

## MINUTES OF MEETING

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

November 29-30, 1979

### CALL TO ORDER

The meeting was called to order at 1:00 p.m., November 29, 1979, by Justice Paul M. Sand, Chairman.

### ATTENDANCE

#### Present

Hon. Eugene A. Burdick  
Hon. Halvor L. Halvorson  
Mr. James L. Lamb  
Mr. LeRoy A. Loder  
Mr. Richard A. McKennett  
Mr. Herbert L. Meschke  
Hon. Wm. S. Murray  
Hon. James H. O'Keefe

#### Absent

Hon. Gerald G. Glaser  
Hon. Larry Hatch  
Hon. Robert C. Heinley  
Hon. Kirk Smith  
Hon. Robert Vogel  
Mr. Leonard H. Bucklin  
Mr. William A. Hill  
Mr. Ward M. Kirby  
Mr. Larry Kraft  
Mr. Russell G. Nerison  
Mr. David L. Peterson

### APPROVAL OF MINUTES

Judge Burdick MOVED that the minutes be corrected, as follows:

Page 2: Hyphenate "multi-sheeted";

Page 14: Correct spelling of "researched";

Page 15: Insert "shall" before "consider" in explanatory note to subdivision (c); insert (1) in subdivision (c)(1)(L) in explanatory note to subdivision (f);

Page 17: Insert the word "among" before "the" in the last line of the explanatory note to subdivision (q).

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Mr. McKennett seconded the motion.

Judge Murray MOVED the approval of the minutes as corrected. Judge Burdick seconded the motion. Motion CARRIED.

#### RULE 2, NDRCivP - EXPLANATORY NOTE

Mr. McKennett MOVED to adopt the explanatory note to Rule 2, NDRCivP. Judge Halvorson seconded the motion. Motion CARRIED.

This rule is identical to Rule 1, FRCivP, and provides for one form of action to be known as a "civil action." The old forms of action have been abolished, as has the distinction between "law" and "equity" cases.

Even though one form of action has been substituted for actions at law and in equity, a distinction persists so far as the right to a jury trial is concerned. Section 7 of the North Dakota Constitution preserves a trial by jury in all cases in which it could have been demanded as a matter of right at common law. Dobervich v. Central Cass Public School District No. 17, 283 N.W.2d 187 (N.D. 1979).

#### RULE 4, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to redraft the explanatory note to Rule 4 and make no recommendation that the contents be noted on the envelope, such as "Service of Process". Mr. Lamb seconded the motion. Motion CARRIED, with Judge Burdick and Judge Murray voting no.

#### RULE 5(f), NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 5(f) on line 4 by inserting "original" before "pleading". Mr. Meschke seconded the motion. Motion CARRIED.

Mr. Lamb MOVED to adopt the explanatory note to Rule 5(f), NDRCivP, as amended. Mr. Loder seconded the motion. Motion CARRIED.

Subdivision (f) was added [effective \_\_\_\_\_] to allow proof of service either as provided in Rule 4 or by an attorney's certificate. The certificate could be affixed directly to the original pleading or other paper by use of a stamp or other method in order to save paper and reduce bulky files.

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#### RULE 8, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to amend the proposed explanatory note to Rule 8, NDRCivP, as follows:

Line 40: After the word "conclusions" insert "These matters are subject to a motion to strike under Rule 12(f)."

Lines 32 through 35: Delete.

Mr. McKennett seconded the motion. Motion CARRIED.

Mr. Loder MOVED to adopt the explanatory note to Rule 8, as amended. Judge Burdick seconded the motion. Motion CARRIED.

This rule is identical to Rule 8, FRCivP, except for the deletion of reference to a showing of grounds for jurisdiction in subdivisions (a) and (b) and maritime grounds in subdivision (d)(2).

Previous to the adoption of NDRCivP, a complaint or counterclaim was required to allege the pleader's "cause of action." Section 28-0702, NDRC 1943. Because of considerable confusion among the courts as to what constituted a "cause of action," Rule 8 was cast in language designed to finesse the confusion as well as to simplify the pleader's task.

Wright and Miller put it this way:

"The substitution of 'claim showing that the pleader is entitled to relief' for code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions' and eliminate the unfortunate rigidity and confusion surrounding the words 'cause of action' that had developed under the codes. The draftsmen of the federal rules obviously felt that the use of a new formulation would emphasize the modern philosophy of procedure espoused by the federal rules, destroy the viability of the old code precedents, and encourage a more flexible approach by the courts in defining the concept of claim for relief." Wright and Miller, Federal Practice and Procedure: Civil § 1216.

