (b) also establishes the requirement that the court address the defendant personally.

Paragraph (b)(1) requires the court to determine if the defendant understands the nature of the charge and requires the court to inform the defendant of and determine that the defendant understands the mandatory minimum punishment, if any, and the maximum possible punishment. The objective is to insure that the defendant knows what minimum sentence the judge MUST impose and the maximum sentence the judge MAY impose and, further, to explain the consecutive sentencing possibilities when the defendant pleads to more than one offense. This provision is included so that the judicial warning effectively serves to overcome subsequent objections by the defendant that the defendant's counsel gave the defendant erroneous information. Paragraph (b)(1) also specifies the constitutional rights the defendant waives by a plea of guilty and ensures a knowing and intelligent waiver of counsel is made. A similar requirement is found in

Rule 5(b) governing the initial appearance.

Paragraph (b)(1) was amended, effective June 1, 2006, to remove a reference to court appointment of counsel for indigents. Courts ceased appointing counsel for indigents on January 1, 2006, when the North Dakota Commission on Legal Counsel for Indigents became responsible for defense of indigents.

Paragraph (b)(1) was amended, effective March 1, 2016, to include a new subparagraph (J) requiring the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere. The amendment, which is based on an amendment to Fed.R.Crim.P. 11, mandates a generic warning, not specific advice concerning the defendant's individual situation.

Paragraph (b)(2) requires the court to determine that a plea of guilty is voluntary before accepting it. Paragraph (b)(2), together with subdivision (c), affords the court an adequate basis for rejecting an improper plea agreement induced by threats or inappropriate promises. The rule specifies that the court personally address the defendant in determining the voluntariness of the plea.

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

Paragraph (b)(3) requires that the court not enter judgment on a plea of guilty without making an inquiry to ensure that there is a factual basis for the plea.

Paragraph (b)(4) was added to the rule, effective March 1, 2014, and requires the

court to obtain an acknowledgment from the defendant on whether the defendant is admitting guilt, or instead is maintaining innocence but pleading guilty because evidence exists from which the trier of fact could reasonably conclude the defendant committed the crime.

Subdivision (c) provides for a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements, provided they are disclosed in open court and subject to acceptance or rejection by the trial judge. It is believed that where the defendant by the defendant's plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. The procedure described in subdivision (c) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Paragraph (c)(1) specifies that both the attorney for the prosecution and the attorney for the defense, or the defendant when acting pro se, participate in plea discussions. It also makes clear that there are three possible concessions that may be made in a plea agreement: first, the charge may be reduced to a lesser or related offense; second, the attorney for the prosecution may agree not to recommend or not oppose the imposition of a particular sentence; or third, the attorney for the prosecution may promise to move for a dismissal of other charges. The court is not permitted to participate in plea discussions because of the possibility that the defendant would believe that the defendant

would not receive a fair trial, if no agreement had been reached or the court rejected the agreement, and a subsequent trial ensued before the same judge.

Paragraph (c)(2) provides that the parties must disclose any plea agreement in open court or, for good cause, in camera. Paragraph (c)(3) gives the court, upon notice of the plea agreement, the option of accepting or rejecting the agreement or deferring its decision until receipt of the presentence report. The court must inform the defendant that it may choose not to accept a sentence recommendation made as part of a plea agreement. Decisions on plea agreements are left to the discretion of the individual trial judge.

Paragraph (c)(4) requires the court, if it accepts the plea agreement, to inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This provision serves the dual purpose of informing the defendant immediately that the agreement will be implemented.

Paragraph (c)(5) requires the court, on the record, upon its rejection of the plea agreement, to inform the defendant of this fact and to advise the defendant personally, in open court, or for good cause, in camera, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw the defendant's plea and must be advised that if the defendant persists in the defendant's guilty plea, the disposition of the case may be less favorable to the defendant than contemplated by the plea agreement.

Paragraph (c)(6) requires that the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court unless it

can be shown that for good cause this was not done. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the prosecution. The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

A new subdivision (d) on plea withdrawal was transferred to Rule 11 from Rule 32 effective March 1, 2010.

Subdivision (e) makes it clear that N.D.R.Ev. 410 governs the admissibility of plea discussions.

Subdivision (f) requires that a verbatim record be kept of the proceedings. The record is important in the event of a post-conviction attack.

Subdivision (g) was amended, effective March 1, 1996, to reference Rule 43(c). In a non-felony case, if the defendant wants to plead guilty without appearing in court, a written form must be used which advises the defendant of his or her constitutional rights and creates a record showing that the plea was made voluntarily, knowingly, and understandingly. See Appendix Form 17. A court may accept a guilty plea via contemporaneous audio or audiovisual transmission by reliable electronic means using the procedure set out in N.D. Sup. Ct. Admin. Rule 52.

Rule 11 does not include a subdivision entitled harmless error and differs from the 1983 amendment to Fed.R.Crim.P. 11(h) in that respect. Rule 52(a), Harmless Error, is

intended to have general application to all the criminal rules of procedure.

SOURCES: Joint Procedure Committee Minutes of April 29, 2021, pages ___; January 25, 2018, page 8; January 28-29, 2016, page 7; April 23-24, 2015, page 14; January 29-30, 2015, page 23; January 31-February 1, 2013, page 12; September 27, 2012, pages 18-21; January 29-30, 2009, pages 11-13, 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005, pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004, pages 28-30; January 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 11-16; April 26, 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978, pages 31-34; March 16-17, 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977, page 4; April 24-26, 1973, pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972, pages 2-6; November 18-20, 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-14-16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22, 29-14-23, 29-14-24, 29-14-26, 29-14-27, 29-16-01, 29-21-16, 29-22-33, 33-12-17, 33-12-18.

