

MINUTES OF MEETING

Joint Committee of the Judicial Council
and the State Bar Association
Special Procedure Committee

April 8-9, 1976

The meeting was called to order at 1:30 p.m., April 8, 1976, by Justice Paul M. Sand, Chairman.

ATTENDANCE

Members Present:

Hon. Eugene A. Burdick
Hon. Gerald G. Glaser
Hon. James H. O'Keefe
Hon. Kirk Smith
Hon. Wm. S. Murray
Mr. Calvin N. Rolfson
Mr. John Shaft
Mr. Harry Pearce
Mr. Ronald G. Splitt
Mr. Kent Higgins
Hon. Robert Vogel
Hon. Paul M. Sand

Staff Present:

Duane Houdek
Eveleen Klaudt

Also Present:

Christine Hogan (Law Clerk)

REVIEW OF MINUTES

Judge Burdick MOVED that consideration of adoption of the Minutes of the January 29-30, 1976, meeting be left for some later time. The motion was seconded by Mr. Rolfson. Motion CARRIED.

Justice Sand announced that we would now consider Rules 11, 30, and 39 of the Rules of Appellate Procedure, and Rule 4 of the Rules of Civil Procedure.

RULE 11, NDRAppP

The discussion of the proposed amendments to Rule 11, NDRAppP, was led by Justice Vogel.

Judge Burdick MOVED that the amendments to Rule 11 of the North Dakota Rules of Appellate Procedure be approved.

RULE 11 - Transmission of the Record

(a) Time for transmission; duty of appellant. The record on appeal, including the transcript and

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exhibits necessary for the determination of the appeal, shall be transmitted to the supreme court within (((forty))) eighty days after the filing of the notice of appeal unless the time is shortened or extended by an order entered under subdivision (d) of this rule. After filing the notice of appeal the appellant shall comply with the provisions of Rule 10(b) and shall take any other action necessary to enable the clerk to assemble and transmit the record. If more than one appeal is taken, each appellant shall comply with the provisions of Rule 10(b) and this subdivision, and a single record shall be transmitted within (((forty))) eighty days after the filing of the final notice of appeal.

(b) [Remains unchanged.]

(c) [Remains unchanged.]

(d) [Remains unchanged.]

(e) [Remains unchanged.]

(f) [Remains unchanged.]

(g) [Remains unchanged.]

The motion was seconded by Justice Vogel. Motion CARRIED. Rule 11 of the North Dakota Rules of Appellate Procedure, as proposed for amendment by Justice Vogel, and amended on February 24, 1976, is adopted.

RULE 30, NDRAppP

The discussion of the proposed amendments to Rule 30, NDRAppP, was led by Justice Vogel.

Justice Vogel MOVED that Rule 30 be amended, in the fourth line, after the word "contain", add the words "in convenience size." The motion LOST for lack of a second.

Justice Vogel MOVED that Rule 30 of the North Dakota Rules of Appellate Procedure, as proposed for amendment, be adopted.

RULE 30. Appendix to the Briefs.

(a) Duty of appellant to prepare and file; content of appendix; time for filing; number of copies. The appellant shall prepare and file a separately bound appendix to the briefs which shall contain: (1) the relevant docket entries in the proceeding below; (2) any relevant portions of the pleadings, charge, findings, or opinion; (3) the judgment, order, or decision in question; and (4) any other parts of the record, including portions of the transcript, to which the parties wish to direct the particular attention of the court. The fact that parts of

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the record are not included in the appendix shall not prevent the parties or the court from relying on such parts.

Unless filing is to be deferred pursuant to the provisions of subdivision (c) of this rule, the appellant shall serve and file the appendix with his brief. Eight copies of the appendix shall be filed with the clerk, and one copy shall be served on counsel for each party separately represented, unless the court shall by rule or order direct the filing or service of a lesser number.

(b) [Remains unchanged.]

((((c) [Reserved for future use.])))

(c) Alternative method of designating contents of the appendix; how references to the record may be made in the briefs when alternative method is used. If the court shall so provide by rule for classes of cases or by order in specific cases, preparation of the appendix may be deferred until after the briefs have been filed, and the appendix may be filed 21 days after service of the brief of the appellee. If the preparation and filing of the appendix is thus deferred, the provisions of subdivision (b) of this Rule 30 shall apply, except that the designations referred to therein shall be made by each party at the time his brief is served, and a statement of the issues presented shall be unnecessary.

