IN THE SUPREME COURT
STATE OF NORTH DAKOTA

In Re Proposed Amendments to the North Dakota Rules of Civil Procedure, Rules of Appellate Procedure, Rules of Court.	)	No. 20010171

WRITTEN COMMENTS ON THE PROPOSED AMENDMENTS TO The North Dakota Rules of Civil Procedure

COMES NOW Commonwealth Law Publishers Limited, as publishers of Volume 1 of the North Dakota Rules Manual, by Jerome Radosh, its Editor-in-Chief, and in response to public notice, hereby tenders to the Clerk of the Court for filing, the following comments on the proposed amendments to the North Dakota Rules of Civil Procedure .

October 12, 2001

Jerome Radosh, J.D.

I. Adoption of Proposed Rule 37.1, "Change In Location Of A Hearing, Proceeding, Or Trial; Change Of Venue.

Recommendation No. 1.

We recommend that the Court refuse the Joint Procedure Committee's petition to supersede the North Dakota statutory scheme for venue and change of venue to a court procedural rule.

Comment.

(a) Venue and change of venue is a prerogative of the legislature.

The venue of civil actions is a matter for legislative regulation and does not abridge constitutional jurisdiction conferred on courts. The fixing of the venue of civil actions is necessarily a judgement of the body politic, expressed through enactment of a law by the legislature, or as in North Dakota, the Legislative Assembly. The only limitation on legislative fixing of venue occurs when the venue laws discriminate between litigants or violate fundamental rights, see *Burlington Northern R. Co. v Ford*, 504 US 648 (1992). For a general discussion of legislative prerogative for fixing venue and change of venue, see 92A CJS *Venue* § 6 et seq. (2000), and 77 Am Jur 2d *Venue* §§ 1 -10 (1997).

Most states (and the United States of America) reserve the fixing of venue and change of venue to the legislature. When such fixing is devolved to the courts, it is under legislative guidance and approval, either explicit or implicit. This is so because it is thought that the legislature is best attuned to evolving venue concepts and problems rather than courts who ordinarily must await a justiciable controversy to rule on a problem. The 1997 amendment to NDCC Chapter 28-04 (S.L. 1997, ch 274) reflects the Legislative Assembly of North Dakota's contemporary concern with evolving problems of venue in North Dakota.

Overall, legislators appear to have a better grip on the needs of their constituency than the courts do. Judges and lawyers tend to think that the body of laws and rules exists to serve themselves, when in reality, laws, rules and courts exist to serve the general public. Courts seem to make rules to suit their convenience while legislatures make laws to suit the convenience of the public at large. These are the reasons, back in the 1930's, that underpinned the refusal of Congress to grant unrestrained rulemaking authority to the Supreme Court of the United States, and likewise with most states.

(b) Ohio, Pennsylvania, Washington and West Virginia.

There is a statement in the Minutes of the Committee (January 27-28, 2000, page 13) that "The Supreme Court of Ohio, Washington, West Virginia, and Pennsylvania have all held venue is procedural and a proper subject of the court's rule making authority." We find some infirmities in that statement that the Court should note.

(i) Ohio.

Venue and change in venue in civil actions is governed by court rule in Ohio. Rule 3, Ohio Rules of Civil Procedure, specifies when venue is proper (3)(B), change of venue (3)(C), and other subsidiary issues concerning venue of action. However, there is a distinct difference between the rulemaking authority of the Supreme Court of Ohio and the unencumbered rule making authority of the Supreme Court of North Dakota.

Article IV, § 5(B) of the Constitution of Ohio, provides that the supreme court shall prescribe rules governing practice and procedure in all courts of the state. Proposed rules are to be filed with the clerk of each house of the general assembly during a regular session. The proposed rules become effective "unless prior to such day the general assembly adopts a concurrent resolution of disapproval." (Prospective rule amendments are also subject to this provision.) The Constitution of North Dakota contains no such restriction on the rulemaking authority of the Supreme Court of North Dakota.

Accordingly, adoption of a court rule in Ohio setting down venue and change in venue had the implicit approval of the Ohio General Assembly. The decision of the Supreme Court of Ohio, referred to in the minutes, only determined that fixing venue came under umbrella of the Court's rulemaking powers under Article IV, § 5(B), see *Morrison v Steiner*, 32 Ohio St. 2d 86, 290 NE2d 841 (1972).

(ii) Pennsylvania.

Courts in Pennsylvania have had authority to change venue in civil and criminal cases since 1875. Article 3, § 23 of the Constitution of the Commonwealth of Pennsylvania provides that "The power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law." We have not looked for a decision of the Supreme Court of Pennsylvania on that point since in view of the constitutional provision, any decision would be redundant.

(iii) Washington.

