

## MEMORANDUM

TO: Petra H. Mandigo Hulm, Clerk of the North Dakota Supreme Court

FROM: Hon. Frank L. Racek, Presiding Judge of the East Central Judicial District Court

RE: Comment proposed amendments to Rule 3.2 of the North Dakota Rules of Court

DATE: November 6, 2020

On October 7, 2020, the North Dakota Supreme Court issued a Notice of Comment regarding proposed changes to Rule 3.2 of the North Dakota Rules of Court. Any comments to the proposed amendments must be sent to the Clerk of the Supreme Court by no later than Friday, November 6, 2020. On November 5, 2020, the 9 judges of the East Central Judicial District met and unanimously agreed to urge the Court not to adopt the amendments to Rule 3.2 and to submit a comment regarding the same. This memorandum is that written comment.

Rule 3.2 presently requires the moving party in the notice of motion (or the non-moving party in the response brief or other supporting paper) indicate either the motion will be decided on the briefs or indicate a time and date for oral argument. The amended Rule will allow either party to request the court schedule the time and place for oral argument. This will put a burden on the clerk to filter through every notice of motion and responsive document received to see if either party has selected this option. The clerk will then be required to contact the scheduler who will find the time for hearing. The Court will then have to issue an additional notice of the hearing to all interested parties. Under the existing Rule, the party merely has to contact the scheduler to obtain the date and time for hearing and either include it (or the provision that the motion would be heard on briefs and without argument) in the moving or responding documents. No clerk time is needed to review the moving and responding documents under the existing procedure. The existing Rule puts the burden to schedule a hearing on the party requesting it. This ensures that if a hearing is requested, the request will not be missed. The new rule puts many additional burdens on the clerk's office and removes the safeguards of the current rule.

Even more problematic is the new language regarding evidentiary hearings. The language of the amended Rule will exponentially expand the time needed to deal with motion practice. The clerk will now be required to review every file to see if a request for an evidentiary hearing has been made. Further, the new language of the amended Rule (at Section a(4)), does not require this request to be made in a separate pleading. This means the clerk will have to check every brief filed on every motion to see if this language has been included. If it has, the case will need to be sent to the judge via Odyssey. The judge will then have to decide if an evidentiary hearing has been granted (and possibly write a short opinion setting forth the judge's reasoning). The judge will then have to send the file back to a scheduler, who will have to coordinate with the parties, find a date and time for a hearing and issue a notice of hearing. This will take dramatically more time than the old practice.

Under the current WAPC study, Cass County is understaffed by 7 clerks. Further, there are presently 2 unfilled clerk positions in Cass County. With the number of clerks in our office, it is not uncommon to have at least one unfilled position at any one time. Further, we are also underjudged according to the weighted caseload study. Simply put, the proposed amendments to Rule 3.2 will put additional and unnecessary demands on our already overworked personnel.

Further, since July of 2014, our district has adopted procedures to ensure Rule 3.2 compliance, to give the parties the opportunity to cure defectively-noticed motions, to quickly and expeditiously deny, without prejudice, motions not in compliance with Rule 3.2, and to implement internal practices within our clerk's office so that any Rule 3.2 issues are handled with a minimum of clerk time. For your information, I am attaching to this comment several documents we prepared in 2014. While they may have been slightly altered since that time, we continue to utilize these forms (now in Odyssey) and this process (slightly streamlined even more) to this day.

Again, on behalf of the judges of the East Central Judicial District, I urge the Court not to adopt the proposed changes to Rule 3.2 of the North Dakota Rules of Court.

A handwritten signature in black ink, appearing to read "Frank L. Racek". The signature is fluid and cursive, with a large initial "F" and "R".

