Rules of Criminal Procedure for the Magistrate Courts

ARTICLE 1
General Provisions

6-101. Scope and title.

A. **Scope.** These rules govern the criminal procedure in all magistrate courts.

B. **Construction.** These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every magistrate court action. They shall not be construed to extend or limit the jurisdiction of any court, or to abridge, enlarge or modify the substantive rights of any litigant.

C. **Title.** These rules shall be known as the Rules of Criminal Procedure for the Magistrate Courts.

D. **Citation form.** These rules shall be cited by set and rule numbers, as in NMRA, Rule 6-___.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. *Cowan v. Davis*, 1981-NMSC-054, 96 N.M. 69, 628 P.2d 314.

Retrial not barred by failure to reserve jurisdiction. — The failure of a magistrate court to expressly reserve the right to retry a defendant in its final order does not bar a retrial on the basis that such action would constitute double jeopardy. *Cowan v. Davis*, 1981-NMSC-054, 96 N.M. 69, 628 P.2d 314.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 1 et seq.

22 C.J.S. Criminal Law § 1 et seq.

6-102. Conduct of court proceedings.

A. **Judicial proceedings.** Judicial proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice.

B. **Nonjudicial proceedings.** Proceedings designed and carried out primarily as ceremonies, and conducted with dignity by judges in open court, may properly be photographed in, or broadcast from, the courtroom with the permission and under the supervision of the court like all other court proceedings in accordance with Rule 23-107 NMRA.

C. **Appearance of the defendant and witnesses before the court.** A defendant shall not be required to appear before the jury in distinctive clothing that would give the appearance that the defendant is incarcerated. Except by written order of the court, the defendant may not appear before the jury in any visible restraint devices, including handcuffs, chains, or stun belts, a visible bullet proof vest, or any other item which, if visible to the jury, would prejudice the defendant in the eyes of the jury. When the defendant appears in court for a jury trial in any restraint device, a notation shall be placed in the court's file stating the kind of restraint device used and the reasons why the defendant is being restrained. Before requiring a witness to appear before the jury in prison clothing or any visible restraint, the court shall balance the need for courtroom security and the likelihood of prejudice to the defendant in the eyes of the jury.

D. **Closed circuit television recordings.** The Administrative Office of the Courts (AOC) may install closed circuit television systems in the magistrate courts. The recordings produced by the closed circuit television system do not constitute a record of court proceedings, and the presence of closed circuit television recording equipment in the courtroom shall have no effect on the status of the magistrate court as a non-record court.

[As amended, effective September 2, 1997; May 5, 1998; as amended by Supreme Court Order No. 08-8300-007, effective January 29, 2008; as amended by Supreme Court Order No. 13-8300-018, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-021, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 18-8300-020, effective December 31, 2018.]

Committee commentary. — The Committee added Paragraph C to ensure that defendants are not prejudiced because of being restrained before the court. The court is required under Paragraph C to place a notation in the court's file regarding the kind of restraint device used and the reasons why the defendant is being restrained.

[Adopted by Supreme Court Order No. 13-8300-018, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-020, effective December 31, 2018, removed language related to the prohibition of taking photographs in the courtroom during judicial proceedings, and clarified that any photographing and broadcasting of certain court proceedings is subject to Rule 23-107 NMRA; in

Paragraph A, deleted “The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof, and the transmitting or sound recording of such proceedings for broadcasting by radio or television, introduce extraneous influences that tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; and no such action shall be done or permitted.”; and in Paragraph B, after “Proceedings”, deleted “other than judicial proceedings”, and after “supervision of the court”, added “like all other court proceedings in accordance with Rule 23-107 NMRA”.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-021, effective December 31, 2016, in Paragraph A, after “introduce extraneous influences”, deleted “which” and added “that”, and after “no such action shall be done or permitted”, deleted “except as provided by Rule 6-601 NMRA of these rules”; and in Paragraph D, after “the courtroom shall have no effect”, deleted “upon” and added “on”.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-018, effective December 31, 2013, provided for the appearance of defendant and witnesses before the jury, and added Paragraph C.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-007, effective January 29, 2008, added Paragraph C.

The 1998 amendment, effective May 5, 1998, deleted "or upon express approval of the Supreme Court" at the end of Paragraph A.

The 1997 amendment, effective September 2, 1997, inserted "as provided by Rule 6-601 of these rules or" near the end of Paragraph A.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.

Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 A.L.R.4th 1196.

6-103. Rules and forms.

A. **Rules.** Each magistrate court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law, these rules or regulations prescribed by the administrative office of the courts or the district court chief judge of the judicial district in which the magistrate court is located. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court. Proposed rules or amendments

shall be submitted to the district court chief judge of the judicial district in which the local rules would apply and shall not become effective until approved by the chief judge.

B. **Forms.**

(1) Forms that are generated by the magistrate court using the court's automated case management system shall be substantially in the form approved by the Supreme Court.

(2) Local forms may be developed, used, and distributed by individual magistrate courts or magistrate court divisions subject to the following requirements:

(a) Any local form shall be submitted to the district court chief judge of the judicial district in which the local form is intended for use and shall not become effective until approved by the chief judge;

(b) Any local form approved by a chief judge shall not be generated by the magistrate court using the court's automated case management system; and

(c) Any local form shall not be inconsistent with law, these rules, or regulations prescribed by the Supreme Court, the administrative office of the courts, or the district court chief judge of the judicial district in which the local form is intended for use.

(3) A party may file a pleading or paper that is substantially in the form approved by the Supreme Court.

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; as amended by Supreme Court Order No. 19-8300-003, effective July 1, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-013, effective July 1, 2019, amended procedures for enacting or amending magistrate court rules and forms developed, used and distributed by magistrate courts; in Paragraph A, after “administrative office of the courts”, added “or the district court chief judge of the judicial district in which the magistrate court is located”, after “shall be submitted to the”, deleted “director of the administration office of the courts” and added “district court chief judge of the judicial district in which the local rules would apply”, and after “approved by the”, deleted “director” and added “chief judge”; in Paragraph B, deleted “Forms used or distributed by the magistrate courts shall be submitted to the director of the administration office of the courts and shall not become effective until approved by the director. A party may file a pleading or paper that is substantially in the form approved by the Supreme Court. Forms may be combined.” and added new Subparagraphs (1) through (3).

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, delegated the Supreme Court approval of forms used in the magistrate courts to the director of the Administrative Office of the Courts and provided for forms to be combined.

Cross references. — For magistrate court civil rule relating to the approval of forms, *see* Rule 2-103 NMRA.

For criminal forms approved for use in the district and magistrate courts by the Supreme Court, *see* Rule 9-101 NMRA et seq.

For the approval of forms used in the district courts, *see* Rule 5-102 NMRA.

6-104. Time.

A. **Computing time.** This rule applies in computing any time period specified in these rules, in any local rule or court order, or in any statute, unless another Supreme Court rule of procedure contains time computation provisions that expressly supersede this rule.

(1) ***Period stated in days or a longer unit; eleven (11) days or more.*** When the period is stated as eleven (11) days or a longer unit of time,

(a) exclude the day of the event that triggers the period;

(b) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(c) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period stated in days or a longer unit; ten (10) days or less.*** When the period is stated in days but the number of days is ten (10) days or less,

(a) exclude the day of the event that triggers the period;

(b) exclude intermediate Saturdays, Sundays, and legal holidays; and

(c) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(3) ***Period stated in hours.*** When the period is stated in hours,

(a) begin counting immediately on the occurrence of the event that triggers the period;

(b) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(c) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(4) ***Unavailability of the court for filing.*** If the court is closed or is unavailable for filing at any time that the court is regularly open,

(a) on the last day for filing under Subparagraphs (A)(1) or (A)(2) of this rule, then the time for filing is extended to the first day that the court is open and available for filing that is not a Saturday, Sunday, or legal holiday; or

(b) during the last hour for filing under Subparagraph (A)(3) of this rule, then the time for filing is extended to the same time on the first day that the court is open and available for filing that is not a Saturday, Sunday, or legal holiday.

(5) ***"Last day" defined.*** Unless a different time is set by a court order, the last day ends

(a) for electronic filing, at midnight; and

(b) for filing by other means, when the court is scheduled to close.

(6) ***"Next day" defined.*** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(7) ***"Legal holiday" defined.*** "Legal holiday" means the day that the following are observed by the judiciary:

(a) New Year's Day, Martin Luther King Jr.'s Birthday, Presidents' Day (traditionally observed on the day after Thanksgiving), Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(b) any other day observed as a holiday by the judiciary.

B. **Extending time.**

(1) ***In General.*** When an act may or must be done within a specified time, the court may, for cause shown, extend the time

(a) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) ***Exceptions.*** The court shall not extend the time for a determination of probable cause, the commencement of trial, or for taking an appeal, except as otherwise provided in these rules.

C. **Additional time after certain kinds of service.** When a party may or must act within a specified time after service and service is made by mail, facsimile, electronic transmission, or by deposit at a location designated for an attorney at a court facility under Rule 6-209(C)(1)(e) NMRA, three (3) days are added after the period would otherwise expire under Paragraph A. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

D. **Public posting of regular court hours.** The court shall publicly post the hours that it is regularly open.

[As amended, effective August 1, 2004; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — In 2014, the Joint Committee on Rules of Procedure amended the time computation rules, including Rules 1-006, 2-104, 3-104, 5,104, 6-104, 7-104, 8-104, 10-107, and 12-308 NMRA, and restyled the rules to more closely resemble the federal rules of procedure. *See* Fed. R. Civ. Pro. 6; Fed. R. Crim. Pro. 45. The method of computing time set forth in this rule may be expressly superseded by other rules. *See, e.g.*, Rule 6-203 NMRA (requiring the court to make a probable cause determination within forty-eight (48) hours of a warrantless arrest, notwithstanding the time computation provisions in this rule).

Subparagraph (A)(4) of this rule contemplates that the court may be closed or unavailable for filing due to weather, technological problems, or other circumstances. A person relying on Subparagraph (A)(4) to extend the time for filing a paper should be prepared to demonstrate or affirm that the court was closed or unavailable for filing at the time that the paper was due to be filed under Subparagraph (A)(1), (A)(2), or (A)(3).

[Adopted by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

The 2014 amendment, approved by Supreme Court Order No. 14-8300-016, effective December 31, 2014, completely rewrote the rule; deleted former Paragraph A which provided rules for computation of time by excluding the day of the event from which the period of time began to run, including the last day of the period of time, excluding Saturdays, Sundays, legal holidays and days of severe inclement weather, and defined legal holidays; deleted former Paragraph B which provided for the enlargement of the period of time by the court; deleted former Paragraph C which provided for the service of motions for the enlargement of the period of time and for ex parte applications; deleted former Paragraph D, which provided for a three day enlargement of the period of time when a party was served by mail; and added current Paragraphs A through D.

The 2004 amendment, effective August 1, 2004, amended Paragraph A to delete "by local rules of any magistrate court", to add after "legal holiday" in the second sentence "or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible" and to add the last sentence of the paragraph relating to how time is computed and defining "legal holiday"; amended Subparagraph (2) of Paragraph B to delete references to Rules 6-506 and 6-703 and amended Paragraph D to make gender neutral changes.

Applicability of 2004 amendment. — The August 1, 2004 amendment of this rule applies to cases filed in the magistrate courts on and after August 1, 2004. *See* the prior rule for cases filed prior to that date.

Court's jurisdiction not limited by time limits specified for preliminary examination. — Nothing in either the district court rules or the magistrate court rules limits the jurisdiction of the magistrate court to the time limits specified in Rule 6-202 NMRA; rather, they specifically grant limited jurisdiction to the magistrate court beyond the time limits prescribed in Rule 6-202 NMRA. *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Rescheduling to allow judge to attend judicial conference is permissible enlargement. — Where a preliminary hearing scheduled by the magistrate court within the time period of Rule 6-202 NMRA is rescheduled upon motion of the magistrate judge to permit the judge's attendance at a judicial conference, that constitutes good cause and permissible enlargement of time under Paragraph B of this rule. *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Law reviews. — For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

6-105. Assignment and designation of judges.

A. **Assignment.** In magistrate courts with two or more judges, cases shall be assigned randomly among the judges of the court under a selection system administered by the Supreme Court, unless the presiding judge orders otherwise for

good cause shown. Once a judge is assigned to hear a case that judge shall have sole responsibility for the case and no other judge may take any action on the case except

(1) at arraignment or first appearance;

(2) in cases where the judge has been reassigned because the assigned judge has been recused, is excused, is sick, or is otherwise unavailable and another judge has been assigned; or

(3) with the approval of the assigned judge and all of the parties.

