

Rule 5. Procedure on First Appearance**5.01 Purpose of First Appearance**

(a) The purpose of the first appearance is for the court to inform the defendant of the:

- (1) charge(s);
- (2) defendant's rights, including the right to have counsel appointed if eligible; and
- (3) opportunity to enter a plea as permitted by Rules 5.06, 5.07, and 5.08.

(b) The court must first determine whether a defendant is disabled in communication as defined in Rule 5.02.

(c) The court must ensure the defendant has a copy of the charging document.

(d) The court must set bail and other conditions of release under Rule 6.02.

(e) On the prosecutor's motion, the court must require that the defendant be booked, photographed, and fingerprinted.

(Amended effective July 1, 2015.)

5.02 Requirement for Interpreter

A defendant is disabled in communication if, due to a hearing, speech or other communications disorder or difficulty in speaking or comprehending the English language, the defendant cannot fully understand the proceedings or any charges made, or is incapable of presenting or assisting in the presentation of a defense.

If a defendant is disabled in communication, the judge must appoint a qualified interpreter under Minn. Gen. R. Prac. 8 for the District Courts to assist the defendant throughout the proceedings. The proceedings that require a qualified interpreter include any proceeding attended by the defendant.

5.03 Statement of Rights

The court must advise the defendant of the following:

- (a) The right to remain silent and not submit to interrogation;
- (b) Anything the defendant says may be used against the defendant in this or any subsequent proceeding;
- (c) The right to counsel in all proceedings, including police line-ups and interrogations;
- (d) If the defendant appears without counsel and is financially unable to obtain counsel, counsel will be appointed if the defendant has been charged with an offense punishable by incarceration;
- (e) The right to communicate with defense counsel, and that a continuance will be granted if necessary to permit this;
- (f) The right to a jury trial or a trial to the court;
- (g) If the offense is a misdemeanor, the defendant may plead guilty or not guilty, or demand a complaint before entering a plea;

(h) If the offense is a designated gross misdemeanor as defined in Rule 1.04(b) and a complaint has not yet been filed, a complaint must be issued within ten days if the defendant is not in custody or within 48 hours if the defendant is in custody;

(i) If the offense is a gross misdemeanor and the defendant has had an opportunity to consult with an attorney, the defendant may plead guilty in accordance with Rule 15.02.

The court may advise a number of defendants at once of these rights, but each defendant must be asked individually at arraignment whether the defendant heard and understood the rights as explained earlier.

(Amended effective August 1, 2012.)

5.04 Appointment of Counsel

Subd. 1. Notice of Right to Counsel; Appointment of the District Public Defender; Waiver of Counsel.

(1) Notice of Right to Counsel. If a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration appears without counsel, the court must advise the defendant of the right to counsel, and that the court will appoint the district public defender if the defendant has been determined to be financially unable to obtain counsel.

The court must also advise the defendant that the defendant has the right to request counsel at any stage of the proceedings.

(2) Appointment of the Public Defender. The court must appoint the district public defender on request of a defendant who is:

(a) charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration, or subject to an extradition proceeding or probation revocation proceeding;

(b) not represented by counsel; and

(c) financially unable to obtain counsel.

The court must not appoint a district public defender if the defendant is financially able to retain private counsel but refuses to do so.

(3) Waiver of Counsel, Misdemeanor or Gross Misdemeanor. Defendants charged with a misdemeanor or gross misdemeanor punishable by incarceration who appear without counsel, do not request counsel, and wish to represent themselves, must waive counsel in writing or on the record. The court must not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights. The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant about the waiver.

(4) Waiver of Counsel, Felony. The court must ensure that defendants charged with a felony who appear without counsel, do not request counsel, and wish to represent themselves, enter on the record a voluntary and intelligent written waiver of the right to counsel. If the defendant refuses to sign the written waiver form, the waiver must be made on the record. Before accepting the waiver, the court must advise the defendant of the following:

(a) nature of the charges;

(b) all offenses included within the charges;

- (c) range of allowable punishments;
- (d) there may be defenses;
- (e) mitigating circumstances may exist; and

(f) all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel.

The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

Subd. 2. Appointment of Advisory Counsel. The court may appoint advisory counsel to assist a defendant who voluntarily and intelligently waives the right to counsel.