CONSIDERED: N.D.C.C. § 31-13-03.

CROSS REFERENCE: N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to and Appointment of Counsel); N.D.R.Ev. 410 (Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty); N.D.Sup.Ct.Admin.R. 52 (Contemporaneous

253 Transmission by Reliable Electronic Means).

RULE 12. PLEADINGS AND PRETRIAL MOTIONS

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, information and complaint in district court, the complaint in municipal court, and the pleas of not guilty and guilty.

(b) Pretrial Motions.

(1) In General. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made at Any Time. A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) Motions That Must Be Made Before Trial. The following defenses, objections and requests must be raised by pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the right to speedy trial;

(iv) selective or vindictive prosecution;

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment, information, or complaint, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

(4) Notice of the Prosecution's Intent to Use Evidence.

(A) At the Prosecution's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the prosecution's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) Setting the Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule

a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) Extending or Resetting the Deadline. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) Consequences or Not Making a Timely Motion Under Rule 12(b)(3). If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved]

(f) Recording the Proceedings. Except in municipal courts, a verbatim record must be made of all proceedings at the motion hearing, including any findings of fact and conclusions of law made orally by the court.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the complaint, in the indictment, or in the information, it may order the defendant to be held in custody or that bail be continued for a specified time until a new indictment, information, or complaint is filed.

EXPLANATORY NOTE

Rule 12 was amended, effective January 1, 1980; September 1, 1983; January 1,

1995; March 1, 2006; March 1, 2016. The explanatory note was amended, effective _____.

Rule 12 is similar to Fed.R.Crim.P. 12 with modifications to conform to practice in North Dakota.

Rule 12 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) was amended, effective September 1, 1983, to delete obsolete references to the county court with increased jurisdiction and the county justice court. Subdivision (a) was further amended, effective January 1, 1995, in response to county court elimination. The amendment provides for use of the complaint in district court.

All objections or defenses raised before trial must be made by a motion to dismiss or by motion to grant appropriate relief as provided in these rules. Selection of a wrong plea will no longer be a hazard, since there is now but one mode of raising all objections and defenses. If counsel, unaware of procedural changes, ignorantly interposes an obsolete plea or motion, it may be considered as a motion to dismiss.

Subdivision (b) was amended, effective March 1, 2016, to provide specific guidance for pretrial motions:

Paragraph (b)(1) provides that any defense or objection that is capable of determination without trial on the merits may be raised by motion before trial.

Paragraph (b)(2) allows lack of jurisdiction to be raised at any time the case is pending.

Paragraph (b)(3) provides that certain motions must be made prior to trial and follows the federal rule in delineating these motions. Paragraph (b)(3) was amended, effective March 1, 2016, to include a list of specific motions that must be made pretrial if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits.

Paragraph (b)(4) follows the federal rule and provides a method for insuring that the defendant knows what evidence the prosecution intends to offer into evidence at trial in order to afford the defendant an opportunity to raise objections to the evidence prior to trial.

Subdivision (c) was amended, effective March 1, 2016, to govern both the deadline for making pretrial motions and the consequences for failing to meet the deadline. It contains three paragraphs: Paragraph (c)(1) explains how the deadline for pretrial motions is set, Paragraph (c)(2) specifically allows the court discretion to reset motion deadlines, and Paragraph (c)(3) explains the treatment of untimely motions.

Subdivision (d) follows the federal rule and was amended, effective January 1, 1980, to require the existence of "good cause" to defer ruling on a pretrial motion, with the intent of discouraging the tendency to reserve ruling on pretrial motions. Moreover, the court cannot defer its ruling if to do so will adversely affect a party's right to appeal. This protects certain prosecution appeal rights which could be deprived by a deferred

ruling.

Subdivision (e) was deleted, effective March 1, 2016. Paragraph (c)(3) deals with the effect of failure to raise issues in a pretrial motion.

Subdivision(f) follows the federal rule except that a verbatim record of the hearing need not be made in municipal court.

The omission of the sentence "This rule does not affect any federal statutory period of limitations," from subdivision (g) is made because North Dakota does not have statutes comparable to the federal statutes.

Rule 12 does not have a subdivision (h) to correspond to the to the federal rule. Fed.R.Crim.P. (12)(h) was adopted to make the provisions of Fed.R.Crim.P. 26.2, Production of Statements of Witnesses, applicable to hearings on a motion to suppress evidence. The effect of the federal rule is that after a witness other than the defendant has testified at a suppression hearing, any statement of that witness in the possession of the party calling the witness shall be available to the other party for examination and use. In North Dakota, under Rule 16, a witness' statements are discoverable at any point in the proceedings, rather than only after a witness has testified.

SOURCES: Joint Procedure Committee Minutes of April 29, 2021, pages_____; April 23-24, 2015, pages 25-26; January 27-28, 2005, pages 3-6; January 27-28, 1994, pages 9-10; September 23-24, 1993, pages 9-10; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 16-19; February 17-18, 1983, pages 25-32; December 7-8, 1978, pages 3-8; October 12-13, 1978, pages 1-2; May 11-12, 1972, pages

7-13; July 25-26, 1968, pages 4-6.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-11-01, 29-11-02, 29-11-13, 29-14-01, 29-14-03, 29-14-04, 29-14-05, 29-14-06, 29-14-07, 29-14-08, 29-14-09, 29-14-10, 29-14-11, 29-14-12, 29-14-13, 29-14-14, 29-14-15, 29-14-25, 29-16-01, 29-21-16, 29-22-33.

