

State of North Dakota

JOINT PROCEDURE COMMITTEE

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MAY 9 2011

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STAFF ATTORNEY
MICHAEL J. HAGBURG

FIRST FLOOR JUDICIAL WING
600 E BOULEVARD AVE DEPT 180
BISMARCK, ND 58505-0530

May 9, 2011



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

Re: Rule 3, N.D.R.Crim.P., The Complaint; Rule 5, N.D.R.Crim.P., Initial Appearance Before the Magistrate; Rule 7, N.D.R.Crim.P., The Indictment and the Information

Dear Chief Justice VandeWalle:

At its April meeting, the Joint Procedure Committee approved proposed amendments to Criminal Procedure Rules 3, 5 and 7. The proposed amendments are consistent with recent legislative amendments to N.D.C.C. § 29-04-05 and related statutes. New statutory language provides that “[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.” The legislative amendments were included in H.B. 1192, a copy of which is attached.

The proposed amendments to Rules 3, 5 and 7 are relatively minor. They include deletion of language in Rule 3 that defines the complaint as the sole initial charging document for an offense. Proposed changes to Rules 5 and 7 specifically allow an information to be used as the initial charging document for an offense.

The rationale behind the statutory changes and the proposed rule amendments is to remove impediments to initiating prosecutions by information or by a uniform complaint and summons. Implementing the changes will eliminate remnants of the old dual court charging system and its “first complaint, later information” charging procedure. Cass County already routinely uses the information as the initial charging document.

The proposed changes to Rule 3, 5 and 7 are attached. Because the H.B. 1192 statutory amendments will become effective August 1, 2011, the Committee requests that the Court act on the rule amendment proposals immediately as an emergency measure.

Sincerely,

A handwritten signature in black ink that reads "Mary Muehlen Maring". The signature is written in a cursive style with a large, looping initial "M".

Mary Muehlen Maring
Chair, Joint Procedure Committee

MH:kh
attachment

**Sixty-second Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 4, 2011**

HOUSE BILL NO. 1192
(Representatives Dahl, Karls, Sanford, S. Meyer)

AN ACT to amend and reenact section 29-04-05 of the North Dakota Century Code, relating to the commencement of a criminal prosecution; and to repeal sections 29-09-02, 29-09-06, and 29-09-07 of the North Dakota Century Code, relating to criminal procedure and the methods of prosecution.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 29-04-05 of the North Dakota Century Code is amended and reenacted as follows:

29-04-05. When actionprosecution 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.

SECTION 2. REPEAL. Sections 29-09-02, 29-09-06, and 29-09-07 of the North Dakota Century Code are repealed.

RULE 3. THE COMPLAINT

(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.

EXPLANATORY NOTE

Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007;_____.

Subdivision (a) was amended, effective January 1, 1995, to allow a complaint to be subscribed and sworn to outside the presence of a magistrate. An effect of this amendment is to allow facsimile transmission of the complaint. For a listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The amendment does not preclude a magistrate from examining a complainant or other witnesses under oath when making the probable

22 cause determination.

23 Subdivision (a) was amended, effective March 1, 1996, to clarify that the complaint
24 is the initial document for charging a person with a misdemeanor or felony.

25 Subdivision (a) was amended, effective March 1, 2007, to specify that the complaint
26 must contain a statement of the facts that establish the elements of the offense charged.

27 Subdivision (a) was amended, effective _____, to eliminate
28 language about the complaint being the initial charging document for all criminal offenses.
29 N.D.C.C. § 29-04-05 was amended in 2011 to specify that “A prosecution is commenced
30 when a uniform complaint and summons, a complaint, or an information is filed or when a
31 grand jury indictment is returned.”

32 Subdivision (c) is similar to Rule 7(e).

33 Rule 3 was amended, effective March 1, 2006, in response to the December 1, 2002,
34 revision of the Federal Rules of Criminal Procedure. The language and organization of the
35 rule were changed to make the rule more easily understood and to make style and
36 terminology consistent throughout the rules.

37 Sources: Joint Procedure Committee Minutes of April 28-29, 2010,
38 pages _____; April 24-25, 2003, pages 25-26; January 26-27, 1995, pages 3-5; April
39 28-29, 1994, pages 20-22; January 27-29, 1972, pages 4-7; September 27-28, 1968, pages
40 1-2; November 17-18, 1967, page 2.

41 Statutes Affected:

42 Superseded: N.D.C.C. §§ 29-01-13(1), 29-05-02 to the extent that it requires a

43 complaint to be subscribed and sworn to before a magistrate, N.D.C.C. §§ 29-05-03, 33-12-
44 03, 33-12-04, 33-12-05, 33-12-16, 33-12-25.

45 Considered: N.D.C.C. §§ 12-01-04(12), 29-01-14, 29-02-06, 29-02-07, 29-04-05, 29-
46 05-01, 29-05-05.

47 Cross References: N.D.R.Civ.P. 7 (The Indictment and the Information).

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE

(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;

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

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

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

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

32 (c) Right to preliminary examination.

33 (1) Waiver.

