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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Proposed Amendments to the North Dakota:

Rules of Civil Procedure
Rules of Criminal Procedure

Submitted by the
Joint Procedure Committee
September 2003

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Joint Procedure Committee,)
) PETITION FOR ADOPTION,
) AMENDMENT, OR REPEAL OF
Petitioner,) COURT RULES
)
)

TO: The Supreme Court of the State of North Dakota:

The Joint Procedure Committee petitions the Supreme Court, under N.D.R.Proc.R. § 3, for an order adopting the following proposals:

North Dakota Rules of Civil Procedure
Rule 52 - Findings by the Court

North Dakota Rules of Criminal Procedure
Rule 44 - Right to and Appointment of Counsel

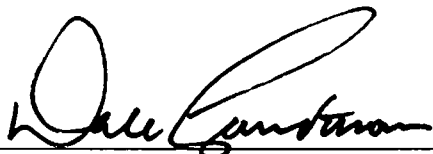
This petition is supported by the attached material containing the proposed rules, proposed explanatory notes, and synopsis of the proposals.

Dated September 29, 2003.

Members of the Joint Procedure Committee:

Honorable Bruce E. Bohlman
Honorable Donovan Foughty
Honorable M. Richard Geiger
Honorable Gail Hagerty
Honorable Lawrence A. Leclerc
Honorable David W. Nelson
Honorable Thomas J. Schneider
Honorable Mikal Simonson

Prof. Linda Bata
Mr. Michael R. Hoffman
Mr. John C. Kapsner
Mr. Daniel S. Kuntz
Mr. Galen Mack
Mr. Ronald H. McLean
Ms. Sherry Mills Moore
Mr. Stephen W. Plambeck
Ms. Cathy Howe Schmitz
Mr. Michael G. Sturdevant


Justice Dale V. Sandstrom
Chair

SYNOPSIS OF PROPOSED AMENDMENTS

A. North Dakota Rules of Civil Procedure

Rule 52 - Findings by the Court

Subdivision (a) is amended to prescribe application of the “clearly erroneous” standard of review in juvenile cases.

B. North Dakota Rules of Criminal Procedure

Rule 44 - Right to and Appointment of Counsel

The explanatory note is amended to reflect the United States Supreme Court’s holding in Alabama v. Shelton.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its actions. Requests for findings are not necessary for purposes of review. Findings of fact, including findings in juvenile matters, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master or juvenile referee, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. On motion served and filed no later than 15 days after notice of entry of judgment the court may amend its findings—or make additional findings—and may amend the judgment. The motion may accompany a motion for a new trial under Rule 59. When findings of fact are made in actions tried without a jury, the sufficiency of the

22 evidence supporting the findings may be later questioned whether or not the party raising
23 the question in the district court objected to the findings, moved to amend them, or moved
24 for partial findings.

25 (c) Judgment on Partial Findings. If during a trial without a jury a party has been fully
26 heard on an issue and the court finds against the party on that issue, the court may enter
27 judgment as a matter of law against that party with respect to a claim, or defense that cannot
28 under the controlling law be maintained or defeated without a favorable finding on that
29 issue, or the court may decline to render any judgment until the close of all the evidence.
30 Such a judgment shall be supported by findings of fact and conclusions of law as required
31 by subdivision (a) of this rule.

32
33 EXPLANATORY NOTE

34 Rule 52 was amended, effective August 1, 1971; March 1, 1986; March 1, 1994;
35 March 1, 1997; March 1, 1998; ~~_____.~~

36 A choice between two permissible views of the evidence is not clearly erroneous
37 when the trial court's findings are based either on physical or documentary evidence, or
38 inferences from other facts, or on credibility determinations. ~~Anderson v. City of Bessemer~~
39 ~~City, N.C., 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). Prior decisions of this~~
40 ~~Court to the contrary are to be disregarded.~~

41 Subdivision (a) was amended, effective March 1, 1994, to expressly provide that
42 findings of fact, whether based on oral or documentary evidence, are not to be set aside

43 unless clearly erroneous. ~~See Stracka v. Peterson, 377 N.W.2d 580 (N.D. 1985).~~
44 Subdivision (a) was further amended, effective _____, to clarify that findings
45 of fact in juvenile matters, including referee findings adopted by the district court, are not
46 to be set aside unless clearly erroneous.

47 Subdivision (c) was added, effective March 1, 1994, to track the 1991 federal
48 amendment, by authorizing the court in a non-jury trial to enter judgment at any time that
49 the court can make a dispositive finding of fact on the evidence against any party. The new
50 subdivision replaces part of Rule 41(b), which formerly authorized a dismissal at the close
51 of the plaintiff's case if the plaintiff had failed to carry an essential burden of proof.

