

**ORDER OF ADOPTION**  
Supreme Court No. 20010171

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**Amendments to the North Dakota Rules of Civil Procedure,  
Rules of Appellate Procedure, and Rules of Court**

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The Joint Procedure Committee filed proposed amendments to N.D.R.Civ.P. 12, 77, 82, N.D.R.App.P. 42, N.D.R.Ct. 2.2 and 3.2, and proposed N.D.R.Civ.P. 37.1 regarding Change in Location of a Hearing, Proceeding, or Trial; Change of Venue. Notice was provided under N.D.R.Proc.R. § 7. and a hearing was held on the proposed amendments on October 23, 2001. At that time, any written comments received were also submitted to the Court. The Court considered the matter.

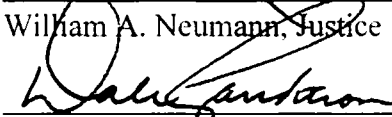
**ORDERED**, proposed amendments to N.D.R.Civ.P. 12, 77, 82, N.D.R.App.P. 42, and N.D.R.Ct. 2.2 and 3.2, , as further amended, are ADOPTED, effective March 1, 2002.

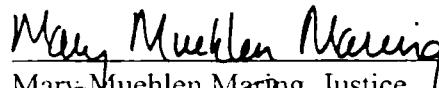
**IT IS FURTHER ORDERED**, proposed N.D.R.Civ.P. 37.1, as further amended, is ADOPTED as N.D.R.Civ.P. 39.1, effective March 1, 2002.

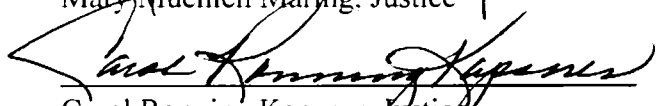
Dated at Bismarck, North Dakota, December 6, 2001.

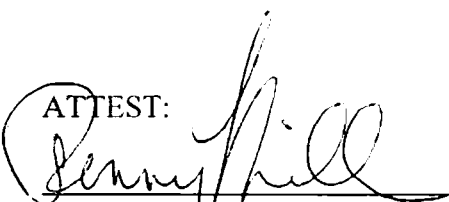
  
Gerald W. VandeWalle, Chief Justice

  
Wilham A. Neumann, Justice

  
Dale V. Sandstrom, Justice

  
Mary Muehlen Maring, Justice

  
Carol Ronning Kapsner, Justice

ATTEST:  
  
Penny Miller, Clerk

RULE 12. DEFENSES AND OBJECTIONS--WHEN AND HOW PRESENTED--  
BY PLEADING OR MOTION--MOTION FOR JUDGMENT ON PLEADINGS

(a) When Presented. A defendant who is served with a summons shall serve an answer thereto within 20 days after service of the summons, unless the court directs otherwise when service of process is made pursuant to Rule 4(d)(4); if a copy of the complaint is not served with the summons, and demand therefor is made pursuant to Rule 4(c)(2), within 20 days after the service of the complaint. A party who is served with a cross-claim shall serve an answer thereto within 20 days after service of the cross-claim. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters those periods of time as follows, unless a different time is fixed by order of the court: (i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading must be served within 10 days after notice of the court's action; (ii) if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, must be asserted in the responsive pleading thereto if one is required, but the following defenses at the option

22 of the pleader may be made by motion: (i) lack of jurisdiction over the subject matter, (ii)  
23 lack of jurisdiction over the person, (iii) improper venue, ~~(iv)~~ (iv) insufficiency of process, ~~(v)~~  
24 ~~(v)~~ (v) insufficiency of service of process, ~~(vi)~~ (vi) failure to state a claim upon which relief can  
25 be granted, ~~(vii)~~ (vii) failure to join a party under Rule 19. A motion making any of these  
26 defenses must be made before pleading if a further pleading is permitted. No defense or  
27 objection is waived by being joined with one or more other defenses or objections in a  
28 responsive pleading or motion. If a pleading sets forth a claim for relief to which the  
29 adverse party is not required to serve a responsive pleading, the adverse party may assert at  
30 the trial any defense in law or fact to that claim for relief. If, on a motion asserting defense  
31 numbered ~~(v)~~ (vi), to dismiss for failure of the pleading to state a claim upon which relief  
32 can be granted, matters outside the pleading are presented to and not excluded by the court,  
33 the motion must be treated as one for summary judgment and disposed of as provided in  
34 Rule 56, and all parties must be given reasonable opportunity to present all material made  
35 pertinent to the motion by Rule 56.