CROSS REFERENCE: N.D.R.Crim.P. 14 (Relief from Prejudicial Joinder); N.D.R.Crim.P. 16 (Discovery and Inspection); N.D.R.Crim.P. 17.1 (Omnibus Hearing and Pretrial Conference); N.D.R.Crim.P. 47 (Motions).

RULE 12.2 NOTICE OF DEFENSE BASED ON MENTAL CONDITION; MENTAL EXAMINATION

(a) Notice of Lack of Criminal Responsibility by Reason of Mental Disease or Defect Defense. A defendant who intends to assert a defense of lack of criminal responsibility by reason of mental disease or defect at the time of the alleged offense must so notify the prosecuting attorney in writing and file the notice within the time provided for filing a pretrial motion or at any later time the court sets. A defendant who fails to do so cannot later rely on the defense of lack of criminal responsibility. The court may, for good cause, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(b) Notice of Expert Evidence of Mental Disease or Defect Inconsistent With the Mental Element Required for the Offense Charged. If a defendant intends to introduce expert evidence relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of whether the defendant had the mental state required for the offense charged, the defendant must--within the time provided for filing a pretrial motion or at any later time the court sets--notify the prosecuting attorney in writing of this intention and file the notice. The court may, for good cause, allow the defendant to file the notice late, grant the parties additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination.

(1) Authority to Order an Examination; Procedures. In an appropriate case the court may, upon motion of the prosecuting attorney, order the defendant to submit to an examination by one or more mental health professionals retained by the prosecuting attorney.

(2) Inadmissibility of a Defendant's Statements. No statement made by a defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony based on the statement, and no other fruits of the statement may be admitted in evidence against the accused in any criminal, civil, or administrative proceeding except on an issue regarding mental condition on which the defendant has introduced evidence.

(d) Failure to Comply. If the defendant fails to give notice under Rule 12.2(b) or does not submit to an examination when ordered under Rule 12.2(c), the court may exclude any expert evidence from the defendant on the issue of the defendant's mental disease, mental defect, or any other mental condition bearing on the defendant's guilt.

(e) Inadmissibility of Withdrawn Intention. Evidence of an intention of which notice was given under Rule 12.2(a) or (b), later withdrawn, is not, in any civil, criminal, or administrative proceeding, admissible against the person who gave notice of the intention.

EXPLANATORY NOTE

Rule 12.2 was amended, effective January 1, 1980; January 1, 1988; March 1, 1990; March 1, 2006. The explanatory note was amended_____.

All references to "insanity" have been deleted from the rule. The current test is found in N.D.C.C. § 12.1-04.1-01 which sets the standards for lack of criminal responsibility by reason of mental disease or defect.

Rule 12.2 is an adaption of Fed.R.Crim.P. 12.2 and was amended, effective January 1, 1988, to track the Federal 1984 and 1985 amendments. Subdivisions (a), (b) and (d) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 12.2 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.

When Rule 12.2 was originally promulgated in 1973, it was adapted from the proposed federal rule. Subsequently, several amendments were made to the proposed federal rule before it was adopted. These are now substantially incorporated into Rule 12.2.

Several amendments effective January 1, 1980, were made to this rule, with a twofold purpose. Several of the changes brought the rule into substantial conformity with the then present Fed.R.Crim.P. 12.2. The remainder of the changes were necessary to comply with statutory changes.

Subdivision (a) requires a defendant intending to rely on the defense of lack of criminal responsibility to notify the prosecution of the defendant's intention in writing,

within a specified time, and to file the notice. If no notice is given, the defendant is prohibited from raising the defense. Subdivision (a) was amended, effective January 1, 1988, to track the 1984 amendment to Fed.R.Crim.P. 12.2.

Subdivision (b) is intended to deal with the issue of expert testimony bearing upon the issue of whether the defendant had the mental state required for the offense charged. It provides that the defendant must give pretrial notice when the defendant intends to introduce such evidence.

Paragraph (c)(1) provides for examination of the defendant by one or more mental health professionals retained by the prosecuting attorney when the defendant has raised the issue under this rule. Under paragraph (C)(2), statements made by the defendant during the course of the examination, or any fruits of those statements, may not be used as evidence in any proceeding.

Subdivision (c) was amended, effective January 1, 1988, to change a psychiatric examination by a psychiatrist designated by court order to an examination by one or more mental health professionals retained by the prosecuting attorney, which tracks N.D.C.C. § 12.1-04.1-05.

~~Failure~~ Subdivision (d) provides that failure to give notice under subdivision (b) or submit to examination may result in the exclusion of any testimony by defendant's expert witness~~, as provided in subdivision (d)~~.

Subdivision (e) was adopted, effective January 1, 1988, and provides that evidence of an intention of which notice was given under subdivision (a) or (b), which is later

withdrawn, is not in any civil, criminal or administrative proceeding, admissible against the person who gave said notice.

