

## **CHAPTER 12.1-27.1 OBSCENITY CONTROL**

### **12.1-27.1-01. Obscenity - Definitions - Dissemination - Classification of offenses.**

1. A person is guilty of a class C felony if, knowing of its character, the person disseminates obscene material or if the person produces, transports, or sends obscene material with intent that it be disseminated.
2. A person is guilty of a class C felony if the person presents or directs an obscene performance for pecuniary gain or participates in any portion of a performance which contributes to the obscenity of the performance as a whole.
3. A person is guilty of a class C felony if the person, as owner or manager of an establishment licensed under section 5-02-01, permits an obscene performance in the establishment. A person is guilty of a class C felony if that person participates, whether or not for compensation, in an obscene performance in an establishment licensed under section 5-02-01.
4.
  - a. In addition to the penalty provided in subsection 1, 2, or 3, any person who violates subsection 1, 2, or 3 in the course of a commercial or for-profit activity or transaction in which the offender had or shared ownership, control, managerial responsibility, or a financial interest other than wages is subject to the following penalty:
    - (1) For an individual, a fine not to exceed ten thousand dollars; or
    - (2) For a corporation, limited liability company, association, partnership, or other legal entity, a fine not to exceed twenty-five thousand dollars.
  - b. In addition to the penalty provided in subsection 1, 2, or 3, the court shall impose the following penalty upon the conviction of a person or entity described in subdivision a for a second or subsequent offense under subsection 1, 2, or 3:
    - (1) For an individual, a fine not to exceed fifty thousand dollars; or
    - (2) For a corporation, limited liability company, association, partnership, or other legal entity, a fine not to exceed one hundred thousand dollars.
5. As used in this chapter, the terms "obscene material" and "obscene performance" mean material or a performance which:
  - a. Taken as a whole, the average person, applying contemporary North Dakota standards, would find predominantly appeals to a prurient interest;
  - b. Depicts or describes in a patently offensive manner sexual conduct, whether normal or perverted; and
  - c. Taken as a whole, the reasonable person would find lacking in serious literary, artistic, political, or scientific value.

Whether material or a performance is obscene must be judged with reference to ordinary adults, unless it appears from the character of the material or the circumstances of its dissemination that the material or performance is designed for minors or other specially susceptible audience, in which case the material or performance must be judged with reference to that type of audience.
6. As used in this chapter, "disseminate" means to sell, lease, rent, advertise, broadcast, transmit, exhibit, or distribute for pecuniary gain. "Disseminate" includes any transmission of visual material shown on a cable television system, whether or not accompanied by a soundtrack, and any sound recording played on a cable television system.
7. As used in this chapter, the term "material" means any physical object, including, but not limited to, any type of book, sound recording, film, or picture used as a means of presenting or communicating information, knowledge, sensation, image, or emotion to or through a human being's receptive senses.
8. As used in this chapter, the term "patently offensive" means so offensive on its face as to affront the contemporary North Dakota standards of decency.
9. As used in this chapter, the term "performance" means any play, dance, or other exhibition presented before an audience.

10. As used in this chapter, the term "prurient interest" means a voyeuristic, lascivious, degrading, shameful, or morbid interest in nudity, sex, or excretion that goes substantially beyond customary limits of candor in description or representation of those matters.
11. As used in this chapter, the term "sexual conduct" means actual or simulated:
  - a. Sexual intercourse;
  - b. Sodomy;
  - c. Sexual bestiality;
  - d. Masturbation;
  - e. Sadomasochistic abuse;
  - f. Excretion; or
  - g. Lewd exhibition of the male or female genitals.

As used in this subsection, the term "sodomy" means contact between the penis and the anus, the mouth and the penis, the mouth and the vulva, or the mouth and the anus. As used in this subsection, the term "sadomasochistic abuse" means a depiction or description of flagellation or torture by or upon a person who is nude or clad in undergarments or in a bizarre or revealing costume; or the condition of being fettered, bound, or otherwise physically restrained on the part of one so clothed.
12. As used in this chapter, the term "book" means any book, magazine, pamphlet, newspaper, or other article made out of paper and containing printed, typewritten, or handwritten words.
13. As used in this chapter, "sexually expressive image" means a photograph or visual representation that exhibits a nude or partially denuded human figure, as defined in section 12.1-27.1-03.1, or sexual conduct.

**12.1-27.1-02. Promoting obscenity to minors - Definitions.**

As used in this section and in section 12.1-27.1-03:

1. "Promote" means to produce, direct, manufacture, issue, sell, lend, mail, publish, distribute, exhibit, or advertise.
2. "Harmful to minors" means that quality of any description or representation, in whatever form of sexual conduct or sexual excitement, when such description or representation:
  - a. Considered as a whole, appeals to the prurient sexual interest of minors;
  - b. Is patently offensive to prevailing standards in the adult community in North Dakota as a whole with respect to what is suitable material for minors; and
  - c. Considered as a whole, lacks serious literary, artistic, political, or scientific value for minors.
3. "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

**12.1-27.1-03. Promoting obscenity to minors - Minor performing in obscene performance - Classification of offenses.**

1. It is a class C felony for a person, knowing of its character, to recklessly promote to a minor any material or performance which is harmful to minors, or to admit a minor to premises where a performance harmful to minors is exhibited or takes place.
2. It is a class C felony to permit a minor to participate in a performance which is harmful to minors.