The leading case of Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), makes clear that a complaint is sufficient if plaintiff would be entitled to relief under any state of facts that could be proven in support of the claim alleged.

While the pleading of "facts" constituting a "cause of action" may suffice as a statement of a "claim for relief" under this rule, the pleader runs the risk of pleading more than "a short and plain statement of the claim" as well as pleading "evidentiary facts" and "conclusions." These matters are subject to a motion to strike under Rule 12(f). See, 4 Cyclopaedia of Federal Procedure (3d ed.) § 14.157.

For historical background of the development of Rule 8, see R. W. Miller, Civil Procedure of the Trial Court in Historical Perspective (1952), Chapters VI, VII and XIII.

#### RULE 10, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the explanatory note to Rule 10, NDRCivP, as follows:

Line 7: Delete "the substance of";

Line 8: Delete "added" and insert "moved";

Line 9: Delete "after being deleted from that rule";

and to adopt the explanatory note when so amended. Mr. Meschke seconded the motion. Motion CARRIED.

Subdivision (a) is adapted from Rule 10, FRCivP, with addition of requiring the name of the county in which the action is brought to be included in the caption and deleting the federal requirement of including the file number of the case as part of the caption. Even though the filing number is not required, its use is encouraged because it is helpful to the court and the clerk. Also, Rule 25(d)(2) was moved to subdivision (a) [effective \_\_\_\_\_]. It governs the situation when a public officer sues or is sued in his official capacity and is identical to Rule 25(d)(2), FRCivP.

Subdivisions (b) and (c) are identical to the same subdivisions of Rule 10, FRCivP.

#### RULE 25, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 25, NDRCivP, so that line 9 will read: "The deleted subdivision is now a part of Rule 10(a)." and to adopt the explanatory note as amended. Mr. Lamb seconded the motion. Motion CARRIED.

Rule 25 is identical to Rule 25, FRCivP, except for the addition to subdivision (a) of the third paragraph concerning a death after verdict or order for judgment; specification in subdivision (b) that the

action may be continued by a guardian or guardian ad litem rather than a representative, as in the federal rule; substitution of a different title or heading for subdivision (d); and deletion of subdivision (d)(2) [effective \_\_\_\_\_]. The deleted subdivision is now a part of Rule 10 (a).

#### RULE 28, NDRCivP

The staff attorney was requested to research the feasibility of amending Rule 28(b) in line with the federal rule.

#### NEXT MEETING

Judge Burdick MOVED to schedule the next meeting of the Joint Procedure Committee for January 17-18, 1980, with the chairman to be given the authority to change the date for exceptional circumstances. Mr. Lamb seconded the motion. Motion CARRIED.

#### RULE 29, NDRCivP - EXPLANATORY NOTE

Mr. Loder MOVED to adopt the explanatory note to Rule 29, NDRCivP, as proposed. Judge Burdick seconded the motion. Motion CARRIED.

Rule 29 is identical to Rule 29, FRCivP.

The rule was amended in 1971, as the federal rule had been previously, to give the court express authority over a stipulation under this rule. At the same time the clause allowing stipulations concerning other methods of discovery [other than depositions] was added. This is restricted by requiring court approval for extension of time limitations in the listed rules.

#### RULE 30, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 30, NDRCivP, as follows:

Lines 10 and 11: Delete

Line 14: Delete everything after "43(b)."

Mr. Loder seconded the motion. Motion CARRIED.

Judge Burdick MOVED to adopt the explanatory note to Rule 30, NDRCivP, as amended. Mr. McKennett seconded the motion. Motion CARRIED.

Rule 30 is derived substantially from Rule 30, FRCivP. The only deviations are the addition to subdivision (b)(3) of the last sentence making clear

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that the court may take into account the convenience of parties and witnesses and the interests of justice in regulating the time and order of taking depositions; addition to subdivision (c) of a provision to allow the court to order who pays the cost of transcription; and in subdivision (e) reduction of the federal 30-day time period for the witness to sign the deposition in 10 days.

Subdivision (c) was also amended, effective January 1, 1980, to refer to the Rules of Evidence (see Rule 611), rather than Rule 43(b). Deviating again from the federal rule, subdivision (b)(4) was amended, effective January 1, 1980, to allow audio-visual depositions without a court order.

