

State of North Dakota

JOINT PROCEDURE COMMITTEE

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FEBRUARY 8 2016  
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CLERK OF SUPREME COURT

February 8, 2016

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STATE OF NORTH DAKOTA

Honorable Gerald W. VandeWalle, Chief Justice  
North Dakota Supreme Court  
600 East Boulevard Avenue  
Bismarck, ND 58505-0530

Re: Proposed Amendments to N.D.R.Crim.P. 10 (Arraignment) and N.D.R.Crim.P.  
43 (Defendant's Presence)

Dear Chief Justice:

Recently, the Court acted on a proposal from the Joint Procedure Committee to amend Rule 43 to allow a represented defendant in a felony case to waive the preliminary hearing and enter a not guilty plea in writing. Soon after the amendment took effect March 1, 2015, courts and attorneys around the state began to raise questions about whether the amendment was intended to allow a represented defendant in a felony case to also waive the arraignment in writing. At its April and September 2015 meetings, the committee discussed whether the rule should be further amended to clarify whether the arraignment can be waived.

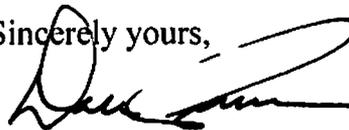
In proposing the original amendments, the committee wanted to recognize the need for the defendant to be instructed by the court at some stage of the proceeding about the significance of a felony charge being brought. This instruction traditionally occurs at the arraignment. On the other hand, under current practice the preliminary examination and the arraignment take place consecutively at the same court session. Therefore, allowing written waiver of the preliminary hearing alone contributes little to party and judicial economy because the defendant, defense attorney, and prosecutor still need to be present at a court session for the arraignment.

At its January 2016 meeting, the committee finalized amendments to Rule 43 intended

to clarify that a represented defendant in a felony case may waive the preliminary hearing and arraignment in writing when the defendant is pleading not guilty. In order to eliminate any conflicts between this proposed amendment and Rule 10's "open court" arraignment requirement, the committee proposes that Rule 10 be amended to include an exception to the "open court" requirement when presence has been waived under Rule 43. The committee decided to send the proposed amendments to Rule 10 and Rule 43 directly to the Court because it believes there is a need to provide direction on this matter to courts and attorneys. The proposed amendments are attached.

Thank you for your attention to the committee's proposals.

Sincerely yours,



Dale V. Sandstrom  
Chair, Joint Procedure Committee

MH:kh

attachments

RULE 10 ARRAIGNMENT

1 (a) In General. Arraignment Unless the defendant has waived presence  
2 under Rule 43, arraignment must be conducted in open court and consists of:

3 (1) ensuring the defendant has a copy of the indictment, information, or  
4 complaint;

5 (2) reading the indictment, information, or complaint to the defendant or  
6 stating to the defendant the substance of the charge; and then

7 (3) asking the defendant to plead to the indictment, information or  
8 complaint.

9 If the defendant appears at the arraignment without counsel, the defendant must be  
10 informed of the right to counsel as provided in Rule 44.

11 (b) Reliable Electronic Means. Contemporaneous audio or audiovisual  
12 transmission by reliable electronic means may be used to arraign a defendant as  
13 permitted by N.D. Sup. Ct. Admin. R 52.

14 EXPLANATORY NOTE

15 Rule 10 was amended, effective March 1, 1990; March 1, 2004; March 1,  
16 2006; March 1, 2016; \_\_\_\_\_.

17 Rule 10 follows Fed.R.Crim.P. 10 in substance and controls with respect to  
18 all arraignments which arise within the state.

19 Rule 10 is designed both to safeguard important rights of the defendant as

20 well as to protect proper administration of criminal law. The arraignment is an  
21 appearance before the court, intended to inform the accused of the charge against  
22 the accused and to obtain an answer from the accused. It is an important step in the  
23 criminal case, since it formulates the issue to be tried.

24 Failure to comply with the requirements of a proper arraignment is an  
25 irregularity that does not warrant a reversal of a conviction if not raised before  
26 trial. Under the rule, no specific time for the arraignment is set and no precise  
27 ceremonial or verbal formality need be followed.

