North Dakota Law Review

Volume 49 | Number 3 Article 13

1973

The New North Dakota Rule of Appellate Procedure

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BAR NOTES AND CASE COMMENTARY

THE NEW NORTH DAKOTA RULES OF APPELLATE PROCEDURE

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I. INTRODUCTION

The Supreme Court of North Dakota has extensive rulemaking authority, which, to date, has been used very sparingly. There are inherent powers vested in the judicial branch of government, plus specific constitutional authority to exercise "general superintending control" over inferior courts.[1] Supplementing this is legislative authority for the Supreme Court to make all rules it may consider necessary relating to "pleading, practice and procedure."[2]

Not fully appreciated is the Court's clear authority to amend or repeal existing legislation in the procedural area by adoption of its own rules. The North Dakota Century Code provides that:

> All statutes relating to pleadings, practice and procedure in civil or criminal actions, remedies, or proceedings, enacted by the legislative assembly, shall have force and effect only as rules of Court and shall remain in effect unless and until amended or otherwise altered by rules promulgated by the Supreme Court.[3]

Rules may be adopted in one of two ways—by the Court's own initiative or by petition to the Court. The proposed rule must be filed with the clerk of the Supreme Court and the clerk of the District Court for each county within the state. In addition, the rule and a copy of the notice of hearing upon the rule must be mailed to each judge and attorney within the state.[4] The petition process requires the signatures of five attorneys from each of the six judicial districts within the state.

The breadth and flexibility of the Supreme Court's rulemaking authority should be more fully appreciated by the Bar. Because problems of procedural reform maybe unappreciated when submitted to the legislature, the Supreme Court may be a more informed and concerned body for policy making in this area.

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1. N.D. CONST. art. 4, § 86.
2. N.D. CENT. CODE. §§ 27-02-07, 27-02-08 (Supp. 1971).
3. N.D. CENT. CODE. § 27-02-09 (Supp. 1971).
4. N.D. CENT. CODE. § 27-02-09 (Supp. 1971).

II. THE HISTORY OF REFORM

The impetus for revision of North Dakota appellate practice came from contacts between the Procedure Committee of the State Bar Association of North Dakota and the Supreme Court. During the summer of 1969, LeRoy Loder,[6] then chairman of the Committee, discussed the need for new appellate rules with then Chief Justice Obert Teigen. At its September meeting the Procedure Committee appointed a subcommittee on appellate rules from its membership which was also to serve as an Advisory Committee to the Supreme Court.[7]

The Advisory Committee met and discussed models for the new appellate rules. It was determined that recent appellate procedural reform should be fully researched and the most relevant materials made available to the Committee. Arrangements were made through Dean Robert Rushing of the University of North Dakota School of Law and the research project was commenced by senior law students. Contact was maintained with the researchers as they reviewed all existing state and federal appellate rules, together with appellate reform and law review materials.

In late November of 1969, copies of selected appellate rules, law review materials and research reports were forwarded to the Committee. After review of the available material, the Committee determined that the federal rules of appellate procedure, recently adopted for use in the Federal Circuit Courts, should be used as the model for proposed appellate rules in North Dakota.[8] The drafting process continued through a series of five drafts over a period of nearly two years. It involved circulation of drafts to interested lawyers, members of the Judicial Council and the Supreme Court. Successive drafts were reviewed before the full Procedure Committee.

While adoption upon the initative of the Court was considered, it was later determined that the rules should be submitted by petition to the Court. A resolution for submission of appellate rules in the general form of draft number four was submitted to the annual meeting of the State Bar Association of North Dakota on June 24, 1971, and approved. Based upon comments and discussion during and after the annual meeting, draft number five was pre-

5. My personal observation over the years while serving on the Procedure Committee has been that our legislature is unresponsive to changes submitted by the North Dakota Bar Association.

6. Member of the firm of Pringle & Herigstad, P.C., Minot, North Dakota.

7. The membership of the Committee consisted of Kermit Bye, Lawrence LeClerc, Timothy Davies and J. Philip Johnson, all of Fargo. Drawing all of the members from a limited area was intended to allow them to operate within a limited travel budget.