~~All references to "insanity" have been deleted from the rule. The current test is found in N.D.C.C. § 12.1-04.1-01 which sets the standards for lack of criminal responsibility by reason of mental disease or defect.~~

SOURCES: Joint Procedure Committee Minutes of September 24, 2020, page 7; January 27-28, 2005, pages 8-11; April 20, 1989, page 4; December 3, 1987, page 15; January 23, 1986, pages 4-7; October 30-31, 1980, page 31; January 25-26, 1979, pages 4-5; December 7-8, 1978, pages 32-33; October 12-13, 1978, page 2; June 26-27, 1972, pages 1-2; May 11-12, 1972, pages 14-15; Fed.R.Crim.P. 12.2.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. ~~§§ 12-02-01(4), 12-05-03, 29-20-02, 29-20-03, 29-20-04, 29-20-05~~ ch. 12.1-04.1 (Criminal Responsibility and Post-Trial Responsibility Act).

SUPERSEDED: N.D.C.C. § 12.1-04-05.

~~CROSS REFERENCE: N.D.C.C. ch. 12.1-04.1 (Criminal Responsibility and Post-trial Responsibility Act).~~

RULE 15. DEPOSITIONS

(a) When Taken. At any time after the defendant has appeared, any party may take testimony of any person by deposition including audio-visual depositions taken as provided in N.D.R.Civ.P. 30.1, except:

(1) the defendant may not be deposed unless the defendant consents and the defendant's lawyer, if the defendant has one, is present or the defendant waives the lawyer's presence;

(2) a discovery deposition may be taken after the time set by the court only with leave of court;

(3) a deposition to perpetuate testimony may be taken only with leave of court, which must be granted upon motion of any party if it appears that the deponent may be able to give material testimony but may be unable to attend a trial or hearing;

(4) upon motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress, or cause undue burden or expense to, the deponent or a party, the court in which the prosecution is pending or a court of the jurisdiction where the deposition is being taken may order that the deposition not be taken or continued or may limit the scope and manner of its taking. Upon demand of the objecting party or deponent, the taking of the deposition may be suspended for the time necessary to make the motion; and

(5) a victim may refuse to participate in a deposition requested by the defendant or

the defendant's attorney.

Attendance of witnesses and production of documentary evidence and objects may be compelled by subpoena under Rule 17.

(b) Witness Who Would Not Respond To Subpoena. If a party is granted leave to take a deposition to perpetuate testimony, the court, upon motion of the party and a showing of probable cause to believe that the deponent would not respond to a subpoena, by order must direct a law enforcement officer to take the deponent into custody and hold the deponent until the taking of the deposition commences but not to exceed six hours and to keep the deponent in custody during the taking of the deposition. If the motion is by the prosecuting attorney, the court, upon further motion by the prosecuting attorney and a showing of probable cause to believe the defendant would not otherwise attend the taking of the deposition, may make the same order for the defendant.

(c) Notice Of Taking. The party at whose instance the deposition is to be taken shall give all parties reasonable written notice of the name and address of each person to be examined, the time and place for the deposition, and the manner of recording. Upon motion of a party or of the deponent, the court may change the time, place, or manner of record.

(d) How Taken. The deposition must be taken in the manner provided in civil actions, except:

(1) if the deposition is taken at a place over which this state lacks jurisdiction, it may be taken instead in the manner provided by the law of that place;

(2) it must be recorded by the means specified in the notice; and

(3) upon motion of a party and a showing that a party or the deponent is engaging in serious misconduct at the taking of a deposition, the court by order may direct that the deposition's taking be continued in the presence of a designated officer, in which case the designated officer may preside over the remainder of the deposition's taking.

(e) Place Of Taking. The deposition ~~must be taken in a building where the trial may be held, at a place agreed upon by the parties, or at a place designated by special or general order of the court~~ must be taken at any location agreed upon by the parties or a location designated by the court. If the defendant is in custody or subject to terms of release that prohibit leaving the state and does not appear before the court and understandingly and voluntarily waives the right to be present, a deposition to perpetuate testimony must not be taken at a place which requires transporting the defendant within a jurisdiction that does not confer upon law enforcement officers of this state the right to transport prisoners within it.

(f) Presence Of Defendant.

(1) At Discovery Deposition. The defendant may be present at the taking of a discovery deposition, but if the defendant is in custody, the defendant may be present only with leave of court.

(2) At Deposition To Perpetuate Testimony. The defendant must be present at the taking of a deposition to perpetuate testimony, but if the defendant's counsel is present at the taking:

(A) the court may excuse the defendant from being present if the defendant appears before the court and understandingly and voluntarily waives the right to be present;

(B) the taking of the deposition may continue if the defendant, present when it commenced, leaves voluntarily; or

(C) if the deposition's taking is presided over by a judicial officer, the judicial officer may direct that the deposition's taking or part of the deposition's taking be conducted in the defendant's absence if the judicial officer has justifiably excluded the defendant because of the defendant's disruptive conduct.

(3) Unexcused Absence. If the defendant is not present at the commencement of the taking of a deposition to perpetuate testimony and the defendant's absence has not been excused:

(A) its taking may proceed, in which case the deposition may be used only as a discovery deposition; or

(B) if the deposition is taken at the instance of the prosecution, the prosecuting attorney may direct that the commencement of its taking be postponed until the defendant's attendance can be obtained, and the court, upon application of the prosecuting attorney, by order may direct a law enforcement officer to take the defendant into custody during the taking of the deposition.

(4) Taking Depositions Outside the United States Without the Defendant's Presence. The deposition of a witness who is outside the United States may be taken

without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(g) Payment Of Expenses. If the deposition is taken at the instance of the prosecution, the court may, and in all cases where the defendant is unable to bear the expense the court must, direct the state to pay the expense of taking the deposition, including the reasonable expenses of travel and subsistence of defense counsel and, if the deposition is to perpetuate testimony or if the court permits for a discovery deposition, of

the defendant in attending the deposition.