#### RULE 31 - EXPLANATORY NOTE

Judge Burdick MOVED to delete the second sentence of the proposed explanatory note to Rule 31, NDRCivP. Mr. Meschke seconded the motion. Motion CARRIED.

Mr. McKennett MOVED to adopt the explanatory note to Rule 31, NDRCivP, as amended. Judge Burdick seconded the motion. Motion CARRIED.

Rule 31 is identical to Rule 31, FRCivP.

#### RULE 32 - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 32, NDRCivP, as follows:

Line 1: Delete "The rule"

Lines 2 and 3: Delete;

Line 4: Delete "federal amendments";

Line 6: Delete "again."

Mr. Lamb seconded the motion. Motion CARRIED.

Judge Burdick MOVED to adopt the explanatory note to Rule 32, NDRCivP, as amended. Judge O'Keefe seconded the motion. Motion CARRIED.

Rule 32 is identical to Rule 32, FRCivP. Effective January 1, 1980, subdivision (c), on the effect of taking or using depositions, was abrogated to conform to federal amendments subsequent to

the adoption of the Rules of Evidence. As the Notes of the Advisory Committee on the 1975 amendments to the civil rules state:

"The concept of 'making a person one's own witness' appears to have had significance principally in two respects; impeachment and waiver

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of incompetency. Neither retains any vitality under the Rules of Evidence. The old prohibition against impeaching one's own witness is eliminated by Evidence Rule 607. The lack of recognition in the Rules of Evidence of state rules of incompetency in the Dead Man's area renders it unnecessary to consider aspects of waiver arising from calling the incompetent party-witness. Subdivision (c) is deleted because it appears to be no longer necessary in the light of the Rules of Evidence."

#### SUPERSEDED STATUTES

Mr. Lamb MOVED that the staff attorney review the table of superseded statutes and bring it up to date, and that superseded statutes be indexed into the proper current rule. Mr. Meschke seconded the motion. Motion CARRIED.

#### RULE 33, NDRCivP - EXPLANATORY NOTE

Mr. McKennett MOVED to adopt the explanatory note to Rule 33, NDRCivP, as proposed. Judge Burdick seconded the motion. Motion CARRIED.

Rule 33 is identical to Rule 33, FRCivP.

#### RULE 34, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 34, NDRCivP, by deleting everything after the first sentence, and to adopt the explanatory note as amended. Mr. Loder seconded the motion. Motion CARRIED.

RULE 34 is identical to Rule 34, FRCivP.

#### RULE 35, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to delete everything after the first sentence of the proposed explanatory note to Rule 35, NDRCivP, and to adopt the note as amended. Mr. Lamb seconded the motion. Motion CARRIED.

This rule is identical to Rule 35, FRCivP.

#### RULE 36, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 36, NDRCivP, by deleting everything after the first sentence, and to adopt the note as amended. Mr. McKennett seconded the motion. Motion CARRIED.

Rule 36 is identical to Rule 36, FRCivP.

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#### RULE 37, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the explanatory note to Rule 37, NDRCivP, by deleting everything after the word "States" in line 6, and to insert: "The rule encourages the imposition of sanctions in cases in which there has been an abuse of the discovery rules." and to adopt the note as amended. Mr. Loder seconded the motion. Motion CARRIED.

Rule 37 is identical to Rule 37, FRCivP, with two minor changes to conform to our system. In subdivision (e), reference is made to issuing a subpoena as provided in Rule 45, rather than under the United States Code; and in subdivision (f), State of North Dakota is substituted for United States. The rule encourages the imposition of sanctions in cases in which there has been an abuse of the discovery rules.

#### RECESS

The meeting recessed to 9:00 a.m., November 30, 1979.

#### CALL TO ORDER

The meeting was called to order at 9:00 a.m., November 30, 1979, by Justice Paul M. Sand, Chairman.

#### ATTENDANCE

##### Present

Hon. Eugene A. Burdick

Hon. Halvor L. Halvorson

Mr. LeRoy A. Loder

Mr. Richard A. McKennett



Mr. Herbert L. Meschke

Hon. Wm. W. Murray

RULE 38, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to adopt the explanatory note to Rule 38, NDRCivP, with style changes. Judge Murray seconded the motion. Motion CARRIED.

