

State of North Dakota

JOINT PROCEDURE COMMITTEE

20150239

CHAIR
JUSTICE DALE V. SANDSTROM
STAFF ATTORNEY
MICHAEL J. HAGBURG

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

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

October 5, 2015

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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 North Dakota Court Rules
Supreme Court No. 20150239

Dear Chief Justice:

The Joint Procedure Committee submitted its annual Petition for Adoption, Amendment or Repeal of Court Rules to the Supreme Court on August 12, 2015. At its September meeting, the committee discussed issues related to a proposal contained in the August 12 petition.

Currently, N.D.R.Crim.P. 5 (Initial Appearance Before the Magistrate) is before the Court as part of the annual petition. The committee would like to offer suggestions regarding possible further amendments to Rule 5 and two related rules.

In the version of Rule 5 now before the Court, two amendments are proposed: to require the defendant in a felony case be informed at the initial appearance of the right of a defendant who is not a U.S. citizen to request a consular officer be informed of the defendant's arrest; and to allow the use of contemporaneous audio or audiovisual transmission by reliable electronic means to conduct initial proceedings.

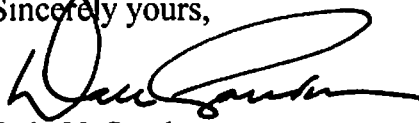
The committee suggests a third amendment to Rule 5 to require the prosecutor to file a written dismissal of a charge originally filed in a Uniform Complaint and Summons but later dropped. In addition, the committee suggests N.D.R.Crim.P. 3 (The Complaint) be

amended to require the prosecutor to file a written dismissal of charges included in an initial complaint but dropped in an amended complaint and N.D.R.Crim.P. 5.1 (Preliminary Examination) be amended to require a magistrate to formally dismiss the charge if the magistrate decides to discharge the defendant. Copies of the proposed amendments to these rules are attached.

The proposals were brought before the committee by State Court Administrator Sally Holewa, who said the practices set out in the proposed amendments were not being followed uniformly statewide. The committee discussed the proposals and concluded they represented the best practices and should be followed by magistrates and state's attorneys. The committee suggests the practices be adopted as part of the rules as a way to better insure they are followed statewide.

The committee appreciates the Court's consideration of these suggestions. Thank you for your attention to this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read "Dale V. Sandstrom", with a large, stylized flourish at the end.

Dale V. Sandstrom
Chair, Joint Procedure Committee

RULE 3. THE COMPLAINT

1 (a) General. The complaint is a written statement of the essential facts
2 constituting the elements of the offense charged. The complaint must be sworn to
3 and subscribed before an officer authorized by law to administer oaths within this
4 state and be presented to a magistrate. The complaint may be presented as provided
5 in Rule 4.1.

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

11 (c) Amendment. The magistrate may permit a complaint to be amended at
12 any time before a finding or verdict if no additional or different offense is charged
13 and if substantial rights of the defendant are not prejudiced. If the prosecuting
14 attorney chooses not to pursue a charge contained in the initial complaint, a written
15 dismissal of that charge must be filed with the amended complaint.

16 EXPLANATORY NOTE

17 Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1,
18 2006; March 1, 2007; August 1, 2011; March 1, 2013;_____.

19 Subdivision (a) was amended, effective January 1, 1995, to allow a

20 complaint to be subscribed and sworn to outside the presence of a magistrate. An
21 effect of this amendment is to allow facsimile transmission of the complaint. For a
22 listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The
23 amendment does not preclude a magistrate from examining a complainant or other
24 witnesses under oath when making the probable cause determination.

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

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

31 Subdivision (a) was amended, effective August 1, 2011, to eliminate
32 language about the complaint being the initial charging document for all criminal
33 offenses. N.D.C.C. § 29-04-05 was amended in 2011 to specify that “A
34 prosecution is commenced when a uniform complaint and summons, a complaint,
35 or an information is filed or when a grand jury indictment is returned.”

36 Subdivision (a) was amended, effective March 1, 2013, to allow the
37 complaint to be presented to the magistrate by telephone or other reliable
38 electronic means under Rule 4.1.

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

40 Subdivision (c) was amended, effective _____, to a written

41 dismissal to be filed with the amended complaint if the prosecuting attorney
42 chooses not to pursue charges raised in the initial complaint.

43 Rule 3 was amended, effective March 1, 2006, in response to the December
44 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and
45 organization of the rule were changed to make the rule more easily understood and
46 to make style and terminology consistent throughout the rules.

47 SOURCES: Joint Procedure Committee Minutes of _____;
48 January 26-27, 2012, page 25; April 28-29, 2011, pages 17-18; April 24-25, 2003,
49 pages 25-26; January 26-27, 1995, pages 3-5; April 28-29, 1994, pages 20-22;
50 January 27-29, 1972, pages 4-7 September 27-28, 1968, pages 1-2; November 17-
51 18, 1967, page 2.

52 STATUTES AFFECTED:

53 SUPERSEDED: N.D.C.C. §§ 29-01-13(1), 29-05-02 to the extent that it
54 requires a complaint to be subscribed and sworn to before a magistrate, 29-05-03,
55 33-12-03, 33-12-04, 33-12-05, 33-12-16, 33-12-25.