36 (c) Motion for Judgment on the Pleadings. After the pleadings are closed but within  
37 such time as not to delay the trial, any party may move for judgment on the pleadings. If,  
38 on a motion for judgment on the pleadings, matters outside the pleadings are presented to  
39 and not excluded by the court, the motion shall be treated as one for summary judgment and  
40 disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to  
41 present all material made pertinent to such a motion by Rule 56.

42 (d) Preliminary Hearings. The defenses specifically enumerated ~~(1)-(6)~~ ~~(i)-(vii)~~ in

43 subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for  
44 judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial  
45 on application of any party, unless the court orders that the hearing and determination  
46 thereof be deferred until the trial.

47 (e) Motion for More Definite Statement. If a pleading to which a responsive pleading  
48 is permitted is so vague or ambiguous that a party cannot reasonably be required to frame  
49 a responsive pleading, the party may move for a more definite statement before interposing  
50 a responsive pleading. The motion must point out the defects complained of and the details  
51 desired. If the motion is granted and the order of the court is not obeyed within 10 days after  
52 notice of the order or within such other time as the court may fix, the court may strike the  
53 pleading to which the motion was directed or make such order as it considers just.

54 (f) Motion to Strike. Upon motion made by a party before responding to a pleading  
55 or, if no responsive pleading is permitted by these rules, upon motion made by a party within  
56 20 days after the service of the pleading upon the party or upon the court's own initiative at  
57 any time, the court may order stricken from any pleading any insufficient defense or any  
58 redundant, immaterial, impertinent, or scandalous matter.

59 (g) Consolidation of Defenses in Motion. A party who makes a motion under this  
60 rule may join with it any other motions herein provided for and then available to the party.  
61 If a party makes a motion under this rule but omits therefrom any defense or objection then  
62 available to the party which this rule permits to be raised by motion, the party may not  
63 thereafter make a motion based on the defense or objection so omitted, except a motion as

64 provided in subdivision (h)(2) hereof on any of the grounds there stated.

65 (h) Waiver or Preservation of Certain Defenses.

66 (1) A defense of lack of jurisdiction over the person, insufficiency of process, or  
67 insufficiency of service of process is waived (A) if omitted from a motion in the  
68 circumstances described in subdivision (g), or (B) if it is neither made by motion under this  
69 rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a)  
70 to be made as a matter of course.

71 (2) A defense of failure to state a claim upon which relief can be granted, a defense  
72 of failure to join a party indispensable under Rule 19, and an objection of failure to state a  
73 legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a),  
74 or by motion for judgment on the pleadings, or at the trial on the merits.

75 (3) Whenever it appears by suggestion of the parties or otherwise that the court lacks  
76 jurisdiction of the subject matter, the court shall dismiss the action.

77 (i) Offer of Fixed Damages. Service. In an action arising on contract, the defendant  
78 may serve upon the plaintiff with the answer an offer in writing that if the defense fails the  
79 damages will be assessed at a specific sum, and if the plaintiff signifies acceptance thereof  
80 in writing with or before service of the note of issue and certificate of readiness and on the  
81 trial has a verdict, the damages must be assessed accordingly.

82 (j) Effect if Offer of Fixed Damages Rejected. If the plaintiff does not accept an offer  
83 of fixed damages, the plaintiff must prove the plaintiff's damages as if it had not been made  
84 and is not permitted to introduce the offer in evidence. If the damages in the plaintiff's favor

85 do not exceed the sum stated in the offer, the defendant may recover costs incurred in  
86 consequence of any necessary preparations or defense in respect to the question of damages.