The statement in the Committee Minutes that the Supreme Court of Washington has held that venue is procedural appears to have originated from dicta appearing in two cases, *Sherwin v Arveson*, 96 Wash 2d 77, 833 P2d 1335 (1981) and repeated in *Easterday v South Columbia Basin Irr. Dist.*, 46 Wash App 746, 745 P2d 1522 (1987).

Venue and change of venue in Washington are governed by statute. The general venue statute is RCWA § 4.12.025. Change of venue is governed by RCWA § 4.12.030.

The holding in *Sherwin, supra*, while dictum, has been recognized as declaring that venue is a matter of procedure rather than substance and is subject to court rules that supersedes conflicting statutes. However, the Supreme Court of Washington has not yet relied on that dictum and made any substantive rules regarding venue and change of venue except for Rule 82.

Rule 82, Rules for Superior Court, the court of general jurisdiction in Washington, provides only (a) the venue for nonresidents, (b) waiver if the action is brought in the wrong county, (c) that no default may be entered if action is brought in the wrong county, and (d) payment of fees on transfer.

Otherwise, venue and change of venue in Washington is governed by solely by statute, see 1 Kunsch, *Washington Practice*, §§ 212 et seq., (1997).

(iv) West Virginia.

The Supreme Court of Appeals of West Virginia has made it clear that venue is the prerogative of the legislature.

Justice Cleckley, writing for the Court in *State Ex Rel. Riffle v Ranson*, 195, W Va 121, 464 SE2d 763 (1995), states: "To be clear, the West Virginia Legislature is the paramount authority for deciding and resolving policy issues pertaining to venue matters. Once the Legislature indicates it preference by the enactment of a statute, the Court's role is limited. Our duty is to interpret the statute, not to expand or enlarge upon it," at 768.

Ranson was followed by the Court in *State Ex Rel. Mitchem v Kirkpatrick*, 199 W Va 501, 485 SE2d 445 (1997). In a Per Curiam opinion, the Court stated in Syllabus Point 1 that "West Virginia Code 56-1-1(b) (1986) is the exclusive authority for a discretionary transfer or change of venue and any other transfer or change of venue from one county to another within West Virginia that is not explicitly permitted by statute is impermissible and forbidden," at 446. [Per Curiam opinions in West Virginia have no precedential authority *except* for the syllabus points.]

The erroneous conclusion appearing in the Committee Minutes that the Supreme Court [of Appeals] of West Virginia has held that venue is procedural etc. appears to stem from dictum inserted solely as an annotation to West Virginia Code § 56-1-1, prepared by the publishers Michie Co./Lexis. That dictum comes from the case of *State Ex Rel. Kenamond v Warmuth*, 179 W Va 230, 366 SE2d 738 (1988). The dictum never appeared as a West headnote.

(c) The Changing concept of venue.

The concept of venue has changed from the days of Blackstone (circa 1788), and has moved from one of location specific and action specific, now to one of strategic advantage.

We have seen the Bureau of Census 2000 population statistics for North Dakota and recognize the conditions of decreasing population coupled with the migration of persons from the rural counties of the state to the urban areas. We recognize the difficulties that these population movements have had and are having on county government, court structure and functions.

Perhaps it would be an overstatement to label the proposal of Rule 37.1 a knee-jerk response to changing demographic conditions in North Dakota, but indeed the proposed Rule and the other related proposed rules, in addition, fail to consider, account for, and meet current tends and concepts for venue in civil actions.

It is indeed a momentous event when the a court takes away from the legislature the law making powers that it has enjoyed since its inception. Once taken away, the body politic, represented by the legislature, may never get the powers back. Accordingly, when courts adopt rules that supersede statutes, the rules should first reflect changing concepts and practice of law, and then secondarily, changing demographic conditions and other external factors.

Again reluctant to call the proposed Rule 37.1 a knee-jerk response, we suggest that it lacks, at this juncture, the necessary depth and breadth of a court rule worthy of superseding statutory provisions.

(i) Venue shopping.

One of the two significant trends in contemporary civil litigation is venue shopping. Of course, there has always been forum shopping by lawyers; trying to get a friendly judge, friendly jury, favorable laws, etc. Much of this shopping has been eliminated by (1) administrative procedures, such as in the recent reassignment of the Microsoft case in the District of Columbia by computerized random selection of the judge, and (2) by the lifting of wrongful death, and other damage caps in most states.

Now, forum shopping has turned into venue shopping by plaintiffs—find a venue in which juries (1) always render a

verdict for the plaintiff, and (2) award damages to the plaintiff in an amount that is extremely high. Jefferson County, Mississippi (on the Mississippi River just north of Natchez) is just one of those counties.