B. **Reassignment.**

(1) ***Courts with two or more judges.*** In magistrate courts with two or more judges, upon receipt of a notice of excusal or upon recusal, the magistrate court shall give written notice to the parties to the action.

(a) *Recusal*. Upon recusal, the selection system administered by the Supreme Court shall randomly assign another magistrate judge first, to another judge in the originating court, or, if all of those judges have been excused or have recused, to another judge in the same magistrate district to preside over the case unless for good cause shown the presiding magistrate judge shall make a specific assignment. In situations where recusal would be required for multiple judges in a magistrate district, recusing magistrate judges may enter a joint recusal prior to formal assignment by the selection system in order to expedite the recusal process.

(b) *Excusal; reassignment*. Upon the filing of a notice of excusal, the selection system administered by the Supreme Court shall randomly reassign the case first, to another judge in the originating court, or, if all of those judges have been excused or have recused, to another judge in the same magistrate district, unless the presiding judge determines that there is justifiable reason to assign a case to a particular judge and the reason is included in the notice of reassignment.

(c) *Designation by district court*. If all magistrate judges in the magistrate district have been excused or have recused themselves, one of the judges on the district court's order of designation shall be randomly assigned to conduct any further proceedings. The magistrate court shall send notice of the reassignment to the parties. The district court's order of designation shall be entered at the beginning of the calendar year.

(2) ***Other courts.*** In magistrate courts with only one magistrate judge, upon receipt of a notice of excusal or upon recusal, the magistrate court shall give written notice to the parties to the action.

(a) *Recusal*. Upon recusal, another magistrate judge of the magistrate district shall be randomly assigned to preside over the case by the selection system administered by the Supreme Court.

(b) *Excusal.* Upon the filing of the notice of excusal, another magistrate judge of the magistrate district shall be randomly assigned to preside over the case by the selection system administered by the Supreme Court.

(c) *Designation by district court*. If all the magistrate judges in the magistrate district have recused themselves or been excused, one of the judges on the district court's order of designation shall be randomly assigned to conduct any further proceedings. The magistrate court shall send notice of the reassignment to the parties. The district court's order of designation shall be entered at the beginning of the calendar year.

C. **Assignment out-of-district.** If a criminal proceeding is filed against a judge or an employee of the magistrate district in which a criminal proceeding is pending, no judge of the magistrate district may hear the matter and one of the judges on the district court's order of designation shall be randomly assigned to conduct any further proceedings. The magistrate court shall send notice of the reassignment to the parties. The district court's order of designation shall be entered at the beginning of the calendar year.

D. **Assignment of direct criminal contempt cases.** Cases of direct criminal contempt shall be assigned to the judge before whom the contempt occurred.

E. **Reassignment to multiple cases.** The district court judge may designate a magistrate judge from another magistrate district to sit in actions arising in a particular magistrate district for a specific period of time.

F. **Subsequent proceedings.** All proceedings shall be conducted in the original magistrate court, except that with the consent of all parties and the assigned judge, proceedings may be held in another magistrate court in the same judicial district in which the original magistrate court is located. The clerk of the original magistrate court shall continue to be responsible for the court file and shall perform such further duties as may be required. Within five (5) business days after assignment or designation of a new judge, the clerk shall make a copy of the court file for the designated judge and forward it to the judge. Within ten (10) business days of adjudication of the case, the original documents of the adjudication shall be forwarded to the clerk of the original magistrate court for filing.

G. **Unavailability of judge.** At any time during the pendency of the proceedings if the assigned judge is unavailable, the assigned judge may designate another judge of the magistrate district to hear any matter that is not dispositive of the case or the parties may agree on another judge to hear any matter, including the merits of the case. The agreement is subject to the approval of the assigned judge and the judge agreed upon

by the parties. If another judge is agreed upon to hear the merits of the case, the case shall be reassigned to that judge.

[As amended, effective September 1, 1989; November 1, 1995; May 1, 2002; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; by Supreme Court Order No. 10-8300-016, effective May 14, 2010; by Supreme Court Order No. 11-8300-041, effective for cases filed on or after December 2, 2011; as amended by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 17-8300-026, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — In 2011, Subparagraph (B)(1)(a) was amended to provide for a joint recusal process for magistrates in those limited circumstances where it may be appropriate, such as, when a current employee or employee's family member is a defendant or litigant in magistrate court.

[Adopted by Supreme Court Order No. 11-8300-041, effective for cases filed on or after December 2, 2011; as amended by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-026, effective December 31, 2017, removed the provision allowing the parties to stipulate to a replacement judge after a magistrate judge has been excused, removed the ten-day time limit within which a district court judge will be assigned to a case in which all magistrate judges in the magistrate district have been excused or have recused themselves, and removed the provision allowing the parties to file a stipulation designating a magistrate judge to preside over a criminal proceeding against a judge or an employee of the same magistrate district; in Paragraph B, Subparagraph B(1)(b), in the subparagraph heading, after "Excusal", added "; reassignment", and in the first sentence, after "notice of excusal", deleted "the magistrate court shall give written notice to the parties to the action. Upon the filing of a notice of excusal, the parties or their counsel may agree to another judge of the magistrate district to preside over the case and this agreement shall be contained in the notice of excusal.", deleted the former subparagraph designation and heading "(c) Reassignment." and the language "If the parties fail to agree on a judge", added the remaining language from former Subparagraph B(1)(c) to Subparagraph B(1)(b), and redesignated former Subparagraph B(1)(d) as Subparagraph B(1)(c), and after "the Supreme Court shall", deleted "within ten (10) days", and in Subparagraph B(1)(c), after "recused themselves", deleted "within ten (10) days after service of the last notice of excusal or recusal", in Subparagraph B(2)(b), after "notice of excusal", deleted "the parties or their counsel may agree to another judge of the magistrate district to preside over the case. This agreement shall be contained in the Notice of Excusal. Upon excusal", in Subparagraph B(2)(c), after "or been excused", deleted "within ten (10) days after filing of the last notice of recusal or excusal"; and in Paragraph C, after "may hear the matter", deleted "without written

agreement of the parties. If within ten (10) days after the proceeding is filed, the parties have not filed a stipulation designating a judge to preside over the matter", and added "and".

The 2015 amendment, approved by Supreme Court Order No. 15-8300-006, effective December 31, 2015, modified the procedure for assigning magistrate judges when all of the magistrate judges in the magistrate district have been excused or have recused themselves, modified the procedure for assigning a judge when, in a pending criminal proceeding, a judge or employee of the magistrate district is a party to that proceeding, made stylistic changes, and revised the committee commentary; in Paragraph A, after "In", deleted "those" and added "magistrate", and after "two or more judges", deleted "the"; in Subparagraph B(1), after "upon recusal", deleted "the magistrate or clerk of"; in Subparagraph B(1)(a), in the first sentence, after the third occurrence of "magistrate", added "judge", in the second sentence, after "recusing", deleted "magistrates" and added "magistrate judges"; in Subparagraph B(1)(b), after "notice of excusal", deleted "the judge or clerk of", and after the next "the", added "magistrate"; in Subparagraph B(1)(d), in the heading, deleted "Certification to" and added "Designation by", in the first sentence, after "If all", deleted "magistrates" and added "magistrate judges", after "excusal or recusal", deleted "the presiding magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate" and added "one of the judges on the district court's order of designation shall be randomly assigned", after "any further proceedings. The", deleted "district" and added "magistrate", after "shall send notice of", deleted "its designation" and added "the reassignment", after "to the parties", deleted "or their counsel, to the excused or recused magistrate and to the designated magistrate", and added the last sentence; in Subparagraph B(2), after the second occurrence of "magistrate", added "judge", and after the third occurrence of "magistrate", added "court"; in Subparagraph B(2)(c), in the heading, deleted "Certification to" and added "Designation by", in the first sentence, after "If all the", deleted "magistrates" and added "magistrate judges", after "recusal or excusal", deleted "the magistrate of the court where the action was first filed shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate" and added "one of the judges on the district court's order of designation shall be randomly assigned", in the second sentence, after "The", deleted "district" and added "magistrate", after "shall send notice of" deleted "its designation" and added "the reassignment", after "parties", deleted "or their counsel, to the excused magistrate and to the designated magistrate", and added the last sentence; in Paragraph C, in the second sentence, after "over the matter," deleted "the clerk shall request the district court to designate a judge" and added "one of the judges on the district court's order of designation shall be randomly assigned to conduct any further proceedings", in the third sentence, after "The", deleted "district" and added "magistrate", after "shall send notice of", deleted "its designation" and added "the reassignment", after "parties", deleted "or their counsel and to the magistrate court", and added the last sentence; and in Paragraph E, after the first occurrence of "district", added "court", and after the first occurrence of "magistrate", added "judge".

The 2011 amendment, approved by Supreme Court Order No. 11-8300-041, effective December 2, 2011, in Sub-subparagraph (a) of Subparagraph (1) of Paragraph B, added the last sentence to permit magistrates to enter a joint recusal prior to formal assignment by the selection system.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-016, effective May 14, 2010, in Paragraph A, in the first sentence, after "In those courts", changed "which have a presiding magistrate, the presiding magistrate shall assign cases among the judges of the court as equitably on a random basis" to "with two or more judges, the cases shall be assigned randomly among the judges of the court pursuant to a selection system administered by the Supreme Court"; in Subparagraph (1) of Paragraph B, in the title, after "Courts with", deleted "presiding magistrates" and added "two or more judges", and in the first sentence, after "In magistrate courts", deleted "which have a presiding magistrate" and added "with two or more judges"; in Item (a) of Subparagraph (1) of Paragraph B, after "Upon recusal, the", deleted "presiding magistrate of the court" and added "selection system administered by the Supreme Court"; after "Supreme Court shall", added "randomly"; added the language that occurs between "assign another magistrate judge" and "to preside over the case"; and after "to preside over the case", added the remainder of the sentence; in Item (c) of Subparagraph (1) of Paragraph B, after "agree on a judge, the", deleted "presiding judge" and added "selection system administered by the Supreme Court shall"; and added the language that occurs between "randomly reassign the case" and "unless the presiding judge determines"; in Item (d) of Subparagraph (1) of Paragraph B, in the first sentence, after "If all magistrates in the", added "magistrate"; in Subparagraph (2) of Paragraph B, in the introductory sentence, after "In magistrate courts", deleted "which do not have a presiding" and added "with only one magistrate"; in Item (a) of Subparagraph (2) of Paragraph B, after "assigned to preside over the case", deleted "chief clerk and in such a manner that all other judges of the magistrate district are assigned approximately equal numbers of cases in which another magistrate has been recused" and added the remainder of the sentence; in Item (b) of Subparagraph (2) of Paragraph B, in the third sentence, after "assigned to preside over the case", deleted "chief clerk and in such a manner that all other judges of the magistrate district are assigned approximately equal numbers of cases in which another magistrate has been excused" and added the remainder of the sentence; added Paragraph D; and in Paragraph F, in the third sentence, after "Within five (5)", added "business" and after "court file for the designated judge", added the remainder of the sentence; and added the last sentence.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, added Paragraph A providing for assignment of judges in magistrate court districts with presiding judges; relettered Paragraph A as Paragraph B and revised the paragraph to add subparagraphs and reorganize the provisions; added a new Paragraph C providing for reassignment of criminal cases out of the district when charges are filed against a judge or employee of the district; added a new Paragraph D to provide for designation of a temporary magistrate to serve in a magistrate district; relettered former Paragraph B as a new Paragraph E and amended the paragraph to provide for trial in another magistrate district upon consent of the parties; and relettered

former Paragraph C as Paragraph F to provide for hearings of nondispositive matters upon absence of the availability of the trial judge and to permit the parties to agree upon another judge to hear the merits of the case.

The 2002 amendment, effective May 1, 2002, added Paragraph C.

The 1995 amendment, effective November 1, 1995, rewrote the rule.

Cross references. — For disqualification of magistrate, *see* Section 35-3-7 NMSA 1978.

For the statutory right to excuse a magistrate court judge, *see* Section 35-3-8 NMSA 1978.

For constitutional right to disqualify a magistrate court judge, *see* N.M. Const., art. 6, § 18.

For form on certification of excusal or recusal, *see* Rule 4-102 NMRA.

For form on notice of excusal, *see* Rule 4-103 NMRA.

For disqualification pursuant to the Code of Judicial Conduct, *see* Rule 21-400 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86, 88, 91, 261 et seq.

Interlocutory ruling or order of one judge as binding on another in same case, 132 A.L.R. 14.

Requiring successor judge to journalize finding or decision of predecessor, 4 A.L.R.2d 584.

Power of successor judge taking office during termtime to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.

Receipt of verdict in civil case in absence of trial judge, 20 A.L.R.2d 281.