87  
88 EXPLANATORY NOTE

89 Rule 12 was amended, effective 1971; January 27, 1977; March 1, 1990; March 1,  
90 2002.

91 This rule is derived from Fed.R.Civ.P. 12, with the addition of subdivisions (i) and  
92 (j) providing for an offer of fixed damages. Subdivision (a) has been changed slightly to  
93 conform to numbering differences between these rules and the federal rules and to delete  
94 references to statutes, agencies, and officers of the United States. ~~In subdivision (b),~~  
95 ~~improper venue is deleted from the enumerated defenses because matters of venue are~~  
96 ~~controlled by N.D.C.C. Chapter 28-04.~~ Subdivision (b) was amended, effective March 1,  
97 2002, to incorporate a time limitation for an objection to improper venue.

98 Subdivisions (i) and (j) are derived from Sections 28-0711 and 28-0712, N.D.R.C.  
99 1943. Subdivision (h) was amended in 1971 to conform to changes in the federal rule.

100 Rule 12 was amended, effective March 1, 1990. The amendments are technical in  
101 nature and no substantive change is intended.

102 SOURCES: Joint Procedure Committee Minutes of September 28-29, 2000, page  
103 8; April 20, 1989, page 2; December 3, 1987, page 11; September 20-21, 1979, page 8;  
104 Fed.R.Civ.P. 12.

105 STATUTES AFFECTED:

106 SUPERSEDED: Sections 28-0504, 28-0704, 28-0706, 28-0707, 28-0708, 28-0709,  
107 28-0711, 28-1712, 28-1713, 28-0716, 28-0718, 28-0722, 28-0724, 28-0725, 28-0734, 28-  
108 0910, 28-1104, 28-1606, N.D.R.C. 1943.

109 CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction--Process--  
110 Service), N.D.R.Civ.P. 7 (Pleadings Allowed--Form of Motions), N.D.R.Civ.P. 8 (General  
111 Rules of Pleading), N.D.R.Civ.P. 9 (Pleading Special Matters), N.D.R.Civ.P. 10 (Form of  
112 Pleadings), N.D.R.Civ.P. 15 (Amended and Supplemental Pleadings), N.D.R.Civ.P. 19  
113 (Joinder of Persons Needed for Just Adjudication), N.D.R.Civ.P. 39.1 (Change in Location  
114 of a Hearing, Proceeding, or Trial; Change of Venue), and N.D.R.Civ.P. 56 (Summary  
115 Judgment);, N.D.R.Ev. 408 (Compromise and Offers to Compromise);, N.D.R.Ct. 8.8  
116 (Alternative Dispute Resolution), N.D.R.Ct. 8.9 (Roster of Alternative Dispute Resolution  
117 Neutrals).

RULE 77. DISTRICT COURTS AND CLERKS

(a) District Courts Always Open. The district court is deemed to always be open for the purpose of filing any pleading or other proper paper, of issuing and returning mesne and final process, and of making and directing all interlocutory motions, orders, and rules.

(b) ~~Trials, and Hearings, and Other Acts~~ Orders in Chambers. All trials upon the merits must be conducted in open court and so far as convenient in a ~~regular~~ court room. All other acts or proceedings may be done or conducted by a judge in ~~chambers elsewhere~~, without the attendance of the clerk or other court officials ~~and at any place either within or without the district; but no hearing, other than one ex parte, may be conducted outside the district without the consent of all parties affected thereby.~~

(c) Clerk's Office and Orders by Clerk. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, and for other proceedings not requiring allowance by or an order of the court are grantable of course by the clerk; but the court upon cause shown may suspend, alter, or rescind the clerk's action.

(d) [Transferred to Rule 58(b)].



22 EXPLANATORY NOTE

23 Rule 77 was amended, effective March 1, 1990; March 1, 1999; March 1,  
24 2000; March 1, 2002.

25 Subdivision (b) was amended, effective March 1, 2002, to eliminate the phrase  
26 addressing judicial acts or proceedings outside the district. See N.D.R.Civ.P. 39.1.

27 Subdivision (c) was amended, effective March 1, 1990. The amendment is  
28 technical in nature and no substantive change is intended.