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

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

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

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

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

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

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

57 EXPLANATORY NOTE

58 Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1, 2006; June
59 1, 2006; March 1, 2010; _____.

60 Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the defendant
61 of the charge against the defendant and to inform the defendant of the defendant's rights. This
62 procedure differs from arraignment under Rule 10 in that the defendant is not called upon to
63 plead.

64 Subdivision (a) provides that an arrested person must be taken before the magistrate
65 "without unnecessary delay." Unnecessary delay in bringing a person before a magistrate is
66 one factor in the totality of circumstances to be considered in determining whether
67 incriminating evidence obtained from the accused was given voluntarily.

68 Subdivision (a) was amended, effective January 1, 1995, to clarify that a "prompt"
69 judicial determination of probable cause is required in warrantless arrest cases.

70 Subdivision (b) is designed to carry into effect the holding of *Miranda v. Arizona*, 384
71 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966). Because the Miranda
72 rule is constitutionally based, it applies to all officers whether state or federal. One should
73 note that the protections required by Miranda apply as soon as a person "has been taken into
74 custody or otherwise deprived of his freedom of action in any significant way", while the
75 requirement that an accused be taken before a magistrate is applicable only to an "arrested
76 person". The Miranda decision is based upon the Fifth Amendment privilege against self-
77 incrimination and holds that no statement obtained by interrogation of a person in custody
78 is admissible, unless, before the interrogation begins, the accused has been effectively
79 warned of the accused's rights, including the right not to answer questions and the right to
80 have counsel present.

81 Subdivision (b) specifies the action which must be taken by the magistrate.
82 Subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C) are stated by Miranda to be absolute
83 prerequisites to interrogation and cannot be dispensed with on even the strongest showing
84 that the person in custody was aware of those rights.

85 Paragraph (b)(1) was amended, effective June 1, 2006, to remove a reference to court
86 appointment of counsel for indigents. Courts ceased appointing counsel for indigents on
87 January 1, 2006, when the North Dakota Commission on Legal Counsel for Indigents became
88 responsible for defense of indigents.

89 Paragraph (b)(2) provides an additional requirement to the instructions given by the
90 magistrate in paragraph (b)(1) when the charge is a felony. It requires the magistrate to
91 inform the defendant of the right to a preliminary examination. The Sixth Amendment right
92 to counsel applies to a preliminary examination granted under state law because the
93 preliminary examination is a critical stage of the state's criminal process.

94 Subdivisions (b) and (c) were amended, effective March 1, 1990. The amendments
95 track the 1987 amendments to Fed.R.Crim.P. 5, which are technical in nature, and no
96 substantive change is intended.

97 Subdivision (c) was amended, effective January 1, 1995, in response to elimination
98 of county courts and to ensure that a defendant is not called upon to waive the preliminary
99 examination or to plead without the assistance of counsel at the initial appearance.

100 Subdivision (d) was amended, effective March 1, 2004, to permit the use of interactive
101 television to conduct initial proceedings. Subdivision (d) was amended, effective March 1,
102 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs proceedings conducted by
103 interactive television.

104 Subdivision (e) was added, effective March 1, 2010, to provide a procedure for using
105 the uniform complaint and summons. Statutory provisions governing the uniform complaint

106 and summons, which is commonly referred to as the "uniform citation," are in N.D.C.C. §§
107 20.1-02-14.1 and 29-05-31.

108 Rule 5 was amended, effective March 1, 2006, in response to the December 1, 2002,
109 revision of the Federal Rules of Criminal Procedure. The language and organization of the
110 rule were changed to make the rule more easily understood and to make style and
111 terminology consistent throughout the rules.

112 Rule 5 was amended, effective _____, to include new language
113 indicating that either "the complaint or information" can be used as a charging document.
114 N.D.C.C. § 29-04-05 was amended in 2011 to specify that "A prosecution is commenced
115 when a uniform complaint and summons, a complaint, or an information is filed or when a
116 grand jury indictment is returned."

117 Sources: Joint Procedure Committee Minutes of April 28-29, 2011, pages _____;
118 May 21-22, 2009, pages 2-10; April 27-28, 2006, pages 2-5, 15-17; January 29-30, 2004,
119 pages 22-23; September 26-27, 2002, pages 12-13; January 27-28, 1994, pages 3-5;
120 September 23-24, 1993, pages 4-7; April 20, 1989, page 4; December 3, 1987, page 15;
121 February 22-23, 1973, page 18; March 23-24, 1972, pages 2-3, 11-12; January 27, 1972,
122 pages 17-22; November 21-22, 1969, pages 2, 8-9, 17-19; May 3-4, 1968, pages 1-2; January
123 26-27, 1968, pages 7-9.

124 Statutes Affected:

125 Superseded: N.D.C.C. §§ 29-05-04, 29-05-11, 29-05-17, 29-05-19, 29-07-01, 29-07-
126 02, 29-07-04, 29-07-05, 29-07-07, 29-07-08, 29-07-09, 29-07-10, 33-12-07, 33-12-09.

