

## **CHAPTER 29-21 TRIAL**

**29-21-01. Order of trial.** The jurors having been impaneled and sworn, the trial must proceed in the following order:

1. If the information or indictment is for a felony, the clerk or state's attorney shall read it, and shall state the plea of the defendant to the jury. In all other cases this formality may be dispensed with.
2. The state's attorney, or other counsel for the state, shall open the case and offer the evidence in support of the information or indictment.
3. The defendant or the defendant's counsel then may open the defense and offer the defendant's evidence in support thereof.
4. The parties then, respectively, may offer rebutting testimony only, unless the court, for good reason, in furtherance of justice, or to correct an evident oversight, permits them to offer evidence upon their original case.
5. When the evidence is concluded, unless the case is submitted to the jury on either side, or on both sides, without argument, the counsel for the state shall commence, and the defendant or the defendant's counsel shall follow. Then the counsel for the state shall conclude the argument to the jury.
6. The judge then shall charge the jury.

**29-21-02. Order of trial may be changed for cause.** When the state of the pleadings requires it, or in any other case, for good reasons and in the sound discretion of the court, the order of trial and argument prescribed in section 29-21-01 may be departed from.

**29-21-03. Court to decide questions of law.** The court shall decide all questions of law which arise in the course of the trial.

**29-21-04. Jurors generally determine only facts.** On the trial of an information or indictment for any offense other than libel, questions of law are to be decided by the court, and, although the jurors have the power to find a general verdict, which includes questions of law as well as of fact, they are bound, nevertheless, to receive as law what is laid down as such by the court.

**29-21-05. Presumption of innocence - Acquittal on reasonable doubt.** A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether the defendant's guilt is satisfactorily shown, the defendant is entitled to be acquitted.

**29-21-06. Doubt as to degree of crime.** When it appears that a defendant has committed a public offense and there is reasonable ground to doubt in which of two or more degrees the defendant is guilty, the defendant can be convicted of the lowest of such degrees only.

**29-21-07. Persons jointly accused of crime jointly tried - Exceptions.** Whenever two or more persons are jointly charged with any crime, they must be tried jointly, subject to the power of the court, in its discretion and for special reasons, to order separate trials as to one or more of the defendants, and when tried jointly there may be joint or several convictions or acquittals, as the jury may determine the facts.

**29-21-08. Defendant discharged to testify.** When two or more persons are charged with an offense in the same information or indictment, the court, at any time before the

defendants have gone into their defense, on the application of the state's attorney, may direct any defendant to be discharged from the information or indictment, that that defendant may be a witness for the state.

**29-21-09. Discharge to be witness for codefendant.** Whenever two or more persons are charged with an offense in the same information or indictment, and the court is of the opinion that in regard to a particular defendant there is not sufficient evidence to put that person on that person's defense, it shall order that person to be discharged before the evidence is closed that that person may be a witness for that person's codefendant.

**29-21-10. Such discharge an acquittal - Bar to further prosecution.** The discharge of a defendant under either of sections 29-21-08 and 29-21-09 is an acquittal of the offense charged in the information or indictment, or any offense of which that person might have been found guilty thereunder, and is a bar to another prosecution therefor.

**29-21-11. Defendant witness in own behalf.** In the trial of a criminal action or proceeding before any court or magistrate of this state, whether prosecuted by information, indictment, complaint, or otherwise, the defendant, at the defendant's own request and not otherwise, must be deemed a competent witness, but the defendant's neglect or refusal to testify does not create or raise any presumption of guilt against the defendant. Nor may such neglect or refusal be referred to by any attorney prosecuting the case, or considered by the court or jury before whom the trial takes place.

**29-21-12. Rules of evidence.** Superseded by N.D.R.Crim.P., Rule 26; N.D.R.Ev., Rule 101.

**29-21-12.1. Statements, admissions, or confessions procured by duress, fraud, threat, or promises inadmissible in any criminal action.** Repealed by S.L. 1995, ch. 320, § 1.

**29-21-13. Forgery - Proof on trial.** Upon a trial for forging any bill or note purporting to be the bill or note of an incorporated company or bank, or for passing, or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it is not necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but it may be proved by general reputation, and persons of skill are competent witnesses to prove that such bill or note is forged or counterfeited.

**29-21-14. Testimony of accomplice - Corroboration required.** A conviction cannot be had upon the testimony of an accomplice unless the accomplice is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof.

**29-21-15. Mistake in offense charged - Other proceedings.** When it appears, at any time before verdict or judgment, that a mistake has been made in charging the proper offense, the defendant must not be discharged, if there appears good cause to detain the defendant in custody, but the court shall commit the defendant, or require the defendant to give bail for the defendant's appearance to answer to the offense, and also may require the witnesses to give bail for their appearance. The provisions of rule 12 of the North Dakota Rules of Criminal Procedure as to the manner and time of prosecution, so far as applicable, govern the further proceedings under this section.

**29-21-16. Mistake in charge not former acquittal nor putting once in jeopardy.** Upon the trial of an information filed or indictment found, under the provisions of section 29-21-15, neither a plea of former acquittal nor of once in jeopardy may be sustained by reason of the discharge of the jury on the first information or indictment.

**29-21-17. Trial on original charge after mistake.** If, after a mistake in charging an offense as is provided in section 29-21-15, a new information is not filed nor a new indictment

found as is provided in rule 12 of the North Dakota Rules of Criminal Procedure, the court shall proceed again to try the defendant on the original charge.