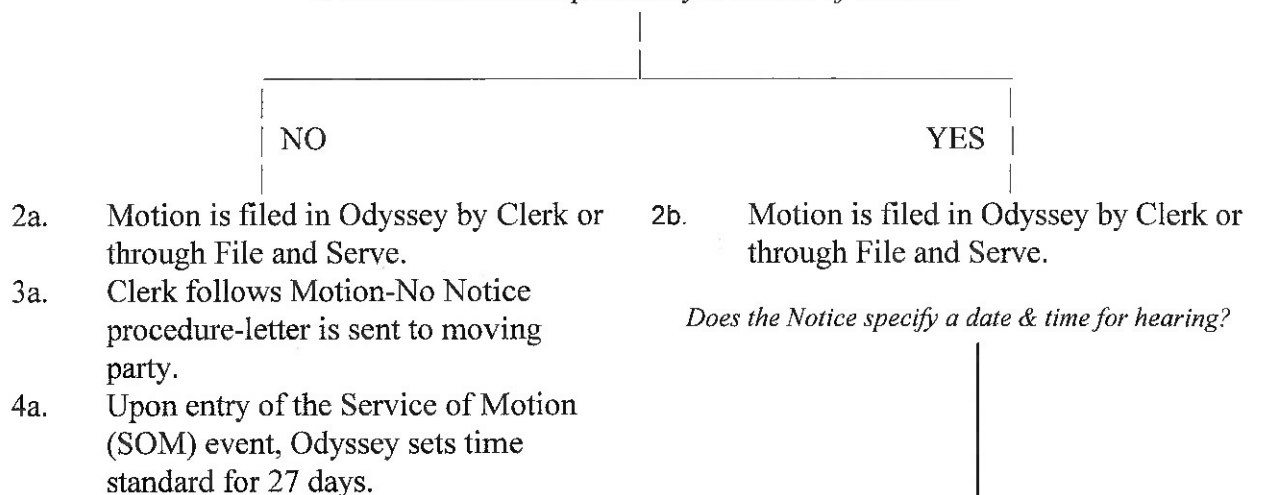
Hon. Frank L. Racek

Presiding Judge, East Central Judicial District

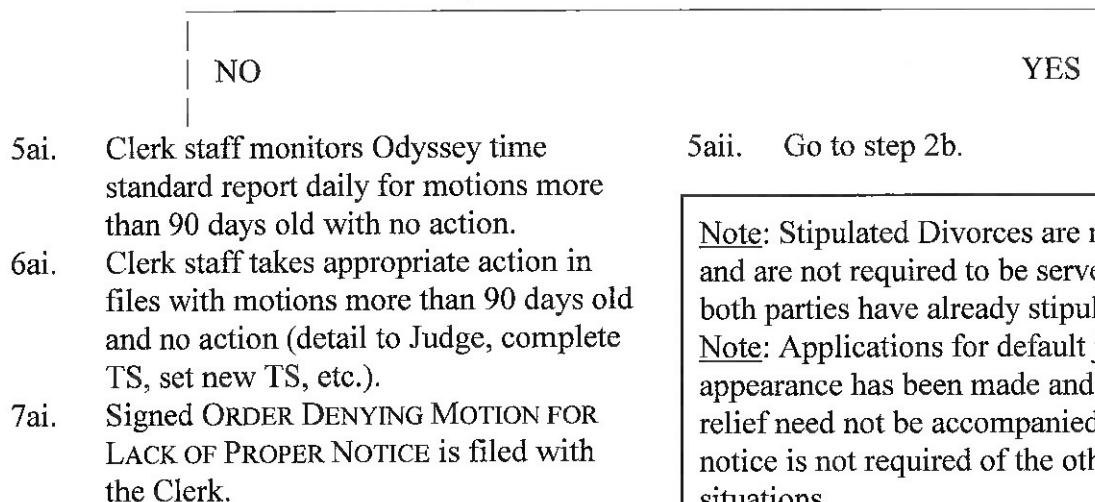
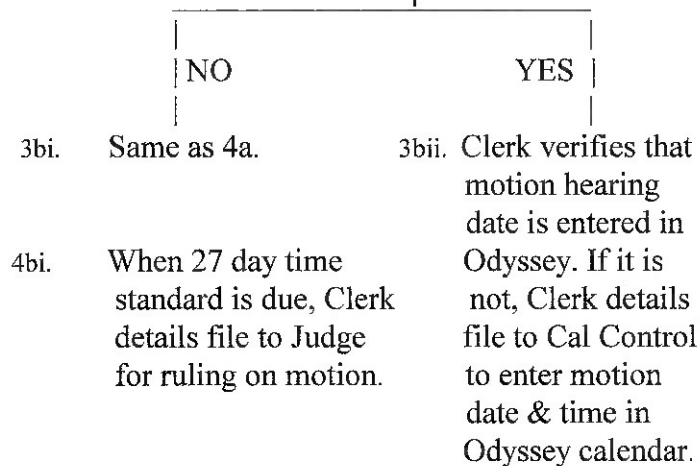
## Procedures for Dealing with Motion Practice

1. A motion is received in the clerk's office for filing.

*Is the motion accompanied by a Notice of Motion?*



*Is a proper Notice received within 27 days?*



Note: Stipulated Divorces are not considered motions and are not required to be served with a Notice (since both parties have already stipulated).

Note: Applications for default judgment when no appearance has been made and motions for ex parte relief need not be accompanied by a Notice since notice is not required of the other party in these situations.

Note: Motion for Summary Judgment is on a 34 day time track.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF CASS

EAST CENTRAL JUDICIAL DISTRICT

	,	)	
		)	
	Plaintiff,	)	File. No. 09-_____
		)	
vs.		)	<b>ORDER DENYING MOTION FOR LACK</b>
		)	<b>OF PROPER NOTICE</b>
	,	)	
		)	
	Defendant.	)	
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**ORDER**

[¶ 1] It appearing to the Court that the Plaintiff/Defendant having filed a MOTION TO \_\_\_\_\_, but having failed to serve and file a NOTICE OF MOTION as required by the prior ORDER of the Court; and further having been made aware of this failure and of the possibility of the denial of said motion if proper NOTICE OF MOTION was not served and filed; and finally having failed to correct this deficiency by not then properly serving and filing a NOTICE OF MOTION within the time previously ordered by the Court,

[¶ 2] IT IS HEREBY ORDERED AND DECREED that the above entitled motion be, and the same hereby is, **DENIED**.

[¶ 3] Dated: \_\_\_\_\_, \_\_\_\_\_.

By the Court:

\_\_\_\_\_  
The Honorable