

MINUTES OF MEETING

Joint Procedure Committee

October 30-31, 1980

CALL TO ORDER

The meeting was called to order at 1:00 p.m., October 30, 1980, by Justice Paul M. Sand, Chairman.

ATTENDANCE

Present

Hon. William S. Murray
Hon. Kirk Smith
Mr. William A. Hill
Mr. LeRoy A. Loder
Mr. David L. Peterson

Absent

Hon. Eugene A. Burdick
Hon. Gerald G. Glaser
Hon. Halvor L. Halvorson
Hon. Larry Hatch
Hon. Robert C. Heinley
Hon. James H. O'Keefe
Hon. Robert Vogel
Mr. Leonard H. Bucklin
Mr. Ward M. Kirby
Mr. Larry Kraft
Mr. James L. Lamb
Mr. Richard A. McKennett
Mr. Herbert L. Meschke
Mr. Russell G. Nerison

APPROVAL OF MINUTES

Mr. Peterson MOVED that the minutes be approved as submitted. Mr. Loder seconded the motion. Motion CARRIED.

RULE 10.1, SUPPLEMENTAL COURT RULES

Mr. Hill MOVED the adoption of Rule 10.1, as submitted. Mr. Peterson seconded the motion. Motion CARRIED.

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PLEADINGS

(a) Legibility and Numbering. All pleadings and other instruments must be typewritten, printed, or reproduced and easily readable. Each sheet must be separately numbered.

(b) Spacing and Names. Writing must appear on one side of the sheet only and must be double-spaced, except for quoted material. Names must be typed or printed beneath all signatures.

(c) Binding. All pleadings and other instruments in an action or proceeding must be filed by the clerk flat and unfolded and each set of papers firmly fastened together.

(d) Non-conforming Instruments - Sanctions. If a party fails to comply with this rule, the court on motion of a party or its own motion, may order the pleading or other instrument to be reformed. If the order is not obeyed, the court may order the instrument to be regarded as stricken and its service to be of no effect.

(e) Copy of Lost Papers. If any original paper is lost or withheld by any person, the court may authorize a copy thereof to be filed and used instead of the original.

(f) File Numbers. The clerk, at the time of the filing of a case and at the time of the filing of any responsive pleading, shall assign a file number to the case and immediately notify, by mail, the attorney of record of the file number assigned to the proceedings. Thereafter, all instruments and pleadings to be filed must bear the assigned file number on the front or title page in the upper right-hand portion of the instrument to be filed. Instruments and pleadings that do not conform to this rule will not be filed by the clerk until they are in compliance with this rule.

(g) Proof of Service Attached. Proof of service must be securely attached to the original papers when they are presented to the clerk for filing.

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RULE 19.1, SUPPLEMENTAL COURT RULES

Judge Smith MOVED the adoption of Rule 19.1, as submitted. Mr. Loder seconded the motion. Motion CARRIED.

JUDGMENTS, ORDERS AND DECREES

(a) Presentation of Drafts. Whenever the court rules upon a motion other than in the course of trial or makes a final determination in an action, the attorney for the prevailing party shall prepare and present to the court the order, order for judgment, or decree to be entered, unless the court directs otherwise.

(b) Satisfaction of Judgment for Money When Judgment Creditor Cannot be Found.

(1) Motion to Satisfy. A judgment for money, if no execution is outstanding and the time for appeal has expired, may be satisfied by the court upon written motion of the debtor supported by affidavit state:

a. the amount, stating the judgment balance, accrued interest, and costs;

b. that after the exercise of due diligence the judgment creditor and his attorney cannot be found or that the judgment creditor or his attorney has failed or refused to deliver a satisfaction of judgment upon being tendered the amount due; and

C. that notice of the motion has been sent by mail to the judgment creditor and his attorney at their respective last known addresses.

(2) order of Satisfaction. Upon granting the motion, the court shall enter an order directing the clerk to receive the amount of the judgment with accrued interest and costs for the judgment creditor. After payment, the court shall enter an order satisfying the judgment and showing the amount deposited with the clerk.

(3) Decrees. For purposes of this rule, the word judgment includes a decree for payment of money upon which execution could issue.

RULE 24.1, SUPPLEMENTAL COURT RULES

Mr. Hill MOVED the adoption of Rule 24.1, as submitted. Judge Smith seconded the motion. Motion CARRIED.