Rule 38 is derived from Rule 38, FRCivP, with several exceptions. The Constitution and statutes of North Dakota were added to those of the United States as sources of the right to a trial by jury. A new subdivision (c) was inserted, effective January 1, 1978, providing for a jury of 6 members unless a jury of 12 is specifically demanded. The old subdivisions (c) and (d) were then redesignated as (d) and (e). Also, in new subdivision (e), concerning waiver, the second sentence was added. The federal subdivision (e) on admiralty and maritime claims is not included in North Dakota.

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This rule does not change the right to a trial by jury. However, it does provide that the failure of a party to serve a timely demand for trial by jury is a waiver of that right.

Subdivision (c) asserts that if a jury is demanded it will be a jury of 6, unless a jury of 12 is specifically demanded within the time required by subdivision (b). This is in accord with Section 28-14-03.1, NDCC.

RULE 39, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to adopt the proposed explanatory note to Rule 39, NDRCivP. Mr. Loder seconded the motion. Motion CARRIED.

Rule 39 is identical to Rule 39, FRCivP, except for the inclusion of a reference to the Constitution and statutes of North Dakota in addition to those of the United States in subdivision (a) and the deletion from subdivision (c) of mention of certain actions against the United States.

RULE 40, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the explanatory note to Rule 40, NDRCivP, by adding the following sentence after line 44: "However, other "local rules" adopted pursuant to Rule 83 must not be inconsistent with District Court rules adopted by the Supreme Court." Judge Murray seconded the motion. Motion CARRIED.

Rule 40 is identical to Rule 40, FRCivP, with the exception of referring to statutes of North Dakota rather than of the United States. It allows district courts to make their own rules for

placing cases on the calendar. This should be accomplished by following the procedures in the North Dakota Rule on Local Court Procedural Rules and Administrative Rules (ND Local Ct R). Rule 40 also requires that precedence be given to cases so entitled by statute.

An official note to this rule provides that the former rule remains in effect in any district in which appropriate rules have not been promulgated. Former Rule 40 states:

**"RULE 40. ASSIGNMENT OF CASES FOR TRIAL**

"(a) Issues--When, Where and How Tried. The judges of the district court shall provide by order or by rule for the placing of actions before the trial calendar in such manner as the court deems expedient. Precedence shall be given to actions entitled thereto.

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"(b) Note of Issue--Service and Filing. No notice of trial need be served, but a party desiring to place an action upon the calendar for trial, at any time after issue is joined therein and at least 20 days before a court term, shall prepare a note of issue containing the title of the action, stating that issue has been joined and whether trial by jury has been demanded, and setting forth the names and addresses of respective counsel, and shall serve the same on opposing counsel and file the same, with proof of service, with the clerk who shall thereupon enter the action upon the calendar as directed by the court.

"(c) Either Party Proceeds. Either party, when the case is reached upon the calendar and in the absence of the adverse party, unless the court for good cause otherwise directs, may proceed with his case, and take dismissal of the complaint, or a verdict, or judgment as the case may require."

See also Rule VI, Rules of Court for the District Court, concerning calendars, particularly as to the duties of the clerk. At first glance, a conflict with Rule 40 appears, but an official note to Rule VI indicates that "local" rules promulgated under authority of Rule 40 would prevail over Rule VI. However, other "local rules" adopted pursuant to Rule 83 must not be inconsistent with District Court rules adopted by the Supreme Court.

Mr. Meschke MOVED to defer approval of the explanatory notes to Rules 40 and 83, NDRCivP, and that they be placed on the agenda for further consideration at the next meeting. It is also suggested that the staff attorney gather materials for study of the problem of local rules. Mr. McKennett seconded the motion. Motion CARRIED.

**RULE 41, NDRCivP - EXPLANATORY NOTE**

Judge Burdick MOVED to amend the proposed explanatory note to Rule 41, NDRCivP, by deleting the second and third sentences. Mr. McKennett seconded the motion. Motion CARRIED.

Judge Burdick MOVED to adopt the note as amended. Mr. Loder seconded the motion. Motion CARRIED.

Rule 41 is identical to Rule 41, FRCivP, except for minor changes to conform to state practice and to prohibit dismissal by stipulation under subdivision (a) when a provisional remedy has been allowed.

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#### RULE 42, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to adopt the proposed explanatory note to Rule 42, NDRCivP. Judge Burdick seconded the motion. Motion CARRIED.

Rule 42 is identical to Rule 42, FRCivP, except for the deletion from subdivision (b) of a provision allowing the court to order separate trials if conducive to "expedition and economy" and a clause preserving the right to trial by jury, and the addition of authority for the court to direct a final judgment.