Disqualification of original trial judge to sit on retrial after reversal or mistrial, 60 A.L.R.3d 176.

Disqualification of judge, justice of the peace or similar judicial officer for pecuniary interest in fines, forfeitures or fees payable by litigants, 72 A.L.R.3d 375.

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

48A C.J.S. Judges §§ 162 to 185.

6-106. Excusal; recusal; disability.

A. **Definition of parties.** ”Party” as used in this rule means the defendant, the state, a municipality, a county, or the person filing the complaint, or an attorney representing the defendant, the state, county, municipality, or other party.

B. **Excusal.** Whenever a party to any criminal action or proceeding of any kind files a notice of excusal, the judge’s jurisdiction over the cause terminates immediately.

C. **Limitation on excusals.** No party shall excuse more than one judge. A party may not excuse a judge after the party has requested that judge to perform any discretionary act other than conducting an arraignment or first appearance, setting initial conditions of release, or making a determination of indigency. No judge may be excused from conducting an arraignment or first appearance or setting initial conditions of release. Any excusal of a judge scheduled to hear a preliminary hearing must be filed at least four (4) days prior to the hearing.

D. **Excusal procedure.** A party may exercise the statutory right to excuse the judge before whom the case is pending by filing with the clerk of the court a notice of excusal. The notice of excusal must be signed by a party and filed within ten (10) days after the later of

(1) arraignment or the filing of a waiver of arraignment; or

(2) service on the parties by the court of notice of assignment or reassignment of the case to a judge.

E. **Notice of reassignment; service of excusal.** If the case is reassigned to a different judge, the court shall give notice of the reassignment to all parties. Any party electing to excuse a judge shall serve notice of that election on all parties.

F. **Misuse of excusal procedure.** Excusals are not to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or group of attorneys may be using excusals for improper purposes or with such frequency as to impede the administration of justice, the Chief Judge of the district shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written notice to the attorney or group of attorneys believed to be improperly using excusals. The Chief Justice may take appropriate action to address any misuse, including issuance of an order providing that the attorney or attorneys or any party they represent may not file excusals for a specified period of time or until further order of the Chief Justice.

G. **Recusal; procedure.** No magistrate shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a certificate of recusal in any such action. Upon receipt of notification of recusal from a judge, the clerk of the magistrate court shall give written notice to each party. Upon recusal, another judge shall be assigned or designated to conduct any further proceedings in the action in the manner provided by Rule 6-105 NMRA.

H. **Failure to recuse.** If a party believes that the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, the party may file a notice of facts requiring recusal. The notice shall specifically set forth the constitutional grounds alleged. Upon receipt of the notice, the judge may file a certificate of recusal in the action or enter an order finding that there are not reasonable grounds for recusal. If within ten (10) days after the filing of notice of facts requiring recusal, the judge fails to file a certificate of recusal in the action, any party may certify that fact by letter to the district court of the county in which the action is pending with a copy of the notice of recusal. No filing fee shall be required for the filing of a letter certifying grounds for recusal described in Paragraph G of this rule. The party's certification to the district court shall be filed in the district court not less than five (5) days after the expiration of time for the magistrate court judge to file a certificate of recusal or not less than five (5) days after the filing of an order in the magistrate court finding the grounds alleged in the notice of recusal do not constitute reasonable grounds for recusal, whichever date is earlier. A copy of the letter shall also be filed with the magistrate court. The district court shall make an investigation as the court deems warranted and enter an order in the action, either prohibiting the magistrate court judge from proceeding further or finding that there are insufficient grounds to reasonably question the magistrate court judge's impartiality under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct.

I. **Stay.** If a letter is filed with the district court and magistrate court certifying the issue of recusal to the district court under Paragraph H of this rule, the magistrate court judge may enter a stay of the proceedings pending action by the district court. If the magistrate court judge fails to stay the proceedings, the party filing the letter in the district court may petition the district court for a stay of magistrate court proceedings. The district court may grant a stay of the proceedings for not more than fifteen (15) days after the filing of a letter certifying a recusal issue to the district court. Unless a stay is granted, the magistrate court judge shall proceed with the adjudication of the merits of the proceedings.

J. **Inability of a judge to proceed.** If a trial or hearing has been commenced and the judge is unable to proceed, any other judge of the district may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness. If no other judge is available in the district, either party may certify that fact by letter to the district court of the county in which the action is pending. The district court may make an investigation as the court deems warranted. If the court finds that the

magistrate is in fact disabled or unavailable, the court shall designate another judge to preside over the case.

[As amended, effective January 1, 1987; July 1, 1988; September 1, 1989; September 1, 1990; November 1, 1995; May 1, 2002; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-020, effective December 31, 2020, prohibited the misuse of the excusal procedure, and provided the magistrate court with the procedure to address attorneys using excusals for improper purposes or with such frequency as to impede the administration of justice; added a new Paragraph F and redesignated the succeeding paragraphs accordingly; in Paragraph H, after “Paragraph”, deleted “F” and added “G”; and in Paragraph I, after “Paragraph”, deleted “G” and added “H”.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, amended Paragraph A to include a municipality, county or other party within the definition of "party" to a magistrate court criminal proceeding.

The 2002 amendment, effective May 1, 2002, deleted "procedure for exercising" from the rule heading; in Paragraph C, moved the last sentence "No party shall excuse more than one judge" to be the first sentence; in Paragraph D, substituted "Excusal procedure" for "Procedure for excusing a judge" in the bold heading, deleted "magistrate court" preceding "judge" and deleted "magistrate" preceding "court" in the first sentence; in Paragraph E, substituted "Notice of reassignment; service of excusal" for "Service of notice of assignment" in the bold heading; in Paragraph F, inserted "procedure" in the bold heading, deleted "court judge" following "magistrate" and inserted "certificate of" preceding "recusal" in the first sentence; in Paragraph G, substituted "facts requiring recusal" for "excusal" at the end of the first sentence and rewrote the pargraph from the third sentence to the end; redesignated former Paragraph H as present Paragraph I and added present Paragraph H.

The 1995 amendment, effective November 1, 1995, rewrote the rule.

Cross references. — For form of certificate of excusal or recusal of a magistrate court judge, *see* Rule 9-102A NMRA.

For comparable metropolitan court rule, *see* Rule 7-106 NMRA.

Excusal after asking magistrate to exercise discretion was not permitted. — Where the state filed a criminal complaint in magistrate court charging defendant with felony offenses and sought to establish probable cause in a preliminary hearing in magistrate court; the magistrate made a finding of no probable cause; the state filed the

same charges in the district court which remanded the matter to magistrate court for a preliminary hearing; the state then peremptorily excused the original magistrate from conducting the preliminary hearing; and a second magistrate listened to a tape recording of the original preliminary hearing, and without more evidence made a finding of probable cause and bound defendant to district court for trial on the felony charges, the state could not disqualify the original magistrate after the state had asked the original magistrate to exercise discretion in the first proceeding. *State v. White*, 2010-NMCA-043, 148 N.M. 214, 232 P.3d 450.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Disqualification from criminal proceeding of trial judge who earlier presided over disposition of case of coparticipant, 72 A.L.R.4th 651.

6-107. Pro se and attorney appearance.

A. **Appearance by an individual, pro se or attorney.** A defendant to any criminal action may appear, defend, and appeal any proceeding without an attorney, pro se, or may appear through an attorney as provided in Paragraph D below. Non-attorneys may not represent individuals, except as provided in Paragraphs B and C of this rule.

B. **Pro se appearance by an individual on behalf of corporation or limited liability company.** If the defendant is a corporation or limited liability company, whose voting shares or memberships are held by a single shareholder or member, or a closely knit group of shareholders or members all of whom are natural persons active in the conduct of the business, and the appearance is by an officer or general manager who has been authorized to appear on behalf of the corporation or limited liability company, then this individual may appear, defend, and appeal any proceeding on behalf of the defendant corporation or limited liability company.

C. **Pro se appearance by an individual on behalf of general partnership.** If the defendant is a general partnership that meets all of the following qualifications:

(1) the partnership has less than ten partners, whether limited or general, except that a husband and wife are treated as one partner for this purpose;

(2) all partners, whether limited or general, are natural persons; and

(3) the appearance is by a general partner who has been authorized to appear by the general partners, then this individual may appear, defend, and appeal any proceeding on behalf of the defendant general partnership.

D. **Attorney appearance.** Whenever counsel undertakes to represent a defendant in any criminal action, the attorney will file a written entry of appearance, unless the attorney has been appointed by written order of the court. Counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing

in another state or territory, shall comply with Rule 24-106 NMRA. For the purpose of this rule, an attorney enters an appearance by:

(1) filing of a written entry of appearance or any pleading or paper signed by the attorney; or

(2) communicating with the judge in open court on behalf of a defendant. An attorney who enters an appearance by an in-court communication with the judge shall file a written entry of appearance with the court within three (3) days after the communication with the judge.

E. **Consent and notice.** No attorney or firm who has appeared in a cause may withdraw from it without written consent of the court.

F. **Substitution of counsel.** The court may condition consent to withdraw as an attorney upon substitution of other counsel or the filing by a party of proof of service on all parties of an address at which service may be made upon the party. Withdrawing counsel or substitute counsel shall serve on all parties a copy of the motion requesting written consent to withdraw and shall file proof of service with the court.

[As amended, effective September 15, 2000; February 16, 2004; as amended by Supreme Court Order No. 13-8300-028, effective for all cases filed or pending on or after December 31, 2013.]

Committee commentary. — A friend or family member may not represent a defendant, nor a parent represent a minor child defendant, unless the friend, family member, or parent is a licensed attorney and enters an appearance in the case.

Corporations, limited liability corporations, and partnerships are required to submit an entry of appearance form approved by the Supreme Court, if available.

[Adopted by Supreme Court Order No. 13-8300-028, effective for all cases filed or pending on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-028, effective December 31, 2013, provided for the pro se appearance of an individual; deleted the former title “Entry of appearance” and added the current title; added Paragraphs A, B, and C; and in Paragraph D, deleted the former title “How entered” and added the current title, added the second sentence, and in Subparagraph (2), in the first sentence, deleted “any communication” and added “communicating”.

The 2003 amendment, effective February 16, 2004, in Paragraph A substituted “how entered” for “written entry of appearance” in the introductory language, deleted “in the cause” preceding “unless” in the first sentence, and substituted “an attorney enters an

appearance by" for "the" in the last sentence of the introductory paragraph, designated previously undesignated text as Subparagraph (1), substituted "a written entry of appearance or any pleading or paper signed by the attorney; or" for "any pleading signed by counsel constitutes an entry of appearance" in that subparagraph, and inserted Subparagraph (2), substituted present Paragraph B for former Paragraph B, which read "Oral entry of appearance. With permission of the court, an attorney may enter an appearance on behalf of a defendant by oral communication with the court, provided a written entry of appearance is filed within three (3) days", and present Paragraph C for former Paragraph C, which read "Duration of representation. An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by the court".

The 2000 amendment, effective September 15, 2000, redesignated former Subsection B as present Subsection C and added Subsection B.

6-108. Non-attorney prosecutions.

A. **Law enforcement officers.** Law enforcement officers may file criminal complaints against persons in the magistrate court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the jurisdiction of the court. Law enforcement officers may prosecute misdemeanor criminal complaints they have filed in magistrate court, except that no law enforcement officer may prosecute any case that

(1) is tried before a jury;

(2) involves a charge of driving under the influence of intoxicating liquor or drugs; or

(3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, 30-3-18, or 40-13-6 NMSA 1978.

B. **Other authorized prosecutions.** A governmental entity may appear and prosecute any misdemeanor proceeding if the appearance is by an employee of the governmental entity authorized by the governmental entity to institute or cause to be instituted an action on behalf of the governmental entity, except that no governmental entity may prosecute through a non-attorney any case that

(1) is tried before a jury;

(2) involves a charge of driving under the influence of intoxicating liquor or drugs; or

(3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, 30-3-18, or 40-13-6 NMSA 1978.

C. **Trial procedures.** In cases where law enforcement officers and non-attorney government employees are authorized under Paragraphs A and B of this rule to prosecute complaints they have filed, those law enforcement officers and government employees shall be permitted to testify and present evidence to the court. In the court's discretion, those parties may also ask questions of witnesses, either directly or through the court, and may make statements bringing pertinent facts and legal authorities to the court's attention.

D. **Probation violations.** Persons employed as probation officers or compliance officers with a county misdemeanor compliance program or county DWI compliance program may appear and prosecute probation violations they have filed in magistrate court. Those officers may participate in any related court proceedings in the same manner as provided for law enforcement officers and non-attorney government employees under Paragraph C.