28 Rule 10 was amended, effective March 1, 2004. The existing text of the rule  
29 was divided into subdivisions to improve clarity.

30 Subdivision (a) was amended, effective \_\_\_\_\_, to reference  
31 Rule 43, which contains provisions allowing waiver of presence under specified  
32 circumstances.

33 Subdivision (b) was added effective March 1, 2004, to permit the use of  
34 interactive television to conduct the arraignment. Subdivision (b) was amended,  
35 effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs  
36 proceedings conducted by remote means. Subdivision (b) was further amended,  
37 March 1, 2016, to allow the use of contemporaneous audio or audiovisual  
38 transmission by reliable electronic means to conduct the arraignment.

39 Rule 10 was amended, effective March 1, 2006, in response to the  
40 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The

41 language and organization of the rule were changed to make the rule more easily  
42 understood and to make style and terminology consistent throughout the rules.

43 SOURCES: Joint Procedure Committee Minutes of \_\_\_\_\_;  
44 September 24-25, 2015, pages 23-24; April 23-24, 2015, pages 13-14; April 29-30,  
45 2004, pages 26-28; September 26-27, 2002, page 13; April 20, 1989, page 4;  
46 December 3, 1987, page 15; March 23-25, 1972, pages 20-23; May 3-4, 1968,  
47 pages 8-9; Fed.R.Crim.P. 10.

48 STATUTES AFFECTED:

49 SUPERSEDED: N.D.C.C. §§ 29-11-56, 29-12-01, 29-13-01, 29-13-03, 29-  
50 13-04, 29-13-05, 29-13-06, 29-13-07, 29-13-08, 29-13-09, 33-12-15.

51 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the  
52 Magistrate); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right  
53 to and Appointment of Counsel); N.D.Sup.Ct.Admin.R. 52 (Contemporaneous  
54 Transmission by Reliable Electronic Means).

**RULE 43. DEFENDANT'S PRESENCE**

1           (a) When Required.

2           (1) In General. Unless this rule provides otherwise, the defendant must be  
3 present at:

4           (A) the initial appearance, the arraignment, and the plea;

5           (B) every trial stage, including jury impanelment and the return of the  
6 verdict; and

7           (C) sentencing.

8           (2) Reliable Electronic Means. Presence permitted by contemporaneous  
9 audio or audiovisual transmission by reliable electronic means is presence for the  
10 purposes of this rule.

11          (3) Jury Question.

12          (A) In General. If, after beginning deliberations, the members of the jury  
13 request information on a point of law or request to have testimony read or played  
14 back to them, they must be brought into the courtroom. The court's response must  
15 be provided in the presence of counsel and the defendant.

16          (B) Agreed Manner of Response. In the alternative, after consultation with  
17 counsel in the presence of the defendant, the court may respond to a jury's question  
18 or request for testimony in a manner other than in open court if agreed to by  
19 counsel and the defendant.

20 (b) When Not Required. If the court permits, a defendant need not be  
21 present under any of the following circumstances:

22 (1) Felony Offense. The offense is punishable by imprisonment for more  
23 than one year, and with a represented defendant's written consent, the preliminary  
24 hearing, the arraignment, and entry of a not guilty plea ~~and the preliminary hearing~~  
25 may occur in the defendant's absence.

26 (2) Misdemeanor Offense or Infraction. The offense is punishable by fine or  
27 by imprisonment for not more than one year, or both, and with the defendant's  
28 written consent, the arraignment, plea, trial, ~~or~~ and sentencing may occur in the  
29 defendant's absence.

30 (3) Conference or Hearing on Legal Question. The proceeding involves  
31 only a conference or hearing on a question of law.

32 (4) Sentence Correction. The proceeding involves the correction or  
33 reduction of sentence under Rule 35.

34 (c) Waiving Continued Presence. The further progress of the trial, including  
35 the return of the verdict and the imposition of sentence, may not be prevented and  
36 the defendant waives the right to be present if the defendant, initially present at  
37 trial or having pleaded guilty:

38 (1) is voluntarily absent after the trial has begun (whether or not the  
39 defendant has been informed by the court of the obligation to remain during the  
40 trial);

41 (2) is voluntarily absent at the imposition of sentence; or  
42 (3) after being warned by the court that disruptive conduct will cause the  
43 removal of the defendant from the courtroom, persists in conduct that justifies the  
44 defendant's exclusion from the courtroom.