#### RULE 43, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to defer action on the explanatory note to Rule 43, NDRCivP, temporarily. Judge Murray seconded the motion. Motion CARRIED.

#### RULE 44, NDRCivP - EXPLANATORY NOTE

Mr. McKennett MOVED to amend the proposed explanatory note to Rule 44, NDRCivP, by deleting the last sentence. Judge Burdick seconded the motion. Motion CARRIED.

Judge Burdick MOVED to adopt the note to Rule 44, NDRCivP, as amended. Mr. McKennett seconded the motion. Motion CARRIED.

Rule 44 is identical to Rule 44, FRCivP, except for the addition of a provision to subdivision (a) allowing a public officer having a seal to make a certificate with respect to records in his own custody.

#### RULE 44.1, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 44.1, NDRCivP, by deleting lines 2 through 4, and adding "except for the reference to the North Dakota Rules of Evidence.", and to adopt the note as amended. Judge Halvorson seconded the motion. Motion CARRIED.

Rule 44.1 is identical to Rule 44.1, FRCivP, except for the reference to the North Dakota Rules of Evidence.

### RECESS

The meeting recessed to 1:00 p.m., November 30, 1979.

### CALL TO ORDER

The meeting was called to order at 1:00 p.m., November 30, 1979, by Judge Burdick in the temporary absence of Justice Sand.

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### ROLL CALL

#### Present

Hon. Eugene A. Burdick

Hon. Halvor L. Halvorson

Mr. Richard A. McKennett

Mr. Herbert L. Meschke

Hon. Wm. S. Murray

### RULE 45, NDRCivP - EXPLANATORY NOTE

Mr. McKennett MOVED to amend the proposed explanatory note to Rule 45, NDRCivP, by deleting the last sentence. Judge Halvorson seconded the motion. Motion CARRIED.

Mr. McKennett MOVED to adopt the note to Rule 45, as amended. Judge Halvorson seconded the motion. Motion CARRIED.

Rule 45 is derived from Rule 45, FRCivP. There are several deviations from the federal rule, including changes to conform to the justice system of North Dakota. The main differences are the addition of provisions in subdivisions (a) and (d) for the issuance of a subpoena by the attorney for the party and more detailed provisions on service in subdivision (c), including service by mail, telegraph, or telephone.

### RULE 46, NDRCivP - EXPLANATORY NOTE

Mr. McKennett MOVED to amend the proposed explanatory note to Rule 46, NDRCivP, by deleting the second sentence, and to adopt the note as amended. Judge Halvorson seconded the motion. Motion CARRIED.

Rule 46 is identical to Rule 46, FRCivP.

#### RULE 48, NDRCivP - EXPLANATORY NOTE

Judge Halvorson MOVED to amend the proposed explanatory note to Rule 48, NDRCivP, by deleting the word "historical" in line 3. Judge Murray seconded the motion. Motion CARRIED.

Judge Halvorson MOVED to adopt the note to Rule 48, as amended. Mr. McKennett seconded the motion. Motion CARRIED.

Subdivision (a) is identical to Rule 48, FRCivP.

Subdivision (b) was added, effective January 1, 1978, to provide for a jury of 6 members unless a jury of 12 is properly demanded.

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#### RULE 49, NDRCivP - EXPLANATORY NOTE

Mr. McKennett MOVED to amend the proposed explanatory note to Rule 49, NDRCivP, by deleting "North Dakota" in line 3, and to adopt the note as amended. Judge Murray seconded the motion. Motion CARRIED.

Rule 49 is identical to Rule 49, FRCivP, except for the deletion from subdivision (b) of reference to Rule 58, as Rule 58 differs substantially from Federal Rule 58.

#### RULE 50, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED that the staff attorney be asked to draft a more appropriate explanatory note dealing only with the differences between the state rule and the federal rule. Mr. McKennett seconded the motion. Motion CARRIED.

#### RULE 51, NDRCivP - EXPLANATORY NOTE

Judge Murray MOVED that the proposed explanatory note to Rule 51, NDRCivP, be amended as follows:

Line 2: Add the word "North";

Line 6: After the word "when" insert "and upon what";

Line 7: Delete "on what";

Lines 14-20: Delete, and insert "In requiring the court to inform counsel of its action upon requested instructions, counsel are informed as to which requests are granted or denied, thus enabling counsel to argue the facts in light of the court's instruction upon the law."

and that the note be adopted as amended. Mr. Meschke seconded the motion. Motion CARRIED.