127 Considered: N.D.C.C. §§ 20.1-02-14.1, 29-04-05, 29-05-31, 29-07-03, 29-07-06, 40-
128 18-15, 40-18-16, 40-18-18.

129 Cross Reference: N.D.R.Crim.P. 5.1 (Preliminary Examination); N.D.R.Crim.P. 10
130 (Arraignment); N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 43
131 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to and Assignment of Counsel); N.D. Sup.
132 Ct. Admin. R. 52 (Interactive Television).

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 by 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

22 violated.

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

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

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

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

38 (g) Names of witnesses to be endorsed on indictment or information. When an
39 indictment or information is filed, the names of all the witnesses on whose evidence the
40 indictment or information was based must be endorsed on it before it is presented. The
41 prosecuting attorney, at a time the court prescribes by rule or otherwise, must endorse on the
42 indictment or information the names of other witnesses the prosecuting attorney proposes to

43 call. A failure to endorse those names does not affect the validity or sufficiency of the
44 indictment or information, but the court in which the indictment or information was filed
45 must direct the names of those witnesses to be endorsed on application of the defendant. The
46 court may not allow a continuance because of the failure to endorse any of those names
47 unless the application was made at the earliest opportunity and then only if a continuance is
48 necessary in the interests of justice.

49 EXPLANATORY NOTE

50 Rule 7 was amended effective March 1, 1990; January 1, 1995; March 1, 1996; March
51 1, 2006; March 1, 2007; _____.

52 Rule 7 is an adaptation of Fed.R.Crim.P. 7 and controls all indictments and
53 informations. Although North Dakota provides that a defendant may be prosecuted by
54 indictment or information, indictments are seldom used.

55 Subdivision (a) was amended, effective January 1, 1995, in response to county court
56 elimination. The amendment allows misdemeanors to be charged by complaint in district
57 court, and for the inclusion of misdemeanor charges with felony charges in an indictment or
58 information.

59 Subdivision (a) was amended, effective March 1, 1996, to clarify that even though a
60 felony is initially charged by complaint, the subsequent prosecution must be by indictment
61 or information.

62 Subdivision (a) was amended, effective _____, to delete language
63 indicating that a preliminary examination was required before commencing a prosecution on

64 an information. N.D.C.C. § 29-04-05 was amended in 2011 to specify that “A prosecution
65 is commenced when a uniform complaint and summons, a complaint, or an information is
66 filed or when a grand jury indictment is returned.”

67 Subdivision (b) entitled "Waiver of Indictment" is retained in title and number only
68 to conform with the outline and form of Fed.R.Crim.P. 7. Article I, Section 10 of the North
69 Dakota Constitution provides that an individual must be prosecuted by indictment in cases
70 of felony unless otherwise provided by the legislature, but in all cases either by information
71 or indictment. Since the legislature has provided the state with an alternative to a prosecution
72 by indictment in N.D.C.C. § 29-09-02, it follows that under the state constitution, there is no
73 right in the accused to demand prosecution by indictment.

74 The language of subdivision (c), "must be carried on in the name * * * of the State of
75 North Dakota," does not mandate a change in the style of prosecution before municipal
76 courts. The purpose of the indictment or information is to inform the defendant of the precise
77 offense of which the defendant is accused so that the defendant may prepare the defendant's
78 defense and further that a judgment will safeguard the defendant from subsequent
79 prosecution for the same offense. The language employed in subdivision (c) is intended to
80 provide the defendant with the Sixth Amendment protection to "be informed of the nature
81 and the cause of the accusation * * * ." With this view in mind, subdivision (c) is established
82 for the benefit of the defendant and is intended simply to provide a means by which the
83 defendant can be properly informed of the proceedings without jeopardy to the prosecution.

84 Subdivisions (c) and (g) were amended, effective March 1, 1990. The amendments

85 are technical in nature and no substantive change is intended.

86 Subdivision (c) was amended, effective March 1, 2007, to specify that the indictment
87 or information must contain a statement of the facts that establish the elements of the offense
88 charged.

89 The purpose of subdivision (d) is to protect the defendant against prejudicial
90 allegations of irrelevant or immaterial facts.

91 Rule 7 was amended, effective March 1, 2006, in response to the December 1, 2002,
92 revision of the Federal Rules of Criminal Procedure. The language and organization of the
93 rule were changed to make the rule more easily understood and to make style and
94 terminology consistent throughout the rules.

95 Sources: Joint Procedure Committee Minutes of April 28-29, 2011, pages _____;
96 January 26, 2006, page 3; January 29-30, 2004, pages 24-25; January 26-27, 1995, pages 3-5;
97 January 27-28, 1994, pages 8-9; September 23-24, 1993, pages 8-10; April 20, 1989, page
98 4; December 3, 1987, page 15; March 23-25, 1972, pages 3-11; December 11-12, 1968,
99 pages 1-2; July 25-26, 1968, pages 1-4.

100 Statutes Affected:

101 Superseded: N.D.C.C. §§ 29-09-01, 29-09-03, 29-09-04, 29-09-05, ch. 29-11.

102 Considered: N.D.C.C. §§ 29-04-05, 29-09-02, 29-09-06, 29-09-07.

103 Cross Reference: N.D.C.C. ch. 29-10.1 (Grand Jury).