8. Among the appellate rules considered most useful as a model for North Dakota were those from the states of Alaska, Delaware, Montana and Minnesota.

pared by the Committee and submitted by petition to the Supreme Court. After a mailing of the notice and proposed rules to all judges and members of the North Dakota Bar, the Supreme Court held a hearing upon the petition on March 21, 1972. The Supreme Court then commenced a detailed study and revision of the rules. On December 13, 1972, the Court issued its order adopting new rules of appellate procedure having an effective date of March 1, 1973.

III. THE FEDERAL MODEL

Selecting a basic form or model to be followed is the most difficult choice in the preparation of procedural rules. The arguments for adopting the federal practice were compelling. Under it, the appellate procedure would be compatible with the trial procedure, which is based upon the federal rules. In addition, the research and study of the federal rules, which are adaptations of various circuit rules, was the most exhaustive available. Present and subsequent authority for interpreting the federal rules would be available to the lawyers and courts of North Dakota. The rules of many larger states are based upon a two-tier system of appellate courts. Thus, their rules cannot be directly applied to the situation in North Dakota. On the other hand, while the federal court system includes the United States Supreme Court, the federal rules of appellate procedure are designed only for the first tier—the circuit courts.

As evidenced by the six-draft process involved, adaptation of the federal rules for North Dakota practice was not a simple matter. A great number of revisions were made from the federal rules. Some of the most basic include:

1. The series of special rules governing such items as bankruptcy appeals, tax court appeals, administrative agency appeals and other federal statutory appeals were omitted.[9]
2. Also omitted were those rules dealing with discretionary appeals. With the exception of certain writs and special requests, all appeals are a matter of right in North Dakota.[10]
3. The federal rules dealing with extraordinary writs and habeas corpus proceedings have been omitted.[11]
4. The coverage of the rules is revised to include both the District Courts and the County Courts of Increased Jurisdiction as trial courts.[12]

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9. *See* FED. R. APP. P. 6, 13, 14, 15, 16, 17, 18, 19 & 20.
10. FED. R. APP. P. 5.
11. FED. R. APP. P. 21, 22, 23 & 24; N.D. CENT. CODE., chs. 32-34, 32-35, 32-33, 32-06, 32-22.
12. N.D.R. APP. P. 1.

5. The federal system of service through the clerk and by certificate of mailing is revised to follow the North Dakota practice of service by the attorneys and an affidavit of mailing.[13]

IV. CHANGES FROM FORMER PRACTICES

Of most importance to the North Dakota Bench and Bar are changes in existing practice. Before examining the specific changes, it should be noted that the purposes of the new rules are, essentially, threefold: (1) To more fully synthesize existing appellate procedure by incorporating statutory and Court rule sources into one set of rules; (2) To adopt the basic form of the federal rules of appellate procedure consistent with State District Court rules; and (3) To modernize and simplify appellate procedure in order to make it less rigid and technical and more easily understandable.

The changes in procedure are many in detail but a few concepts will cover most of them. First, perfecting an appeal is greatly simplified. The only jurisdictional requirement is the filing of a simple notice of appeal within the given time period.[14] Filing is sufficient and the clerk is to mail copies of the notice of appeal to opposing parties. The usual service-by-counsel practices apply to all other papers during the course of the appeal. The requirement of filing specifications of error is eliminated.[15] Another old term goes by the wayside in the elimination of provisions governing the "judgment roll." The rules provide instead for a method of establishing the "record" for appeal, which may or may not include the full transcript and exhibits.[16] The requirement of supplying "ultimate facts," which has long represented an insoluble problem for appeals lawyers, has been dropped.[17]

One important concept taken from the federal rules is added to the appellate practice. In addition to preparation of the "record" for appeal, counsel will have to prepare an "appendix."[18] This is a form of abbreviated record for quick reference and accessibility that is to be filed with the brief. The early drafts of the rules contained reference only to an addendum to the brief containing discretionary items from the record. However, in its final draft the Court incorporated the federal appendix provisions, which are designed to provide all the judges with the most relevant portions of the record.

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13. N.D.R. APP. P. 25.
14. N.D.R. APP. P. 3.
15. *Id.*
16. N.D.R. APP. P. 10.
17. N.D.R. APP. P. 28.

The question of reproduction methods has been an open question. The new rules provide for a manner of handling printed briefs and other documents but do not make it mandatory. The only specific reproduction method which has been prohibited is use of carbons, as the Court has been unsatisfied with their legibility. Any commercial copying method which produces a "clear black image on white paper" may be utilized,[19] although it is contemplated that the copy must not deteriorate substantially faster than ordinary typed copy.