29 Subdivision (d) was transferred to Rule 58(b), effective March 1, 2000.

30 SOURCES: Joint Procedure Committee Minutes of September 28-29, 2000,  
31 pages 3-7; September 24-25, 1998, page 16; April 30-May 1, 1998, pages 12-13;  
32 April 20, 1989, page 2; December 3, 1987, page 11; January 17-18, 1980, pages 9-  
33 10; Fed.R.Civ.P. 77.

34 STATUTES AFFECTED: Sections 28-2002, N.D.R.C. 1943, and N.D.C.C.  
35 § 27-05-07.

36 CROSS REFERENCE: N.D.R.Civ.P. 39.1 (Change in Location of a Hearing,  
37 Proceeding, or Trial; Change of Venue); N.D.R.App.P. 4 (Appeal When Taken).

## RULE 42. DISMISSAL: MOOTNESS

(a) Voluntary Dismissal. If the parties to an appeal or other proceeding sign and file with the clerk of the supreme court an agreement that the proceeding be dismissed, which specifies the terms as to payment of costs, and the parties pay whatever fees are due, the clerk shall enter the case dismissed, but no mandate or other process may issue without an order of the court. An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court.

(b) Involuntary Dismissal. When an appellant is in violation of any appellate rule and no motion to dismiss has been filed by the appellee, the clerk of the supreme court shall notify the appellant that unless the appellant gives reason within ten days why the case should not be dismissed, the case will be dismissed.

(c) Mootness. When ~~a party believes an appealed~~ an issue has before the court may have become moot due to a change in circumstance, the ~~party~~ parties shall advise the court in writing about the change in circumstance and explain why appeal of the issue should or should not be dismissed.

## EXPLANATORY NOTE

Rule 42 was amended, effective March 1, 2002.

21           This rule is derived from Rule 42, FRAppP, although subdivision (a) of the Federal  
22 Rule, relating to dismissal in the trial court before the appeal is docketed, has been deleted.  
23 All stipulations and motions for dismissal must be filed in the ~~Supreme Court~~ supreme court.

24           Rule 42 was amended, effective March 1, 1990. The amendment provides for an  
25 involuntary dismissal when an appellant fails to comply with the appellate rules.

26           Subdivision (c) was added, effective March 1, 1999, because generally the ~~Supreme~~  
27 ~~Court~~ supreme court will not consider a moot issue. See Ashley Education Association v.  
28 Ashley Public School, 556 N.W.2d 666 (N.D. 1996).

29           SOURCES: Supreme Court Conference Minutes of October 23, 1989. Joint  
30 Procedure Committee Minutes of September 28-29, 2000, page 9; September 25-26, 1997,  
31 pages 6-7; January 30, 1997, pages 13-14; April 20, 1989, pages 17-18; May 25-26, 1978,  
32 page 21; March 16-17, 1978, page 14. Fed.R.App.P. 42.

## RULE 2.2 FACSIMILE TRANSMISSION

(a) Filing. Papers required to be filed with the clerk of the trial court may be filed by facsimile transmission, if the clerk of court has a bond-paper facsimile receiving machine available in the courthouse. Filing is complete ~~at the time that~~ when the facsimile transmission is received by the clerk. A document received by the clerk's office in whole or in part after normal business hours must be processed on the next court day and deemed received at the opening of business on that day. The filed facsimile is the original.

Within 5 days after the clerk of court has received the transmission, the party filing ~~the document by facsimile transmission~~ shall forward the ~~following~~ filing fee, if any, to the clerk of the court.:

~~(1) a \$5 transmission fee; and~~

~~(2) the filing fee, if any.~~

Upon failure to comply with the requirements of this rule, the court in which the action is pending may make such orders as are just, including but not limited to, an order striking pleadings or parts thereof, staying further proceedings until compliance is complete, or dismissing the action, proceeding, or any part thereof.

(b) Issuance of Orders or Warrants. Facsimile transmissions may be used for the issuance of all orders and warrants and have the same effect as the original. The original order or warrant, along with any other documents, including affidavits, must be delivered

22 promptly to the clerk of the trial court for the county where the request or application for the  
23 order or warrant was made.