(h) Substantive Use On Grounds Of Unavailability. So far as otherwise admissible under the rules of evidence, a deposition to perpetuate testimony may be used as substantive evidence at the trial or upon any hearing if the deponent is unavailable as defined in N.D.R.Ev. 804(a). A discovery deposition may then be so used if the court determines that the use is fair in light of the nature and extent of the total examination at the taking thereof, but it may be offered by the prosecution only if the defendant was present at its taking. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it that is relevant to the part offered.

(i) Objections To Admissibility. Objections to receiving in evidence a deposition or part of a deposition may be made as provided in civil actions.

(j) Deposition By Agreement Not Precluded. Nothing in this rule precludes the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties.

EXPLANATORY NOTE

Rule 15 was amended, effective January 1, 1980; March 1, 1990; March 1, 2006; March 1, 2016; May 1, 2017;_____.

Rule 15 is substantially the same as Rule 431, Uniform Rules of Criminal Procedure (1974). Former Rule 15, effective until January 1, 1980, was an adaptation of Fed.R.Crim.P. 15. The present rule provides for a greatly expanded use of depositions in criminal cases.

Subdivisions (a), (b), (f) and (h) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended. Rule 15 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) permits depositions to be taken to perpetuate testimony, as in the former rule, but also for discovery purposes, which was not previously provided for. Rather than requiring court approval of discovery depositions, this subdivision changes the emphasis by allowing them without court approval, subject to the right of a party or deponent to move under paragraph (4) to have a court order that the deposition be continued, not taken, or limited in scope or manner of taking. The court will set a time after which discovery depositions may not be taken without court permission. Leave of court is required for the taking of a deposition to perpetuate testimony.

Subdivision (a) was amended, effective March 1, 1990. The amendment was made to clarify the fact that audio-visual depositions may be taken under the rule. The amendment also provides that the method of taking audio-visual depositions is governed by N.D.R.Civ.P. 30.1.

Subdivision (a) was amended, effective May 1, 2017, to add a new paragraph (a)(5) providing that a victim may refuse to participate in a deposition requested by the defendant or the defendant's attorney. This right is granted by N.D. Const. Art. I, §

25(1)(f). "Victim" is defined in N.D. Const. Art. I, § 25(4).

Subdivision (b) provides a method for securing the attendance of a deponent who would not respond to a subpoena. In addition, to ensure confrontation and the presence of the defendant required by subdivision (f)(2) to use the deposition at trial, the prosecuting attorney may move the court for an order to secure defendant's presence at the taking of a deposition.

Requirements for notice of the taking of a deposition are set forth in subdivision (c). The court may change the noticed time, place, or manner of recording upon motion of the deponent, as well as any party.

Subdivision (d) specifies that a deposition be taken in the same manner as in civil actions, with certain exceptions. Paragraph (1) covers depositions on enclaves over which the State of North Dakota lacks jurisdiction, such as Indian reservations, as well as depositions outside the physical boundaries of the state. Paragraph (2) allows depositions to be recorded by other than stenographic means, without a court order. Provision is made in paragraph (3) for a court to designate an official to preside over a deposition upon a showing of misconduct by a party or the deponent.

The place of taking a deposition is governed by subdivision (e). Restriction is placed on taking depositions outside of this state in situations where the defendant may not travel or be transported to the proposed location, unless the defendant waives the right to be present.

Subdivision (e) was amended, effective _____, to allow an in-state

deposition to be taken at any location agreed upon by the parties or designated by the court.

Subdivision (f) concerns the presence of the defendant at a deposition. Distinction is made between a discovery deposition and one to perpetuate testimony. The defendant is not required to be present at a discovery deposition, but the defendant's presence may enable the prosecution to use the deposition as substantive evidence at trial, as provided in subdivision (h). The taking of a deposition to perpetuate testimony necessitates the defendant's presence, with four exceptions: defendant is excused by the court upon an appearance and voluntary waiver of the right to be present; defendant is voluntarily absent after start of deposition; a judicial officer presiding over the deposition justifiably excludes the defendant because of the defendant's disruptive conduct; or the court allows a deposition to be taken outside the United States without the defendant's presence after making case-specific findings. No warning is expressly required before exclusion, as in Rule 43(b)(2). If the defendant is not present at a deposition to perpetuate testimony under one of the above exceptions, the defendant's counsel must be.

Paragraph (3) of subdivision (f) covers the situation when the defendant is not present at the start of a deposition to perpetuate testimony and has not been excused under paragraph (2). The taking may proceed as a discovery deposition or the prosecuting attorney, if the prosecuting attorney is taking the deposition, may postpone the taking and secure a court order to take the defendant into custody to assure the defendant's presence, so that the deposition will have the greater admissibility of a perpetuation deposition.

Paragraph (f)(4) was adopted, effective March 1, 2016, to allow a deposition to be taken outside the United States without the defendant's presence in certain specified circumstances. The provision was based on Fed.R.Crim.P. 15(c)(3).

SOURCES: Joint Procedure Committee Minutes of April 29, 2021, pages_____; January 26-27, 2017, pages 7-9; April 23-24, 2015, pages 26-27; January 27-28, 2005, page 12; April 20, 1989, pages 4-5; March 24-25, 1988, pages 6-7; December 3, 1987, pages 9-10 and 15; January 25-26, 1979, pages 5-7; December 7-8, 1978, pages 33-37; October 12-13, 1978, page 3; April 2-26, 1973, pages 9-10; June 26-27, 1972, page 3; December 11-12, 1968, pages 2-24; September 26-27, 1968, pages 2-6; Rule 431, Uniform Rules of Criminal Procedure (1974).