E. **Special prosecutor.** Nothing in this rule shall prevent the district attorney from appointing an attorney to act as a special prosecutor for those cases in which a law enforcement officer or an employee acting under authority of a governmental entity has been unable to resolve a case through pretrial procedures and the case must be tried before a jury.

[As amended, effective March 15, 1986; July 1, 1988; as amended by Supreme Court Order No. 08-8300-044, effective December 31, 2008; as amended by Supreme Court Order No. 13-8300-033, effective for all cases filed on or after December 31, 2013; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Although this rule requires that a jury trial must be prosecuted by an attorney, it does not require the district attorney's office to enter an appearance in all cases in which the defendant is eligible for a jury trial. Until and unless the district attorney enters an appearance in the case, the law enforcement officer or other non-attorney government employee who initiated the matter may act as a prosecutor in all respects. In situations where a district attorney's office "cannot prosecute a case for ethical reasons or other good cause," *see* § 36-1-23.1 NMSA 1978 (1984), Paragraph E of this rule makes explicit that the district attorney may appoint a special prosecutor to prosecute the matter through a jury trial. The rule in this respect does not expand the reach of Section 36-1-23.1, but merely clarifies that the district attorney's appointing power under the statute may be exercised in appropriate circumstances to allow a prosecution to continue even if the initiating law enforcement officer or government employee is unable to prosecute it to completion.

[Adopted by Supreme Court Order No. 13-8300-033, effective for all cases filed on or after December 31, 2013; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective December 31, 2020, authorized probation officers or persons employed as compliance officers with a county misdemeanor compliance program or county DWI compliance program to prosecute probation violations they have filed in magistrate court, clarified that this rule does not prohibit the district attorney from appointing a special prosecutor to prosecute cases before a jury where the initiating law enforcement officer or government employee is unable to prosecute it to completion, and revised the committee commentary; and added Paragraphs D and E.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-033, effective December 31, 2013, provided limitations on the prosecution of criminal complaints by law enforcement officers and government employees; deleted the provision that private attorneys cannot prosecute criminal complaints without being designated by the district attorney as a special prosecutor; deleted the provision that the rule does not prevent the district attorney from dismissing cases or assuming the prosecution of cases filed by law enforcement officers or government employees; in Paragraph A, in the title, deleted “Peace” and added “Law enforcement”, in the first sentence, deleted “Peace” and added “Law enforcement”, in the second sentence, after “charges within the”, deleted “trial”, and added the third sentence and added Subparagraphs (1) through (3); in Paragraph B, in the title, after “authorized”, deleted “appearances” and added “prosecutions”, and after “on behalf of the governmental entity”, added the remainder of the sentence and added Subparagraphs (1) through (3); in Paragraph C, in the first sentence, deleted “Peace” and added “In cases where law enforcement”, after “law enforcement officers and”, added “non-attorney”, after “non-attorney government employees”, deleted “appearing on behalf of a governmental entity as provided in Paragraph B, on” and added “are authorized under Paragraphs A and B of this rule to prosecute”, after “they have filed”, added “those law enforcement officers and government employees”, and after “government employees shall be”, deleted “authorized” and added “permitted”; deleted former Paragraph D, which provided that private attorneys could not prosecute criminal complaints without being designated by the district attorney as a special prosecutor; and deleted former Paragraph E, which provided that the rule did not prevent the district attorney from dismissing cases or assuming the prosecution of cases filed by law enforcement officers or government employees.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-044, effective December 31, 2008, in Paragraph A, deleted the phrase "and private citizens" from the title and deleted the phrase "and individual private citizens in their own behalf" in the first sentence and in Paragraph C, deleted the phrase "and individual private citizens in their own behalf" following the phrase "Paragraph B".

Prosecution of magistrate or municipal case in district court after appeal. — A peace officer who has prosecuted a criminal case in magistrate or municipal court may not continue to prosecute the case in district court after an appeal of the magistrate or municipal court judgment has been filed in district court. 1989 Op. Att'y Gen. No. 89-27.

6-109. Presence of the defendant.

A. **Presence defined.** The defendant's "presence," as used in this rule, may include either

(1) the defendant's physical appearance in open court; or

(2) the defendant's appearance through an audio or audio-visual communication under Rule 6-110A NMRA.

B. **Presence required.** Except as otherwise provided by this rule, the defendant shall be present at

(1) the first appearance, the arraignment, the plea, and any hearing to set bail or conditions of release;

(2) every stage of the trial, including the impaneling of the jury and the return of the verdict; and

(3) the imposition of any sentence.

C. **Continued presence not required.** The further progress of any proceeding, including the trial and return of the verdict, shall not be prevented whenever a defendant, initially present at such proceeding:

(1) is voluntarily absent after the proceeding has commenced, regardless of whether the court informed the defendant of an obligation to remain present; or

(2) engages in conduct that the court determines, by clear and convincing evidence, to be so disruptive as to justify the exclusion of the defendant from further proceedings. If a defendant is excluded from the proceedings under this subparagraph, the court shall provide the defendant with a timely opportunity to regain the right to be present so long as the defendant agrees to refrain from any further disruptive conduct.

D. **Presence not required.** A defendant need not be present in the following situations:

(1) a defendant who is an organization may appear by counsel for all purposes;

(2) when the proceeding involves only a conference or hearing upon a question of law, if an attorney has entered on the defendant's behalf;

(3) in prosecutions for offenses that may be disposed of without a hearing under Rule 6-503 NMRA; and

(4) in prosecutions for offenses within magistrate court trial jurisdiction, the court may accept a knowing, intelligent, and voluntary waiver of a defendant's right to

be present for first appearance, arraignment, entry of a plea of not guilty, trial, or the imposition of any sentence. The defendant may not waive the right to be present for the entry of a guilty or no contest plea.

[As amended by Supreme Court Order No. 15-8300-009, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 16-8300-024, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — This rule permits a defendant to expressly waive appearance in magistrate court for the proceedings listed in Subparagraph (D)(4) of this rule if the waiver is knowing, voluntary, and intelligent. *See State v. Padilla*, 2002-NMSC-016, ¶ 14, 132 N.M. 247, 46 P.3d 1247 (concluding that a trial court may "accept a knowing, intelligent, and voluntary waiver of a defendant's presence, either as an express waiver or as an implied waiver when a defendant has forfeited his or her right to presence by conduct"). However, unless the case is one that may be disposed of without a hearing under Rule 6-503 NMRA, a defendant in magistrate court may not waive appearance for the entry of a guilty or no contest plea. A defendant who pleads guilty or no contest waives multiple trial rights, including (1) the right to a speedy and public trial; (2) the privilege against self-incrimination, (3) the requirement that the prosecution must prove guilt beyond a reasonable doubt; (4) the right to appear and defend against the charges; and (5) the right to confront one's accusers. To ensure that the defendant's waiver of these constitutional trial rights and entry of a guilty or no contest plea is knowing, intelligent, and voluntary, the magistrate court shall not accept a plea of guilty or no contest without first advising the defendant as required by Rule 6-502 NMRA in open court, which may include an audio or audio-video appearance under Rule 6-110A NMRA.

[Adopted by Supreme Court Order No. 15-8300-009, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-024, effective December 31, 2016, provided that if an attorney has entered on the defendant's behalf, a defendant's appearance is not required at proceedings in magistrate court involving a question of law; and in Subparagraph (D)(2), after "question of law", added "if an attorney has entered on the defendant's behalf".

The 2015 amendment, approved by Supreme Court Order No. 15-8300-009, effective December 31, 2015, substantially rewrote the rule and added the committee commentary; in the heading of the rule, deleted "appearance of counsel"; in Paragraph A, in the heading, deleted "required" and added "defined", added the first sentence, and added Subparagraphs (1) and (2); designated the language that was formerly in Paragraph A as present Paragraph B; in Paragraph B, added the heading "Presence required." and added "Except as otherwise provided by this rule, the"; added the designation for Subparagraph B(1), added "the first appearance, the", after

“arraignment”, added “the plea, and any hearing to set bail or conditions of release” and deleted “and at”; added the designation for Subparagraph B(2), and after “impaneling of the jury”, added “and”; added the designation for Subparagraph B(3), and after “imposition of any sentence”, deleted “except as otherwise provided by these rules”; redesignated former Paragraphs B and C as Paragraphs C and D, respectively; in Subparagraph C(1), added “is”, after “voluntarily”, changed “absents” to “absent”, and deleted “himself”, and after “the proceeding has commenced”, added “regardless of whether the court informed the defendant of an obligation to remain present”; in Subparagraph C(2), after “engages in conduct”, deleted “which is such” and added “that the court determines, by clear and convincing evidence, to be so disruptive”, after “to justify”, deleted “his being excluded from the proceeding” and added the remainder of the subparagraph; in Subparagraph D(1), deleted “a corporation” and added “a defendant who is an organization”; in Subparagraph D(2), added “when the proceeding involves only a conference or hearing upon a question of law”; added Subparagraph D(3); added the designation for Subparagraph D(4), after “the court”, deleted “with the written consent of”, added “may accept a knowing, intelligent, and voluntary waiver of a defendant’s right to be present for”, deleted “the defendant, may permit”, and added “first appearance”, after “arraignment”, added “entry of a”, after “plea”, added “of not guilty”, after “trial”, deleted “and”, and added “or the”, after “imposition of”, added “any”, and after “sentence”, deleted “in the defendant’s absence”, and added the last sentence.

Cross references. — For forms on waiver of appearance and certificate of defense counsel, *see* Rule 9-104 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 692 to 700, 901 to 935.

Voluntary absence of accused when sentence is pronounced, 6 A.L.R.2d 997.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

23A C.J.S. Criminal Law §§ 1161 to 1167.

6-110. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated April 24, 1989, this rule, relating to definition of "record", was withdrawn effective for cases filed in the magistrate courts on or after September 1, 1989.

6-110A. Audio and audio-visual appearances of defendant.

A. **When permitted.** The court may permit a defendant or attorneys to appear through the use of a simultaneous audio or audio-visual communication when it will

legitimately serve justice considering, among other issues, the economic needs of the parties. When an appearance through the use of an audio or audio-visual communication is conducted, the court may require the party requesting to appear by audio or audio-visual communication to pay the expense of the communication. Prior to an audio or audio-visual appearance, the defendant shall file with the court a written request to appear by audio or audio-visual communication substantially in the form approved by the Supreme Court. The judge shall conduct any audio or audio-visual proceeding in a place open to the public.

B. **Required audio-visual appearances.** For purposes of these rules, an appearance through a simultaneous audio-visual communication, as defined in Paragraph A above, constitutes an appearance in open court for:

(1) an arraignment, initial appearance, bail hearing, or entry of any plea; or

(2) a sentencing proceeding, after conviction at trial or a plea of guilty or no contest, unless the court is to take testimony or a statement from someone other than the defendant.

C. **Conduct of required audio-visual proceedings.** The following conditions must be met for any required audio-visual proceeding conducted pursuant to Paragraph B of this rule:

(1) the defendant and the defendant's attorney, if any, shall have the ability of private, unrecorded communication;

(2) the judge, legal counsel, if any, and defendant shall be able to communicate and see each other through a two-way audio-visual communication between the court and the place of custody or confinement; and

(3) the proceedings shall be conducted in a place open to the public through the use of audio-visual equipment which will permit members of the public to simultaneously see and hear the proceedings contemporaneously with the judge.

D. **Construction of rule.** This rule shall not prohibit other audio or audio-visual appearances upon waiver of any right such person held in custody or confinement might have to be physically present. Nothing contained in this rule shall be construed as establishing a right for any person held in custody to appear by a two-way audio-visual communication system.

[Approved, effective November 1, 2000; as amended, effective July 1, 2002; as amended by Supreme Court Order No. 08-8300-044, effective December 31, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-044, effective December 31, 2008, in Paragraph B, changed the phrase "The court may require the defendant to appear through the use of" to the phrase "For purposes of these rules, an appearance through" and at the end of the sentence, added the phrase "as defined in Paragraph A above, constitutes an appearance in open court" and in Subparagraph (1) of Paragraph B, added the phrase "entry of any plea; or".

The 2002 amendment, effective July 1, 2002, in the third sentence of Paragraph A, substituted "request to appear by audio or audio-visual communication" for "waiver of appearance" and rewrote Paragraph C(1) which formerly read "the defendant and the defendant's legal counsel, if any, shall be together in one room at the time".

Cross references. — For filing by fax, *see* Rule 6-210 NMRA.

For filing electronically, *see* Rule 6-211 NMRA.

For written waiver of appearance, *see* Criminal Form 9-104 NMRA.

For a written request to appear before the court by audio or audio-visual communications, *see* Criminal Form 9-104A NMRA.

6-111. Suspended.