Jefferson County, with a population of about 10, 000, had some 21,000 civil actions filed in its district court between 1995 and 2000. Since 1995, juries in that county have returned 19 verdicts of $9 million or more and five verdicts that have exceeded $100 million each. See the article by Robert Pear, "Mississippi Gaining Image as Lawsuit Mecca," *Chicago Daily Law Bulletin*, August 21, 2001, page 2.

North Dakota Rule 23. and the interpretation the Court has given it, is probably the most liberal class action rule in the country. The liberality of this Rule along with pockets of Populist sentiment remaining in some counties, North Dakota could also become a lawsuit mecca. Currently the reverse prevails— we read advertisements in North Dakota newspapers from out-of-state law firms soliciting clients in North Dakota for product liability actions. We conclude that the North Dakota plaintiff's bar is soundly asleep on this opportunity.

The point is, North Dakota *will* be subject to venue shopping. We have not analyzed the impact on North Dakota procedure as this is beyond the scope of these comments, but we have not found in the Minutes of the Committee any discussion of this topic and how to deal with it.

(ii) Venue by contract.

The second of two contemporary trends in civil litigation involves venue by contract. North Dakota, since 1971, has permitted parties, by agreement in writing, to bring a civil action in North Dakota with the agreement being the only basis for the exercise of jurisdiction, see NDCC § 28-04.1-02. The statute is silent regarding venue. Many companies are now specifying the forum *and* venue of prospective civil actions in their contracts with their vendors and customers.

One such firm is Wal-Mart, the nation's largest retailer. Written into each vendor agreement with Wal-Mart is a forum selection clause stating that "The parties agree that the exclusive jurisdiction of any dispute arising in connection with this agreement or any dispute relating to the service or goods provided hereunder shall be in the state and federal courts of the counties of Benton or Washington, State of Arkansas."

Bentonville, the county seat of Benton County, is the headquarters of Wal-Mart. Washington County, which adjoins Benton County on the south, has as its county seat the City of Fayetteville, the situs of the U.S. District Court for the Western District of Arkansas. (A copy of this contract provision is reproduced in Judge Piersol's opinion in *Highlander Golf, Inc. v Wal-Mart Stores, Inc.*, 115 F Supp 2d 1157, 1159 (D SD 2000).

It is common knowledge that the late Sam Walton was a legend in northwest Arkansas; that Wal-Mart provides employment for 15,000+ people in the Benton-Washington Counties area; and, that many of the local residents were original investors in Wal-Mart stock and are now wealthy as the result. It is obvious that Wal-Mart chose this venue because it knows that the home town people ordinarily will not turn against them and render a verdict against Wal-Mart. This in turn gives Wal-Mart the freedom to breach its contracts at will with impunity, as it did in *Highlander*. (Perhaps this is part of Wal-Mart's method of providing lower prices to its customers.)

Forum selection clauses are now routinely inserted in contracts for bank loans, credit card agreements, airline tickets, and contracts for the purchase and sale of goods. The only limitation to forum selection clauses is that they must be reasonable.

South Dakota has developed a four-factor test to determine the reasonableness of a forum selection clause, see *Baldwin v Heinold Commodities, Inc.*, 363 NW2d 191 (SD 1985). Rules for the application of a forum selection clause in North Dakota might be appropriate to include in the proposed venue rule. However, we are unable to find any reference in the Committee Minutes that this issue was presented or discussed.

(d) Change of venue on agreement of parties.

We have been unable to find from the Minutes any reference or discussion to the concept of permitting parties by stipulation to agree that the place of the trial may be changed to any county in the state.

Montana has such a provision. §25-2-202, MCA, provides that all the parties to an action, by stipulation or by consent in open court entered in the minutes, may agree that the place of trial may be changed to any county in the state. The court, then, must order the change as agreed.

Inserting a provision similar to the one in Montana as subparagraph (D) in the proposed Rule 37.1(b)(1) could eliminate many of the concerns of the Committee for ease of changing venue. If the court house at Ashley, McIntosh County is not air conditioned and a trial is set for July, the parties could agree to a change of venue to a county with a courtroom that *is* air conditioned. The "boxes" stored in the Steele County courtroom would no longer pose a problem—the parties could agree to move to a courtroom without boxes.

For the more than a few situations where this provision could be useful, we recommend that the Court consider adding

it to 37.1(b)(1), that is, if in the end, the Court is disposed to adopt Rule 37.1.

(e) Wording of the proposed Explanatory Note to proposed Rule 37.1

The third sentence of the second paragraph of the Explanatory Note appears to be incorrect and misleading. The sentence reads "The rule incorporates and supersedes the statutory provisions governing venue." We have been unable to find where the Rule incorporates or supersedes NDCC §§ 28-04-01, 02, 03, 04, and 05. We suggest that the sentence should properly read "The rule incorporates and supersedes the statutory provisions governing change of venue." The Court should give prompt attention to this misleading statement—before someone cites it as authority.