(1) If the court appoints advisory counsel because of concerns about fairness of the process, the court must state that on the record. The court must advise the defendant and advisory counsel on the record that the defendant retains the right to decide when and how to use advisory counsel, and that decisions about the use of advisory counsel may affect a later request by the defendant to allow the advisory counsel to assume full representation.

(2) If the court appoints advisory counsel because of concerns about delays in completing the trial, the potential disruption by the defendant, or the complexity or length of the trial, the court must state that on the record.

The court must then advise the defendant and advisory counsel on the record that advisory counsel will assume full representation of the defendant if the defendant:

- (a) becomes so disruptive during the proceedings that the defendant's conduct is determined to constitute a waiver of the right of self representation; or
- (b) requests advisory counsel to take over representation during the proceeding.

(3) Advisory counsel must be present in the courtroom during all proceedings and must be served with all documents that would otherwise be served upon an attorney of record.

Subd. 3. Standards for District Public Defender Eligibility. A defendant is financially unable to obtain counsel if the defendant meets the standards for eligibility defined in Minnesota Statutes, section 611.17.

Subd. 4. Financial Inquiry. The court has a duty to conduct a financial inquiry to determine the financial eligibility of a defendant for the appointment of a district public defender as required under Minnesota Statutes, section 611.17.

Subd. 5. Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant must not preclude the appointment of the district public defender for the defendant. If the court, after finding the defendant eligible for district public defender services, determines that the defendant now has the ability to pay part of the costs, it may require a defendant to make partial payment as provided in Minnesota Statutes, section 611.20.

(Amended effective August 1, 2012.)

5.05 Date of Rule 8 Appearance; Consolidation of Appearances Under Rule 5 and Rule 8

If the defendant is charged with a felony or gross misdemeanor, the court must set a date for a Rule 8 appearance before the court having jurisdiction to try the charged offense no later than 14

days after the defendant's initial appearance under Rule 5, unless the defendant waives the right to a separate Rule 8 appearance.

The defendant must be informed of the time and place of the Rule 8 appearance and ordered to appear as scheduled. The time for appearance may be extended by the court for good cause.

In felony and gross misdemeanor cases, the defendant may waive the separate appearances otherwise required by this rule and Rule 8. The waiver must be made either in writing or on the record in open court. If the defendant waives a separate appearance under Rule 8, all of the functions and procedures provided for by Rules 5 and 8 must take place at the Rule 5 hearing.

5.06 Plea and Post-Plea Procedure in Misdemeanor Cases

Subd. 1. Entry of Plea in Misdemeanor Cases. In misdemeanor cases, the arraignment must be conducted in open court. The court must ask the defendant to enter a plea, or set a date for entry of the plea. A defendant may appear by counsel and a corporation must appear by counsel or by an authorized officer.

Subd. 2. Guilty Plea; Offenses From Other Jurisdictions. If the defendant enters a plea of guilty, the presentencing and sentencing procedures provided by these rules must be followed. The defendant may also request permission under Rule 15.10 to plead guilty to other misdemeanor offenses committed within the jurisdiction of other courts in the state.

Subd. 3. Not Guilty Plea and Jury Trial. If the defendant enters a plea of not guilty to a charge for which the defendant would be entitled to a jury trial, the defendant must exercise or waive that right. The defendant may waive the right to a jury trial either on the record or in writing. If the defendant fails to waive or demand a jury trial, a jury trial demand must be entered in the record.

Subd. 4. Demand or Waiver of Evidentiary Hearing. If the defendant pleads not guilty and a notice of evidence and identification procedures has been given by the prosecutor as required by Rule 7.01, the defendant and prosecutor must each either waive or demand an evidentiary hearing under Rule 12.04. The demand or waiver may be made either on the record or in writing and must be made at the first court appearance after the notice has been given by the prosecutor.

5.07 Plea and Post-Plea Procedure in Gross Misdemeanor Cases

Subd. 1. Entry of Guilty Plea in Gross Misdemeanor Cases. The defendant may plead guilty to a gross misdemeanor charge in accordance with Rule 15.02 if the defendant has counsel, or has had the opportunity to consult with counsel before pleading guilty. If the defendant does not plead guilty, entry of a plea must await the Rule 8 or Omnibus Hearing. A corporation must appear by counsel or by an authorized officer.