45 EXPLANATORY NOTE

46 Rule 43 was amended, effective January 1, 1980; March 1, 1990; March 1,  
47 1998; March 1, 2004; March 1, 2006; March 1, 2008; March 1, 2010; March 1,  
48 2015;\_\_\_\_\_.

49 Although Rule 43 does not require the defendant's presence in all instances,  
50 the rule does not give a defendant the right to be absent. The court has discretion  
51 whether to require the presence of the defendant.

52 In a non-felony case, if the defendant pleads guilty without appearing in  
53 court, a written form must be used advising the defendant of his or her  
54 constitutional rights and creating a record showing that the plea was made  
55 voluntarily, knowingly, and understandingly.

56 Rule 37 provides for summary affirmance if the defendant does not appear  
57 at a trial anew.

58 Rule 43 was amended, effective March 1, 2006, in response to the  
59 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The  
60 language and organization of the rule were changed to make the rule more easily  
61 understood and to make style and terminology consistent throughout the rules.

62           Subdivision (a) was amended, effective March 1, 2004, in response to  
63 amendments to Rule 5 and Rule 10 allowing interactive television to be used for  
64 the initial appearance and arraignment. N.D. Sup. Ct. Admin. R. 52, which took  
65 effect June 1, 2005, governs proceedings conducted by interactive television.

66           Subdivision (a) was amended, effective March 1, 2010, to explain  
67 requirements for the consideration of questions submitted by the jury after  
68 deliberations begin.

69           Subdivision (a) was amended, effective March 1, 2015, to allow a  
70 defendant to be present by contemporaneous audio or audiovisual transmission  
71 using reliable electronic means. Any appearance by a defendant by electronic  
72 means must be consistent with the standards set by N.D. Sup. Ct. Admin. R. 52,  
73 which governs the use of contemporaneous transmission by reliable electronic  
74 means in court proceedings.

75           Subdivision (b) was amended, effective March 1, 2015, to allow a  
76 represented defendant in a felony case to waive presence at the preliminary hearing  
77 ~~by submitting~~ and submit a not guilty plea in writing.

78           Subdivision (b) was amended, effective \_\_\_\_\_, to clarify that a  
79 represented defendant in a felony case may waive presence at the arraignment in  
80 writing.

81           SOURCES: Joint Procedure Committee Minutes of \_\_\_\_\_;  
82 September 24-25, 2015, pages 21-23; April 24-25, 2014, pages 12-15; May 21-22,

83 2009, pages 10-11; January 29-30, 2009, pages 13-17; September 28-29, 2006,  
84 pages 8-10; January 27-28, 2005, pages 34-36; September 26-27, 2002, pages  
85 13-14; January 30, 1997, pages 7-8; September 26-27, 1996, pages 8-10; January  
86 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994,  
87 pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; December 7-8,  
88 1978, pages 27-28; October 12-13, 1978, pages 43-44; December 11-15, 1972,  
89 pages 41-43; May 15-16, 1969, pages 11-13.

90 STATUTES AFFECTED:

91 SUPERSEDED: N.D.C.C. §§ 29-12-12, 29-13-02, 29-14-21, 29-16-03,  
92 29-16-04, 29-16-06, 29-22-05, 29-22-11, 29-26-04, 33-12-23.

93 CONSIDERED: N.D.C.C. §§ 29-16-05, 29-26-11.

94 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the  
95 Magistrate); N.D.R.Crim.P. 10 (Arrest); N.D.R.Crim.P. 11 (Pleas);  
96 N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 37  
97 (Appeal as of Right to District Court; How Taken); N.D.R.Crim.P. Appendix Form  
98 17 (Misdemeanor Petition to Enter Plea of Guilty); N.D. Sup. Ct. Admin. R. 52  
99 (Contemporaneous Transmission by Reliable Electronic Means ).