If the deferred appendix authorized by this subdivision is employed, references in the briefs to the record may be to the pages of the parts of the record involved, in which event the original paging of each part of the record shall be indicated in the appendix by placing in brackets the number of each page at the place in the appendix where that page begins. Or if a party desires to refer in his brief directly to pages of the appendix, he may serve and file typewritten or page proof copies of his brief within the time required by Rule 31(a), with appropriate references to the pages of the parts of the record involved. In that event, within 14 days after the appendix is filed he shall serve and file copies of the brief in the form prescribed by Rule 32(a) containing references to the pages of the appendix in place of or in addition to the initial references to the

pages of the parts of the record involved. No other changes may be made in the brief as initially served and filed, except that typographical errors may be corrected.

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(d) [Remains unchanged.]

(e) [Remains unchanged.]

(f) [Remains unchanged.]

The motion was seconded by Mr. Rolfson. Motion CARRIED. Rule 30 of the North Dakota Rules of Appellate Procedure, as proposed for amendment by Justice Vogel, and amended on February 24, 1976, is adopted.

RULE 39, NDRAppP

The discussion of the proposed amendments to Rule 39 of the North Dakota Rules of Appellate Procedure, was led by Justice Sand.

Justice Vogel MOVED to amend Rule 39, NDRAppP, in the second line of subsection (g), after the word "taxed" add the word "only"; and in the third line of subsection (g) delete the word "only" after the word "court." And to amend subsection (e) on the second line of that subsection after the word "court" and the period add the words "In civil cases." And that when so amended that Rule 39 be adopted.

RULE 39 - Costs

(a) To whom allowed. In all civil cases, (((Except))) except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; and if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) [Reserved for future use.]

(c) [Reserved for future use.]

(d) [Reserved for future use.]

(e) Costs on appeal in civil cases taxable in the trial court. In civil cases costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for costs of supersedeas bonds or other bonds

to preserve rights pending appeal, the reasonable and necessary costs of preparing briefs under the rules (presumed to be one hundred dollars for appellant's brief and seventy-five dollars for

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appellee's brief), and the fee for filing the notice of appeal shall be taxed in the trial court as costs of the appeal in favor of the party entitled to costs under this rule.

(f) Costs taxable in the supreme court. In original proceedings before the court, costs as applicable in (e) above may be taxed by the clerk in favor of the party entitled to costs.

(g) Costs on appeal of criminal actions. Costs incurred in the appeal of a criminal action shall be taxed only in the trial court upon motion of a party to the appeal and order of the supreme court.

The motion was seconded by Mr. Shaft. Motion CARRIED. Rule 39 of the North Dakota Rules of Appellate Procedure, as proposed for amendment by Justice Sand, and amended on February 23, 1976, is adopted.

RULE 4(e), NDRCivP

The discussion of the proposed amendments of Rule 4(e), North Dakota Rules of Civil Procedure, was led by Judge Burdick.

Judge Burdick MOVED that line 1, page 4, be amended as follows: After the word "stating" delete the colon, insert a comma, and add the words "as may be applicable, one or more of the following:"; on page 2, subsection (D), after the word "garnishment" add the words "or other judicial processes"; in subsection (4) in the 5th line of the printed Rule, after the word "served" add "at the defendant's last reasonably ascertainable post-office address" and strike the balance of the subsection; on page 2 of the typewritten Rule, in subsection (E), after the word "individual" add the words "subject to the court's jurisdiction"; and when so amended that Rule 4(e) be adopted.

(e) Service by Publication.

(((l) When Service by Publication Permitted. The summons may be served upon any defendant by publication in the following cases:

(A) when the defendant is not a resident of this state;

(B) when the defendant is a foreign corporation, joint stock company, or association and has no agent or other person in this state upon whom personal service can be made;

(C) when the defendant is a domestic corporation which has forfeited its charter or right to do business in this state or has failed to file its annual report as required by law; or

(D) when personal service cannot be made upon such defendant in this state to the best knowledge, information, and belief of the person making the affidavit mentioned in paragraph (2) of this subdivision, and such affidavit is accompanied by the return of the sheriff of the county in which the action is brought, stating that after diligent inquiry for the purpose of serving such summons he is unable to make personal service thereof upon such defendant.)))