[As amended, effective January 1, 1996; as amended by Supreme Court Order No. 16-8300-016, effective for all cases pending or filed on or after December 31, 2016; suspended by Supreme Court Order No. 21-8300-032, effective November 22, 2021, until further order of the court.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 21-8300-032, 6-111 NMRA, relating to criminal contempt, was suspended effective November 22, 2021, until further order of the court. For provisions of the former rule, *see* the 2020 NMRA on *NMOneSource.com*.

6-112. Exhibits.

A. **Preservation of exhibits.** Unless otherwise ordered by the court, at the conclusion of the trial all tendered exhibits shall be preserved by the court. If the exhibits are returned to the parties, the court shall advise the parties of their responsibility to preserve and retain exhibits offered into evidence.

B. **Delivery to clerk.** The exhibits and a receipt listing the exhibits shall be prepared by the offering party and delivered to the clerk of the magistrate court. Upon receipt of the exhibits, the clerk shall sign the receipt and file a copy in the court file.

C. **Return for appeal.** Any exhibits returned to the parties shall be returned to the clerk of the magistrate court within ten (10) days after the filing of a notice of appeal in the district court.

D. **Final disposition.** Unless otherwise ordered by the court, all exhibits delivered to the clerk shall be disposed of by the court unless claimed by the attorney or party tendering the exhibit within ninety (90) days after final disposition of the proceedings, including any appeal.

[Adopted, effective January 1, 1995.]

6-113. Victim's rights.

A. The court shall respect all rights of victims of crimes enumerated and filed as specified in the Victims of Crime Act, Sections 31-26-1 to 31-26-14 NMSA 1978.

B. At any scheduled court proceeding, the court shall inquire whether any victim entitled to notice of the proceeding, under Article II, Section 24, is present. If the victim is present, the court shall ascertain that the victim has been informed of the right to

(1) be treated with fairness and respect for the victim's dignity and privacy throughout the criminal justice process;

(2) timely disposition of the case;

(3) be reasonably protected from the accused throughout the criminal justice process;

(4) notification of court proceedings;

(5) attend all public court proceedings the accused has the right to attend;

(6) confer with the prosecution;

(7) make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

(8) restitution from the person convicted of the criminal offense that caused the victim's loss or injury;

(9) information about the conviction, sentencing, imprisonment, escape or release of the accused;

(10) have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work with good cause;

(11) promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons for retention of the victim's property; and

(12) be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned by the offender.

C. If the victim is not present, the court shall inquire of the district attorney whether an attempt has been made to notify the victim of the proceeding. If the district attorney cannot verify that an attempt has been made, unless doing so would result in a violation of a jurisdictional rule, the court shall

(1) reschedule the hearing; or

(2) continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement; and

(3) order the district attorney to notify the victim of the rescheduled hearing.

[Adopted by Supreme Court Order No. 08-8300-044, effective December 31, 2008.]

Committee commentary. — Article II, Section 24 of the Constitution of the State of New Mexico and the Victims of Crime Act, Sections 31-26-1 to 31-26-14 NMSA 1978 (2005) provide that victims of specific crimes enumerated in the Constitution and Act have specific rights in court proceedings. This rule applies only to those crimes enumerated and filed as specified under the Victims of Crime Act.

[Adopted by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

6-114. Public inspection and sealing of court records.

A. **Presumption of public access; scope of rule.** Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) "court record" means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) “lodged” means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) “protected personal identifier information” means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver’s license number, and all but the year of a person’s date of birth;

(4) “public” means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) “public access” means the inspection and copying of court records by the public; and

(6) “sealed” means a court record for which public access is limited by order of the court or as required by Paragraph C of this rule.

C. **Protection of personal identifier information.**

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court’s judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse. Any attorney or other person granted electronic access to court records containing protected personal identifier information shall be responsible for taking all reasonable precautions to ensure that the protected personal identifier information is not unlawfully disclosed by the attorney or other person or by anyone under the supervision of that attorney or other person. Failure to comply with the provisions of this subparagraph may subject the attorney or other person to sanctions or the initiation of disciplinary proceedings.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person’s name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

D. **Motion to seal court records required.** Except as provided in Paragraph C of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. The motion is subject to the provisions of Rule 6-304 NMRA, and a copy of the motion shall be served on all parties who have appeared in the case in which the court record has been

filed or is to be filed. Any party or member of the public may file a response to the motion to seal within fifteen (15) days after the motion is filed. The movant shall lodge the court record with the court pursuant to Paragraph E when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph E. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

E. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph D of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rule 6-301 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

F. **Requirements for order to seal court records.**

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of public access to the court record;

(b) the overriding interest supports sealing the court record;

(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;

(d) the proposed sealing is narrowly tailored; and

(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

G. **Sealed court records as part of record on appeal.** Court records sealed under the provisions of this rule that are filed as part of an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate court shall be filed in the district court pursuant to Rule 5-123 NMRA if the case is pending on appeal.

H. **Motion to unseal court records.**

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal is subject to the provisions of Rule 6-304 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph F for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph F. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

I. **Failure to comply with sealing order.** Any person or entity who knowingly discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Adopted by Supreme Court Order No. 10-8300-005, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023, temporarily suspending Paragraph C for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph C for an additional 90 days, effective November 10, 2010; by Supreme Court Order No. 11-8300-007, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017.]

Committee commentary. — This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Numerous statutes identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., NMSA 1978, § 7-1-4.2(H) (providing for confidentiality of taxpayer information); NMSA 1978, § 14-6-1(A) (providing for confidentiality of patient health information); NMSA 1978, § 24-1-9.5 (limiting disclosure of test results for sexually transmitted diseases); NMSA 1978, § 29-10-4 (providing for confidentiality of certain arrest record information); NMSA 1978, § 29-12A-4 (limiting disclosure of local crime stoppers program information); NMSA 1978, § 29-16-8 (providing for confidentiality of DNA information); NMSA 1978, § 31-25-3 (providing for confidentiality of certain communications between victim and victim counselor); NMSA 1978, § 40-8-2 (providing for sealing of certain name change records); NMSA 1978, § 40-6A-312 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); NMSA 1978, § 40-10A-209 (providing for limitations on disclosure of certain information during

proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); NMSA 1978, § 40-13-7.1 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); NMSA 1978, § 40-13-12 (providing for limits on internet disclosure of certain information in domestic violence cases); NMSA 1978, § 44-7A-18 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, this rule does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph D of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph F of this rule before deciding whether to seal any particular court record.

Paragraph C of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph C discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph C. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs D and E set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To

protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal". If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as Sealed Pleading or In the Matter of a Sealed Case, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access.

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph F. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further

provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph F also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph H of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Adopted by Supreme Court Order No. 10-8300-005, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-007, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-002, effective March 31, 2017, provided that any attorney or other person granted access to electronic

records in magistrate court cases that contain protected personal identifier information must take reasonable precautions to protect that personal identifier information, and provided that any attorney or other person who unlawfully discloses such personal identifier information may be subject to sanctions or the initiation of disciplinary proceedings; and in Subparagraph C(1), added the last two sentences.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-007, effective February 7, 2011, in Paragraph C, eliminated the former prohibition against including personal identifier information in court records without a court order, the prohibition against disclosing personal identifier information that the court orders to be included in a court record, the requirement that citations be automatically sealed, and the exceptions to the prohibitions against the inclusion and disclosure of personal identifier information; and required the court and the parties to avoid including personal identifier information in court records unless they deem the inclusion of personal identifier information to be necessary to the court's function, prohibited the publication of personal identifier information on court web sites and by posting in the courthouse, and required persons requesting access to court records to provide personal information and identification.

6-115. Court interpreters.

A. **Scope and definitions.** This rule applies to all criminal proceedings filed in the magistrate court. The following definitions apply to this rule:

(1) "case participant" means a party, witness, or other person required or permitted to participate in a proceeding governed by these rules;

(2) "interpretation" means the transmission of a spoken or signed message from one language to another;

(3) "transcription" means the interpretation of an audio, video, or audio-video recording, which includes but is not limited to 911 calls, wire taps, and voice mail messages, that is memorialized in a written transcript for use in a court proceeding;

(4) "translation" means the transmission of a written message from one language to another;

(5) "court interpreter" means a person who provides interpretation or translation services for a case participant;

(6) "certified court interpreter" means a court interpreter who is certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the Administrative Office of the Courts or who is acknowledged in writing by the Administrative Office of the Courts as a court interpreter certified by another jurisdiction that is a member of the Consortium for Language Access in the Courts;

(7) "justice system interpreter" means a court interpreter who is listed on the Registry of Justice System Interpreters maintained by the Administrative Office of the Courts;

(8) "language access specialist" means a bilingual employee of the New Mexico Judiciary who is recognized in writing by the Administrative Office of the Courts as having successfully completed the New Mexico Center for Language Access Language Access Specialist Certification program and is in compliance with the related continuing education requirements;

(9) "non-certified court interpreter" means a justice system interpreter, language access specialist, or other court interpreter who is not certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the Administrative Office of the Courts;

(10) "sight translation" means the spoken or signed translation of a written document; and

(11) "written translation" means the translation of a written document from one language into a written document in another language.

B. **Identifying a need for interpretation.**

(1) The need for a court interpreter exists whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding. The need for a court interpreter may be identified by the court or by a case participant. A court interpreter shall be appointed if one is requested.

(2) The court is responsible for making arrangements for a court interpreter for a juror who needs one.

(3) A party is responsible for notifying the court of the need for a court interpreter as follows:

(a) if the defendant needs a court interpreter, defense counsel shall notify the court at arraignment or within ten (10) days after waiver of arraignment; and

(b) if a court interpreter is needed for a party’s witness, the party shall notify the court in writing substantially in a form approved by the Supreme Court upon service of a notice of hearing and shall indicate whether the party anticipates the proceeding will last more than two (2) hours.

(4) If a party fails to timely notify the court of a need for a court interpreter, the court may assess costs against that party for any delay caused by the need to obtain a court interpreter unless that party establishes good cause for the delay.

(5) Notwithstanding any failure of a party, juror, or other case participant to notify the court of a need for a court interpreter, the court shall appoint a court interpreter for a case participant whenever it becomes apparent from the court's own observations or from disclosures by any other person that a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding.

C. **Appointment of court interpreters.**

(1) When a need for a court interpreter is identified under Paragraph B of this rule, the court shall appoint a certified court interpreter except as otherwise provided in this paragraph.

(2) For cases exclusively involving charges under the Motor Vehicle Code except for driving while under the influence of intoxicating liquor or drugs, reckless driving, or driving while license suspended or revoked, the court may appoint a language access specialist without complying with Subparagraph (5) of this paragraph.

(3) Upon approval of the court, the parties may stipulate to the use of a non-certified court interpreter for non-plea and non-evidentiary hearings without complying with the waiver requirements in Paragraph D of this rule.

(4) To avoid the appearance of collusion, favoritism, or exclusion of English speakers from the process, the judge shall not act as a court interpreter for the proceeding or regularly speak in a language other than English during the proceeding. A party's attorney shall not act as a court interpreter for the proceeding, except that a party and the party's attorney may engage in confidential attorney-client communications in a language other than English.

(5) If the court has made diligent, good faith efforts to obtain a certified court interpreter and one is not reasonably available, after consulting with the Administrative Office of the Courts, the court may appoint a justice system interpreter subject to the restrictions in Sub-subparagraphs (d) and (e) of this subparagraph. If the court has made diligent, good faith efforts to obtain a justice system interpreter and one is not reasonably available, after consulting with the Administrative Office of the Courts, the court may appoint a language access specialist or less qualified non-certified court interpreter only after the following requirements are met:

(a) the court provides notice to the parties substantially in a form approved by the Supreme Court that the court has contacted the Administrative Office of the Courts for assistance in locating a certified court interpreter or justice system interpreter but none is reasonably available and has concluded after evaluating the totality of the circumstances including the nature of the court proceeding and the potential penalty or consequences flowing from the proceeding that an accurate and complete interpretation of the proceeding can be accomplished with a less qualified non-certified court interpreter;

(b) the court makes a written finding that the proposed court interpreter has adequate language skills, knowledge of interpretation techniques, and familiarity with interpretation in a court setting to provide an accurate and complete interpretation for the proceeding;

(c) the court makes a written finding that the proposed court interpreter has read, understands, and agrees to abide by the New Mexico Court Interpreters Code of Professional Responsibility set forth in Rule 23-111 NMRA;

(d) with regard to a non-certified signed interpreter, in no event shall the court appoint a non-certified signed language interpreter who does not, at a minimum, possess both a community license from the New Mexico Regulations and Licensing Department and a generalist interpreting certification from the Registry of Interpreters for the Deaf; and

(e) a non-certified court interpreter shall not be used for a juror.