Subd. 2. Guilty Plea; Offenses From Other Jurisdictions. The procedure in Rule 5.06, subd. 2 applies to gross misdemeanor cases.

(Amended effective August 1, 2012.)

5.08 Plea in Felony Cases

In felony cases, a defendant may plead guilty as early as the Rule 8 hearing. The defendant cannot enter any other plea until the Omnibus hearing under Rule 11.

5.09 Record

Minutes of the proceedings must be kept unless the court directs that a verbatim record be made. Any plea of guilty to an offense punishable by incarceration must comply with the requirements of Rule 15.09.

Comment - Rule 5

Rule 5 prescribes the procedure at the defendant's initial appearance. In most misdemeanor cases, the initial appearance will also be the time of arraignment and disposition.

Rule 5.02 requires the appointment of a qualified interpreter for a defendant disabled in communication. Minnesota Statutes, section 611.32, subdivision 1, mandates the appointment. The definition for "disabled in communication" contained in Rule 5.02 is the same as that contained in Minnesota Statutes, section 611.31. Minnesota Statutes, section 611.33, and Minn. Gen. R. Prac. 8 for the District Courts should be referred to for the definition of qualified interpreter.

The warning under Rule 5.03 as to the defendant's right to counsel continues the requirement of Minnesota Statutes, section 611.15. See St. Paul v. Whidby, 295 Minn. 129, 203 N.W.2d 823 (1972), recognizing that misdemeanors authorizing a sentence of incarceration are criminal offenses and criminal procedures must be followed.

Under Rules 5.03(i) and 5.07, a defendant may plead guilty to a gross misdemeanor at the first appearance under Rule 5 in accordance with the guilty plea provisions of Rule 15.02. If that is done, the defendant must first have the opportunity to consult with an attorney. If the guilty plea is to a designated gross misdemeanor prosecuted by tab charge, a complaint must be filed before the court accepts the guilty plea. See Rule 4.02, subd. 5(3), and the comments to that rule. See also Rule 5.04, subd. 1(3), concerning waiver of the right to counsel. Rule 5.03(i) does not permit a defendant to enter a plea of not guilty to a gross misdemeanor at the first appearance under Rule 5. Rather, in accordance with Rules 8.01 and 11.08, a not-guilty plea in felony and gross misdemeanor cases is not entered until the Omnibus Hearing or later.

Minnesota law requires that a waiver of counsel be in writing unless the defendant refuses to sign the written waiver form. In that case, a record of the waiver is permitted. Minnesota Statutes, section 611.19. In practice, a Petition to Proceed As Pro Se Counsel may fulfill the dual requirements of providing the defendant with the information necessary to make a voluntary and intelligent waiver of the right to counsel as well as providing a written waiver. See Form 11. Also see Appendix C to Rule 15 for the Petition to Enter Plea of Guilty by Pro Se Defendant.

The decision in Faretta v. California, 422 U.S. 806 (1975), held that counsel may be appointed over the defendant's objection, to assist and consult if requested to do so by the defendant. Rule 5.04 establishes standards for appointing advisory counsel in cases where the defendant waives counsel and the court believes it is appropriate to appoint advisory counsel.

In most cases, the primary role of counsel appointed over the defendant's objection will be advisory. In fewer cases, the role of appointed counsel may be to take over representation of the defendant during trial. The term "standby counsel" is too broad a term to cover the role of appointed counsel in every case or even most cases where counsel is appointed over the objection of the defendant. Because the primary purpose of counsel appointed over the objection of the defendant is to help the accused understand and negotiate through the basic procedures of the trial and "to relieve the trial judge of the need to explain and enforce basic rules of [the] courtroom," counsel appointed over the objection of the accused may be more properly called "advisory counsel."

Two main reasons exist for appointing advisory counsel for defendants who wish to represent themselves: (1) the fairness of a criminal process where lay people choose to represent themselves - to aid the court in fulfilling its responsibility for insuring a fair trial, to further the public interest in an orderly, rational trial, or if the court appoints advisory counsel to assist the pro se defendant - and (2) the disruption of the criminal process before its completion caused by the removal of an unruly defendant or a request for counsel during a long or complicated trial.

