

## **Explanation for Proposed Changes to Rules of Criminal Procedure:**

### **Rule 3**

The proposed change to Rule 3 recognizes that an information could be used as the initial charging document for an offense. The proposed change does so by eliminating the characterization of the “complaint” as “the initial charging document for all criminal offenses.” The change would ensure the propriety of initiating prosecutions by information, which is currently the common practice in Cass County. In the past, Cass County’s common practice involved first filing a complaint and later filing an information, which helped demark the stage of proceedings – county court or district court – in the old dual court system. Because the dual court system was abolished, using the “first complaint, later information” procedure became unnecessary. With that two-step procedure unnecessary, Cass County developed its common practice based primarily on the need for an efficient, workable process in a system with high volume – nearly 5,000 cases per year.

The proposed change to Rule 3 would also ensure the propriety of initiating an offense by grand jury indictment or uniform complaint and summons.

### **Rule 5**

The proposed changes to Rule 5 parallel the proposed change to Rule 3, recognizing that an information may be used as the initial charging document for an offense. The proposed changes do so by adding the phrase “or information” where appropriate.

### **Rule 7**

The proposed change to Rule 7 parallels the proposed change to Rule 3, again recognizing that an information may be used as the initial charging document for an offense. The proposed change does so by eliminating the characterization of the information as an appropriate charging document for a felony offense arising “after preliminary examination.”

## **Proposed Changes to Rules of Criminal Procedure:**

### **RULE 3. THE COMPLAINT**

**1.(a) General.** The complaint is a written statement of the essential facts constituting the elements of the offense charged ~~and is the initial charging document for all criminal offenses.~~ The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state and be presented to a magistrate.

**(b) Magistrate Review.** The magistrate may examine on oath the complainant and other witnesses and receive any affidavit filed with the complaint. If the magistrate examines the complainant or other witnesses on oath, the magistrate shall cause their statements to be reduced to writing and subscribed by the persons making them or to be recorded.

**(c) Amendment.** The magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

### **RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE**

#### **1. (a) General.**

(1) Appearance Upon an Arrest. An officer or other person making an arrest must take the arrested person without unnecessary delay before the nearest available magistrate.

(2) Arrest Without a Warrant. If an arrest is made without a warrant, the magistrate must promptly determine whether probable cause exists under Rule 4(a). If probable cause exists to believe that the arrested person has committed a criminal offense, a complaint or information must be filed in the county where the offense was allegedly committed. A copy of the complaint or information must be given within a reasonable time to the arrested person and to any magistrate before whom the arrested person is brought, if other than the magistrate with whom the complaint or information is filed.

#### **(b) Statement by the Magistrate at the Initial Appearance.**

(1) In All Cases. The magistrate must inform the defendant of the following:

(A) the charge against the defendant and any accompanying affidavit;

(B) the defendant's right to remain silent; that any statement made by the defendant may later be used against the defendant;

(C) the defendant's right to the assistance of counsel before making any statement or answering any questions;

(D) the defendant's right to be represented by counsel at each and every stage of the proceedings;

(E) if the offense charged is one for which counsel is required, the defendant's right to have legal services provided at public expense to the extent that the defendant is unable to pay for the defendant's own defense without undue hardship; and

(F) the defendant's right to be admitted to bail under Rule 46.

(2) Felonies. If the defendant is charged with a felony, the magistrate must inform the defendant also of the defendant's right to a preliminary examination and the defendant's right to the assistance of counsel at the preliminary examination.

(3) Misdemeanors. If the defendant is charged with a misdemeanor, the magistrate must inform the defendant also of the defendant's right to trial by jury in all cases as provided by law and of the defendant's right to appear and defend in person or by counsel.

**(c) Right to Preliminary Examination.**

(1) Waiver.

(A) If the offense charged is a felony, the defendant has the right to a preliminary examination. The defendant may waive the right to preliminary examination at the initial appearance if assisted by counsel.

(B) If the defendant is assisted by counsel and waives preliminary examination and the magistrate is a judge of the district court, the defendant may be permitted to plead to the offense charged in the complaint or information at the initial appearance.

(C) If the defendant waives preliminary examination and does not plead at the initial appearance, an arraignment must be scheduled.

(D) The magistrate must admit the defendant to bail under the provisions of Rule 46.

(2) Non-waiver. If the defendant does not waive preliminary examination, the defendant may not be called upon to plead to a felony offense at the initial appearance. A magistrate of the county in which the offense was allegedly committed must conduct the preliminary examination. The magistrate must admit the defendant to bail under the provisions of Rule 46.

**(d) Interactive television.** Interactive television may be used to conduct an appearance under this rule as permitted by N.D.Sup.Ct.Admin.R. 52.

**(e) Uniform Complaint and Summons.** Notwithstanding Rule 5(a), a uniform complaint and summons may be used in lieu of a complaint or information and appearance before a magistrate, whether an arrest is made or not, for an offense that occurs in an officer's presence or for a motor vehicle or game and fish offense. When a uniform complaint and summons is issued for a felony offense, the prosecuting attorney must also subsequently file a complaint or information that complies with Rule 5(a). An individual held in custody must be brought before a magistrate for an initial appearance without unnecessary delay.

## **RULE 7. THE INDICTMENT AND THE INFORMATION**

**(a) When Used.**

(1) Felony. All felony prosecutions in the district court must be by indictment after grand jury inquiry or information ~~after preliminary examination~~.

(2) Misdemeanor. All misdemeanor and other prosecutions in the district court, including

appeals, must be by indictment, information, or-complaint.