BONDS IN NON-CRIMINAL MATTERS

(a) Personal sureties.

(1) Schedules. Bonds having personal sureties and requiring approval by the court will be approved by the court only if the sureties have executed schedules of property in a form approved by the court, sufficient to justify the bond.

(2) Filing of Schedules. If the persons offered as sureties are accepted by the court, the schedules of property must be filed with the bond.

(3) Notice. If the persons offered as sureties are accepted by the court, copies of the schedules of property must be served upon all opposing parties in the manner prescribed by NDRCivP within 48 hours after the acceptance of the sureties.

(b) Rejustification of Sureties. Any person assured by a bond executed in court may by motion request the sureties to rejustify. The motion must be accompanied by an affidavit showing grounds for believing the sureties to be insufficient, the manner of inquiry, and the facts ascertained. If the court finds that the affiant's belief is well founded, it may order either that the sureties justify within a time specified or furnish a new bond having sufficient sureties.

(c) Official Bonds. Official bonds to be approved by the court must be submitted to and approved by the judge presiding in the case, unless approval by more than one judge is required by law.

RULE 30.1, SUPPLEMENTAL COURT RULES

Mr. Peterson MOVED to retain paragraph (h) and to amend lines 12 and 13 by deleting the words "or any opposition to the motion or interim order," of proposed Rule 30.1. Mr. Loder seconded the motion. Motion CARRIED.

Mr. Loder MOVED to adopt the financial statement form as found in Rule IV of the Fourth District rules to include a list of creditors, showing unpaid balance and monthly payments. Mr. Peterson seconded the motion. Motion CARRIED.

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Mr. Loder MOVED to adopt Rule 30.1, as amended. Judge Murray seconded the motion. Motion CARRIED.

DOMESTIC RELATIONS

(a) Interim Support Schedule - Ex Parte Order. Upon motion, an ex parte interim order of support may be issued by any district judge within a judicial district. The interim order, in addition to ordering support payments, may direct a party to continue to pay any monthly payments for rent, house payments, medical and hospitalization insurance premiums, telephone service charge, utility bills (gas, sewer, water, electricity), as they become due. In the event support is ordered, a current mailing address must be listed for both parties.

(b) Financial Statement to be Filed. A motion for temporary support, custody, and attorney's fees must have attached thereto an itemized financial statement prepared as shown in Appendix

(c) Restraining and Eviction Order. A restraining and eviction order will not be issued ex parte unless the movant appears personally and executes an affidavit setting forth specific facts relied on by the party sufficient to justify the issuance of the order.

(d) Custody - Visitation. Temporary custody of minor children may be granted, in which case the order must provide for reasonable visitation rights of the spouse, unless the affidavit accompanying the motion sets forth sufficient facts to establish that visitation should be restricted to certain time and places or prohibited.

(e) Payments to Clerk. The interim order must provide:

(1) All support payments, attorney's fees, and costs, must be paid to and through the clerk of the district court, either by cash, certified check, or money order, made payable to the clerk of court;

(2) Personal checks may not be accepted.

(f) Attorney's Fees and Costs. As a general rule, partial payments of attorney's fees and costs in the sum of \$150 will be ordered if the financial statement sets forth facts establishing that the party has insufficient personal income or funds with which to pay attorney's fees and costs.

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(g) Right to Hearing - Form of Interim Order. The interim order must provide specifically:

(1) That the party to whom the order is directed, upon written motion, may have a hearing upon the necessity for the issuance of the order or the amount to be paid; and

(2) That unless the motion is served or filed in the office of the clerk of the district court within 5 days after service of the interim order, the order becomes final and is nonappealable, pending a final determination of the issues raised by the pleadings or until further order of the court in the event of a material change of circumstances.

(h) Financial Statement. If a motion objecting to the interim order is filed, there also must be filed at least one day before the hearing on the motion a financial statement prepared as shown in Appendix _____.

RULE 31.1, SUPPLEMENTAL COURT RULES

Judge Smith MOVED to amend Rule 31.1 to read as follows:

In an appeal to the district court from a decision of an administrative agency, board, commission, or office, after receipt of the record the court shall fix a time for filing briefs. The court in its discretion may permit or require oral argument. A party desiring oral argument may so indicate on or before the time fixed for filing of the party's brief.

Motion LOST for lack of a second.