Recommendation No. 2.

If the Court is finally disposed to adopt the concept of Rule 37.1, we recommend that the Rule should be re-numbered so as to place it in its logical order with other relevant rules.

Comment.

Rule 37, NDRCivP. provides the remedies for failure of a party to make or cooperate in discovery and sanctions for such failure. It is the last of a series of rules in Section V of the Rules of Civil Procedure governing discovery.

The numbering of the proposed new rule as "37.1" implies that it is an adjunct of Rule 37. However, proposed Rule 37.1 has nothing, even remotely, to do with discovery or sanctions. (We have been unable to find any reference in the Committee Minutes as to how this rule number and position was chosen.)

The Federal Rules of Civil Procedure, from which the North Dakota Rules of Civil Procedure were adopted, were grouped in the logical sequence of a civil action under the then new mode of rule pleading. The Rules provide a roadmap for court and counsel to follow from the beginning of a civil action (II) through judgement (VII). (The old Field Codes had a similar sequential flow.)

Venue and change of venue is a matter that must be resolved well before trial and judgement. Preferably, if trial management by the court under Rule 16 is to have any efficacy, venue matters should be resolved at the time of the close of pleadings. It logically follows then that a rule relating to venue and change of venue should be placed where both court and counsel logically expect it to be pertinent. Therefore, placing a new rule dealing with venue and change of venue as a tag-on to a rule governing discovery sanctions is disjunctive.

A significant feature of the Rules of Civil Procedure is that the subjective groupings of the Rules (I through XI) creates context that enables court and counsel to apply each rule in relation to other rules in the same group. Maintaining this context, we suggest, is critical for an orderly application and interpretation of the Rules of Civil Procedure.

Sutherland tells us that "The importance of selecting the position of an act in relation to the entire body of statutory enactment cannot be over emphasized," 1A *Sutherland Stat. Const.* § 21.03 (5th Ed. 1993). "In the interpretation of legislation, the new act will be interpreted in pari materia with existing law and the location of the new statute in the code will necessarily be considered as some indication of what is the related legislation," *Id.*

The Court in *Builders League v Pine Hill*, 669 A2d 279, 280 (NJ App 1996), aptly stated this principle: "Consequently, the sense of the Section is to be gleaned not only from its objective and the subjective matter which it covers, but also from its 'contextual setting.' "

As we recommend below in these comments, if the Court is disposed to adopt the proposed Rule 37.1, we urge that subdivision (a) of proposed 37.1 be placed in a new subdivision of Rule 40, and that subdivision (b) of proposed 37.1 be placed as a new subdivision of Rule 3.

As another alternative, we recommend that the Court, again if disposed to adopt proposed 37.1, renumber proposed 37.1(b) as Rule 12.1— an adjunct to Rule 12. The Committee has elsewhere suggested an inclusion of a provision for "improper venue" in Rule 12, which would then make Rule 12.1 complimentary.

Recommendation No. 3.

As the alternative to adoption of Rule 37.1, we recommend that subdivision (b) of the proposed Rule 37.1 be incorporated into existing Rule 3, as a new subdivision of that Rule..

Comment.

Because venue is such a preliminary matter, or perhaps it may be better said to be a foundational matter, venue and change of venue should be determined at the outset of a civil action.

NDRCivP. 3 provides that an action is commenced by the service of a summons. Rule 4(c)(1) requires, first off, that

the "summons must specify the venue of the court in which the action is brought." Therefore, counsel for the plaintiff, at the early point of instigating the preparation and service of a summons, and at the least, must have investigated the case sufficiently to make a decision regarding the proper venue. Accordingly, venue issues quickly enter a civil action as soon as the summons is drawn.

Under NDCC § 28-04-07, the court may change the place of trial for specified reasons. The earliest reason that could trigger proceedings for a change of venue by the defendant is § 28-04-07, paragraph 1., which provides that a court can change the place of trial when the county designated in the complaint is not the proper county. Once the plaintiff complies with Rule 4(c)(2) and (3) and the defendant gets a copy of the complaint, the defendant is then able object to venue. In any event, such a motion may be made well before any responsive pleadings are made or the service and filing of dilatory motions. Accordingly, Rule 3 is the most logical position for a change of venue rule.

Some states have treated venue as a sort of a "housekeeping" provision and inserted it as a general provision under the generic Rule 40 assignment of cases for trial. Change of venue in Wyoming is governed by RCivP. 40.1(a), "Transfer of trial and change of judge." Change of venue in Idaho is governed by Rule 40(e), "Change of venue." South Dakota RCivP. 40, which includes a change of venue provision, is a broad housekeeping rule covering many subjects and lacks any identity to the format of Federal and North Dakota Rule 40. Change of venue in Montana is purely statutory, see § 25-2-210, MCA.