D. **Waiver of the right to a court interpreter.** Any case participant identified as needing a court interpreter under Paragraph B of this rule may at any point in the case waive the services of a court interpreter with approval of the court only if the court explains in open court through a court interpreter the nature and effect of the waiver and makes a written finding that the waiver is knowingly, voluntarily, and intelligently made. If the case participant is the defendant in the criminal proceeding, the waiver shall be in writing and the court shall further determine that the defendant has consulted with counsel regarding the decision to waive the right to a court interpreter. The waiver may be limited to particular proceedings in the case or for the entire case. With the approval of the court, the case participant may retract the waiver and request a court interpreter at any point in the proceedings.

E. **Procedures for using court interpreters.** The following procedures shall apply to the use of court interpreters:

(1) **Qualifying the court interpreter.** Before appointing a court interpreter to provide interpretation services to a case participant, the court shall qualify the court interpreter in accordance with Rule 11-604 of the Rules of Evidence. The court may use the questions in Form 9-109 NMRA to assess the qualifications of the proposed court interpreter. A certified court interpreter is presumed competent, but the presumption is rebuttable. Before qualifying a justice system interpreter or other less qualified non-certified court interpreter, the court shall inquire into the following matters:

(a) whether the proposed court interpreter has assessed the language skills and needs of the case participant in need of interpretation services; and

(b) whether the proposed court interpreter has any potential conflicts of interest.

(2) **Instructions regarding the role of the court interpreter during trial.** Before the court interpreter begins interpreting for a party during trial, the court shall instruct the parties and others present in the courtroom regarding the role of the court interpreter. If the court interpreter will provide interpretation services for a juror, the court also shall instruct the jury prior to deliberations in accordance with UJI 14-6022 NMRA.

(3) **Oath of the court interpreter.** Before a court interpreter begins interpreting, the court shall administer an oath to the court interpreter as required by Section 38-10-8 NMSA 1978. If a court interpreter will provide interpretation services for a juror, the court also shall administer an oath to the court interpreter prior to deliberations in accordance with UJI 14-6021 NMRA. All oaths required under this subparagraph shall be given in open court.

(4) **Objections to the qualifications or performance of a court interpreter.** A party shall raise any objections to the qualifications of a court interpreter when the court is qualifying a court interpreter as required by Subparagraph (1) of this paragraph or as soon as the party learns of any information calling into question the qualifications of the court interpreter. A party shall raise any objections to court interpreter error at the time of the alleged interpretation error or as soon as the party has reason to believe that an interpretation error occurred that affected the outcome of the proceeding.

(5) **Record of the court interpretation.** Upon the request of a party, the court may make and maintain an audio recording of all spoken language court interpretations or a video recording of all signed language interpretations. Unless the parties agree otherwise, the party requesting the recording shall pay for it. Any recordings permitted by this subparagraph shall be made and maintained in the same manner as other audio or video recordings of court proceedings. This subparagraph shall not apply to court interpretations during jury discussions and deliberations.

(6) **Court interpretation for multiple case participants.** When more than one case participant needs a court interpreter for the same spoken language, the court may appoint the same court interpreter to provide interpretation services for those case participants. When more than one case participant needs court interpretation for a signed language, separate court interpreters shall be appointed for each case participant. If a party needs a separate court interpreter for attorney-client communications during a court proceeding, prior to the commencement of the court proceeding, the party shall obtain a court interpreter of the party's own choosing and at the party's own expense. If the party is a criminal defendant represented by court-appointed counsel, a court interpreter for attorney-client communications may be paid as allowed under the Indigent Defense Act and Public Defender Act.

(7) **Use of team court interpreters.** To avoid court interpreter fatigue and promote an accurate and complete court interpretation, when the court anticipates that a court proceeding requiring a court interpreter for a spoken language will last more than two (2) hours the court shall appoint a team of two (2) court interpreters to provide interpretation services for each spoken language. For court proceedings lasting less

than two (2) hours, the court may appoint one (1) court interpreter but the court shall allow the court interpreter to take breaks approximately every thirty (30) minutes. The court shall appoint a team of two (2) court interpreters for each case participant who needs a signed language court interpreter when the court proceeding lasts more than one (1) hour. If a team of two (2) court interpreters are required under this subparagraph, the court may nevertheless proceed with only one (1) court interpreter if the following conditions are met:

(a) two (2) qualified court interpreters could not be obtained by the court;

(b) the court makes a written finding that it contacted the Administrative Office of the Courts for assistance in locating two (2) qualified court interpreters but two (2) could not be found; and

(c) the court allows the court interpreter to take a five (5)-minute break approximately every thirty (30) minutes.

(8) **Use of court interpreters for translations and transcriptions.** If a court interpreter is required to provide a sight translation, written translation, or transcription for use in a court proceeding, the court shall allow the court interpreter a reasonable amount of time to prepare an accurate and complete translation or transcription and, if necessary, shall continue the proceeding to allow for adequate time for a translation or transcription. Whenever possible, the court shall provide the court interpreter with advance notice of the need for a translation or transcription before the court proceeding begins and, if possible, the item to be translated or transcribed.

(9) **Modes of court interpretation.** The court shall consult with the court interpreter and case participants regarding the mode of interpretation to be used to ensure a complete and accurate interpretation.

(10) **Remote spoken language interpretation.** Court interpreters may be appointed to serve remotely by audio or audio-video means approved by the Administrative Office of the Courts for any proceeding when a court interpreter is otherwise not reasonably available for in-person attendance in the courtroom. Electronic equipment used during the hearing shall ensure that all case participants hear all statements made by all case participants in the proceeding. If electronic equipment is not available for simultaneous interpreting, the hearing shall be conducted to allow for consecutive interpreting of each sentence. The electronic equipment that is used must permit attorney-client communications to be interpreted confidentially.

(11) **Court interpretation equipment.** The court shall consult and coordinate with the court interpreter regarding the use of any equipment needed to facilitate the interpretation.

(12) **Removal of the court interpreter.** The court may remove a court interpreter for any of the following reasons:

(a) inability to adequately interpret the proceedings;

(b) knowingly making a false interpretation;

(c) knowingly disclosing confidential or privileged information obtained while serving as a court interpreter;

(d) knowingly failing to disclose a conflict of interest that impairs the ability to provide complete and accurate interpretation;

(e) failing to appear as scheduled without good cause;

(f) misrepresenting the court interpreter's qualifications or credentials;

(g) acting as an advocate; or

(h) failing to follow other standards prescribed by law and the New Mexico Court Interpreter's Code of Professional Responsibility.

(13) **Cancellation of request for a court interpreter.** A party shall advise the court in writing substantially in a form approved by the Supreme Court as soon as it becomes apparent that a court interpreter is no longer needed for the party or a witness to be called by the party. The failure to timely notify the court that a court interpreter is no longer needed for a proceeding is grounds for the court to require the party to pay the costs incurred for securing the court interpreter.

F. **Payment of costs for the court interpreter.** Unless otherwise provided in this rule, and except for court interpretation services provided by an employee of the court as part of the employee's normal work duties, all costs for providing court interpretation services by a court interpreter shall be paid from the Jury and Witness Fee Fund in amounts consistent with guidelines issued by the Administrative Office of the Courts.

[Adopted by Supreme Court Order No. 12-8300-022, effective for all cases filed or pending on or after January 1, 2013.]

Committee commentary. — This rule governs the procedure for the use of court interpreters in court proceedings. In addition to this rule, the New Mexico Judiciary Court Interpreter Standards of Practice and Payment Policies issued by the Administrative Office of the Courts (the AOC Standards), also provide guidance to the courts on the certification, use, and payment of court interpreters. But in the event of any conflicts between the AOC Standards and this rule, the rule controls.

The rule requires the use of certified court interpreters whenever possible but permits the use of less qualified interpreters in some situations. For purposes of this rule, a certified court interpreter may not be reasonably available if one cannot be located or if funds are not available to pay for one. But in all instances, before a court may use a

non-certified court interpreter, the court must contact the Administrative Office of the Courts (AOC) for assistance and to confirm whether funds may in fact be available to pay for a certified court interpreter.

The rule does not attempt to set forth the criteria for determining who should be a certified court interpreter. Instead, the task of certifying court interpreters is left to the AOC. When a court interpreter is certified by the AOC, the certified court interpreter is placed on the New Mexico Directory of Certified Court Interpreters, which is maintained by the AOC and can be viewed on its web site. A certified court interpreter is also issued an identification card by the AOC, which can be used to demonstrate to the court that the cardholder is a certified court interpreter.

In collaboration with the New Mexico Center for Language Access (NMCLA), the AOC is also implementing a new program for approving individuals to act as justice system interpreters and language access specialists who are specially trained to provide many interpretation services in the courts that do not require a certified court interpreter. Individuals who successfully complete the Justice System Interpreting course of study offered by the NMCLA are approved by the AOC to serve as justice system interpreters and will be placed on the AOC Registry of Justice System Interpreters. Those who are approved as justice system interpreters will also be issued identification cards that may be presented in court as proof of their qualifications to act as a justice system interpreter. Under this rule, if a certified court interpreter is not reasonably available, the court should first attempt to appoint a justice system interpreter to provide court interpretation services. If a justice system interpreter is not reasonably available, the court must contact the AOC for assistance before appointing a non-certified court interpreter for a court proceeding.

In addition to setting forth the procedures and priorities for the appointment of court interpreters, this rule also provides procedures for the use of court interpreters within the courtroom. In general, the court is responsible for determining whether a juror needs a court interpreter, and the parties are responsible for notifying the court if they or their witnesses will need a court interpreter. But in most cases, the court will be responsible for paying for the cost of court interpretation services, regardless of who needs them. However, the court is not responsible for providing court interpretation services for confidential attorney-client communications during a court proceeding, nor is the court responsible for providing court interpretation services for witness interviews or pre-trial transcriptions or translations that the party intends to use for a court proceeding. When the court is responsible for paying the cost of the court interpretation services, the AOC standards control the amounts and procedures for the payment of court interpreters.

Although this rule generally applies to all court interpreters, the court should be aware that in some instances the procedures to follow will vary depending on whether a spoken or signed language court interpreter is used. Courts should also be aware that in some instances when court interpretation services are required for a deaf or hard-of-hearing individual, special care should be taken because severe hearing loss can present a complex combination of possible language and communication barriers that

traditional American Sign Language/English interpreters are not trained or expected to assess. If a deaf or hard-of-hearing individual is having trouble understanding a court interpreter and there is an indication that the person needs other kinds of support, the court should request assistance from the AOC for a language assessment to determine what barriers to communication exist and to develop recommendations for solutions that will provide such individuals with meaningful access to the court system.

While this rule seeks to provide courts with comprehensive guidance for the appointment and use of court interpreters, the courts should also be aware that the AOC provides additional assistance through a full-time program director who oversees the New Mexico Judiciary's court interpreter program and who works in tandem with the Court Interpreter Advisory Committee appointed by the Supreme Court to develop policies and address problems associated with the provision of court interpreter services in the courts. Whenever a court experiences difficulties in locating a qualified court interpreter or is unsure of the proper procedure for providing court interpretation services under this rule, the court is encouraged, and sometimes required under this rule, to seek assistance from the AOC to ensure that all case participants have full access to the New Mexico state court system.

[Adopted by Supreme Court Order No. 12-8300-022, effective for all cases filed or pending on or after January 1, 2013.]

6-116. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, court employees and security personnel, and victims and victim's representatives as defined in the Victims of Crime Act, Section 31-26-3 NMSA 1978. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding.

(1) ***Motion of the court*.** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity*.** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A motion for courtroom closure shall be filed and

served at least twenty (20) days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response*.** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court. A reply is not permitted without leave of the court, which may be granted upon a showing of good cause.

(4) ***Response by non-party*.** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph C of this rule.

(5) ***Continuance*.** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses.

C. **Public hearing.** Unless the court denies a motion for courtroom closure on the pleadings, the court shall hold a public hearing on any proposed courtroom closure considered under Subparagraph (B)(1) or (B)(2) of this rule.

(1) ***Notice of hearing to the public*.** Media organizations, persons, and entities that have requested to receive notice of proposed courtroom closures shall be given timely notice of the date, time, and place of any hearing under this paragraph. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review*.** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential information relevant to the motion. Any evidence tendered to the court for an in camera review that is not ordered to be disclosed shall be returned to the party.

D. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

[Adopted by Supreme Court Order No. 16-8300-022, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 18-8300-020, effective December 31, 2018.]