Mr. Loder MOVED to amend Rule 31.1 in line 5, after the word "permit" add "or require." Judge Smith seconded the motion. Motion CARRIED.

Mr. Loder MOVED to adopt Rule 31.1 as amended. Mr. Hill seconded the motion. Motion CARRIED.

ADMINISTRATIVE APPEALS

In an appeal in which the decision of the court will be based exclusively on a record made before an administrative agency, board, commission, or officer, after receipt of the record, the court shall fix a time for filing briefs. The court, in its discretion, may permit or require oral argument. A party desiring oral argument may so indicate on or before the time fixed for filing of that party's brief.

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_____, being duly sworn, says that affiant is the
_____ (Plaintiff or Defendant) herein, and has read this financial
statement and knows the contents thereof and that the same is true.

1. My monthly gross income from all sources is \$_____

2. My monthly take-home pay therefrom is \$_____

3. I have cash on hand \$_____

4. I have on deposit in banks \$_____

5. I have stocks and bonds in the amount of \$_____

6. Other assets and approximate value are (list) \$_____

7. The debts of myself and my spouse are:

CREDITORS \$_____

UNPAID

BALANCE \$_____

MONTHLY

PAYMENTS \$ _____

(Attach additional schedules as needed)

TOTAL \$ _____

8. My necessary monthly expenses to support myself (and child or children) are as follows:

Rent or House Payment \$ _____

Water \$ _____

Telephone \$ _____

Food \$ _____

Clothing \$ _____

Laundry \$ _____

Life Insurance \$ _____

Fire Insurance \$ _____

Transportation \$ _____

Baby Sitter \$ _____

Drugs \$ _____

Medical \$ _____

Other (list) \$ _____

(Attach additional schedules as needed)

TOTAL \$ _____

Subscribed and sworn to before me this _____ day of _____, 19__

Notary Public

My commission expires:

RULE 36.1, SUPPLEMENTAL COURT RULES

Judge Smith MOVED to adopt Rule 36.1, as proposed. Mr. Hill seconded the motion. Motion CARRIED.

MASTERS

(a) Closing of Proofs Before Master.

(1) Time Fixed by Court. Upon reference to a master to take testimony, the court upon the motion of any party shall fix a time within which each party shall close proofs. By stipulation of the parties or by order of the master upon good cause shown, the time so fixed may be extended for not more than ten days for either party. Further extensions may be granted upon order of court.

(2) Time Fixed by Master. If no time is fixed by the court for closing of proofs, the master upon motion of any party shall fix a time within which each party shall close proofs. Upon good cause shown, the master may extend the time so fixed. If a party fails to close proofs within the time fixed, the master may proceed as if proof had been closed.

(b) Fees.

(1) Stenographer's Affidavit. The master's certificate of stenographer's fees must be accompanied by an affidavit of the stenographer who transcribed the testimony stating the actual number of words per page in the transcript of testimony and the rate per folio actually charged for the reporting and the transcription.

(2) Taxing Fees. Master's and stenographer's fees may be taxed against a party who occasions any improper proceedings before the master not warranted by the interests of justice or by the rights of the parties.

(3) Disallowance. The court in its discretion may disallow master's fees in whole or in part in respect to any improper proceedings or failure to make a timely report occasioned by the fault of the master.

(d) Master's Rulings on Evidence.

(1) Ruling. The master shall rule upon all objections concerning the admissibility of evidence or propriety of questions put by the attorneys at the time the objections are made.

(2) Review of Exclusion. A master's ruling excluding offered evidence must be reviewed by the court upon the motion of the aggrieved party before the master files his report and after the closing of proofs. If the court sustains the ruling, the master shall proceed to make his report upon the evidence received by him. If the court finds the ruling erroneous, the master shall take further evidence as the court directs.

(3) Review of Admission. A master's ruling admitting evidence over objection must be reviewed by the court upon the motion of the aggrieved party after the closing of proofs but not later than the hearing by the court of exceptions to the report.

(4) Interlocutory Review. Upon motion made in good faith and a showing that good cause for immediate review exists, the court may order the master to certify the question of his ruling on evidence to the court for review before the closing of proofs.

(5) Motion to Dismiss. The master shall rule upon a motion to dismiss made at the close of the plaintiff's case.

(e) Accounting Before Masters. A party ordered to render an accounting shall file with the master at the time directed a statement of his account in the form of debits and credits.