24

25 EXPLANATORY NOTE

26 Rule 2.2 was adopted effective January 1, 1995; amended effective March 1, 2002.

27 The rule is not intended to govern appeals to the Supreme Court of North Dakota. See Rule  
28 25(a), N.D.R.App.P. and AR 31.

29 Rule 2.2 was amended, effective March 1, 2002, to delete the facsimile transmission  
30 fee.

31 SOURCES: Joint Procedure Committee Minutes of September 28-29, 2000, pages  
32 7-8; January 26-27, 1995, pages 2-3; September 23-24, 1993, pages 17-19; April 29-30,  
33 1993, pages 11-16; November 7-8, 1991, page 3; October 25-26, 1990, pages 9-10.

34 CROSS REFERENCES: N.D.R.App.P. 25(a) (Filing and Service); AR-N.D. Sup.,  
35 Ct. Admin. R. 31 (Facsimile Transmission).

## RULE 3.2 MOTIONS

(a) Submission of Motion. Notice must be served and filed with a motion. The notice must indicate the time of oral argument, or that the motion will be decided on briefs unless oral argument is timely requested. Upon serving and filing a motion, the moving party shall serve and file a brief and other supporting papers and the adverse party shall have 10 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within 5 days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is deemed submitted to the court unless counsel for any party requests oral argument on the motion. If any party who has timely served and filed a brief requests oral argument, the request must be granted. A timely request for oral argument must be granted even if the movant has previously served notice indicating that the motion is to be decided on briefs. The party requesting oral argument shall secure a time for the argument and serve notice upon all other parties. The court may hear oral argument on any motion by telephonic conference. The court may require oral argument and may allow or require testimony on the motion. Requests for oral argument or the taking of testimony must be made not later than 5 days after expiration of the time for filing the answer brief.

(b) Failure to File Briefs. Failure to file a brief by the moving party may be deemed an admission that, in the opinion of party or counsel, the motion is without merit. Failure

23 to file a brief by the adverse party may be deemed an admission that, in the opinion of party  
24 or counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party  
25 must still demonstrate to the court that it is entitled to the relief requested.

26 (c) Extension of Time. Extensions of time for filing briefs and other supporting  
27 papers, or for continuance of the hearing on a motion, may be granted only by written order  
28 of court. All requests for extension of time or continuance, whether written or oral, must be  
29 accompanied by an appropriate order form.

30 (d) Time Limit for Filing Motion. Except for good cause shown, a motion must be  
31 filed in such time that it may be heard not later than the date set for pretrial of the case.

32 (e) Application of Rule. This rule does not apply to the extent it conflicts with  
33 another rule adopted by the Supreme Court.

34

35

#### EXPLANATORY NOTE

36 Rule 3.2 was amended, effective September 1, 1983; March 1, 1986; January 1,  
37 1988; March 1, 1990; January 1, 1995; March 1, 1997; March 1, 2002.

38 The language of subdivision (a) does not prevent a court from adopting a local rule  
39 requiring that every motion be noticed for oral argument, if due allowance is made for a  
40 telephonic hearing.

41 Subdivision (a) was amended, effective March 1, 1990, to provide that the request  
42 for oral argument on the motion must be granted when the party requesting oral argument  
43 has timely served and filed a brief. This amendment clarifies the rule in accordance with

44 Anton v. Anton, 442 N.W.2d 445 (N.D.1989).

45 Subdivision (a) was amended, effective January 1, 1995, in response to First Western  
46 Bank of Minot v. Wickman, 464 N.W.2d 195 (N.D.1990); Breyfogle v. Braun, 460  
47 N.W.2d 689 (N.D.1990). Those cases provide that a written motion must be noticed, and  
48 that the notice must indicate that oral argument has been requested or that the motion will  
49 be decided on briefs unless oral argument is requested. In addition, the amendment shortens  
50 the time between the date a motion is filed and the date a motion may be heard by  
51 eliminating the five-day period within which the movant's brief could be filed.

52 Although the rule contemplates filing a brief with every motion, what What  
53 constitutes a brief should be liberally construed.