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. ch. 31-06.

CONSIDERED: N.D. Const. Art. I, § 25; N.D.C.C. ch. 31-04.

CROSS REFERENCE: N.D.R.Crim.P. 17 (Subpoena); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Civ.P. 30.1 (Uniform Audio-Visual Deposition Rule); N.D.R.Ev. 804 (Hearsay Exceptions; Declarant Unavailable).

RULE 24. TRIAL JURORS

(a) Examination of Jurors.

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

(2) Examination. The court must permit the defendant or the defendant's attorney and the prosecuting attorney to participate in the examination of prospective jurors. The court may allow individual examination of prospective jurors in chambers or a closed courtroom for a compelling reason after applying and announcing on the record the factors establishing the overriding interest for courtroom closure.

(b) Challenges.

(1) Challenges for Cause.

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

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

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

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

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

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

(c) Alternate Jurors.

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

(2) Procedure.

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

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

(3) Retaining Alternate Jurors. The court may retain alternate jurors after the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the

case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

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

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

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

EXPLANATORY NOTE

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

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

Subdivision (a) was modified to allow the continuance of the present practice

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

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

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

Paragraph (a)(2) was amended, effective _____, to require that the court find on the record an overriding interest for courtroom closure before allowing an individual examination of a prospective juror in chambers or a closed courtroom. The court must apply the the four factor pre-closure analysis required by Waller v. Georgia, 467 U.S. 39, 48 (1984) before making such a finding. See State v. Martinez, 2021 ND 42.

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

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

Paragraph (b)(1), formerly paragraph (b)(2), regarding challenges for cause, is not

in the federal rules. This subsection is necessary to preclude any question that challenges for cause are a definite part of the examination of prospective jurors. This rule also obligates the judge to dismiss a prospective juror if grounds for cause exist, thereby avoiding prejudicing other prospective jurors against the attorneys.

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

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

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

Subdivision (c) is taken from the federal rule and replaced superseded statutes.

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

Rule 24 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to

make style and terminology consistent throughout the rules.

SOURCES: Supreme Court Conference Minutes of January 17, 1990; September 28, 1987; Joint Procedure Committee Minutes of April 29, 2021, pages ____; April 27, 2018, page 6; September 28, 2017, page 19; April 29-30, 2010, page 27; January 28-29, 2010, pages 16-19; January 27-28, 2005, pages 19-20; April 20, 1989, page 4; December 3, 1987, page 15; May 21-22, 1987, pages 16-17; February 19-20, 1987, pages 19-20; October 17-20, 1972, pages 12-18; September 26-27, 1968, pages 11-13; Fed.R.Crim.P. 24.

STATUTES AFFECTED:

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

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

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

RULE 31. JURY VERDICT

(a) Return. The jury must return its verdict to a judge in open court. The verdict must be unanimous.

(b) Partial Verdicts, Mistrial, and Retrial.

(1) Multiple Defendants. If there are multiple defendants, the jury may return a verdict at any time during its deliberations for any defendant about whom it has agreed.

(2) Multiple Counts. If the jury cannot agree on all counts for any defendant, the jury may return a verdict on those counts on which it has agreed.

(3) Mistrial and Retrial. If the jury cannot agree on a verdict on one or more counts, the court may declare a mistrial on those counts. The prosecution may retry any defendant on any count on which the jury could not agree.

(c) Lesser Offense. A defendant may be found guilty of an offense necessarily included in the offense charged.

(d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

(e) Special Verdict.

(1) Lack of Criminal Responsibility. If a defendant raises the defense of lack of criminal responsibility by mental disease or defect at the time of the alleged crime and

evidence of the defense is presented at trial, the jury, if it finds the defendant not guilty based on the defense, must state that fact in its verdict.

(2) Double Jeopardy. If a defendant raises the defense of having been formerly convicted or acquitted of the same offense or an offense necessarily included in the same offense, or of having been once in jeopardy, and evidence of the defense is given at trial, the jury, if it finds the defendant proved the defense, must state that fact in its verdict.

(3) Treason. If a defendant is charged with treason or conspiracy to commit treason and more than one overt act is charged, the jury, before returning a verdict of guilty, must return a special verdict on each overt act charged.

(4) Other Defenses. If any other defense cannot be reflected in a general verdict, and evidence of the defense is given at trial, the jury, if it so finds, shall declare that fact in its verdict.

EXPLANATORY NOTE

Rule 31 was amended, effective March 1, 1986; March 1, 2000; March 1, 2006. The explantory note was amended, effective _____.

Rule 31 is an adaptation of Fed.R.Crim.P. 31, except for subdivision (e).

Rule 31 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) retains the requirement of unanimity notwithstanding that the

United States Supreme Court has allowed less than unanimous verdicts.

Under subdivision (b), whenever there is more than one defendant or more than one count, the jury may return a separate verdict with regard to each defendant and in regard to each count. If this procedure is followed and error is found requiring reversal in regard to one defendant or to one count, this would allow a retrial of that issue alone and would not require a retrial on all issues or of the entire case. If the jury is unable to arrive at a verdict in regard to one of the defendants or to one of the counts, it may return a verdict on those counts or defendants on which it is agreed. It may then retire again and resume its deliberations about the remaining defendants or the remaining charges. Further, if the jury does not reach agreement on all charges, those matters on which it does not agree may be tried again.