We find generally that most states treat venue and change of venue as a matter that must be determined at an early stage of civil litigation and therefore place the applicable provisions early in their procedural structure, see particularly the California Code of Civil Procedure.

Venue and change of venue in Ohio are governed by Ohio Rule of Civil Procedure 3. The Rule is titled "Commencement of Action; Venue." Rule 3(B) provides the specifications for proper venue. Rule 3(C) provides the specifications for change of venue. Rule 3(D) provides the procedure when there is no proper forum in Ohio. Rule 3(E) prescribes the proper venue when there are multiple defendants and multiple claims for relief.

We are impressed with the ease of application this Rule has enjoyed in Ohio practice. We recommend that the Court research this alternative and consider including the provisions of proposed Rule 37.1(b) into NDRCivP. 3.

(a) Additional parties and/or claims.

One of the contentious areas of contemporary civil litigation that the Committee overlooked or perhaps underestimated (that is, the Minutes are at least silent in this respect), is the circumstance where additional parties and claims are brought into a civil action, each of which may be grounds for and trigger a motion for a change of venue.

Ordinarily, at the time of the filing of the summons and complaint, plaintiff's counsel, assuming he or she has made the Rule 11(b) inquiries, has determined the names or identities of all of the parties defendant, and all of the claims against them. However, new parties and claims do appear, both from the responsive pleadings and from information obtained through discovery.

The most troublesome issues regarding venue occur in six circumstances. First, when a defendant brings in a third party under Rule 14(a). Second, when a plaintiff brings in a third party under Rule 14(b). Third, when joinder of persons is needed for a just adjudication under Rule 19. Fourth, permissive joinder of persons under Rule 20. Fifth, intervention under Rule 24. Sixth, substitution of parties under Rule 25. All of the parties who are brought into an action under those six rules have a right to object to venue if there are sufficient grounds. Because these parties may enter the action far downstream, timing and time limits for a motion to change venue become important. (A post-judgement motion to intervene is not necessarily untimely, see *Quick v Fischer*, 417 NW2d 843 (ND 1988)).

For instance, if the Bank of North Dakota is brought into a civil action as a third-party defendant and the cause of action against it relates to transactions connected with the Bank, the action must be brought in Burleigh County, see NDCC § 6-09-27. But if the Bank's transaction, which is the subject of the third-party claim, involves real property, then the venue is prescribed by NDCC § 28-04-01, i.e. the county where the real property is situated.

Problems that surface with the entry of new parties downstream in a civil action involve the time frames for motions for change of venue. To address this problem, we recommend that the Court study and consider the provisions of Montana Rule of Civil Procedure 12(b)(i) through (iii). Time limits are specifically provided for in subsection (iii). We recommend that a provision similar to the Montana Rule be inserted in either a prospective Rule 3 amendment or a prospective Rule 12 amendment.

Recommendation No. 4.

As the alternative to adoption of Rule 37.1, we recommend that subdivision (a) of the proposed Rule 37.1 be incorporated into existing Rule 40 as a new subdivision to that Rule.

Comment.

Rule 40, Assignment of cases for trial, is a "housekeeping" rule. The amendment of Rule 40 to add a new subdivision is a natural and logical fit. Rule 40, by its context, assumes that all matters concerning pleadings, parties and discovery have been resolved and that milestone has been reached in the action. Rule 40 then provides for the pre-trial particulars such as the Note of Issue, trial dates, continuances and untried cases. It is a perfect fit to include the change of location particulars in Rule 40. As we stated above in Recommendation No. 2, rules should be grouped according to purpose and subject, the inclusion of subdivision (a) of proposed Rule 37.1 into Rule 40 is the perfect spot on the rules roadmap for it.

II. Adoption Of An Amendment To Rule 12(b)(iii) To Include The Words "Improper Venue."

Recommendation No. 1.

We recommend that the Court amend Rule 12(b)(iii) to include the words "improper venue" as one of the defenses that may be made by motion before pleading further.

Comment.

First, a party may assert the defense of improper venue anyway, whether it is specified in Rule 12(b) or not because as Rule 12(b) explains, the defense may be asserted in the responsive pleading. Once improper venue is asserted in a responsive pleading, a party may move under Rule 12(c) for judgement on the pleadings. Placing the opportunity to move for dismissal due to improper venue before pleading further, saves time and expense, and streamlines the proceedings. This is in accordance with the mandates of Rule 1.

Second, explicitedly placing "improper venue" as one of the defenses that may be made by motion before pleading further alerts defense counsel that (a) he or she ought to investigate the propriety of the asserted venue and read NDCC 28-04-01 through 28-04-05. Then (b) he or she should be motivated serve and file a motion challenging the venue if the facts justify it.