(1) When Service by Publication Permitted. A defendant, whether known or unknown, who has not been served personally under the foregoing subdivisions of this rule may be served by publication in the manner hereinafter provided in one or more of the following situations only if:

(A) The claim for relief is based upon one or more grounds for the exercise of personal jurisdiction under paragraph (2) of subdivision (b) of this rule;

(B) The subject of the action is real or personal property in this state and the defendant has or claims a lien thereon or other interest therein, whether vested or contingent, or the relief demanded against him consists wholly or partly in excluding him from such lien or interest or in defining, regulating, or limiting such lien or interest, or the action otherwise affects the title to the property;

(C) The action is to foreclose a mortgage, cancel a contract for sale, or to enforce a lien upon or a security interest in real or personal property in this state;

(D) The plaintiff has acquired a lien upon property or credits of the defendant within this state by attachment or garnishment or other judicial processes;

(E) The action is for divorce, separation from bed and board, or annulment of a marriage of a resident of this state or to determine custody of an individual subject to the court's jurisdiction; or

(F) The action is to award, partition, condemn, or escheat real or personal property in this state.

(((2) Filing of Complaint and Affidavit for Service by Publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk of the district court in the county in which the action is commenced a complaint setting forth a claim in favor of the plaintiff and against the defendant and also an affidavit stating one of the grounds for service by publication specified in paragraph (1) of this subdivision and also stating the place of the defendant's residence, if known to the affiant, and if not known, stating that fact, and also stating unless the complaint shows:

(A) that the defendant has property within this state or debts owing to him from residents thereof;

(B) that the defendant is a resident of this state and has departed therefrom with intent to defraud his creditors, or to avoid the service of a summons, or keeps himself secreted therein with a like intent;

(C) that the relief sought in the action consists wholly or partly in excluding the defendant from any interest in or lien upon specific real or personal property within this state, or in enforcing, regulating, defining, or limiting such interest or lien in favor of either party to the action or otherwise affects the title to such property;

(D) that the action is for divorce or for separation from bed and board or for a decree annulling a marriage or to determine the custody of an individual; or

(E) that the defendant, although a resident of this state, has been continuously absent from the state for more than 60 days.)))

(2) Filing of Complaint and Affidavit for Service by Publication. Before service of the summons by publication is authorized in any case, there shall be filed with the clerk of the district court in the county in which the action is commenced a complaint

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setting forth a claim in favor of the plaintiff and against the defendant based on one or more of the situations specified in paragraph (1) of this subdivision and an affidavit executed by the plaintiff or his attorney stating, as may be applicable, one or more of the following:

(A) That personal service of the summons cannot be made upon the defendant in this state to the best knowledge, information, and belief of the affiant, in which case the affidavit must be accompanied by the return of the sheriff of the county in which the action is brought stating that after diligent inquiry for the purpose of serving the summons he is unable to make personal service thereof upon the defendant in this state;

(B) That the defendant is a domestic corporation which has forfeited its charter or right to do business in this state or has failed to file its annual report as required by law;

(C) That the defendant is a domestic or foreign corporation and has no officer, director, superintendent, managing agent, business agent, or other agent authorized by appointment or by law upon whom service of process can be made in its behalf in this state; or

(D) That all persons having or claiming an estate or interest in, or lien or encumbrance upon, the real property described in the complaint, whether as heirs, devisees, legatees, or personal representative of a deceased person, or under any other title or interest, and not in possession, nor appearing of record in the office of the register of deeds, the clerk of the district court, or the

county auditor of the county in which the real property is situated, to have such claim, title or interest therein, are proceeded against as unknown persons defendant pursuant to Section 32-17-06 of the North Dakota Century Code, and stating facts necessary to satisfy the requirements of that section.

(3) Number of Publications. [Remains unchanged.]

(4) Mailing Summons and Complaint. A copy of the summons and complaint, at any time after the filing of the affidavit for publication and not later than 10 days after the first publication of the summons,

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shall be deposited in some post office in this state, postage prepaid, and directed to the defendant to be served (((at his place of residence unless the affidavit for publication states that the residence of the defendant is unknown))) at the defendant's last reasonably ascertainable post-office address.

(5) Personal Service Outside State Equivalent to Publication. [Remains unchanged.]

(6) Time When First Publication or Service Outside State Must be Made. [Remains unchanged.]

(7) When Defendant Served by Publication Permitted to Defend. [Remains unchanged.]

