

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

**Notice of Proposed Amendments to Rule 5 of the
Superior Court Rules of Criminal Procedure**

The District of Columbia Superior Court Rules Committee recently completed review of proposed amendments to Rule 5 of the Superior Court Rules of Criminal Procedure. The Rules Committee will recommend to the Superior Court Board of Judges that the amendments be approved unless, after consideration of comments from the Bar and the general public, the proposed amendments are withdrawn or modified.

Written comments must be submitted by May 31, 2022. Comments may be emailed as a PDF file to Pedro.Briones@dccsystem.gov or may be mailed to:

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All comments submitted in response to this notice will be available to the general public. New language is underlined and deleted language is stricken through.

Rule 5. Initial Appearance

(f) REMINDER OF PROSECUTORIAL OBLIGATION.

(1) *In General.* In all criminal proceedings, at the defendant's initial appearance, the judge or magistrate judge must issue a written order to the attorney for the government and defense counsel that confirms the disclosure obligation of the attorney for the government under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, and the possible consequences of violating such order under applicable law. At the first hearing after the defendant's initial appearance, the judge or magistrate judge must orally confirm the terms of the written order.

(2) *General Order.* The Chief Judge must issue a general order for use in accordance with Rule 5(f)(1).

(g) ARRESTS OUTSIDE THE DISTRICT OF COLUMBIA. A person arrested outside the District of Columbia on a warrant issued by the Superior Court of the District of Columbia must be taken before the court or other person enumerated in 18 U.S.C. § 3041 and must be held to answer in the court having jurisdiction to try the defendant pursuant to the Federal Rules of Criminal Procedure as if the warrant had been issued by the United States District Court for the District of Columbia.

(h) VIDEO TELECONFERENCING. Video conferencing may be used to conduct an appearance under this rule if the defendant, having been afforded the opportunity to consult with counsel, consents.

COMMENT TO 2022 AMENDMENTS

Paragraph (f) is a new provision, drafted in response to the 2020 amendment to Federal Rule of Criminal Procedure 5. Paragraph (f), however, is not identical to Federal Rule 5(f). While Federal Rule 5(f)(1) requires that the court issue both an oral and a written order at the first hearing in the case confirming the government's *Brady* obligations, subparagraph (f)(1) requires a written order at the time of the defendant's initial appearance and an oral confirmation of the terms of the written order at the first hearing following the defendant's initial appearance. This procedure is intended to allow arraignments and presentments to proceed without undue delay and to increase the likelihood that the *Brady* admonition is directed to counsel actually assigned to the case, rather than to counsel standing in at the defendant's initial appearance. And while Federal Rule 5(f)(2) requires the promulgation of a model order by each federal judicial council, subparagraph (f)(2) requires the Chief Judge to issue a general order for use in accordance with subparagraph (f)(1). Former paragraphs (f) and (g) have been redesignated as paragraphs (g) and (h), respectively.

COMMENT TO 2017 AMENDMENTS

The Superior Court rule continues to differ substantially from the federal rule, including omission of federal subsection (c)(4), "Procedure for Persons Extradited to the United States"—a provision that was added to the federal rule in 2012.

However, the Superior Court rule incorporates the 2014 federal amendment, which requires the court, at arraignment or presentment, to advise all defendants of the right to or requirement for consular notification if the defendant is a non-citizen. The provision appears in section (d) of the federal rule, but it has been added to section (b) of the Superior Court rule.

COMMENT TO 2016 AMENDMENTS

This rule has been redrafted to conform to the general restyling of the federal rules in 2002. It differs from the federal rule in several respects.

Subparagraph (a)(1) of this rule limits its application to instances of arrest or receipt of an arrested person within the District of Columbia. *Cf.* D.C. Code § 23-563 (c) (2012 Repl.). Subparagraph (a)(4) includes a rule of construction to avoid conflicting with or superseding of 18 U.S.C. § 3501, dealing with the admissibility of confessions. *See* D.C. Code §§ 23-562 (c)(1), 5-115.01 (2012 Repl.). *Cf. Dickerson v. United States*, 530 U.S. 428 (2000).

The provisions of former Rule 5(d) have been moved to Rule 5.1 to be consistent with *Federal Rules 5 and 5.1*. 12

Paragraph (e), which contains the provisions of former paragraph (c), has no federal counterpart. It sets forth the procedures for a probable cause determination that must be made whenever the court imposes significant restraints on the pretrial liberty of a person arrested without a warrant. *See Gerstein v. Pugh*, 420 U.S. 103 (1975).

Subparagraph (e)(5) substitutes the term “docket” for “case jacket.”

Paragraph (f) contains the provisions of former Superior Court Rule 5-l.

Paragraph (g) is identical to paragraph (f) of the federal rule except that it makes explicit that the defendant must have been afforded the opportunity to consult with counsel before consenting to the procedure.