Rule 51 is one of the few rules not derived from the federal rule. Instead, it is taken substantially from North Dakota statutes in effect at the time of the adoption of these rules in 1957.

Subdivision (a) was taken from Section 28-1411, NDRC 1943. It provides when and upon what the jury is to be instructed, and the methods of doing so.

The requesting of instructions is governed by subdivision (b), originally taken from Section 28-1412, 1943 Code, but amended in 1971 to partially comply with the federal rule and to delete the provision requiring the judge to write "given" or "refused" in the margin of each requested instruction.

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In requesting the court to inform counsel of its action upon requested instructions, counsel are informed as to which requests are granted or denied, thus enabling counsel to argue the facts in light of the court's instruction upon the law.

Subdivision (c) specifies when exceptions to instructions must be noted. This is taken from Sections 28-1413 and 28-1414 of the 1943 Code.

#### RULE 52, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to amend the proposed explanatory note to Rule 52, NDRCivP, by deleting the second sentence. Judge Murray seconded the motion. Motion CARRIED.

Mr. McKennett MOVED to adopt the note to Rule 52, as amended. Mr. Meschke seconded the motion. Motion CARRIED.

Rule 52, is derived from Rule 52, FRCivP, except for the deletion from subdivision (b) of references to Rule 58 as Rule 58 differs substantially from Federal Rule 58, and minor changes to conform to our judicial system.

#### RULE 53, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to adopt the proposed explanatory note to Rule 53, NDRCivP. Judge Murray seconded the motion. Motion CARRIED.

Rule 53 is identical to Rule 53, FRCivP, with the exception of several additions to and a deletion from subdivision (a). Allowance is made for payment of the master out of the county treasury in certain cases. Paragraphs (2), (3) and (4) were taken from Sections 28-1704, 28-1705, and 28-1707, NDRC 1943, and provide for objections to the appointment and swearing of the master. The federal provision for appointment of standing masters has been deleted and replaced by the first sentence allowing the court to appoint a special master.

#### RULE 54, NDRCivP - EXPLANATORY NOTE

Mr. McKennett MOVED to amend the proposed explanatory note to Rule 54, NDRCivP, by deleting the word "when" in line 6, and inserting "except for the death of a party"; and to adopt the note as amended. Judge Murray seconded the motion. Motion CARRIED.

Rule 54 is derived from Rule 54, FRCivP, with more detailed provisions concerning the taxation of costs [subdivision (d)], the addition of provisions for retaxation of costs [subdivision (f)], taken from Section 28-2615, NDRC 1943, and except for the death of a party after verdict but before judgment [subdivision (d)] taken from Section 28-2005, NDRC 1943.

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#### RULE 55, NDRCivP - EXPLANATORY NOTE

Judge Murray MOVED to amend the proposed explanatory note to Rule 55, NDRCivP, as follows:

Line 32: insert "ordered or" before "entered"; delete remainder of line; Add "If a default judgment is entered against a person in military service with out compliance with the requirement of Section 520, the judgment may be vacated."

and that the note be adopted, as amended. Mr. Meschke seconded the motion. Motion CARRIED.

Rule 55 is derived from Rule 55, FRCivP, with several changes.

The federal rule contains a two-step process: entry of default and then entry of judgment. The first step is not specifically required in this rule. Subdivision (a) is a combination of the first two subdivisions of the federal rule, but specifies that the clerk cannot enter judgment by default without being directed to do so by the court, unlike the federal rule where the clerk can enter judgment in certain cases without court direction. Paragraph (2) authorizes the court to require proof before directing the default judgment. The time period for notification to a party who has made an appearance has been lengthened to 8 days, from 3 in the federal rule. Paragraph (4), derived partly from Section 28-0906, NDRC 1943, authorizes the court to require a bond before judgment is entered when service of the summons has been made by publication or delivery out of the state, with certain exceptions.

Subdivision (b) is identical to subdivision (d) of the federal rule.

Subdivision (c) is identical to subdivision (e) of the federal rule, with the substitution of the state for United States.

The federal provision [subdivision (c)] for setting aside default was not adopted. See Rule 60(b) regarding relief from a judgment or order.

The operation of this rule is also directly affected by the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, §§ 501 et seq. Section 520 imposes specific requirement that must be fulfilled before a default judgment can be ordered or entered. If a default judgment is entered against a person in military service without compliance with the requirements of § 520 the judgment may be vacated.