(8) Additional Information to be Published. [Remains unchanged.]

The motion was seconded by Mr. Pearce. Motion CARRIED. Rule 4(e) of the North Dakota Rules of Civil Procedure, as proposed for amendment by Judge Burdick, and amended on February 23, 1976, is adopted.

ARTICLE VIII

Rule 803(24)

Judge Murray MOVED to reconsider the action by which Rule 803(24) was adopted. The motion was seconded by Justice Vogel. Motion CARRIED.

Judge O'Keefe MOVED to remove subsection 24 from Rule 803. The motion was seconded by Mr. Pearce. Motion LOST.

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Judge O'Keefe brought up this motion to reconsider because he felt it should be discussed.

Mr. Higgins MOVED to amend Rule 803(24), in line 171, by adding the language "by written motion." Mr. Shaft seconded the motion. Motion LOST.

Mr. Higgins MOVED to amend Rule 803(24), in line 171, by adding the language, "in writing." Mr. Pearce seconded the motion. Motion CARRIED.

Judge O'Keefe wished to be recorded as voting against the motion.

Judge Burdick MOVED to amend Rule 803(24), in line 172, after the words "sufficiently in advance of", add the words, "its offer in evidence", and strike the words, "the trial or hearing", so that it will read:

"172 sufficiently in advance of (((the trial or hearing))) its offer in evidence to provide"

Mr. Rolfson seconded the motion. Motion CARRIED.

Judge Burdick MOVED the adoption of Rule 803(24), as amended. Judge Murray seconded the motion. The motion was WITHDRAWN.

Mr. Higgins MOVED to amend line 171 by adding the words, "and to the court" after the words, "adverse party." Judge Glaser seconded the motion. Motion CARRIED.

Judge Burdick MOVED the adoption of Rule 803(24), as amended.

(24) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party and to the court in writing sufficiently in advance of (((the trial or hearing))) its offer in evidence to provide the adverse party with a fair opportunity to prepare to meet

it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Judge Murray seconded the motion. Motion CARRIED.

RULE 804

Justice Vogel led the discussion on Rule 804.

Justice Vogel MOVED to adopt Rule 804(a).

(a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement;

(2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so;

(3) testifies to a lack of memory of the subject matter of his statement;

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance (or in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if his exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of his statement for the purpose of preventing the witness from attending or testifying.

Mr. Rolfson seconded the motion. Motion CARRIED.

RULE 804(b)(1)

Justice Vogel MOVED to adopt Rule 804(b)(1).

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(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

Judge Burdick seconded the motion. Motion CARRIED.

RULE 804(b)(2)

Justice Vogel MOVED to adopt Rule 804(b)(2) as drafted by the National Conference of Commissioners of Uniform State Laws.

(2) Statement under belief of impending death. A statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death.

Judge Burdick seconded the motion. Motion CARRIED.

RULE 804(b)(3)

Justice Vogel MOVED to adopt Rule 804(b)(3) as drafted by the National Conference of Commissioners of Uniform State Laws.

(3) Statement against interest. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.

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Judge Burdick seconded the motion. Motion CARRIED.

RULE 804(b)(4)

Judge Burdick MOVED the adoption of Rule 804(b)(4). Justice Vogel seconded the motion. Motion CARRIED.

Judge Burdick MOVED to reconsider the action by which Rule 804(b)(4) was adopted. Mr. Rolfson seconded the motion. Motion CARRIED.

Judge Burdick MOVED to amend Rule 804(b)(4) in line 53, by substituting the word "parentage" for the word "legitimacy." Mr. Rolfson seconded the motion. Motion CARRIED.

Judge Burdick MOVED to adopt Rule 804(b)(4), as amended.

(4) Statement of personal or family history. (A) A statement concerning the declarant's own birth, adoption, marriage, divorce, (((legitimacy))) parentage, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had

no means of acquiring personal knowledge of the matter stated; or (B) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Mr. Rolfson seconded the motion. Motion CARRIED.

RULE 804(b)(5)

Judge Burdick MOVED to adopt Rule 804(b)(5) as in Rule 804(b)(6) as drafted by the National Conference of Commissioners of Uniform State Laws, and to incorporate the amendments adopted to Rule 803(24).