Subdivision (b) was amended, effective March 1, 2006, to clarify that a jury may return partial verdicts, either to multiple defendants or multiple counts, or both.

Under subdivision (c), a jury in an appropriate case may convict the defendant of a lesser offense necessarily included in the offense charged.

Subdivision (d) was amended, effective March 1, 2000, to follow the 1998 federal amendment and require individual polling of jurors.

Subdivision (d) permits polling of the jury to ascertain with certainty that each of the jurors approves of the verdict as returned, and that no one has been coerced or induced to a verdict to which he has not fully assented.

Subdivision (e) provides for special verdicts. A determination of factual issues in

the specific instances provided in this subdivision is within the province of the jury. Because it is the court that determines the issue of law, the scope of the jury is not exceeded.

Paragraph (e)(1) was amended, effective March 1, 1986, to substitute "lack of criminal responsibility by mental disease or defect at the time of the alleged crime" for the term "insanity" in order to be consistent with N.D.R.Crim.P. 12.2 (Notice of Defense Based on Mental Condition; Mental Examination) and N.D.C.C. § 12.1-04.1-01 (Standard for Lack of Criminal Responsibility).

SOURCES: Joint Procedure Committee Minutes of April 29, 2021, pages____; January 27-28, 2005, pages 25-28; May 6-7, 1999, pages 16-17; November 30, 1984, page 23; April 24-26, 1973, pages 12-13; October 17-20, 1972, pages 41-44; December 10-11, 1970, pages 13-15; February 20-21, 1969, pages 3-4; December 11-12, 1968, pages 18-19; Fed.R.Crim.P. 31.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-16-01, 29-21-16, 29-22-13, 29-22-15, 29-22-17, 29-22-18, 29-22-19, 29-22-23, 29-22-25, 29-22-33, 33-12-24, 33-12-25.

CONSIDERED: N.D.C.C. §§ 12-06-06, 12.1-04.1-01, 29-22-01, 29-22-02, 29-22-03, 29-22-04, 29-22-05, 29-22-06, 29-22-07, 29-22-08, 29-22-09, 29-22-10, 29-22-12, 29-22-14, 29-22-16, 29-22-20, 29-22-21, 29-22-22, 29-22-24, 29-22-26, 29-22-27, 29-22-28, 29-22-29, 29-22-30, 29-22-31, 29-22-32, 29-22-33, 29-22-34, 29-22-35, 29-22-36, 29-22-37.

CROSS REFERENCES: N.D.R.Crim.P. 12.2 (Notice of Defense Based on Mental Condition; Mental Examination).

RULE 35.1. SUMMARY DISPOSITION

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

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

(2) the judgment of the district court is supported by findings meeting the required standard of proof;

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

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

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

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

(7) a previous controlling appellate decision is dispositive of the appeal; or,

(8) the appellant's brief does not meet minimum requirements.

The court may affirm by an opinion citing this rule and indicating which one or more of the above criteria apply and, for Rule 35.1(a)(7), citing any previous controlling appellate decision. The opinion may be in the following form: "Affirmed under N.D.R.App.P. 35.1(a) (1), (2), (3), (4), (5), (6), ~~or~~ (7) or (8)."

(b) Reversal by Summary Opinion. In any case in which the court determines after

argument, unless waived, that a previous controlling appellate decision is dispositive of the appeal, the court may reverse by an opinion citing this rule and the controlling appellate decision.

EXPLANATORY NOTE

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

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

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

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

Paragraph (a)(8) was added, effective _____, to allow the court to affirm the judgment of the district court, as well as the verdict of a jury, if the appellant's brief does not contain the minimum requirements listed in N.D.R.App.P. 28.

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

SOURCES: Supreme Court Conference Minutes of September 10, 1985; Joint Procedure Committee Minutes of January 28, 2021, pages 17-19; April 27, 2018, pages 10-11; September 27-28, 2001, pages 12-13; January 30, 1997, page 13; November 29, 1984, pages 9-11.

STATUTES AFFECTED:

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

CROSS REFERENCES: N.D.R.App.P. 27 (Motions); N.D.R.App.P. 28 (Briefs); N.D.R.App.P. 35 (Scope of Review).

RULE 404. CHARACTER EVIDENCE; OTHER CRIMES, WRONGS OR ~~OTHER~~ ACTS

(a) Character Evidence.

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or ~~Other~~ Acts.

(1) Prohibited Uses. Evidence of ~~a~~ any other crime, wrong, or ~~other~~ act is not

admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses~~; Notice in a Criminal Case~~. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~The~~

(3) Notice in a Criminal Case. In a criminal case, prosecutor must:

(A) provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; ~~and~~

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

EXPLANATORY NOTE

Rule 404 was amended, effective March 1, 1990, March 1, 1994, March 1, 2008; March 1, 2014;_____.

Character evidence is not admissible when its purpose would be to prove circumstantially how a person acted on a particular occasion. Whenever the character of a person is in issue, as in a defamation case, this exclusion does not apply.

Paragraph (a)(2) allows the accused to offer circumstantial evidence of character. Traditionally, this has been allowed, for the objection to character evidence in general is

not that it has no relevancy but that its probative value, when weighed against possible prejudice, does not warrant admission. If the accused offers such evidence, the issue of prejudice is no longer a factor.

Paragraph (a)(2)(B) was amended, effective March 1, 2008, to add clarifying language on victim character evidence.