(f) Abstracts of Evidence Received by Masters. For a hearing on exceptions to a master's report on a reference to take testimony and report conclusions, the court may order the excepting party to prepare and file an abstract of the testimony and may fix the time for the filing thereof. The excepting party shall serve upon the opposing attorney a copy of the abstract.

RULE 36.2, SUPPLEMENTAL COURT RULES

Mr. Hill MOVED to adopt Rule 36.2 as proposed. Judge Murray seconded the motion. Motion CARRIED.

SCOPE

Consistent with subject matter jurisdiction, these rules apply to all courts of this state.

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Mr. Hill MOVED that the staff attorney devise a key numbering system so that the supplemental rules can be arranged to fit with the civil rules counterparts. Judge Smith seconded the motion. Motion CARRIED.

RULE 26(f), NDRCivP

Mr. Peterson MOVED to amend proposed Rule 26(f), NDRCivP, as follows: Line 186 delete "commencement"; line 187 delete "of" and insert "has been filed" after the word "action"; and to adopt Rule 26(f) as amended. Mr. Loder seconded the motion. Motion CARRIED.

(f) Discovery Conference. At any time after an action has been filed the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery; and
- (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

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Subject to the right of a party who properly moves for a discovery conference to a prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

RULE 28, NDRCivP

Mr. Loder MOVED to adopt proposed Rule 28, NDRCivP. Judge Murray seconded the motion. Motion CARRIED.

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

(a) Within the United States. Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions must be taken before an officer

authorized to administer oaths by the laws of this state or of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. Depositions may also be taken before a person commissioned by the court or pursuant to a letter rogatory under subdivisions (b) and (c). The term officer as used in Rules 30, 31, and 32 includes a person appointed by the court or designated by the parties under Rule 29.

(b) In Foreign Countries. In a foreign country, depositions may be taken (i) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (ii) before a person commissioned by the court, and a person so commissioned has the power by virtue of his commission to administer any necessary oath and take testimony, or (iii) pursuant to a letter rogatory.

(c) Commission or Letter Rogatory. A commission or a letter rogatory must be issued on application and notice, and on terms that are just and appropriate. It is not a requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "The Appropriate Authority in [here name the state or country]." Evidence obtained in a foreign country pursuant to a commission or in response to a letter rogatory need not be excluded merely for the

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reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken under these rules.

(d) Disqualification for Interest. No deposition may be taken before a person who is a relative, employee, or attorney or counsel of any of the parties, or who is a relative or employee of that attorney or counsel, or who is financially interested in the action.

RULE 30, NDRCivP

Mr. Peterson MOVED the adoption of Rule 30, NDRCivP, with the suggested changes. Mr. Hill seconded the motion. Motion CARRIED.

DEPOSITIONS UPON ORAL EXAMINATION

(a) When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4(e), but leave is not required

- (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or
- (2) if special notice is given as provided in subdivision (b)(2).

The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) Notice of Examination - General Requirements -Special Notice - Non-stenographic Recording Production of Documents and Things - Deposition of Organization - Deposition by Telephone.

- (1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice must state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general

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description sufficient to identify him or the particular class or group to which he belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena must be attached to or included in the notice.

- (2) Leave of court is not required for the taking of a deposition by plaintiff if the notice

(A) states that the person to be examined is about to go out of this state and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and

(B) sets forth facts to support the statement.

The plaintiff's attorney shall sign the notice and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when he was served with notice under this subdivision (b)(2) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the depositions may not be used against him.

- (3) The court may for cause may shown enlarge or shorten the time for taking the deposition. The court may regulate at its discretion the time and order of taking depositions as shall best serve the convenience of the parties and witnesses and the interests of justice.

(4) The court upon motion may order that the testimony at a deposition be recorded by other than stenographic or audio-visual means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded

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testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense. Any objections under subdivision (c), any changes made by the witness, his signature identifying the depositions as his own or the statement of the officer that is required if the witness does not sign, as provided in subdivision (e), and the certification of the officer required by subdivision (f) shall be set forth in writing to accompany a deposition recorded by non-stenographic means.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 applies to the request.

(6) A party in his notice and in a subpoena may name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named must designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena must advise a non-party organization of its duty to make such a designation. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rules 28(a), 37(a)(1), 37(b)(1) and 45(d), a deposition taken by telephone is taken in the district and at the place where the deponent is to answer questions propounded to him.