54 SOURCES: Joint Procedure Committee Minutes of September 28-29, 2000, page  
55 13; April 25, 1996, pages 8-11; January 25-26, 1996, pages 10-16; April 28-29, 1994,  
56 pages 15-17; January 27-28, 1994, pages 24-25; September 23-24, 1993, pages 13-16;  
57 April 29-30, 1993, pages 20-22; April 20, 1989, pages 10-15; March 24-25, 1988, pages  
58 7-10 and 13-15; December 3, 1987, pages 4-5; February 19-20, 1987, pages 21-22; June  
59 22, 1984, page 30; April 26, 1984, pages 17-19.

60 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other  
61 Papers); N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 7 (Pleadings Allowed--Form of Motions);  
62 N.D.R.Crim.P. 45 (Time); N.D.R.Crim.P. 47 (Motions); N.D.R.Crim.P. 49 (Service and  
63 Filing of Papers); N.D.R.App.P. 27 (Motions); N.D.R.App.P. 34 (Oral Argument).



VI. TRIALS

RULE 39.1 CHANGE IN LOCATION OF A HEARING,  
PROCEEDING, OR TRIAL; CHANGE OF VENUE

(a) Change in Location of a Hearing, Proceeding, or Trial.

(1) The court may change the location of a hearing, proceeding, or trial to a different county if:

(A) that county's seat is less than ten miles from the seat of the county of venue;

(B) there is reason to believe an impartial trial cannot be obtained in the county of venue; or

(C) considering such factors as the parties' and witnesses' convenience, judicial efficiency, and availability of appropriate facilities, the administration of justice is better served.

(2) If the location of a hearing, proceeding, or trial is changed, the parties shall continue to file with the clerk of court for the county of venue, and the judge originally assigned shall continue to preside over the action. If any party files an objection to the change of trial no later than ten days after the date of notification of the place of trial, the trial must be held where originally venued unless grounds exist for a change of venue as provided in subdivision (b). In the case of a jury trial, the jury panel must be composed of

22 residents of the original county of venue or residents of the judicial district as provided by  
23 N.D.C.C. § 27-09.1-05.1.

24 (b) Change of Venue.

25 (1) The court may change the venue of an action or proceeding to another county  
26 within or outside a judicial district if:

27 (A) the county designated in the complaint is not the proper county  
28 of venue;

29 (B) there is reason to believe an impartial trial cannot be obtained  
30 in the county of venue; or

31 (C) the convenience of witnesses and the ends of justice will be  
32 promoted by the change.

33 (2) If venue is changed, the file must be transferred to the new county of venue and  
34 any additional papers must be filed in the new county of venue. If venue is changed to a  
35 county in a different judicial district, a new judge must be assigned to the action. In the case  
36 of a jury trial, the jury panel must be composed of residents of the new county of venue or  
37 residents of the judicial district as provided by N.D.C.C. § 27-09.1-05.1.

38  
39 EXPLANATORY NOTE

40 Rule 39.1 was adopted, effective March 1, 2002.

41 Under subdivision (a), the location of a hearing, proceeding, or trial is changed  
42 without a complete change in venue. Under subdivision (b), venue is changed and the file

43 transferred to a new county of venue. The rule incorporates and supersedes statutory  
44 provisions governing change of venue.

45 In deciding to move a trial or proceeding, a trial court must consider N.D. Sup. Ct.  
46 Admin. R. 6(B) and 7(B).

47 SOURCES: Joint Procedure Committee Minutes of September 28-29, 2000, pages  
48 3-7; January 27-28, 2000, pages 13-15; September 23-24, 1999, pages 15-16; September 24-  
49 25, 1998, pages 16-17.

50 STATUTES AFFECTED:

51 SUPERSEDED: N.D.C.C. §§ 28-04-05.1, 28-04-07, 28-04-08, 28-04-09, and  
52 28-04-10.

53 CROSS REFERENCE: N.D.C.C. §§ 27-05-22 (District judges to act only  
54 within their districts-Exceptions); 27-05-26 (Change of venue); N.D.R.Civ.P. 12;  
55 N.D. Sup. Ct. Admin. R. 6; N.D. Sup. Ct. Admin. R. 7.