Paragraph (a)(3) provides that, in dealing with impeachment of a witness, Rules 607, 608, and 609 state the applicable rules. The present rule retains its force, and should be consulted whenever the witness is also a party whose actions are sought to be proved.

Subdivision (b) restates the general rule, but continues to provide that character evidence offered for other purposes, e.g., motive, intent, or identity, is admissible. But the mere labeling of such evidence does not automatically bring admission.

Subdivision (b) was amended, effective March 1, 1994, to follow the 1991 federal amendment, by adding a pretrial notice requirement in criminal cases. ~~However, unlike the federal rule, North Dakota's amended rule does not place the burden of requesting notice upon the accused. Because the notice requirement serves as a condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.~~ The amendment is not intended to redefine what evidence would otherwise be admissible under Rule 404(b).

Subdivision (b) was amended, effective _____, to impose special notice requirements on the prosecution in a criminal case.

Rule 404 was amended, effective March 1, 2014, in response to the December 1,

2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

SOURCES: Minutes of Joint Procedure Committee of January 28, 2021, page 23; April 26-27, 2012, page 14; January 25, 2007, pages 10-11; September 28-29, 2006, pages 13-14; April 29-30, 1993, page 10; January 28-29, 1993, pages 11-12; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, pages 20, 21. Fed.R.Ev. 404; Rule 404, SBAND proposal.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. §§ 12.1-20-14, 12.1-20-15, 27-20-33, 27-20-52, 42-02-07.

CROSS REFERENCE: N.D.R.Ev. 412 (Admissibility of Alleged Victim's Sexual Behavior or Alleged Sexual Predisposition in Criminal Proceeding), N.D.R.Ev. 607 (Who May Impeach), N.D.R.Ev. 608 (Evidence of Character and Conduct of Witness), and N.D.R.Ev. 609 (Impeachment by Evidence of Conviction of Crime).

RULE 807. RESIDUAL EXCEPTION

(a) In General. Under the following ~~circumstances~~ conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not ~~specifically covered by~~ admissible under a hearsay exception in Rule 803 or 804:

(1) the statement ~~has equivalent circumstantial~~ is supported by sufficient guarantees of trustworthiness–after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) ~~it is offered as evidence of a material fact;~~

~~(3)~~ it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts~~; and~~

~~(4) admitting it will best serve the purposes of these rules and the interests of justice~~.

(b) Notice. The statement is admissible only if~~, before the trial or hearing,~~ the proponent gives an adverse party reasonable notice of the intent to offer the statement and ~~its particulars, including the declarant's name and address;~~ –including its substance and the declarant's name–so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing–or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

EXPLANATORY NOTE

Rule 807 was adopted, effective March 1, 2000. Rule 807 was amended, effective

March 1, 2014;_____.

Rule 807 contains the contents of former Rules 803(25) and 804(5).

Rule 807 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Rule 807 was amended, effective _____, in response to the December 1, 2019, revision of the Federal Rules of Evidence. The amendments are intended to clarify the standards for admission of evidence under the residual exception.

SOURCES: Joint Procedure Committee Minutes of September 24, 2020, pages 6-7; September 27, 2012, page 26; September 24-25, 1998, page 4; April 30-May 1, 1998, page 16. Fed.R.Ev. 807.

RULE 52. CONTEMPORANEOUS TRANSMISSION BY RELIABLE ELECTRONIC MEANS

Section 1. Purpose and Definition. This rule provides a framework for the use of contemporaneous audio or audiovisual transmission by reliable electronic means in North Dakota's district and municipal courts. This rule is intended to enhance the current level of judicial services available within the North Dakota court system through the use of reliable electronic means and not in any way to reduce the current level of judicial services.

Section 2. In General.

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

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

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

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

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

with the proceeding.

Section 3. Civil Action. In a civil action, a district or municipal court may conduct a hearing, conference, or other proceeding, or take testimony, by reliable electronic means.

Section 4. Criminal Action.

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

(B) Exceptions.

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

(2) Except when otherwise allowed by rule or law, a witness may not testify at trial by reliable electronic means unless the defendant knowingly and voluntarily waives the right to have the witness testify in person.

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

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

(b) the court confirms on the record that the defendant has knowingly and voluntarily consented to the attorney's participation from a separate site; and

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

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

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

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

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

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

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

Section 6. Mental Health Proceeding.

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

(1) the respondent or patient;

(2) a witness;

(3) legal counsel for a party.

(B) Notice, Objection, and Waiver.

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

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

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

(2) Objection.

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

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

(c) If the proceeding is continued, the respondent will continue to be held at the facility where the respondent was receiving treatment or, at the choice of the treatment

provider in a less restrictive setting, until a face-to-face hearing can be completed.

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

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

EXPLANATORY NOTE

This rule was adopted effective May 1, 2005. Amended effective June 1, 2005; March 1, 2015; March 1, 2019; March 1, 2021; _____.

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

Section 4(B)(2) was amended, effective March 1, 2021, to allow witness testimony by reliable electronic means when authorized by rule or law.

Section 4(B)(2) was amended, effective _____, to allow witness testimony by reliable electronic means in a criminal action at a proceeding other than the trial.

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

SOURCES Joint Procedure Committee Minutes of January 28, 2021, pages 20-22; January 30, 2020, page 24; September 26, 2019, pages 21-22; January 25, 2018, pages 15-16; April 24-25, 2014, pages 15-16; April 27-28, 2006, pages 22-24; April 28-29, 2005, pages 21-22; April 24-25, 2003, pages 20-23; September 26-27, 2002, pages 4-12.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 31-04-04.2.