These general reasons for the appointment of counsel to the pro se defendant suggest a natural expectation of the level of readiness of advisory counsel. If the court appoints advisory counsel as a safeguard to the fairness of the proceeding, it would not be expected that counsel would be asked to take over the representation of the defendant during the trial and counsel should not be expected and need not be prepared to take over representation should this be requested or become necessary. If this unexpected event occurred and a short recess of the proceeding would be sufficient to allow counsel to take over representation, the court could enter that order. If the circumstances constituted a manifest injustice to continue with the trial, a mistrial could be granted and a date for a new trial, allowing counsel time to prepare, could be set. The court could also deny the request to allow counsel to take over representation if the circumstances would not make this feasible or practical.

If the court appoints advisory counsel because of the complexity of the case or the length of the trial or the possibility that the defendant may be removed from the trial because of disruptive behavior, advisory counsel must be expected to be prepared to take over as counsel in the middle of the trial so long as the interests of justice are served.

Whenever counsel is appointed over the defendant's objection, counsel's participation must not be allowed to destroy the jury's perception that the accused is representing himself or herself. In all proceedings, especially those before the jury, advisory counsel must respect the defendant's right to control the case and not interfere with it. The accused must authorize appointed counsel before the counsel can be involved, render impromptu advice, or ever appear before the court. If the accused does not wish appointed counsel to participate, counsel must simply attend the trial.

Even where appointed counsel is not expected to be ready to take over representation in the middle of the proceedings, it is appropriate and necessary that all advisory counsel be served with the same disclosure and discovery items as counsel of record so that counsel can at least be familiar with this information in acting in an advisory role. All counsel appointed for the pro se defendant must be served with the pleadings, motions, and discovery.

*It is essential that at the outset the trial court explain to the accused and counsel appointed in these situations what choices the accused has and what the consequences of those choices may be later in the proceedings. In *State v. Richards*, 552 N.W.2d 197, 206 (Minn. 1996), the Supreme Court repeated the rule it set in *State v. Richards*, 463 N.W.2d 499 (Minn. 1990): the defendant's request for the "substitution of standby counsel [shall not be granted] unless, in the trial court's discretion, his request is timely and reasonable and reflects extraordinary circumstances." Trial courts should consider the progress of the trial, the readiness of standby counsel, and the possible disruption of the proceedings. Statement of the expectations of advisory counsel at the outset should make it clear to all concerned about what will happen should there be a change in the representation of the defendant during the proceeding.*

A defendant appearing pro se with advisory counsel should be informed that the duties and costs of investigation, legal research, and other matters associated with litigating a criminal matter are the responsibility of the defendant and not advisory counsel. It should be made clear to the pro se defendant that advisory counsel is not a functionary of the defendant who can be directed to perform tasks by the defendant. A motion under Minnesota Statutes, section 611.21, is available to seek funds for hiring investigators and expert witnesses.

In certain circumstances, a separate appearance to fulfill the requirements of Rule 8 may serve very little purpose. Originally these rules required the appearance under Rule 5 to be in the county court and the appearance under Rule 8 to be in the district court. Now, both appearances are held in the district court. The additional time and judicial resources invested in a separate appearance under Rule 8 may yield little or no benefit. Therefore, Rule 5.05 permits the appearances required by Rule 5 and Rule 8 to be consolidated upon request of the defendant.

When the appearances are consolidated under Rule 5.05, all of the provisions in Rule 8 are applied to the consolidated hearing. This means that under Rule 8.04 the Omnibus Hearing provided for by Rule 11 must be scheduled for a date no later than 28 days after the consolidated hearing. This requirement is subject, however, to the power of the court under Rule 8.04(c) to extend the time for good cause related to the particular case upon motion of the defendant or the prosecution or upon the court's initiative. Also, the notice of evidence and identification procedures required by Rule 7.01 must be given at or before the consolidated hearing.

Under Rule 5.06, subd. 4 if the defendant pleads not guilty in a misdemeanor case and the prosecution has given the notice of evidence and identification prescribed by Rule 7.01, then both the defendant and the prosecution shall either waive or demand a Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3(1965)) hearing. The waiver or demand is necessary only in cases where a jury trial is to be held since the notice is not required under Rule 7.01 if no jury trial is to be held in a misdemeanor case.