

STATE OF NORTH DAKOTA
SUPREME COURT
JOINT PROCEDURE COMMITTEE
600 E. Boulevard Avenue
Bismarck, ND 58505-0530

CHAIR
Justice Lisa Fair McEvers

STAFF ATTORNEY
Michael J. Hagburg

February 5, 2023

Honorable Jon J. Jensen, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Proposed Amendments to N.D.R.App.P. 28

Dear Chief Justice:

By letter dated December 22, 2022, the Supreme Court referred N.D.R.App.P. 28 to the Joint Procedure Committee for consideration of proposed amendments. The Court requested that the committee discuss Justice Tufte's suggestion that language be added to the rule requiring citation to the record showing that issues were preserved for review.

The committee considered the matter at its January 12, 2023, meeting and approved the proposed amendments to Rule 28. A copy of the proposed amended rule is attached.

We appreciate the opportunity to assist the Court on this issue.

Sincerely yours,



Lisa K. Fair McEvers
Chair, Joint Procedure Committee

Attachment

RULE 28. BRIEFS

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

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

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

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

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

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

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

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

(7) the argument, which must contain:

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

(B) for each issue;

22 (i) a concise statement of the applicable standard of review (which may appear in
23 the discussion of the issue or under a separate heading placed before the discussion of the
24 issues);

25 (ii) citation to the record showing that the issue was preserved for review; or a
26 statement of grounds for seeking review of an issue not preserved; and

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

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

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

33 (1) the jurisdictional statement;

34 (2) the statement of the issues;

35 (3) the statement of the case;

36 (4) the statement of the facts; and

37 (5) the statement of the standard of review.

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

43 (e) References to Parties. Except as required under Rule 14, counsel should use the
44 parties' actual names or the designations used in the lower court or agency proceeding, or
45 such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the
46 purchaser.”

47 (f) References to the Record. References to the record must be made as provided
48 by Rule 30.

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

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

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

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

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

64 appropriate portions of the appellant's principal brief.

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

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

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

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

81 EXPLANATORY NOTE

82 Rule 28 was amended, effective March 1, 1986; January 1, 1988; March 1, 1994;
83 March 1, 1996; March 1, 2003; March 1, 2008; March 1, 2010; March 1, 2011; October
84 1, 2014; December 1, 2014; March 1, 2019; March 1, 2022; _____.

85 Under paragraph (b) (4), each legal issue should be stated as a question of law
86 sufficiently specific to allow the court to understand the precise issue presented.
87 Generalized statements such as, “Is the verdict supported by the evidence?” are not
88 sufficient.

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

92 Rule 28 was revised, effective March 1, 2003, in response to the December 1,
93 1998, amendments to Fed.R.App.P. 28. The language and organization of the rule were
94 changed to make the rule more easily understood and to make style and terminology
95 consistent throughout the rules. Substantive changes were made to conform this rule with
96 the changes made in Rule 32.

97 Subdivision (a) was added to inform parties that all briefs must comply with Rule
98 32 and amended effective October 1, 2014, to conform the rule to electronic filing.

99 Subdivision (b):

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

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

105 Paragraph (7) was amended, effective March 1, 2010, to require a party to brief the

106 appropriateness of a district court's grant of a certification under N.D.R.Civ.P. 54(b).

107 Paragraph (7) was amended, effective _____, to require a party to cite
108 to the record to show that an issue was preserved for review or to provide a statement of
109 grounds for seeking review of an issue not preserved.

110 Subdivision (c) was amended, effective March 1, 2003, to conform the appellee's
111 brief with the appellant's brief, and to expand the items that need not be included in the
112 appellee's brief.

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

115 Subdivivison (f) was amended, effective March 1, 2022, to direct parties to Rule
116 30 for instruction on citing to the record.

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

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

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

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

127 filed or after oral argument.

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

130 Rule 28 was amended, effective October 1, 2014, to replace “paper” with
131 “document.”

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

134 SOURCES: Joint Procedure Committee Minutes of January 12, 2023, pages ____ ;
135 September 30, 2021, pages 2-9; September 26, 2013, page 25; April 29-30, 2010, pages
136 23-24; September 24-25, 2009, pages 11-12; April 26-27, 2007, pages 29-31; September
137 27-28, 2001, pages 7-9; April 27-28, 1995, pages 15-17; January 26-27, 1995, pages 6-7;
138 September 29-30, 1994, pages 13-16; January 28-29, 1993, page 11; February 19-20,
139 1987, page 8; September 18-19, 1986, pages 15-16; November 30, 1984, pages 32-33;
140 October 19, 1984, pages 23-26; March 16-17, 1978, page 4; January 12-13, 1978, pages
141 15-18. Fed.R.App.P. 28.

142 STATUTES AFFECTED:

143 SUPERSEDED: N.D.C.C. §§ 28-18-06, 28-18-09, 28-27-33, 29-23-01, 29-23-02,
144 29-23-03, 29-23-04, 29-23-08, and 29-23-09.

145 CROSS REFERENCE: N.D.R.App.P. 10(h) (Correction or Modification of
146 Record); N.D.R.App.P. 14 (Identity Protection), N.D.R.App.P. 25 (Filing and Service),
147 N.D.R.App.P. 30 (References to the Record). N.D.R.App.P. 31 (Filing and Service of