Committee commentary. — Both the United States Constitution and the New Mexico Constitution guarantee a criminal defendant the right to a public trial. *See* U.S. Const. amend. VI; N.M. Const. art. II, § 14. The New Mexico Constitution also guarantees certain crime victims "the right to attend all public court proceedings the accused has the right to attend." N.M. Const. art. II, § 24; *see also* NMSA 1978, Section 31-26-4(E) (1999) (same). Additionally, the public has a First Amendment right to attend criminal trials. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 566-67 (1980). Consistent with these constitutional rights, New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., committee commentary to Rule 6-114 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

The prerequisites to a courtroom closure order, as set forth in Paragraph D, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

> [1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [magistrate] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id*. ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged

overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty*., 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

This rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (B)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph C, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed. The court shall follow the procedure developed by the Supreme Court for providing notice of public hearings to media organizations and other persons and entities who have requested to receive notice under Subparagraph (C)(1) of this rule.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice.

[Adopted by Supreme Court Order No. 16-8300-022, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-020, effective December 31, 2018, clarified that this rule does not affect the court's inherent authority to impose reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings; and in Paragraph A, after "access to the courtroom", added "including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA".

ARTICLE 2
Initiation of Proceedings

6-201. Commencement of action.

A. **How commenced.** A criminal action is commenced by filing one of the following with the court:

(1) a complaint consisting of a signed, sworn written statement containing the facts, the common name of the offense charged, and where applicable, a specific section number of the New Mexico Statutes Annotated, 1978 Compilation, that contains the offense. A separate complaint shall be filed for each defendant;

(2) a traffic citation issued and signed by a state or local traffic enforcement officer under Section 66-8-130 NMSA 1978;

(3) a citation issued and signed by an official authorized by law that contains the name and address of the cited person, the specific offense charged, a citation to the specific section of law violated, and the time and place to appear. Unless the person requests an earlier date, the time specified in the citation shall be at least three (3) days after issuance of the citation; or

(4) an order finding a person to be in direct criminal contempt.

A copy of every citation issued shall be delivered to the person cited, and the original shall be filed with the magistrate court within seven (7) days of the issuance of the citation or, in any event, no later than one (1) day prior to the date cited for the defendant to appear. Any citation that sets an appearance date and is untimely filed may be dismissed with or without prejudice by the court on its own motion. All complaints and citations shall be signed, as defined in Rule 6-210(J) NMRA, and the magistrate court shall not accept for filing any unsigned complaint or citation. In the event that an unsigned complaint or citation commences an action, the case shall be dismissed without prejudice.

B. **Jurisdiction.** Magistrate judges have jurisdiction in all cases as may be provided by law.

C. **Where commenced.** Unless otherwise provided by law, the action must be commenced in the magistrate district where the crime is alleged to have been committed.

D. **Arrest without a warrant; criminal complaint.** In all criminal cases, including cases that are not within magistrate court trial jurisdiction, if the defendant is arrested without a warrant, a criminal complaint shall be prepared and a copy given to the defendant prior to transferring the defendant to the custody of the detention facility. If the defendant is not provided a copy of the criminal complaint upon transfer to a detention facility, without just cause or sufficient reason, the complaint may be dismissed without prejudice or the defendant may be released from custody. If the defendant is in custody and the court is open, the complaint shall be filed immediately with the magistrate court. If the court is not open and the defendant remains in custody, the complaint shall be filed the next business day of the court. If the defendant is not in custody, the complaint shall be filed with the court as soon as practicable.

E. **Name of defendant.** In every complaint or citation the name of the defendant, if known, shall be stated. A defendant whose name is not known may be described by any name or description by which the defendant can be identified with reasonable certainty.

[As amended, effective September 1, 1990; November 1, 1991; May 1, 1997; September 15, 1997; as amended by Supreme Court Order No. 08-8300-044, effective December 31, 2008; as amended by Supreme Court Order No. 16-8300-007, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 21-8300-022, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-022, effective December 31, 2021, provided the time within which an original citation must be filed with the magistrate court, and provided a sanction for the untimely filing of certain citations; in Paragraph A, in the last undesignated subparagraph, after “shall be filed”, deleted “as soon as practicable”, and added “within seven (7) days of the issuance of the citation or, in any event, no later than one (1) day prior to the date cited for the defendant to appear. Any citation that sets an appearance date and is untimely filed may be dismissed with or without prejudice by the court on its own motion.”

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020, required in criminal cases where the defendant is arrested without a warrant and is in custody, that the complaint be filed immediately with the magistrate court if the court is open, and provided the magistrate court with discretion, in cases where the defendant was arrested without a warrant and where the defendant is not provided a copy of the criminal complaint upon transfer to a detention facility without just cause or sufficient reason, to dismiss a complaint without prejudice or to order the release of the defendant from custody; and in Paragraph D, after “shall be prepared and”, added “a copy”, added “If the defendant is not provided a copy of the criminal complaint upon transfer to a detention facility, without just cause or sufficient reason, the complaint may be dismissed without prejudice or the defendant may be released from custody.”, after “If the defendant is in custody”, added “and the court is open”, after “the complaint shall be filed”, added “immediately”, after “with the magistrate court”, deleted “at the time it is given to the defendant”, after “If the court is not open”, deleted “at the time the copy of the complaint is given to the defendant,”, and after “If the defendant is not in custody”, deleted “the next business day of the court”.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-007, effective December 31, 2016, provided that all complaints and citations commencing an action in the magistrate courts must be signed, that the magistrate court shall not accept for filing any unsigned complaint or citation and that any case commenced by an unsigned

complaint or citation shall be dismissed without prejudice; in Paragraph (A), in the introductory sentence, after “commenced by filing”, added “one of the following”; in Subparagraph (A)(1), after “consisting of a”, added “signed”, after “sworn”, added “written”, after “the facts”, added “the”, after “section number of”, added “the”, and after “Compilation”, deleted “which” and added “that”; in Subparagraph (A)(2), after “citation issued”, added “and signed”, and after “officer”, deleted “pursuant to” and added “under”; in Subparagraph (A)(3), after “citation issued”, added “and signed”, and after “issuance of the citation”, added “or”; deleted Subparagraph (A)(4) and redesignated former Subparagraph (A)(5) as Subparagraph (A)(4); in Subparagraph (A)(4), after “in direct”, added “criminal”, and after Subparagraph (A)(4), added the last two sentences of the undesignated paragraph; in Paragraph (B), changed “Magistrates” to “Magistrate judges”; and in Paragraph (D), after “including cases”, deleted “which” and added “that”.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-044, effective December 31, 2008, in Paragraph A, added Subparagraphs (4) and (5).

The second 1997 amendment, effective September 15, 1997, added "A separate complaint shall be filed for each defendant" at the end of Subparagraph A(1).

The first 1997 amendment, effective May 1, 1997, rewrote Paragraph (3) of Subsection A which read "a criminal citation complying with the provisions of Section 31-1-6 NMSA".

The 1991 amendment, effective for cases filed in the magistrate courts on or after November 1, 1991, in Paragraph D, rewrote the second sentence, which formerly read "The complaint shall at that time be filed with the magistrate court", inserted "and the defendant remains in custody" in the third sentence, and added the last sentence.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, in Paragraph A, substituted "state or local traffic enforcement officer pursuant to Section 66-8-130 NMSA 1978; or" for "full-time, salaried police officer, if permitted by law." at the end of Subparagraph (2) and added Subparagraph (3) and the last sentence of the paragraph; rewrote Paragraph D; and added Paragraph E.

Cross references. — For criminal complaint form, *see* Rules 9-201 and 9-202 NMRA.

I. GENERAL CONSIDERATION.

Unavailability of magistrate not basis for discharge. — The rule does not provide for the arrested person to be discharged if a magistrate is not available. *Perea v. Stout*, 1980-NMCA-077, 94 N.M. 595, 613 P.2d 1034, cert. denied, 449 U.S. 1035, 101 S. Ct. 610, 66 L. Ed. 2d 496 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 410.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

22 C.J.S. Criminal Law § 324 et seq.

II. HOW COMMENCED.

Complaint commences prosecution despite later indictment. — Charges initiated by a complaint in a magistrate court should be considered as continued by a later indictment, and, for purposes of the statute of limitations, the prosecution should be considered as commenced by the filing of the complaint. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

Filing of complaint tolls limitation period. — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony was timely because the limitation period was tolled by the filing of a complaint within the three-year period. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

No initials to describe offense. — The use of initials instead of words in a criminal complaint to identify the offense deprived defendant of due process of law. *State v. Raley*, 1974-NMCA-024, 86 N.M. 190, 521 P.2d 1031, cert. denied, 86 N.M. 189, 521 P.2d 1030.

Subsection designation not required. — This rule does not require reference to subsections; it requires only a reference to the specific section number of the statute which contains the offense. *State v. Nixon*, 1976-NMCA-031, 89 N.M. 129, 548 P.2d 91.

6-202. Preliminary examination.

A. **Time.**

(1) ***Time limits.*** A preliminary examination shall be scheduled and held within a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no later than sixty (60) days if the defendant is not in custody, of whichever of the following events occurs latest:

(a) the first appearance;

(b) if an evaluation of competency has been ordered, the date an order is filed in the magistrate court finding the defendant competent to stand trial;

(c) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date the arrest warrant is returned to the court;

(d) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state;

(e) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the metropolitan court stating that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions, or requirements of the program; or

(f) if the defendant is arrested upon a bench warrant for failure to comply with conditions of release or if the defendant's pretrial release is revoked under Rule 6-403 NMRA, the date the defendant is remanded into custody, provided that in no event a preliminary examination shall occur later than required by any of the events in Subparagraph (A)(1) of this rule.

(2) ***Extensions.*** Upon a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only upon a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. The time enlargement provisions in Rule 6-104 do not apply to a preliminary examination.

(3) ***Dismissal without prejudice.*** If a preliminary examination is not held within the time limits in this rule, the court shall dismiss the case without prejudice and discharge the defendant.

B. **Procedures.** If the court determines that a preliminary examination must be conducted, the following procedures shall apply.

(1) ***Counsel.*** The defendant has the right to assistance of counsel at the preliminary examination.

(2) ***Discovery.*** The prosecution shall promptly make available to the defendant any tangible evidence in the prosecution's possession, custody, and control, including records, papers, documents, and recorded witness statements that are material to the preparation of the defense or that are intended for use by the prosecution at the preliminary examination. The prosecution is under a continuing duty to disclose additional evidence to the defendant as such evidence becomes available to the prosecution.

(3) ***Subpoenas.*** Subpoenas shall be issued for any witnesses required by the prosecution or the defendant.

(4) ***Cross-examination.*** The witnesses shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses.

(5) ***Rules of Evidence.*** The Rules of Evidence apply, subject to any specific exceptions in the Rules of Criminal Procedure for the Magistrate Courts.

C. **Recording of examination.** A recording shall be made of the preliminary examination. If the defendant is bound over for trial in the district court, the recording shall be filed with the clerk of the district court with the bind-over order. Any party may request a duplicate of the recording from the district court within six (6) months following the preliminary examination.

D. **Findings of court.**

(1) If, upon completion of the examination, the court finds that there is no probable cause to believe that the defendant has committed a felony offense, the court shall dismiss without prejudice all felony charges for which probable cause does not exist and discharge the defendant as to those offenses.

(2) If the only remaining charges are within magistrate court trial jurisdiction, the court shall either conduct an arraignment immediately on the remaining charges or shall hold an arraignment within the time limits set forth in Rule 6-506(A) NMRA, and the case shall then proceed under the Rules of Criminal Procedure for the Magistrate Courts.

(3) If the court finds that there is probable cause to believe that the defendant committed one or more offenses not within magistrate court trial jurisdiction, the court shall bind the defendant over for trial in the district court. All misdemeanor offenses charged in the complaint shall be included in the bind-over order.

E. **Transfer to district court.**

(1) If the defendant is bound over for trial by the magistrate court, the district attorney shall file the following with the magistrate court:

(a) a copy of the information filed in district court; and

(b) if an order is entered by the district court extending the time for filing an information, a copy of such order.

(2) When a copy of the information filed in district court is filed in the magistrate court, the magistrate court shall at that time transfer the magistrate court record, along with the bind-over order, to the district court.

(3) If an information is not timely filed in the district court in accordance with the requirements of Rule 5-201(C), the magistrate court, upon motion or of its own initiative, shall dismiss the charges without prejudice within two (2) days of the expiration of the applicable filing deadline.

F. **Effect of indictment.** If the defendant is indicted prior to a preliminary examination for the offense pending in the magistrate court, the district attorney shall forthwith advise the magistrate court, and the magistrate court shall take no further action in the case, provided that any conditions of release set by the magistrate court shall continue in effect unless amended by the district court.