The Court ought to amend Rule 12(b)(iii) to include the improper venue defense *regardless* of and *separate and apart* from any other Rule amendments it adopts. Venue issues should be disposed of as early as possible in a civil action!

III. Adoption Of An Amendment To Rule 77(b) providing that All Other Acts And Proceedings, Except Trials, May Be Done Or Conducted By A Judge "Elsewhere."

Recommendation No. 1.

We recommend that the Court decline to amend Rule 77(b) to delete the word "regular" preceding the word "courtroom."

Comment.

It is true that at whatever location a judge convenes as a court is a "courtroom." However, some locations depreciate the solemnity, impartiality, and access that are customary of law courts.

We recently observed an instance where, because of a temporary breakdown of the courthouse heating system, the defending law firm in a bench trial importuned the judge to move the trial to that law firm's office conference room. No only did this location affect the impartiality of the proceeding, but it gave an advantage to the defending counsel by having his or her office across the hall. Further, there was no public access to this proceeding in that the law firm controlled who was allowed to enter the premises. The size and seating capacity of the conference room, alone, limited the presence of some the parties. This is the type of abuse that can creep in when judges are given leave to conduct court in other than a regular courtroom, or "elsewhere" as the Committee puts it.

We have seen instances where court has been conducted in restaurant banquet rooms, an Elk's Lodge meeting room, City Council chambers, County Commission room, bank board of director's room, public library meeting room, school rooms, and law school moot court rooms. We have not yet observed court being held in a church or its social hall.

In West Virginia, courts on occasion or when the public interest so requires, transfer a trial to the local, underutilized federal courtroom. Ample notice of the change of location is always posted on the courthouse doors and courtroom entrances.

West Virginia is blessed with Senator Robert Byrd, chairman of the U.S. Senate Appropriations Committee. One may drive along a road in West Virginia and enter a town about the size of Valley City, ND, and find a $25 million federal courthouse, built out of brilliant Vermont granite and fitted with brass doors—but there is no judge. At Morgantown, (home of West Virginia University), a new federal courthouse was built some ten years ago with two courtrooms but Congress has yet to designate Morgantown as a place of holding court. The federal courts in West Virginia extend comity to the state judges to use their courtrooms. (Incidentally, as of mid-September, 2001, no federal judge has yet to be assigned to the brand new federal courthouse at Helena, MT.) Perhaps North Dakota district courts could utilize vacant federal courtrooms.

There should be no substitute for a "regular" courtroom. If the Steele County Courtroom is "full of boxes" (see Committee Minutes, January 27-28, 2000, page 15), a trial in the same district could be held at a courtroom in the Cass County Court House at Fargo, not an inconvenient drive from Finley. We agree with the comment of "others" who said that where a courtroom is not air conditioned, the judge could wait until September before trying the case (Minutes, January 27-28, 2000, page 15).

We recognize that fires, flood, and other events may render a "regular" courtroom unavailable, but the Court has shown that it has the experience to deal with those occurrences without disturbing public access and the dignity of the court. See Administrative Order No. 8, Emergency extension of deadlines and change in location of court. This order dealt with the 1997 flood at Grand Forks and *inter alia*, the change in the location of trial and hearings to Lakota, the county seat of Nelson County.

We recommend that while the use of the word "regular" may not be adequate to designate a suitable courtroom, adequate words should be included in the Rule that (1) assure that the courtroom has free public access, (2) is on neutral premises, and (3) contains furnishings and fixtures that do not reasonably detract from the solemnity and dignity that a courtroom and the judge presiding therein should possess.

Recommendation No. 2.

We recommend that the Court add the words "and all hearings at which oral testimony is to be presented," be added to the first sentence of Rule 77(b), so as to read "All trials, and all hearings at which oral testimony is to be presented, must be conducted in open court so far as convenient in a regular courtroom."

Comment.

The above quoted phrase was lifted in part from § 807.04, Wisconsin Statutes Annotated (W.S.A.). Many states have similar provisions requiring hearings at which oral testimony is given be held in open court.

Some twenty years ago, the late Justice William Paulson, writing for the Court in *KFGO Radio,Inc. v Rothe*, 288 NW2d 505 (ND 1980), explained that "Open court proceedings serve to educate the public on the law. Open court proceedings also serve to assure the public as well as the litigants that the proceedings were conducted fairly." (Chief Justice VandeWalle was a member of that Court at the time and concurred in the decision.)