(5) Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (i) the statement is offered as evidence of a material fact; (ii) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (iii) the general purposes of these rules and the interests of justice will best be served by admission of

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the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party and to the court in writing sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to prepare to meet it, his intention to offer the statement and the particulars of it, including the name and address of the declarant.

Justice Vogel seconded the motion. Motion CARRIED.

RULE 805

Justice Vogel MOVED the adoption of Rule 805.

RULE 805. Hearsay Within Hearsay.

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

Judge Burdick seconded the motion. Motion CARRIED.

RULE 806

Justice Vogel MOVED to amend Rule 806 in line 3 by deleting the words "has been" and inserting the word "is", and when so amended that Rule 806 be adopted.

RULE 806. Attacking and Supporting Credibility of Declarant.

If a hearsay statement, or a statement defined in Rule 801(d)(2), (C), (D), or (E), (((has been))) is admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination.

Mr. Rolfson seconded the motion. Motion CARRIED.

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ARTICLE I

Judge O'Keefe led the discussion on Article I.

RULE 101

Judge O'Keefe MOVED to adopt Rule 101.

RULE 101. Scope.

These rules govern proceedings in the courts of North Dakota, to the extent and with the exceptions stated in Rule 1101.

Judge Burdick seconded the motion. Motion CARRIED.

The staff attorney is directed to prepare the necessary amendments to Rule 26, North Dakota Rules of Criminal Procedure, and Rule 43, North Dakota Rules of Civil Procedure.

RULE 102

Judge O'Keefe MOVED to adopt Rule 102.

RULE 102. Purpose and Construction.

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.

Mr. Rolfson seconded the motion. Motion CARRIED.

RULE 103

Judge O'Keefe MOVED to adopt Rule 103.

RULE 103. Rulings on Evidence.

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) Offer of Proof. In case the ruling is one excluding evidence, the substance of

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the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.

(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Errors affecting substantial rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.

Judge Burdick seconded the motion. Motion CARRIED.

The staff attorney was directed to specifically include in the explanatory note to Rule 103(a) the reference to the parties as distinguished from the court.

The meeting was adjourned to 9:00 a.m., April 9, 1976.

The meeting was called to order at 9:00 a.m., April 9, 1976, by Justice Paul M. Sand, Chairman.

ATTENDANCE:

Members Present:

Hon. Eugene A. Burdick
Hon. Gerald G. Glaser
Hon. James H. O'Keefe
Hon. Kirk Smith
Hon. Wm. S. Murray
Hon. Wm. F. Hodny
Mr. Calvin N. Rolfson
Mr. John Shaft
Mr. Ronald G. Splitt
Mr. Kent Higgins
Mr. Harry Pearce
Hon. Robert Vogel
Hon. Paul M. Sand

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RULE 104

Judge O'Keefe MOVED the adoption of Rule 104. Mr. Higgins seconded the motion.

Mr. Rolfson MOVED to amend Rule 104 by substituting the National Conference of Commissioners on Uniform State Laws version of Rule 104(c) in lieu of the typewritten Rule 104(c) as submitted to the Committee, and when so amended that Rule 104 be adopted.

Rule 104. Preliminary Questions.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence, shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

((((c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so

conducted whenever the interests of justice require, or whenever an accused is a witness, if he so requests.)))

(c) Hearing of jury. Hearings on the admissibility of confessions in criminal cases shall be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases, shall be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

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The motion was seconded by Judge Burdick. Motion CARRIED.

RULE 105

Judge O'Keefe MOVED that Rule 105 be adopted.

RULE 105. Limited Admissibility.

Whenever evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

Judge Burdick seconded the motion. Motion CARRIED.

RULE 106

Judge O'Keefe MOVED that Rule 106 be adopted.

RULE 106. Remainder of or Related Writings or Recorded Statements.

Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require him at that time to introduce any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.

The motion was seconded by Judge Burdick. Motion CARRIED.

ARTICLE II

Mr. Rolfson led the discussion on Article II.

RULE 201

Mr. Rolfson MOVED the adoption of Rule 201 (a), (b), (c), (d), (e), and (f), as in the typewritten version submitted, and Rule 201(g) as drafted by the National Conference of Commissioners on Uniform State Laws.

RULE 201. Judicial Notice of Adjudicative Facts.

- (a) Scope of rule. This rule governs only judicial notice of adjudicative facts.
- (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or

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- (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
- (c) When discretionary. A court may take judicial notice, whether requested or not.
- (d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.
- (e) opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.
- (f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.
- (((g) Instructing jury. In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.)))
- (g) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

Judge Burdick seconded the motion. Motion CARRIED.