(c) Examination and Cross-Examination - Record of Examination - Oath - Objections.
Examination and cross-examination of witnesses may proceed as permitted at the trial under the North Dakota Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and personally, or by someone acting under his direction and in his presence, must record the testimony of the witness. The testimony must be taken stenographically or recorded by audio-visual means or by any other means ordered in accordance

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with subdivision (b)(4). If requested by one of the parties, the testimony must be transcribed. The court may order the cost of transcription paid by one or some of, or apportioned among, the parties.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, must be noted by the officer upon the deposition. Evidence objected to must be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and he shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it must be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(e) Submission to Witness - Changes - Signing. When the testimony is fully transcribed the deposition must be submitted to the witness for examination and must be read to or by him, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make must be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition must then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 10 days after its submission to him, the officer shall sign it and state on the

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record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 3(d)(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) Certification and Filing by Officer - Exhibits - Copies - Notice of Filing.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the

court, he shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

Documents and things produced for inspection during the examination of the witness, upon the request of a party, shall be marked for identification and annexed to the deposition, and may be inspected and copied by any party, but if the person producing the materials desires to retain them he may

(A) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or

(B) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

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(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) Failure to Attend or to Serve Subpoena - Expenses.

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay the other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of the failure does not attend and another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay the other party the reasonable expenses incurred by him and his attorney in attending, including reasonable attorney's fees.

RULE 32, NDRCivP

Judge Smith MOVED to adopt Rule 32, NDRCivP, as submitted. Mr. Hill seconded the motion. Motion CARRIED.

USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the North Dakota Rules of Evidence.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, superintendent or managing agent, or a person designated under Rule 30(b)(6)

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or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead; or

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; or

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(E) upon application and notice that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used.

(4) If only a part of a deposition is offered in evidence by a party, an adverse party may require him to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of this state or of any other state or of the United States and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the North Dakota Rules of Evidence.

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(b) objections to Admissibility. Subject to the provisions of Rule 28(b) and subdivision (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

(c) [Abrogated.]

(d) Effect of Errors and Irregularities in Depositions.

(1) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. An objections to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the depositions begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking Deposition.

(A) An objection to the competency of a witness or to the competency, relevancy, or materiality of testimony is not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) An objections to the form of written questions submitted under Rule 31 is waived unless served in writing upon the party propounding them within the time allowed for

serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. An error and irregularity in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 is waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after the defect is, or with due diligence might have been, ascertained.

RULE 33, NDRCivP

Mr. Peterson MOVED the adoption of Rule 33, NDRCivP, as submitted. Judge Smith seconded the motion. Motion CARRIED.

INTERROGATORIES TO PARTIES

(a) Availability - Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection must be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, but a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope - Use at Trial. Interrogatories may relate to any matters that can be inquired into under Rule 26(b), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) Option to Produce Business Records. If the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of those business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification must be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

RULE 34, NDRCIVP

Mr. Peterson MOVED the adoption of Rule 34, NDRCivP, as submitted. Mr. Hill seconded the motion. Motion CARRIED.

PRODUCTION OF DOCUMENTS AND THINGS

AND ENTRY UPON LAND FOR INSPECTION

AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request

(1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy any designated documents (including writings, drawings, graphs, charts, photographs,

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phono-records, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and

complaint upon that party. The request must set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, but a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection must be stated. If objection is made to part of an item or category, the part must be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

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(c) Persons not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

RULE 37, NDRCivP

Mr. Loder MOVED the adoption of Rule 37, NDRCivP, as submitted. Judge Murray seconded the motion. Motion CARRIED.

FAILURE TO MAKE DISCOVERY - SANCTIONS

(a) Motion for Order Compelling Discovery. A party upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate Court. An application for an order to a party may be made to the court in which the action is pending, or, on matters relating to a deposition, to the court in the district where the deposition is being taken. An application for an order to a deponent who is not a party must be made to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 and 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested, or fails to permit inspection as requested, the discovering party may move for an

order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) Evasive or Incomplete Answer. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

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(4) Award of Expenses of Motion If the motion is granted, the court, after opportunity for hearing, shall require the party or deponent whose conduct necessitated the motion or the party or attorney advising the conduct, or both of them, to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) Sanctions by Court in District where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the judicial district in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, superintendent, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure that are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated

facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order of the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances made an award of expenses unjust.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36 and the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that

(1) the request was held objectionable pursuant to Rule 36(a), or

(2) the admission sought was of no substantial importance, or

(3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or

(4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, superintendent, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails:

(1) to appear before the officer who is to take his deposition, after being served with a proper notice;

(2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories; or

(3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request,

the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B) and (C) of subdivision (b)(2). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) [Abrogated.]