The district courts' chambers are implied areas of restricted entry. Some restricted entries are more explicit; there may be a sign on the door, "Private." The public is naturally reluctant and fearful of walking into any judge's chambers without invitation. Most chambers have insufficient seating for the parties and their counsel, let alone the public. Chambers are uniformly smaller than courtrooms—they are really offices not meant to be occupied by more than one or two persons. The public who might attend a proceeding in chambers, because of the close quarters, feel intimidated by lack of personal space. Candidly speaking, court chambers are closed to the public except on invitation.

Moving hearings and other proceedings out of chambers into the public courtroom helps to educate the public and promotes the administration of justice.

The public today largely gains its knowledge of how the court system works from Judge Wapner and Judge Judy. Both are fictional television characters acting in fictional drama. It is disappointing that the Court has to explain to the people of North Dakota by analogy to Judge Judy how the North Dakota court system works.

On May 4, 2000, the Court visited West Fargo High School on one of its "road trips." Justice VandeWalle, speaking to students in a class on government, explained the functions of the Supreme Court and remarked "We don't hear individual trials, We're not Judge Judy," *The Forum*, May 5, 2000, page B1. If Justice VandeWalle had been speaking twenty years earlier, he could have freely used the name of one of the Cass County jurists for the analogy and been understood. Today,

few citizens know the names of their local judges, fewer know what they do. Retrenchment of court proceedings to the chambers will only increase the distance between courts and the public.

Moving hearings and proceedings out of chambers will not automatically assure that the public will attend, but the *potential* for the public to attend enhances justice. The potential presence of the public almost necessarily invests the proceedings with some degree of formality. Formality is perhaps the only available substitute for the solemnity by which such proceedings should be characterized. That potential presence of the public is at least some guarantee that there shall be a certain decorum of procedure.

District judges, most of whom seem gratified by the presence of a small or no audience, remark that nobody shows up for court hearings anyway. This is not an excuse for proceedings in chambers. As Lord Blanesburgh explains, "The actual presence of the public is never of course necessary. Where Courts are held in remote parts of the Province [Alberta], as they frequently must be, there may be no members of the public available to attend. But even so the Court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none, " *McPherson v McPherson*, 1936 1 D.L.R. 321 (Alberta 1936).

Moving hearings and proceedings out of chambers and into the courtroom substantially improves the administration of justice and respect for lawyers and courts.

First, it has an effect on lawyers. The unprepared lawyer savors a proceeding in chambers. Neither the clients nor the public will discover his or her ineptitude and he or she can then blame an unfavorable decision on the judge. Forcing lawyers to be prepared helps to assure that the cases are decided on the merits, not by default. It is disappointing to read in the published opinions of this Court how many times the Court has to (correctly) refuse to consider points on appeal because they were not raised in the lower court. Why weren't the issues raised in the lower court—the lawyer was unprepared, inept or indolent.

Second, it has an effect on judges. A judge in full view of the parties and public, including on occasion the news media, is likely to be less flippant, more careful, and less likely to render a half-cocked decision. (Half-cocked decisions end up in wasteful appeals.) Like the lawyer, open court proceedings force the judge to be prepared lest he or she might look like a dunce on the bench. A judge who doesn't feel like reading the file before a hearing also savors an in-chambers hearing—he or she can play it by ear out of public view.

Third, hearings and proceedings in the courtroom require the judge to wear a robe and lawyers to be in proper attire. This aspect, alone, imposes discipline in the minds both the judge and lawyers. A robed judge and properly attired lawyers exhibit a sense of seriousness and formality to the proceedings, rather than that of a relaxed confab in the judge's chambers. As Lord Blanesburgh go on to explain, "If at other public sittings of the Court it is the rule for both Judge and counsel to be robed it is *pessimi exempli* that for a trial of an undefended divorce case [in chambers] the gown of ceremony should be discarded,"*McPherson, supra,* at 328.

Fourth, and this may be the most contentious point, conducting all hearings and proceedings in an open courtroom affords the public an opportunity to view and evaluate the performance quality of both the judges and lawyers. This leads to an informed electorate and moreover, provides the members of the public with an objective basis for choice of a lawyer in the future.

The federal courts, almost uniformly, have moved every proceeding, however incidental, out of chambers and into the courtroom. Many federal judges sign their orders in open court. An increasing number of state court judges are moving all proceedings into the courtroom from chambers. Perhaps the Steele County courtroom would not be "full of boxes" if proceedings were moved out of chambers to the courtroom.

IV. Repeal Of Rule 82.

Recommendation No. 1.

We recommend that the Court refuse to rescind Rule 82 and continue its existence. We suggest that the Rule should be amended by deleting the words "or the venue of actions therein."

Comment.

(a) Jurisdiction.

The Committee Minutes of April 26-27, 2001, page 3, reflect some lack of understanding or confusion as to the purpose and effect of NDRCivP. 82. Its purpose is to prohibit the extension or limitation, by the other rules of civil procedure, of the

jurisdiction of the District Court.