**(b) Waiver of Indictment. [Intentionally omitted].**

**(c) Nature and Contents.**

(1) In General. The indictment or the information must name or otherwise identify the defendant, and must be a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged. It must be signed by the prosecuting attorney. All prosecutions except appeals from municipal courts must be carried on in the name and by the authority of the State of North Dakota and must conclude “against the peace and dignity of the State of North Dakota.” Except as required by this rule, the indictment or information need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specific means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged to have violated.

(2) Citation Error. Unless the defendant was prejudicially misled, neither an error in the citation nor its omission is a ground to dismiss the indictment or information or to reverse a conviction.

**(d) Surplusage.** On motion of either party or on its own motion, the court may strike surplusage from the information or indictment.

**(e) Amending an Information.** Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding.

**(f) Bill of Particulars.** The court may direct the filing of a bill of particulars. The defendant may move for a bill of particulars before arraignment or within one day after arraignment or at a later time if the court permits. The motion must be in writing and must specify the particulars sought by the defendant. A bill of particulars must be granted if the court finds it necessary to protect the defendant against a second prosecution for the same offense or to enable the defendant to adequately prepare for trial. A bill of particulars may be amended at any time subject to such conditions as justice requires.

**(g) Names of Witnesses to Be Endorsed on Indictment or Information.** When an indictment or information is filed, the names of all the witnesses on whose evidence the indictment or information was based must be endorsed on it before it is presented. The prosecuting attorney, at a time the court prescribes by rule or otherwise, must endorse on the indictment or information the names of other witnesses the prosecuting attorney proposes to call. A failure to endorse those names does not affect the validity or sufficiency of the indictment or information, but the court in which the indictment or information was filed must direct the names of those witnesses to be endorsed on application of the defendant. The court may not allow a continuance because of the failure to endorse any of those names unless the application was made at the earliest opportunity and then only if a continuance is necessary in the name of justice.

## **Explanation for Proposed Changes to the North Dakota Century Code:**

The proposed statutory changes involve eliminating the remnants from the old dual court system, which has now been abolished. Under the old system, all cases started in “county court” by complaint. Felonies proceeded to “district court” only after the preliminary examination and, at that time, an information was “presented” in district court. Because the current system involves just the “district court,” keeping remnants of the old dual court system is impractical and inefficient.

Specifically, the proposed changes would clarify that a case starts upon the filing of the charging document – whether uniform complaint and summons, complaint, or information - or upon the return of a grand jury indictment. The changes would also eliminate the “presentment” process

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## Proposed Changes to the North Dakota Century Code:

**29-04-05. When action is commenced.** ~~An information is filed or an indictment found within the meaning of this chapter when it is presented, if an information, by the state's attorney or person appointed to prosecute, or, if an indictment, by the grand jury, in open court, and there received and filed, or if a complaint, when filed by a magistrate having jurisdiction to hear, try, and determine the action.~~

A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned.

**29-09-02. Prosecution on information - In what cases.** Repealed. ~~During each term of the district court held in and for any county in this state at which a grand jury has not been summoned and impaneled, the state's attorney of the county, or any other person appointed by the court, as provided by law, to prosecute a criminal action, shall file an information as the circumstances may require against any person accused of having committed a crime or public offense within such county, or one triable therein:~~

- ~~1. When such person has had a preliminary examination before a magistrate for such crime or public offense and, from the evidence taken thereat, the magistrate has ordered that such person be held to answer to the offense charged or some other crime or public offense disclosed by the evidence;~~
- ~~2. When the crime or public offense is committed during the term of the district court in and for the county in which the offense is committed or triable;~~
- ~~3. When a person accused of a crime or public offense is arrested and waives, in writing, or if before a magistrate, orally, a preliminary examination therefor, but the fact that a preliminary examination was neither had nor waived does not invalidate an information unless the defendant objects to such information because of such fact before entering the defendant's plea;~~
- ~~4. When a person accused of a misdemeanor or infraction, not within the jurisdiction of the magistrate to try and punish, has been arrested and admitted to bail at a place other than the county in which said offense is triable; and~~
- ~~5. At any time when the person accused of a crime or public offense is a fugitive from justice and such information may be needed by the governor of this state to demand such person from the executive authority of any other state or territory within the United States, or to aid the proper executive authority of the United States to demand such person of any foreign government.~~

**29-09-06. State's attorney shall inquire into charges.** Repealed ~~If, at a preliminary examination, a defendant is held to answer, the state's attorney or other person appointed to prosecute shall make full examination and inquiry into the facts and circumstances touching any crime or public offense alleged to have been committed, except as is otherwise provided in section 29-09-07, and triable in said county, and shall file an information charging the commission of a crime according to the facts ascertained on such examination and inquiry and from the written testimony taken before the magistrate, whether it is the offense charged in the~~

~~complaint upon which the examination was had or some other offense.~~

**29-09-07. Procedure when no information filed. Repealed**

~~If the state's attorney, or other person appointed to prosecute in any case mentioned in section 29-09-06, determines that an information ought not to be filed, the person shall present to the court a statement in writing setting forth the person's reasons in fact and in law for not filing an information. Such statement must be filed at and during the term of the court to which the accused is held to appear for trial. The court thereupon shall examine such statement, together with the evidence filed in the case, and if, upon such examination, the court is not satisfied with such statement, the state's attorney, or other person appointed to prosecute, must be directed and required by the court to file the proper information and bring the case to trial. If the court does not require that an information be filed and the defendant is not held or wanted to answer for any other crime or public offense, the defendant must be discharged and the defendant's bail exonerated or money deposited refunded to the defendant.~~