ARTICLE III

RULE 301

In the absence of Mr. Kraft, to whom this Article III had been assigned, Mr. Houdek led the discussion.

Judge Burdick MOVED that Judge Burdick's draft of the proposed Rule 301 be substituted for that of the proposed Rule. Mr. Higgins seconded the motion.

Mr. Higgins MOVED that consideration of Rule 301 be placed at the foot of the agenda. Judge O'Keefe seconded the motion. Motion CARRIED.

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RULE 302

Mr. Rolfson MOVED that we do not adopt Rule 302 but that it should be kept for future use. Mr. Pearce seconded the motion. Motion CARRIED.

RULE 303

Mr. Rolfson MOVED that Rule 303 not be adopted, but that the caption be left, and that there be some comments referring to § 12.1-01-03, NDCC, and to Rule 301. Judge Hodny seconded the motion. Motion CARRIED.

RULE 303. Presumptions in Criminal Cases.

ARTICLE IV

Mr. Houdek led the discussion on Article IV.

RULE 401

Mr. Pearce MOVED that Rule 401 be adopted.

RULE 401. Definition of "Relevant Evidence."

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Mr. Higgins seconded the motion. Motion CARRIED.

RULE 402

Judge O'Keefe MOVED the adoption of Rule 402. The motion was seconded by Judge Hodny.

Mr. Higgins MOVED that Rule 402 be amended in line 5, after the word "Congress" add the words "where applicable." Motion LOST for lack of a second.

Judge Smith MOVED that Rule 402 be amended in line 5 by deleting the words "by Act of Congress." Judge Murray seconded the motion. Motion LOST.

Mr. Higgins MOVED to amend Rule 402 in line 5 after the word "by" add the words "any applicable," so that it would read "by any applicable Act of Congress." Judge O'Keefe seconded the motion. Motion CARRIED.

Justice Vogel MOVED that Rule 402, as amended, be adopted.

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RULE 402. Relevant Evidence Generally Admissible;

Irrelevant Evidence Inadmissible.

All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States or the State of North Dakota, by any applicable Act of Congress, by statutes of North Dakota, by these rules, or by other rules adopted by the Supreme Court of North Dakota. Evidence which is not relevant is not admissible.

Mr. Murray seconded the motion. Motion CARRIED.

RULE 403

Mr. Rolfson MOVED the adoption of Rule 403.

RULE 403. Exclusion of Relevant Evidence

on Grounds of Prejudice, Confusion,

or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Judge Glaser seconded the motion. Motion CARRIED.

RULE 303

Judge Murray MOVED to reconsider the action taken on Rule 303. Mr. Higgins seconded the motion. Motion CARRIED.

Judge Burdick MOVED to amend Rule 303 so that it would read:

"If a presumption is favorable to the defendant in a criminal prosecution, the prosecutor has the burden of proving beyond a reasonable doubt the nonexistence of the fact presumed."

Judge Burdick WITHDREW his motion.

Mr. Rolfson MOVED that the Committee re-examine the previous action on Rule 303, with the reservation that the subject may be brought up at a later date. Judge Glaser seconded the motion. Motion CARRIED.

RULE 404

Judge Burdick MOVED to amend Rule 404 in line 7 by inserting the words "Except as otherwise provided by statute" at the beginning of the sentence. Mr. Higgins seconded the motion. Motion CARRIED.

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Judge Hodny MOVED the adoption of Rule 404, as amended.

RULE 404. Character Evidence Not Admissible

to Prove Conduct, Exceptions: Other Crimes.

(a) Character evidence generally. Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

(1) Character of accused. Except as otherwise provided by statute, evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Judge Murray seconded the motion. Motion CARRIED.

RULE 405

Judge Burdick MOVED the adoption of Rule 405. Judge Glaser seconded the motion.

Mr. Rolfson MOVED to amend Rule 405, line 4, delete the words "or by testimony in the form of an opinion"; and in line 2 delete the words "or opinion." Mr. Higgins seconded the motion. Motion LOST.

The question was on the motion of Judge Burdick to adopt Rule 405.

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RULE 405. Methods of Proving Character.

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

Motion CARRIED.