52 See N.D.R.Ct. 7.1, which concerns the preparation of orders, decrees, findings of fact
53 and conclusions of law.

54 Sources: Joint Procedure Committee Minutes of September 18-19, 2003,
55 pages _____; September 26-27, 1996, pages 10-12; April 25, 1996, pages 18-19;
56 September 28-29, 1995, pages 17-18; January 28-29, 1993, page 8; March 28, 1985, pages
57 1-3; January 19, 1984, pages 3-4; November 29-30, 1979, page 14; Fed.R.Civ.P. 52.

58 STATUTES AFFECTED:

59 SUPERSEDED: N.D.R.C. §§ 28-1601, 28-1602, 28-1603, 28-1605 (1943).

60 CROSS REFERENCE: N.D.R.Ct. 7.1 (Judgments, Orders and Decrees),
61 N.D.R.Civ.P. 12 (Defenses and Objections—When and How Presented—By Pleading or
62 Motion—Motion for Judgment on Pleadings), N.D.R.Civ.P. 41 (Dismissal of Actions),
63 N.D.R.Civ.P. 56 (Summary Judgment), and N.D.R.Civ.P. 59 (New Trials—Amendment of

64 Judgments); N.D.R.App.P. 35 (Scope of Review); and N.D. Sup. Ct. R. 13 (Juvenile
65 Referees).

RULE 44. RIGHT TO AND APPOINTMENT OF COUNSEL

(a) Appointment of Counsel. Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all felony cases. Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all non-felony cases unless the magistrate has determined that sentence upon conviction will not include imprisonment. The court shall appoint counsel to represent a defendant at the defendant's expense if the defendant is unable to secure the assistance of counsel and is not indigent.

(b) Ex Parte Application for Financial Assistance. An indigent defendant may apply ex parte for financial assistance to obtain investigative, expert, or other services necessary for an adequate defense. The application, the record of any proceeding, and the order on the application must be kept under seal, except upon order of the court.

EXPLANATORY NOTE

Rule 44 was amended, effective September 1, 1983; March 1, 1990; March 1, 2001.

Rule 44 is a modification of Fed.R.Crim.P. 44; governing the appointment of counsel;

22 ~~and implements the holding of the U.S. Supreme Court in Argersinger v. Hamlin, 407 U.S.~~
23 ~~25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972). This Rule~~ In non-felony cases, this rule only
24 provides for appointment of counsel when the defendant faces a term of imprisonment,
25 including a suspended sentence of imprisonment or a deferred imposition of sentence, unless
26 imprisonment is waived. ~~when required under the holding of Argersinger, whereas the~~
27 ~~Federal Rule~~ In contrast, Fed.R.Crim.P. 44 requires appointment of counsel for all indigent
28 defendants. It is not the intent of this Rule rule to impose upon counties the expenses of the
29 defense of indigents in municipal courts.

30 Rule 44 was amended in 1983, effective September 1, 1983, to add the words “in the
31 courts of this state” in each of the first two sentences to make it clear that appointment of
32 counsel for indigent defendants at public expense is required only in proceedings through
33 appeal in the courts of North Dakota.

34 Rule 44 was amended, effective March 1, 1990. The amendments are technical in
35 nature and no substantive change is intended.

36 Rule 44 was amended, effective March 1, 2001, to authorize an application for
37 financial assistance ex parte.

38 SOURCES: Joint Procedure Committee Minutes of September 18-19, 2003,
39 pages___; January 27-28, 2000, pages 3-4; September 23-24, 1999, pages 3-6; April 20,
40 1989, page 4; December 3, 1987, page 15; September 30-October 1, 1982, page 22; October
41 15-16, 1981, page 15; Joint Procedure Committee Minutes of April 24-26, 1973, page 14;
42 December 11-15, 1972, pages 44-48; May 6-8, 1971, pages 1-11; November 20-21, 1969,

43 pages 3-8; July 10-11, 1969, pages 16-22; Fed.R.Crim.P. 44.

44 STATUTES AFFECTED:

45 SUPERSEDED: N.D.C.C. §§ 29-07-01, 29-07-04, 29-13-03, 33-12-09.

46 CONSIDERED: N.D.C.C. §§ 12-59-15, 29-01-06, 29-20-01.

47 CROSS REFERENCE: N.D.R.Crim.P. 5.—Initial Appearance Before the Magistrate;

48 N.D.R.Crim.P. 43.—Presence of the Defendant.