56 CONSIDERED: N.D.C.C. §§ 29-04-05, 12-01-04(12), 29-01-14, 29-02-06,
57 29-02-07, 29-04-05, 29-05-01, 29-05-05.

58 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or
59 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 7
60 (The Indictment and the Information).

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE

1 **(a) General.**

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

5 **(2) Arrest Without a Warrant.** If an arrest is made without a warrant, the
6 magistrate must promptly determine whether probable cause exists under Rule
7 4(a). If probable cause exists to believe that the arrested person has committed a
8 criminal offense, a complaint or information must be filed in the county where the
9 offense was allegedly committed. A copy of the complaint or information must be
10 given within a reasonable time to the arrested person and to any magistrate before
11 whom the arrested person is brought, if other than the magistrate with whom the
12 complaint or information is filed.

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

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

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

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

19 **(C)** the defendant's right to the assistance of counsel before making any

20 statement or answering any questions;

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

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

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

28 (2) Felonies. If the defendant is charged with a felony, the magistrate must
29 inform the defendant also of:

30 (i) the defendant's right to a preliminary examination;

31 (ii) ~~and~~ the defendant's right to the assistance of counsel at the preliminary
32 examination;

33 (iii) that a defendant who is not a United States citizen may request that an
34 attorney for the state or a law enforcement officer notify a consular officer from
35 the defendant's country of nationality that the defendant has been arrested.

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

40 (c) Right to Preliminary Examination.

41 (1) Waiver.

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

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

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

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

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

58 (d) ~~Interactive Television~~ Reliable Electronic Means. ~~Interactive television~~
59 Contemporaneous audio or audiovisual transmission by reliable electronic means
60 may be used to conduct an appearance under this rule as permitted by N.D. Sup.
61 Ct. Admin. R 52.

62 (e) Uniform Complaint and Summons.

63 (1) In General. Notwithstanding Rule 5(a), a uniform complaint and
64 summons may be used in lieu of a complaint and appearance before a magistrate,
65 whether an arrest is made or not, for an offense that occurs in an officer's presence
66 or for a motor vehicle or game and fish offense. ~~When a uniform complaint and~~
67 ~~summons is issued for a felony offense, the prosecuting attorney must also~~
68 ~~subsequently file a complaint that complies with Rule 5(a).~~ An individual held in
69 custody must be brought before a magistrate for an initial appearance without
70 unnecessary delay.

71 (2) Duty of Prosecuting Attorney. When a uniform complaint and summons
72 is issued for a felony offense, the prosecuting attorney must also subsequently file
73 a complaint that complies with Rule 5(a). If the prosecuting attorney after review
74 declines to prosecute a charge that has been filed with the court on a uniform
75 complaint and summons, a written dismissal of the charge must be filed with the
76 court.

77 EXPLANATORY NOTE

78 Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1,
79 2006; June 1, 2006; March 1, 2010; August 1, 2011; _____.

80 Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the
81 defendant of the charge against the defendant and to inform the defendant of the
82 defendant's rights. This procedure differs from arraignment under Rule 10 in that

83 the defendant is not called upon to plead.

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

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

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

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

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

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

118 Paragraph (b)(2) was amended, effective _____, to require
119 the defendant in a felony case to be informed at the initial appearance of the right
120 of a defendant who is not a U.S. citizen to request that a consular officer be
121 informed of the defendant's arrest. This amendment was based on the December 1,
122 2014 amendment to Fed.R.Crim.P. 5.

123 Subdivisions (b) and (c) were amended, effective March 1, 1990. The
124 amendments track the 1987 amendments to Fed.R.Crim.P. 5, which are technical

125 in nature, and no substantive change is intended.

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

130 Subdivision (d) was amended, effective March, 1, 2004, to permit the use of
131 interactive television to conduct initial proceedings. Subdivision (d) was amended,
132 effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs
133 proceedings conducted by interactive television. Subdivision (d) was further
134 amended, _____, to allow the use of contemporaneous audio or
135 audiovisual transmission by reliable electronic means to conduct initial
136 proceedings.

137 Subdivision (e) was added, effective March 1, 2010, to provide a procedure
138 for using the uniform complaint and summons. Statutory provisions governing the
139 uniform complaint and summons, which is commonly referred to as the “uniform
140 citation,” are in N.D.C.C. §§ 20.1-02-14.1 and 29-05-31.

141 Subdivision (e) was amended, effective _____, to require the
142 prosecuting attorney to file a written dismissal if the prosecuting attorney decides
143 not to pursue a charge filed with the court on a uniform complaint and summons.

144 Rule 5 was amended, effective March 1, 2006, in response to the December
145 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and

146 organization of the rule were changed to make the rule more easily understood and
147 to make style and terminology consistent throughout the rules.

148 Rule 5 was amended, effective August 1, 2011, to include new language
149 indicating that either “the complaint or information” can be used as a charging
150 document. N.D.C.C. § 29-04-05 was amended in 2011 to specify that “A
151 prosecution is commenced when a uniform complaint and summons, a complaint,
152 or an information is filed or when a grand jury indictment is returned.”