(f) Expenses Against the State. Except to the extent permitted by statute, expenses and fees may not be awarded against the State of North Dakota under this rule.

(g) Failure to Participate in the Framing of a Discovery Plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court

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may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

RULE 45, NDRCivP

Mr. Peterson MOVED the adoption of Rule 45, NDRCivP, as submitted. Mr. Loder seconded the motion. Motion CARRIED.

SUBPOENA

(a) For Attendance of Witnesses - Form - Issuance

(1) Every subpoena must be issued by the clerk under the seal of the court, state the name of the court and the title of the action, and command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(2) A subpoena, or a subpoena for the production of documentary evidence, may also be issued by the attorney for a party to any action or special proceeding in the name of the court or referee in like manner and with the same effect as if issued by the clerk. The subpoena must be subscribed in the name of the attorney together with his office address and must identify the party for whom he appears.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (i) quash or modify the subpoena if it is unreasonable or oppressive or (ii) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service.

(1) A subpoena may be served by the sheriff, by his deputy, or by any other person who is not a

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party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by (i) reading the same to the person to whom it is directed; (ii) delivering a copy thereof to the witness personally; or (iii) leaving a copy thereof at the usual place of business of the witness. Such copy need not contain the name of any other witness.

(2) If either party to an action deposits with the sheriff traveling fees and fees for one day's attendance of any witness, a subpoena for that witness, and a written demand that such witness be served by mail, telegraph, or telephone the sheriff shall serve and make return of the subpoena by:

1. Registered or certified return receipt requested mail;

2. Telegram to the witness, setting forth the subpoena in full, and the sheriff shall demand from the telegraph company a service message showing the delivery or nondelivery of the telegram and the officer, upon receipt of such message, shall make his return accordingly. The service message, if it shows delivery, shall be prima facie evidence of the service; or

3. Reading the subpoena over the telephone to the person to be served and if the person upon whom service is made shall acknowledge his identity over the telephone to the officer making the service, the acknowledgment shall be prima facie evidence of service and the officer shall make his return accordingly.

No deposit of traveling fees or witness fees shall be required if the fees are to be paid by this state or any political subdivision thereof. If service is made pursuant to the provisions of this section, the sheriff, in lieu of mileage, per diem, and livery, shall receive the cost of postage, telegrams, or telephone calls. If the witness so served fails to appear, the sheriff shall return the deposit to the party who made the same.

(3) A witness personally served with a subpoena, except when the fees of the witness are

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to be paid by this state or any political subdivision thereof, may demand his traveling fees and per diem for one day's attendance at the time the subpoena is served upon him and if the fees are not paid the witness shall not be obliged to obey the subpoena. The fact of the demand and nonpayment shall be stated in the return. A witness served with a subpoena by mail, telephone, or telegraph, upon his appearance, may demand and shall receive from the sheriff his traveling fees and per diem for one day's attendance, except when fees of the witness are to be paid by this state or any political subdivision thereof. When the subpoena is issued on behalf of the state or any political subdivision thereof, fees and mileage need not be tendered.

(d) Subpoena for Taking Depositions - Place of Examination.

(1) Proof of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) constitutes a sufficient authorization for the issuance of subpoenas for the persons named or described therein. Proof of service may be made by filing with the clerk a copy of the notice together with a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, or tangible things which constitute or contain matters within the scope of the examination permitted by Rule 26(b), but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

The person to whom the subpoena is directed within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, may serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena is not entitled to inspect and copy the materials except pursuant to an order of the court from which the subpoena was issued. The party serving the subpoena, if objection had been made, may move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) At or after the time of service of a notice to take a deposition as provided in Rules 30(b) and 31(a) an attorney may also issue subpoenas as provided in paragraph (1).