RULE 406

Judge Burdick MOVED the adoption of Rule 406. Mr. Rolfson seconded the motion.

Justice Vogel MOVED a substitute motion that we defer action on Rule 406. Judge Smith seconded the motion. Motion LOST.

Mr. Higgins MOVED the adoption of portion (b) of Rule 406 of the National Conference of Commissioners on Uniform State Laws draft. Judge Burdick seconded the motion. Motion LOST.

The question is on the original motion of Judge Burdick to adopt Rule 406.

RULE 406. Habit: Routine Practice.

Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Motion CARRIED.

RULE 407

Mr. Shaft MOVED the adoption of Rule 407.

RULE 407. Subsequent Remedial Measures.

Whenever, after an event, measures are taken which, if taken previously, would have made the

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event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The motion was seconded by Judge Burdick. Motion CARRIED.

RULE 408

Mr. Shaft MOVED the adoption of Rule 408.

RULE 408. Compromise and Offers to Compromise.

Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. Exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations is not required. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, disproving a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

The motion was seconded by Judge O'Keefe. Motion CARRIED.

RULE 409

Mr. Shaft MOVED the adoption of Rule 409 as submitted. The motion was seconded by Judge Burdick.

Mr. Higgins MOVED to amend Rule 409, line 4, by adding the words "culpability or" after the word "prove." The motion was seconded by Justice Vogel. Motion CARRIED.

Mr. Shaft MOVED the adoption of Rule 409, as amended.

RULE 409. Payment of Medical and Similar Expenses.

Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses

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occasioned by an injury is not admissible to prove culpability or liability for the injury.

The motion was seconded by Judge Burdick. Motion CARRIED.

RULE 410

Mr. Shaft MOVED the adoption of Rule 410. The motion was seconded by Mr. Rolfson.

Judge Burdick MOVED to amend Rule 410 to conform to the new Federal rules. The motion LOST for lack of a second.

Judge Burdick MOVED to amend Rule 410, line 6, after the word "with" insert the words "and relevant to"; and in line 8 delete the word "shall" and insert the word "does". Mr. Rolfson seconded the motion.

Justice Vogel MOVED to amend Rule 410, as follows: "This rule does not require the exclusion of any evidence readily available to the prosecution merely because it is present in the course of plea negotiation or to the court in its consideration of the acceptance of the plea." Mr. Higgins seconded the motion.

Justice Vogel WITHDREW his motion.

Judge Burdick MOVED the adoption of Rule 410 with the amendment in line 6, after the word "with" insert the words "and relevant to", and in line 8 delete the word "shall" and insert the word "does."

RULE 410. Offer to Plead Guilty; Nolo

Contendere; Withdrawn Plea of Guilty.

Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with and relevant to any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. This rule (((shall))) does not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.

The motion was seconded by Mr. Rolfson. Motion CARRIED.

RULE 409

Mr. Pearce MOVED to reconsider the action by which Rule 409 was adopted. The motion was seconded by Mr. Rolfson. Motion CARRIED.

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Judge Burdick MOVED to amend Rule 409 by substituting the words "civil or criminal" for the words "culpability or" in the previous amendment. The motion was seconded by Mr. Higgins. Motion CARRIED.

Judge Burdick MOVED the adoption of Rule 409 as amended.

RULE 409. Payment of Medical and Similar Expenses.

Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove (((culpability or))) civil or criminal liability for the injury.

The motion was seconded by Judge Murray. Motion CARRIED.

MEETING DATE

Judge Burdick MOVED that the next meeting of the Special Procedure Committee be held June 3 and 4, 1976, commencing at 1:30 p.m. on June 3 and continuing for the full day on June 4, 1976. The motion was seconded by Mr. Rolfson. Motion CARRIED.

RULE 407

Judge Burdick MOVED to reconsider the action in adopting Rule 407. The motion was seconded by Mr. Higgins. Motion CARRIED,

Judge Burdick MOVED to amend Rule 407, line 5, by striking the words "negligence or culpable conduct" and substitute therefor the words "civil or criminal liability." The motion was seconded by Mr. Smith.

Judge Burdick WITHDREW his motion.

Judge Burdick MOVED to re-adopt Rule 407.

RULE 407. Subsequent Remedial Measures.

Whenever, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

The motion was seconded by Mr. Higgins. Motion CARRIED.