153 SOURCES: Joint Procedure Committee Minutes of
154 _____; April 23-24, 2015, pages 14-15; April 28-29, 2011, pages
155 17-18; May 21-22, 2009, pages 2-10; April 27-28, 2006, pages 2-5, 15-17; January
156 29-30, 2004, pages 22-23; September 26-27, 2002, pages 12-13; January 27-28,
157 1994, pages 3-5; September 23-24, 1993, pages 4-7; April 20, 1989, page 4;
158 December 3, 1987, page 15; February 22-23, 1973, page 18; March 23-24, 1972,
159 pages 2-3, 11-12; January 27, 1972, pages 17-22; November 21-22, 1969, pages 2,
160 8-9, 17-19; May 3-4, 1968, pages 1-2; January 26-27, 1968, pages 7-9.

161 STATUTES AFFECTED:

162 SUPERSEDED: N.D.C.C. §§ 29-05-04, 9-05-11, 29-05-17, 29-05-19, 29-
163 07-01, 29-07-02, 29-07-04, 29-07-05, 29-07-07, 29-07-08, 29-07-09, 29-07-10, 33-
164 12-07, 33-12-09.

165 CONSIDERED: N.D.C.C. §§ 20.1-02-14.1, 29-04-05, 29-05-31, 29-07-03,
166 29-07-06, 40-18-15, 40-18-16, 40-18-18.

167 CROSS REFERENCES: N.D.R.Crim.P. 5.1 (Preliminary Examination);
168 N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 35 (Correcting or Reducing a
169 Sentence); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to
170 and Assignment of Counsel); N.D. Sup. Ct. Admin. R. 52 (~~Interactive Television~~
171 Contemporaneous Transmission by Reliable Electronic Means).

RULE 5.1 PRELIMINARY EXAMINATION

1 (a) Probable Cause Finding. If the magistrate finds probable cause to
2 believe an offense has been committed and the defendant committed the offense,
3 an arraignment must be scheduled. The finding of probable cause may be based on
4 hearsay evidence in whole or in part. The defendant may cross-examine adverse
5 witnesses and may introduce evidence. The magistrate may receive evidence that
6 would be inadmissible at the trial.

7 (b) Discharge of the Defendant. If the magistrate hears evidence on behalf
8 of the respective parties in a preliminary examination, and finds either a public
9 offense has not been committed or there is not sufficient cause to believe the
10 defendant guilty of the offense, the magistrate must discharge the defendant and
11 dismiss the charge.

12 (c) Record. A verbatim record of the proceedings in the preliminary hearing
13 must be made. Upon request of either party, a copy of the transcript of the record
14 of proceedings must be furnished to the defendant and to the state. If a transcript is
15 requested by the defendant, the cost of the transcript and related costs must be
16 borne by the state if the magistrate finds the defendant is financially unable to pay
17 for the transcript without undue hardship.

18 EXPLANATORY NOTE

19 Rule 5.1 was amended, effective February 12, 1982 on an emergency basis;

20 May 20, 1982, March 1, 1990; January 1, 1995; March 1, 1998; March 1,
21 2006;_____.

22 The function of the preliminary examination is to determine whether there
23 is probable cause to hold the accused for further action.

24 Subdivision (c) was amended, effective March 1, 2006, to require a
25 verbatim record of preliminary hearing proceedings.

26 Rule 5.1 was amended, effective January 1, 1995, to conform with the
27 structure of the state judiciary and the elimination of county courts.

28 Rule 5.1 was amended, effective March 1, 2006, in response to the
29 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
30 language and organization of the rule were changed to make the rule more easily
31 understood and to make style and terminology consistent throughout the rules.

32 Subdivision (b) was amended, effective _____, to require the
33 magistrate to dismiss the charge if the defendant is discharged.

34 SOURCES: Joint Procedure Committee Minutes of
35 _____; January 29-30, 2004, pages 23-24; January 30,
36 1997, page 12; January 27-28, 1994, pages 5-8; September 23-24, 1993, pages 3-4
37 and 7-8; April 20, 1989, page 4; December 3, 1987, page 15; March 23-25, 1972,
38 pages 3, 13-15; November 20-21, 1969, pages 8-9, 17-19; May 3-4, 1968, page 2.

39 STATUTES AFFECTED:

40 SUPERSEDED: N.D.C.C. §§ 29-07-11, 29-07-12, 29-07-15, 29-07-16, 29-

41 07-17, 29-07-18, 29-07-19, 29-07-20, 29-07-21, 29-07-22, 29-07-23, 29-07-24, 29-
42 07-25, 29-07-26, 29-07-27, 29-07-28, 29-07-29, 29-07-30, 29-07-31, 29-07-32.

43 CONSIDERED: N.D.C.C. §§ 29-07-01.1, 29-07-13, 29-07-14.

44 CROSS REFERENCES: N.D.R.Crim.P. 5 (Initial Appearance Before the
45 Magistrate); N.D.R.Crim.P. 10 (Arrestment); N.D.R.Crim.P. 12 (Pleadings and
46 Motions Before Trial; Defenses and Objections).