(3) A resident of this state may be required by subpoena to attend an examination upon deposition only in the county wherein he resides or is employed or transacts his business in person, or at such other convenient place as is fixed by an order of court. A nonresident of this state may be required by subpoena to attend only in the county wherein he is served with the subpoena, or within 40 miles from the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial. Subpoenas for attendance at a hearing or trial may be issued by an attorney and, at the request of any party, must be issued by the clerk of the district court for the county in which the hearing or trial is held. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the state.

(f) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be considered a contempt of the court from which the subpoena issued.

RULE 27, NDRAppP

There being no objection, Rule 27, NDRAppP, and the proposed amendments to this rule, will be considered at a later time.

RULE 1101, NDREv

Mr. Loder MOVED the adoption of Rule 1101, NDREv, as amended, and the explanatory note, as amended. Judge Murray seconded the motion. Motion CARRIED.

APPLICABILITY OF RULES

(a) Courts and magistrates. These rules apply to all courts and magistrates of this State.

(b) Proceedings generally. These rules apply generally to all civil actions, special proceedings,

and criminal actions and to contempt proceedings except those in which the court may act summarily.

(c) Rules of privilege. The rules with respect to privileges apply at all stages of all actions, cases, and proceedings.

(d) Rules inapplicable. The rules, other than those with respect to privileges, do not apply in the following situations:

(1) Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.

(2) Grand jury. Proceedings before grand juries.

(3) Miscellaneous proceedings. Proceedings for extradition or rendition; preliminary examinations in criminal cases; sentencing, or granting or revoking probation or parole; issuance of warrants for arrest, criminal summonses, and search warrants; and proceedings with respect to release on bail or otherwise, detention hearings, a reasonable grounds determination by the juvenile court in a transfer hearing as to whether the child committed the delinquent act alleged, dispositional hearings in juvenile court, and proceedings conducted in accordance with Section 14-17-09, Chapter 27-05.1, and Chapter 28-32, NDCC.

NOTE

This rule is patterned after Rule 1101 of the Federal Rules of Evidence. It was modified in committee by deleting reference to proceedings which are unique to the federal courts, and by adding pretrial proceedings under the Uniform Parentage Act, § 14-17-09, NDCC; proceedings before family court counselors under Chapter 27-05.1, NDCC; detention hearings; juvenile court transfer hearing reasonable grounds determinations; and dispositional hearings in juvenile court to the list of miscellaneous proceedings exempted from coverage by subdivision (d)(3). Dispositional hearings in juvenile court are the counterpart to sentencing of adults and require the same evidentiary treatment. The reasonable grounds determination in a juvenile court transfer hearing is equivalent to a preliminary examination in a criminal case which has relaxed standards for admission of evidence.

ADJOURNMENT

The meeting adjourned to 9:00 a.m., October 31, 1980.

CALL TO ORDER

The meeting was called to order at 9:15 a.m., October 31, 1980, by Justice Paul M. Sand, Chairman.

ATTENDANCE

Present

Hon. William S. Murray
Hon. Kirk Smith
Mr. William A. Hill
Mr. LeRoy A. Loder
Mr. David L. Peterson

RULE 4(e)(4) and (f), NDRCivP

Mr. Loder MOVED that the explanatory note to Rule 4 make mention of the specific days in Section 32-19-32 and Section 32-19-35, NDCC, in regard to mortgage foreclosure actions. See Rule 81 for other remedies affected. Judge Smith seconded the motion. Motion CARRIED.

RULE 12.2, NDRCrimP

Mr. Peterson MOVED that Section 12.1-04-05, NDCC, be superseded by Rule 12.2, NDRCrimP. Judge Smith seconded the motion. Motion CARRIED.

RULE 26, NDRCrimP

The staff attorney is instructed to bring the tables of statutes considered and superseded in line with the annotations found immediately following the rule.

RULE 42, NDRCrimP

Mr. Peterson MOVED that Section 33-10-03, NDCC, be removed from, the list of statutes superseded by Rule 42, NDRCrimP. Judge Murray seconded the motion. Motion CARRIED.

RULE 46, NDRCivP

Mr. Hill MOVED that Section 28-18-01, NDCC, be superseded in its entirety by Rule 46, NDRCivP. Mr. Peterson seconded the motion. Motion CARRIED.

MULTI-DISTRICT LITIGATION

Mr. Loder suggested that complex and multi-district litigation be considered at the next meeting.

ADJOURNMENT

Mr. Hill MOVED that the meeting be adjourned. Mr. Loder seconded the motion. Motion CARRIED.