**29-21-18. Juror knowing fact - Witness.** Superseded by N.D.R.Ev., Rule 606.

**29-21-19. Want of jurisdiction appearing - Jury discharged.** The court may direct the jury to be discharged, when it appears that it has not jurisdiction of the offense, or that the facts charged in the information or indictment do not constitute an offense punishable by law.

**29-21-20. Disposition of accused on discharge of jury.** If the jury is discharged because the court has not jurisdiction of the offense charged, and it appears that it was committed out of the jurisdiction of this state, the defendant must be discharged, unless the court orders that the defendant be detained for a reasonable time, to be specified in the order, to enable the state's attorney to communicate with the chief executive officer of the country, state, territory, or district where the offense charged was committed.

**29-21-21. Admission to bail.** If an offense which the court is without jurisdiction to try was committed within the jurisdiction of another county of this state, the court may direct the defendant to be committed for such time as it deems reasonable to await a warrant from the proper county for the defendant's arrest, or if the offense is a misdemeanor or an infraction, it may admit the defendant to bail in an undertaking, with sufficient sureties, that the defendant, within such time as the court may appoint, will submit to a warrant for the defendant's arrest from the proper county, and if not sooner arrested thereon, will attend at the office of the sheriff of the county where the trial was had, at a time particularly specified in the undertaking, to submit to the warrant if issued, or that the defendant's bail will forfeit such sum as the court may fix, and to be mentioned in the undertaking.

**29-21-22. Certified copies of papers sent to proper county by clerk.** In the cases provided for in section 29-21-21, the clerk forthwith shall transmit a certified copy of the information or indictment and of all the papers filed in the action to the proper county, the expense of which transmission is chargeable to that county.

**29-21-23. When accused discharged.** If a defendant is not arrested on a warrant from the proper county:

1. The defendant must be discharged from custody;
2. The defendant's bail in the action must be exonerated; or
3. Money deposited instead of bail must be refunded,

as the case may be, and the sureties in the undertaking, as mentioned in section 29-21-21, must be discharged.

**29-21-24. Proceedings if accused arrested.** If a defendant, on a warrant from a proper county, is arrested, the same proceedings must be had thereon as upon the arrest of a defendant in another county, on a warrant of arrest issued by a magistrate.

**29-21-25. Court must discharge accused - Exception.** If a jury is discharged because the facts as charged do not constitute an offense punishable by law, the court shall order that the defendant, if in custody, be discharged therefrom, or, if admitted to bail, that the defendant's bail be exonerated, or if the defendant has deposited money instead of bail, that the money deposited be refunded to the defendant, unless in its opinion a new information or indictment can be framed upon which the defendant can be legally convicted, in which case it may direct the state's attorney to file a new information, or, if an information cannot be legally filed sooner, it may direct that the case be submitted to the same or another grand jury, and the provisions of rule 12 of the North Dakota Rules of Criminal Procedure, so far as applicable, as to the time and manner of the prosecution, govern the further proceedings under this section.

**29-21-26. Jury may view place.** When, in the opinion of the court, it is proper that the jurors should view the place in which the offense was charged to have been committed, or in which any other material fact occurred, it may order the jurors to be conducted in a body, in the custody of proper officers, to such place, which must be shown to them by a person appointed by the court for that purpose, and the officers must be sworn to suffer no person to speak to nor communicate with the jurors, nor to do so themselves, on any subject connected with the trial, and to return them into court without unnecessary delay, or at a specified time. The trial judge must be present and the state's attorney and counsel for the defendant may be present at the view by the jurors.

**29-21-27. Custody and conduct of jury.** The jurors sworn to try a criminal action, at any time before the cause is submitted to the jurors, in the discretion of the court, may be permitted to separate, or may be kept in charge of proper officers. The officers must be sworn to keep the jurors together until the next meeting of the court, to suffer no person to speak to nor communicate with them, nor to do so themselves, on any subject connected with the trial, and to return them into court at the next meeting thereof.

**29-21-28. Court must admonish jury.** The jurors also, at each adjournment of the court, whether permitted to separate or required to be kept in charge of officers, must be admonished by the court that it is their duty not to converse among themselves nor with anyone else on any subject connected with the trial, nor to form or express any opinion thereon, until the case is finally submitted to them.

**29-21-29. Counsel's argument restricted.** The court, in its discretion, may restrict the argument to the jury in a criminal case to one counsel for the prosecution and one for each defendant.

**29-21-30. Instructing the jury - Procedure.** Superseded by N.D.R.Crim.P., Rule 30.

**29-21-31. Instructions to be read.** Superseded by N.D.R.Crim.P., Rule 30.

**29-21-32. Fees for court reporter's instructions.** The reporter of the court shall receive for writing out the oral instructions of the court the same fees as for making transcripts.

**29-21-33. Charge - Exceptions before given.** Superseded by N.D.R.Crim.P., Rules 30, 51.

**29-21-34. Defendant may be committed.** Superseded by N.D.R.Crim.P., Rule 46.

**29-21-35. Death or illness of juror - Procedure.** Superseded by N.D.R.Crim.P., Rule 24.

**29-21-36. Substitute for state's attorney.** If the state's attorney fails or is unable to attend at the trial, the court may appoint some attorney at law to perform the duties of the state's attorney on such trial.

**29-21-37. Court may advise jury to acquit.** Superseded by N.D.R.Crim.P., Rule 29.

**29-21-38. Pleadings not evidence in criminal action.** No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in such pleading.