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Justice Sand resumed the chair.

#### RULE 43, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to substitute the following language for lines 15 through 19 of the proposed explanatory note to Rule 48, NDRCivP:

"Although abrogated in the federal rule after adoption of the Rules of Evidence, subdivision (b) on examination and cross-examination of unwilling, hostile, and adverse witnesses has been retained, with the addition of the phrase, 'a witness identified with an adverse party,' effective January 1, 1980. This phrase is borrowed from Rule 611 of the Rules of Evidence which deals generally with the mode and order of interrogation and presentation of witnesses. The added phrase is designed to enlarge the category of adverse witnesses callable. Retention of subdivision (b) is designed to assure the retention of the rights to call and interrogate an adverse witness by leading questions and of the adverse party to cross-examine that witness upon the subject matter of his examination in chief, which Rule 611 does not clearly do as a matter of right."

Judge Burdick seconded the motion. Motion CARRIED.

Judge Burdick MOVED to adopt the explanatory note, as amended. Judge Halvorson seconded the motion. Motion CARRIED.

Rule 43 is derived from Rule 43, FRCivP.

Rule 43(a) was amended in 1976 to reflect the adoption and promulgation of the North Dakota Rules of Evidence. Those rules generally control the admissibility of evidence in all civil trials, unless otherwise provided by statute or rule. It should be emphasized that matters of competency and privileges of witnesses, although not specifically referred to in the rule, are also governed by



the North Dakota Rules of Evidence unless otherwise provided by statute or other rules adopted by the North Dakota Supreme Court.

In subdivision (a), the provision for taking testimony in open court was retained, but those provisions dealing with admissibility of evidence and competency of witnesses were deleted.

Although abrogated in the federal rule after adoption of the Rules of Evidence, subdivision (b) on examination and cross-examination of unwilling, hostile, and adverse witnesses has been retained, with

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the addition of the phrase, "a witness identified with an adverse party," effective January 1, 1980. This phrase is borrowed from Rule 611 of the Rules of Evidence which deals generally with the mode and order of interrogation and presentation of witnesses. The added phrase is designed to enlarge the category of adverse witnesses/callable. Retention of subdivision (b) is designed to assure the retention of the rights to call and interrogate an adverse witness by leading questions and of the adverse party to cross-examine that witness upon the subject matter of his examination in chief, which Rule 611 does not clearly do as a matter of right.

Subdivision (c) was abrogated, effective January 1, 1980, to comport with the same action in the federal rules. It concerned making an offer of proof and making a record of excluded evidence, both matters now covered in Rule 103, North Dakota Rules of Evidence.

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#### RULE 56, NDRCivP - EXPLANATORY NOTE

Mr. Meschke MOVED to delete the last two sentences of the proposed explanatory note to Rule 56, NDRCivP. Judge Burdick seconded the motion. Motion CARRIED.

Mr. Meschke MOVED to adopt the note to Rule 56, as amended. Judge Burdick seconded the motion. Motion CARRIED.

Rule 56 is identical to Rule 56, FRCivP, with the clarifying addition in the last sentence of subdivision (c) that summary judgment, when appropriate, may be rendered against the moving party.

#### RULE 57, NDRCivP

Judge Burdick MOVED to reconsider the adoption of Rule 47, NDRCivP, for the purpose of changing the citation to North Dakota Century Code rather than North Dakota Revised Code of 1943. Judge Murray seconded the motion. Motion CARRIED.

Judge Burdick MOVED to adopt Rule 57, NDRCivP, as amended. Judge Murray seconded the motion. Motion CARRIED.

The procedure for obtaining a declaratory judgment pursuant to Chapter 32-23, NDCC, shall be in accordance with these rules, and the right to trial by jury may be demanded under circumstances and in the manner provided in Rule 38 and 39. The existence of another adequate remedy does not preclude a judgment to declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

#### RULE 57, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to adopt the proposed explanatory note to Rule 57, NDRCivP. Judge Murray seconded the motion. Motion CARRIED.

Rule 57 is identical to Rule 57, FRCivP, except for reference to the appropriate provisions of the North Dakota Century Code instead of the United States Code.

#### RULE 58, NDRCivP - EXPLANATORY NOTE

Judge Murray MOVED to amend the proposed explanatory note to Rule 58, NDRCivP, to delete the second sentence and insert: "The rule has not changed North Dakota practice but differs substantially from the federal rule." and to adopt the note as amended. Judge Halvorson seconded the motion. Motion CARRIED.