**12.1-27.1-03.1. Objectionable materials or performance - Display to minors - Definitions - Penalty.**

1. A person is guilty of a class B misdemeanor if he willfully displays at newsstands or any other business establishment frequented by minors, or where minors are or may be invited as a part of the general public, any photograph, book, paperback book, pamphlet, or magazine, the exposed cover or available content of which exploits, is devoted to, or is principally made up of depictions of nude or partially denuded human

figures posed or presented in a manner to exploit sex, lust, or perversion for commercial gain.

2. As used in this section:

- a. "Nude or partially denuded human figures" means less than completely and opaquely covered human genitals, pubic regions, female breasts or a female breast, if the breast or breasts are exposed below a point immediately above the top of the areola, or human buttocks; and includes human male genitals in a discernibly turgid state even if completely and opaquely covered.
- b. "Where minors are or may be invited as a part of the general public" includes any public roadway or public walkway.
- c. The above shall not be construed to include a bona fide school, college, university, museum, public library, or art gallery.

**12.1-27.1-03.2. Exhibition of X-rated motion picture in unscreened outdoor theater - Penalty.**

Any person who, knowing of its character, exhibits any motion picture rated X by the motion picture association of America in any outdoor theater where the screen is visible beyond the limits of the theater audience area, so that the motion picture may be seen and its content or character distinguished by normal unaided vision by a minor viewing it from beyond the limits of the theater audience area, is guilty of a class B misdemeanor.

**12.1-27.1-03.3. Creation, possession, or dissemination of sexually expressive images prohibited - Exception.**

1. A person is guilty of a class A misdemeanor if, knowing of its character and content, that person:
  - a. Without written consent from each individual who has a reasonable expectation of privacy in the image, surreptitiously creates or willfully possesses a sexually expressive image that was surreptitiously created; or
  - b. Distributes or publishes, electronically or otherwise, a sexually expressive image with the intent to cause emotional harm or humiliation to any individual depicted in the sexually expressive image who has a reasonable expectation of privacy in the image, or after being given notice by an individual or parent or guardian of the individual who is depicted in a sexually expressive image that the individual, parent, or guardian does not consent to the distribution or publication of the sexually expressive image.
2. A person is guilty of a class B misdemeanor if, knowing of its character and content, that person acquires and knowingly distributes any sexually expressive image that was created without the consent of the subject of the image.
3. This section does not authorize any act prohibited by any other law. If the sexually expressive image is of a minor and possession does not violate section 12.1-27.2-04.1, a parent or guardian of the minor may give permission for a person to possess or distribute the sexually expressive image.
4. This section does not apply to any book, photograph, video recording, motion picture film, or other visual representation sold in the normal course of business through wholesale or retail outlets that possess a valid sales tax permit or used by an attorney, attorney's agent, or any other person obtaining evidence for a criminal investigation or pending civil action, or by a medical professional or a peace officer acting within that individual's scope of employment.

**12.1-27.1-04. Definitions.**

Repealed by S.L. 1981, ch. 157, § 1.

**12.1-27.1-05. Civil proceeding a prerequisite to criminal liability.**

Repealed by S.L. 1981, ch. 157, § 1.

**12.1-27.1-06. Commencement of civil proceeding - Intervention - Seizure of materials.**

Repealed by S.L. 1981, ch. 157, § 1.

**12.1-27.1-07. Procedures - Expanded district court - Appeal.**

Repealed by S.L. 1981, ch. 157, § 1.

**12.1-27.1-08. Judgment - Effect - Notice to constructive defendants - Use in criminal prosecutions.**

Repealed by S.L. 1981, ch. 157, § 1.

**12.1-27.1-09. Preliminary injunction - Limitations.**

Repealed by S.L. 1981, ch. 157, § 1.

**12.1-27.1-10. Conflicting decisions - Resolution.**

Repealed by S.L. 1981, ch. 157, § 1.

**12.1-27.1-11. Exceptions to criminal liability.**

Sections 12.1-27.1-01 and 12.1-27.1-03 shall not apply to the possession or distribution of material in the course of law enforcement, judicial, or legislative activities; or to the possession of material by a bona fide school, college, university, museum, or public library for limited access for educational research purposes carried on at such an institution by adults only. Sections 12.1-27.1-01 and 12.1-27.1-03 shall also not apply to a person who is returning material, found to be obscene, to the distributor or publisher initially delivering it to the person returning it.

**12.1-27.1-12. State preemption of local laws regulating obscenity.**

This chapter shall be applicable and uniform throughout the state, and no political subdivision shall enact new, or enforce existing, ordinances or resolutions regulating or prohibiting the dissemination of obscene materials, or controlling obscene performances, except ordinances authorized by section 5-02-09, section 58-03-11, chapter 11-33, or chapter 40-47.