Another area in which the new rules intend to produce greater flexibility is with regard to action upon procedural matters. Requests for extensions of time for filing briefs, and the like, may be referred to a single judge and does not require action by a quorum of the Court.[20]

A number of changes arise under the new rules with regard to the number of copies of documents required. Eight copies of most documents—briefs, appendices, etc., must be filed.[21] The most significant single deadline is that for filing a notice of appeal, which is a jurisdictional requirement. In a civil matter it is sixty days and for criminal matters ten days.[22] This shortens previous periods of three months for a judgment and sixty days for an order in civil matters and three months for a judgment and sixty days for an order in criminal matters.[23] The period for filing a civil appeal runs from the time of "service of notice" that the order or judgment has been entered. Thus, opposing counsel has an obligation to serve notice in order to commence the period of limitation. The time, in criminal proceedings, runs from the entry of the order or judgment. There is less concern here with placing service obligations upon counsel. In either category, the trial court, upon a showing of excusable neglect, may extend the period for thirty days. The extension may be granted before or after expiration of the period for filing.

V. CONCLUSION

As an additional aid to understanding and applying the new rules, the Advisory Committee has prepared an official set of advisory committee notes indicating sources and changes to each of the rules adopted. These notes will be distributed through the

18. N.D.R. APP. P. 30.
19. N.D.R. APP. P. 32; note that carbon copies are authorized, if "legible," for motions and papers other than briefs and appendices. *Id.* at 32 (b).
20. N.D.R. APP. P. 27(c).
21. N.D.R. APP. P. 30 (a), 31 (b).
22. N.D.R. APP. P. 4.
23. N.D. CENT. CODE §§ 28-27-04, 29-28-08 (Supp. 1971).

State Bar Association office to North Dakota lawyers, probably as part of an appellate rules manual. Hopefully, these will also be printed with the rules in the supplement to Volume 5 of the North Dakota Century Code. Appendix A to this commentary provides a quick reference to the successive steps required in an appeal under these rules.

An understanding of the new rules of appellate procedure in North Dakota can be achieved by noting that they basically follow the federal rules. However, there are certain exceptions which are designed to fit the special needs and circumstances of North Dakota.

APPENDIX A

STAGES OF AN APPEAL UNDER THE
NORTH DAKOTA RULES OF APPELLATE PROCEDURE

Step	Time	Action
1. Filing Notice of Appeal with Clerk of the Trial Court	Within 60 days of service of Notice of Order of Judgment (Civil) Within 10 days of entry of Order of Judgment (criminal)	Prepared and filed by Appellant's Counsel, copies mailed by Clerk
2. Motion for Stay of the Order or Judgment appealed from	No time limit but should be obtained promptly	Motion and Notice Prepared and served by Appellant's Counsel
3. Ordering of transcript from Court Reporter	Within 10 days of filing notice of appeal	By Appellant's Counsel
4. Preparation of record on appeal	Previous to filing limit	Partial transcript or agreed statement requires action by both counsel—full transcript, only Appellant's counsel
5. Filing of appeal record with Clerk of Supreme Court	Within 40 days of filing notice of appeal	By Clerk of Trial Court upon direction of Appellant's counsel
6. Filing of Appellant's Brief and Appendix with Clerk of Supreme Court	Within 40 days of filing appeal record	Preparation and filing by Appellant's counsel
7. Filing of Appellee's Brief	Within 30 days of service of Appellant's Brief	Preparation nd filing by Appelle's connsel
8. Oral argument; 45 minutes for Appellant, 30 minutes for Appellee	As set by the Supreme Court	By respective counsel
9. Entry of Judgment	Subsequent to Clerk's receipt of Supreme Court opinion	By Clerk of Supreme Court, prevailing counsel should confirm
10. Petition for rehearing (not encouraged)	Within 14 days of entry of Judgment	By counsel for losing party. No response unless requested by Court
11. Issuance of mandate	21 days after entry of Judgment	By Clerk of Supreme Court, forwarding Judgment to Clerk of Trial Court
12. Taxation of costs in the Trial Court	Subsequent to date of mandate	By Clerk of Trial Court upon application and notice of prevailing counsel