District Courts in North Dakota exercise power over a party or parties, known as "personal jurisdiction," *and* power to hear and determine the general subject of the action, known as "subject-matter" jurisdiction, see *Albrecht v Metro Area Ambulance*, 1998 ND 132, 580 NW2d 583 (1998). Rule 82 regulates both personal *and* subject-matter jurisdiction of the district courts, see, generally, 12 Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2d* § 3141 (1997).

The personal and subject-matter jurisdiction of a district court is necessarily limited by the second clause of the first sentence of Article VI, § 8 of the Constitution of North Dakota, which provides that "district courts shall have original jurisdiction of all causes, *except as otherwise provided by law*," (emphasis added).

For example, a district court has subject-matter jurisdiction to consider a motion for new trial if the motion is served and filed within the time prescribed by Rule 59(c). Otherwise it loses such jurisdiction. Rule 6(b) prevents the district court from extending its jurisdiction to consider a motion for a new trial by prohibiting enlargement of time for a motion for a new trial.

In the recent case, *Schaan v Magic City Beverage Co.*, 2000 ND 71, 609 NW2d 82, Justice Kapsner writing for the Court, held that in the absence in Rule 59(c)(2) of express language permitting a trial court to grant an extension upon motion made after the time for filing a motion for a new trial has expired renders a trial court without power [meaning no subject-matter jurisdiction] to grant such an extension.

Rule 82 is a general rule that also prohibits a district court from extending its jurisdiction to consider, for example, an untimely motion for a new trial. Rule 82, in effect, provides that a district court cannot acquire subject-matter jurisdiction where a statute provides certain time limits for requesting, for example, an administrative hearing, filing an appeal, etc.

Illustrative of a contemporary application of the Rule 82 prohibition of the extension of a court's jurisdiction, is the case of *MCI v Dept. Of Public Service Regulation*, 260 Mont 175, 858 P2d 364 (1993). Here, *MCI* filed an appeal, by mail, from a ruling of an administrative agency after the time prescribed by statute had expired. *MCI* claimed that MRCivP. 6(e) was applicable (three days additional time after service by mail) and therefore their appeal was timely, invoking the provision of Rule 5 that service is complete upon mailing.

The Supreme Court of Montana, Justice Weber writing for the Court, in applying Rule 82 stated that: "The right to an appeal of an administrative agency's ruling is created by statute and is limited by the provisions of the statute as to the time within which the right must be asserted. Where the time for filing an appeal is dictated by the statute which confers the right to appeal, Rule 6(e) cannot be applied to extend the time for filing as this would be an extension of the court's jurisdiction," at 366. (The Court in *MCI*, however, went on to find that in this instance, the Montana Administrative Procedure Act did not dictate the manner of filing an appeal.)

In the case of *In Re McGurran*, 1999 MT 192, 983 P2d 968, Justice Gray writing for the Court, applied the principles of Rule 82 holding that "Rule 6(b) [enlargement of time] is not applicable to petitions for judicial review of administrative proceedings either by its terms or by analogy, inasmuch as the application of that Rule would operate to extend the jurisdiction of the district courts beyond that permitted by statute," at 972.

We recommend, in view of the continuing vitality of Rule 82, that it be retained so that it might be applied to circumstances, similar to the above cited instances, that might arise in future North Dakota litigation.

(b) Venue.

Except for the sentence on admiralty jurisdiction, North Dakota Rule 82 and Federal Rule are identical. No doubt the North Dakota Rule was copied "wholesale" from the federal rule (as were several other North Dakota Rules). The provision regarding the extension or limitation of venue is an application peculiar to the federal rule. While venue for federal actions is governed by statute, see 28 USC §§ 1391- 1413, federal courts experience a distinct venue problem not found in state practice— jurisdiction based on diversity of citizenship. As Judge Kalodner's famous "latticework" phrase explains, the Federal Rules of Civil Procedure must be viewed through a "jurisdictional latticework" externally constructed by Congress., see *Healy v Pennsylvania R. Co.*, 181 F2d 934 (3rd Cir 1950).

The jurisdictional latticework constructed by the Legislative Assembly regarding venue is rather broad. Accordingly, the inclusion of a power to prohibit the extension or limitation of venue in North Dakota Rule 82 is surplusage. That is, venue cannot go beyond the boundaries of North Dakota anyway. *Forum non conveniens* matters are provided for in NDRCivP. 4(b)(5).

Therefore, we recommend that the words "or the venue of actions therein" be deleted from Rule 82. Interesting, however, is the fact that most states that have adopted the equivalent of the federal rules have retained the venue provision in Rule 82 even though it relevance is confined to federal practice.

NOTES