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This rule is derived from Section 28-2001, NDRC 1943. The rule has not changed North Dakota practice but differs substantially from the federal rule.

#### RULE 59, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED that the note to Rule 59, NDRCivP, be drafted, with emphasis on the difference between the state rule and the federal rule. Mr. Meschke seconded the motion. Motion CARRIED.

#### RULE 60, NDRCivP

Judge Burdick MOVED to reconsider Rule 60, NDRCivP, and that it be amended to change the internal reference to read "Rule 4(e)(7)" and to adopt Rule 60, as amended. Mr. Meschke seconded the motion. Motion CARRIED.

RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversights or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court, and thereafter while the appeal is pending may be so corrected with leave of the Supreme Court.

(b) Mistakes--Inadvertence--Excusable Neglect--Newly Discovered Evidence--Fraud--Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment or order in any action or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than 1 year after the judgment or order was entered in the action or proceeding. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Leave to make the

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motion need not be obtained from any appellate court except during such time as an appeal from the judgment is actually pending before such court. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Rule 4(e)(7) of these rules, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

#### RULE 60, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to adopt the proposed explanatory note to Rule 6, NDRCivP. Mr. Meschke seconded the motion. Motion CARRIED.

Rule 60 is identical to Rule 6, FRCivP, except for minor changes to conform to the court system of North Dakota and addition of a provision to subdivision (b) regarding obtaining leave from an appellate court to make a motion for relief.

#### RULE 61, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to adopt the proposed explanatory note to Rule 61, NDRCivP. Mr. Meschke seconded the motion. Motion CARRIED.

Rule 61 is identical to Rule 61, FRCivP.

#### RULE 62, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to adopt the proposed explanatory note to Rule 62, NDRCivP. Mr. Meschke seconded the motion. Motion CARRIED.

Rule 62 is derived from Rule 62, FRCivP, with several added provisions, and changes to subdivisions (a), (b), (c), (d), and (e) to conform to the court system of North Dakota. Federal subdivision (f), concerning a stay according to state law, was deleted. In its place, subdivisions (f), (g), (h), (i), (j), and (k), derived from Sections 28-2712 through 28-2717, NDRC 1943, were inserted. These contain mostly provisions requiring an undertaking to stay certain proceedings. Subdivisions (l) and (m) are identical to subdivisions (g) and (h) in the federal rule. Subdivision (n), taken from Section 28-2807, NDRC 1943, was added setting a time limit on how long an order may be made for.

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#### RULE 63, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to adopt the proposed explanatory note to Rule 63, NDRCivP. Mr. Meschke seconded the motion. Motion CARRIED.

Rule 63 is identical to Rule 63, FRCivP.

#### RULE 64, NDRCivP - EXPLANATORY NOTE

Judge Burdick MOVED to amend the proposed explanatory note to Rule 64, NDRCivP, on line 29, delete "such person's" and insert "the serviceman's"; and to adopt the note, as amended. Judge Halvorson seconded the motion. Motion CARRIED.

Rule 64 is derived from Rule 64, FRCivP.

The principal departure from the federal rule is the authorization for the use of the remedies only for the seizure of property, not persons as in Rule 64, FRCivP. Qualifications to the federal rule do not apply to the North Dakota court system and were not included. Also, the listing of remedies available has been omitted. These are found in the North Dakota Century Code.

The remedies available in this state include attachment (Chapter 32-08.1, NDCC), replevin (Chapter 32-09, NDCC), and others. In recent years, many state laws authorizing prejudgment remedies but not providing for prior notice and hearing have been struck down. See, Sniadach v.

Family Finance Corporation of Bay View, 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d 406 (1974); Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 686 (1977); and Guzeman v. Western State Bank, 516 F.2d 125 (8th Cir. 1975). The latter case ruled that the North Dakota attachment statute (Chapter 32-08, NDCC) violated due process. That statute was subsequently repealed and replaced by Chapter 32-08.1, NDCC.

It is also possible some federal laws may take precedence in this area. For example, Sections 203 and 204 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C. Appendix, §§ 523 and 524, provide under certain circumstances for the vacation or stay of any

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attachment or garnishment directed against the serviceman's property, money, or debts in the hands of another.

#### ADJOURNMENT

Judge Murray MOVED to adjourn to January 17, 1980, at 1:00 p.m. Judge Burdick seconded the motion. Motion CARRIED.