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RULE 411

Mr. Pearce MOVED the amendment of Rule 411 by adding the second sentence of Rule 411 of the Federal Rules of Evidence, "This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness." and the deletion of the word "when" in that sentence and inserting the word "if." The motion was seconded by Mr. Higgins. Motion CARRIED.

Mr. Higgins MOVED the adoption of Rule 411, as amended.

RULE 411. Liability Insurance.

Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully This rule does not require the exclusion of evidence of insurance against liability (((when))) if offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

The motion was seconded by Judge Burdick. Motion CARRIED.

ARTICLE VI

Mr. Higgins led the discussion of Article VI.

RULE 601

Mr. Higgins MOVED the adoption of Rule 601.

RULE 601. General Rule of Competency.

Every person is competent to be a witness except as otherwise provided in these rules.

The motion was seconded by Mr. Rolfson. Motion CARRIED.

RULE 602

Mr. Higgins MOVED the adoption of Rule 602.

RULE 602. Lack of Personal Knowledge.

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the testimony of the witness himself. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.

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The motion was seconded by Judge Burdick. Motion CARRIED.

RULE 603

Mr. Pearce MOVED the adoption of Rule 603.

RULE 603. Oath or Affirmation.

Before testifying, every witness shall be required to declare that he will testify truthfully, by oath or affirmation administered in a form calculated to awaken his conscience and impress his mind with his duty to do so.

The motion was seconded by Judge Burdick. Motion CARRIED.

RULE 604

Mr. Pearce MOVED the adoption of Rule 604.

RULE 604. Interpreters.

An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation that he will make a true translation.

The motion was seconded by Mr. Higgins. Motion CARRIED.

RULE 607

Mr. Higgins MOVED the adoption of Rule 607.

RULE 607. Who May Impeach.

The credibility of a witness may be attacked by any party, including the party calling him.

The motion was seconded by Justice Vogel. Motion CARRIED.

RULE 608

Mr. Higgins MOVED the adoption of Rule 608. The motion was seconded by Mr. Rolfson.

Judge Burdick MOVED to amend Rule 608, line 20, by adding "(c) Privilege against self-incrimination." The motion was seconded by Judge Hodny. Motion CARRIED.

Mr. Higgins MOVED the adoption of Rule 608, as amended.

RULE 608. Evidence of Character and Conduct of Witness.

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(a) opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(c) Privilege against self-incrimination. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.

The motion was seconded by Judge Hodny. Motion CARRIED.

RULE 609

Mr. Higgins MOVED the adoption of Rule 609. The motion was seconded by Judge Burdick.

Judge Burdick MOVED to amend Rule 609, line 12 after the words "since the date of" delete the word "the"; line 13 after the words "witness from" delete the word "the" and insert the word "any"; line 14 after the word "date" add "unless the witness is still in confinement for that conviction." The motion was seconded by Mr. Pearce. Motion CARRIED.

Mr. Higgins MOVED to amend Rule 609, line 35, at the beginning of the line insert the words "or a post-conviction proceeding." The motion was seconded by Judge Hodny. Motion CARRIED.

Justice Vogel MOVED to amend Rule 609, line 17, after the word "conviction" insert the words "is vacated or". The motion was seconded by Mr. Pearce. Motion CARRIED.

Judge Burdick MOVED the adoption of Rule 609 as amended. Mr. Pearce seconded the motion.

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Mr. Higgins MOVED to amend Rule 609, line 9 by striking the words "dishonesty or" because it is not susceptible to reasonable definition. The motion was seconded by Judge Hodny. Motion LOST.

Judge Burdick MOVED the adoption of Rule 609 as amended.

RULE 609. Impeachment by Evidence of Conviction of Crime.

(a) General rule. For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of (((the))) conviction or of the release of the witness from (((the))) any confinement imposed for that conviction, whichever is the later date unless the witness is still in confinement for that conviction.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction is vacated or has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the

conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence

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is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. The pendency of an appeal or a post-conviction proceeding therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal or a post-conviction proceeding is admissible.

The motion was seconded by Mr. Rolfson. Motion CARRIED.

APPROVAL OF MINUTES

Mr. Pearce MOVED to approve the Minutes of the last meeting. The motion was seconded by Justice Vogel. Motion CARRIED.

ADJOURNMENT

Justice Vogel MOVED to adjourn the meeting of the Special Procedure Committee. The motion was seconded by Judge Burdick. Motion CARRIED.