G. **Bail bond.** Unless the defendant is discharged, the magistrate court shall retain jurisdiction over the defendant and the bond until an information or indictment is filed in the district court or until twelve (12) months after the preliminary examination, whichever occurs first. If the defendant is indicted or an information is filed, the magistrate court shall transfer any bond to the district court. Unless the proceedings are remanded to the magistrate court, all further action relating to the bond shall be taken in the district court.

[As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by Supreme Court Order No. 07-8300-025, effective November 1, 2007; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Under Subparagraph (A)(2), the district court may extend the time limits for holding a preliminary examination if the defendant does not consent only upon a showing of exceptional circumstances beyond the control of the state or the court. "'Exceptional circumstances,' . . . would include conditions that are unusual or extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately preceding the commencement of the trial; or other circumstances that ordinary experience or prudence would not foresee, anticipate, or provide for." *See* Committee commentary to Rule 6-506 NMRA.

Article II, Section 14 of the New Mexico Constitution guarantees that the state cannot prosecute a person for a "capital, felonious or infamous crime" without filing either a grand jury indictment or a criminal information. If the state is going to proceed by criminal information, the defendant is entitled to a preliminary examination. *See* N.M. Const. art. II, § 14. At the preliminary examination, "the state is required to establish, to the satisfaction of the examining judge, two components: (1) that a crime has been committed; and (2) probable cause exists to believe that the person charged committed it." *State v. White*, 2010-NMCA-043, ¶ 11, 148 N.M. 214, 232 P.3d 450.

If the court dismisses a criminal charge for failure to comply with the time limits in Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal is without prejudice, and the state may later prosecute the defendant for the same offense by filing either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M. 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d 1387 (explaining that, following dismissal of an indictment, "the State can choose whether to proceed by indictment or information");

State v. Isaac M., 2001-NMCA-088, ¶ 14, 131 N.M. 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude "multiple attempts to show probable cause" because "it is settled law that jeopardy does not attach pretrial"). *Cf*. Fed. R. Crim. P. 5.1(f) ("If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.").

Discharging the defendant means relieving the defendant of all obligations to the court that originated from a criminal charge. Thus, to discharge a defendant the court must release the defendant from custody, relieve the defendant of all conditions of release, and exonerate any bond.

In *State v. Lopez*, 2013-NMSC-047, ¶ 26, 314 P.3d 236, the Supreme Court held that a defendant does not have a constitutional right of confrontation at the preliminary examination, *overruling Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789, to the extent *Mascarenas* held otherwise. Paragraph B of this rule was amended in 2014 to clarify that *Lopez* did not affect the other rights and procedures that apply to preliminary examinations. *See Lopez*, 2013-NMSC-047, ¶ 26. The list of procedures and rights in Paragraph B of this rule is not intended to be a comprehensive list of the defendant's rights at the preliminary examination.

First, *Lopez* did not alter the prosecution's duty to provide discovery, as available, to the defendant. *See Mascarenas*, 1969-NMSC-116, ¶ 14 (holding that if the state is going to call a witness to testify at the preliminary examination, then the defendant has a right to inspect any prior statements or reports made by such witness that are in the possession of the prosecution). However, the defendant's right to discovery prior to the preliminary examination is limited to what is available and in the prosecutor's immediate possession. For example, the defendant does not have a right to discover a laboratory report that has not been prepared and is not ready for use at the preliminary examination.

Additionally, the Rules of Evidence remain generally applicable to preliminary examinations, subject to specific exceptions for certain types of evidence not admissible at trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the "Rules of Evidence generally govern proceedings in preliminary examinations" but explaining that Rule 6-608(A) NMRA "provides a specific exception to our hearsay rule for admissibility" of certain types of written laboratory reports).

The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-examine the state's witnesses. Thus, although Rule 6-608(A) may permit the state to use a laboratory report at the preliminary examination without calling the laboratory analyst as a witness, the defendant retains the right "to call witnesses to testify as to the matters covered in such report." Rule 6-608(B). And the preliminary examination remains "a critical stage of a criminal proceeding" at which "counsel must

be made available to the accused." *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

[Adopted by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective December 31, 2020, required the magistrate court, in cases where the defendant is bound over for trial by the court, to dismiss charges without prejudice within two days of the applicable deadline if an information is not timely filed in the district court; and added Subparagraph E(3).

The 2017 amendment, approved by Supreme Court Order No. 17-8300-016, effective December 31, 2017, revised the time limits for scheduling and holding a preliminary examination, revised the rule regarding when a district court may extend the time limits for holding a preliminary examination if the defendant does not consent, and revised the committee commentary; in Paragraph A, Subparagraph A(1), in the introductory clause, after "shall be", added "scheduled and", after "in any event", deleted "not" and added "no", after "(10) days", deleted "after the first appearance", after "(60) days", deleted "after the first appearance", and after "not in custody", added "of whichever of the following events occurs latest", added Subparagraphs A(1)(a) through A(1)(f), and in Subparagraph A(2), after "upon a showing", added "on the record", after "that", deleted "extraordinary" and added "exceptional", and after "circumstances", added "beyond the control of the state or the court"; and in Paragraph D, Subparagraph D(2), after "jurisdiction", added "the court shall either conduct an arraignment immediately on the remaining charges or shall hold an arraignment within the time limits set forth in Rule 6-506(A) NMRA, and", and after "the case shall", added "then".

The 2014 amendment, approved by Supreme Court Order No. 14-8300-020, effective December 31, 2014, provided for extensions of time for holding a preliminary hearing beyond the ten day time limit; provided for appointment of counsel and discovery; provided for the application of the Rules of Evidence; added Paragraph A; in Paragraph B, deleted the former title, "Subpoena of witnesses" and added the current title and in the introductory sentence, after "must be conducted", added "the following procedures shall apply"; in Paragraph B, added Subparagraphs (1) and (2), in Subparagraph (3), after "required by the", deleted "district attorney" and added "prosecution", in Subparagraph (4), added the title and after "the defendant's presence", deleted "and may be cross-examined" and added the remainder of the sentence, and added Subparagraph (5); in Paragraph C, deleted the former title "Record of hearing" and added the current title, changed "record" to "recording" in two places, in the third sentence, deleted "A" and added "Any party may request a", after "duplicate of the", deleted "tape may be requested by any party" and added "recording from the district court", and after "the preliminary", deleted "hearing" and added "examination", and

deleted the former fourth sentence which provided that the taped record could be disposed of six months after the preliminary hearing; in Paragraph D (1), after “of the examination”, deleted “it appears to”, after “examination, the court”, added “finds”, after “defendant has committed”, deleted “an” and added “a felony”, after “the court shall”, added “dismiss without prejudice all felony charges for which probable cause does not exist and”, and after “discharge the defendant”, added “as to those offenses”; in Paragraph D, added Subparagraphs (2) and (3); deleted former Paragraph D which is restated in Paragraph A (1); in Paragraph E, in the introductory sentence, after “shall file”, added “the following”, in Paragraph E (2), deleted the former language which required the magistrate to bind defendant over for trial if the offense was not within the magistrate’s jurisdiction and to set a trial date if the offense was within the magistrates’ jurisdiction and added the current language; and in Paragraph G, in the first sentence, deleted “After bindover” and added “Unless the defendant is discharged” and after “twelve (12) months”, deleted “have passed” and added “after the preliminary examination”, and in the second sentence, after “defendant is indicted”, added “or an information is filed”.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-025, effective November 1, 2007 added the first sentence of Paragraph F providing for jurisdiction over the release of the defendant until an information or indictment is filed in the district court and amended the second sentence to provide for transfer of the bond upon indictment.

The 2003 amendment, effective February 16, 2004, added the last sentence of Paragraph F.

The 1995 amendment, effective November 1, 1995, added Paragraph F.

The 1992 amendment, effective for cases filed in the magistrate courts on and after October 1, 1992, rewrote Paragraph B.

Cross references. — For form on notice of preliminary examination and certificate of mailing, *see* Rule 9-206 NMRA.

For form on bind-over order, *see* Rule 9-207 NMRA.

For the transfer of the bail bond on appeal from the magistrate court, *see* Rule 6-703 NMRA .

Right of confrontation. — The right of confrontation guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution is a trial right that does not apply to probable cause determinations in preliminary examinations. *State v. Lopez*, 2013-NMSC-047, overruling *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789.

Right of confrontation did not apply at preliminary examination. — Where police officers found a bag containing a green leafy substance and a bag that contained a white powdery substance in defendant's vehicle during a search incident to defendant's arrest for driving with a suspended license; at defendant's preliminary examination, the magistrate court admitted a forensic laboratory report into evidence without an opportunity for the defense to personally cross-examine the laboratory analyst who prepared the report; and the report concluded that the white powdery substance was cocaine and the green leafy substance was marijuana, the magistrate court did not violate defendant's confrontation rights under the United States Constitution and the New Mexico Constitution because the constitutional right of confrontation does not apply to probable cause determinations in preliminary examinations. *State v. Lopez*, 2013-NMSC-047, overruling *Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789.

State is collaterally estopped from presenting the same evidence in a subsequent preliminary hearing. — Where the state filed a criminal complaint in magistrate court charging defendant with felony offenses and sought to establish probable cause in a preliminary hearing in magistrate court; the magistrate made a finding of no probable cause; the state filed the same charges in the district court which remanded the matter to magistrate court for a preliminary hearing; the state then peremptorily excused the original magistrate from conducting the preliminary hearing; and a second magistrate listened to a tape recording of the original preliminary hearing, and without more evidence made a finding of probable cause and bound defendant to district court for trial on the felony charges, the state was collaterally estopped from presenting the identical evidence in the second preliminary hearing. *State v. White*, 2010-NMCA-043, 148 N.M. 214, 232 P.3d 450.

Two things must be proved in preliminary hearing before a magistrate: (1) the fact that a crime has been committed; and (2) probable cause to believe that the person charged committed it. *State v. Vallejos* , 1979-NMCA-089, 93 N.M. 387, 600 P.2d 839, cert. denied, 93 N.M. 205, 598 P.2d 1165.

Preliminary examination deemed critical stage of proceedings. — The preliminary examination, from the arraignment of the defendant until the end of the examination, is a critical stage in criminal proceedings because a defendant needs the advice and assistance of counsel at the time of his arraignment, the entry of plea and his announcement as to whether he desires or waives a preliminary examination, and because he needs the assistance of counsel in cross-examining the state's witnesses at the preliminary examination. *Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966) (decided under former law).

Indictment after preliminary hearing. — Subsequent indictment is not barred when the magistrate conducts a preliminary hearing and decides that insufficient probable cause exists for binding the accused over for trial in district court. *State v. Peavler*, 1975-NMCA-037, 87 N.M. 443, 535 P.2d 650, *rev'd on other grounds*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387.

Court's jurisdiction not limited by time limits specified in this rule. — Nothing in either the district court rules or the magistrate court rules limits the jurisdiction of the magistrate court to the time limits specified in this rule; rather, they specifically grant limited jurisdiction to the magistrate court, by Rule 6-104 NMRA, and former Rule 20(e), N.M.R. Crim. P., beyond the time limits prescribed in this rule. *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Failure to timely hold preliminary examination does not divest jurisdiction. — The magistrate court does not automatically lose jurisdiction upon failing to hold a preliminary examination within the time provisions of Paragraph D. *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Dismissal improper. — Dismissal is not the proper remedy for a delay in holding a preliminary examination when prejudice to the defendant has not been shown. *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Evidence found to support belief that defendant committed crime. — While no evidence was presented at the preliminary hearing on the cause of death of the victim, the magistrate still had probable cause to believe that the defendant committed the crime of murder where the evidence showed that the defendant shot the deceased, who remained in the hospital until his death. *State v. Vallejos*, 1979-NMCA-089, 93 N.M. 387, 600 P.2d 839, cert. denied, 93 N.M. 205, 598 P.2d 1165.

Complaint commences prosecution despite later indictment. — Charges initiated by a complaint in a magistrate court should be considered as continued by a later indictment, and, for purposes of the statute of limitations, the prosecution should be considered as commenced by the filing of the complaint. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

Filing of complaint tolls limitation period. — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony was timely because the limitation period was tolled by the filing of a complaint within the three-year period. *State v. Martinez*, 1978-NMCA-095, 92 N.M. 291, 587 P.2d 438, cert. quashed, 92 N.M. 260, 586 P.2d 1089.

Magistrate is not authorized to restrict action of district attorney in filing information. *State v. McCrary*, 1982-NMCA-003, 97 N.M. 306, 639 P.2d 593.

Determination of probable cause based on judicially-noticed testimony. — Where no witnesses testified at defendant’s preliminary hearing; the State offered testimony that the victim and a detective had given at a previous hearing before the magistrate pertaining to a different charge; the magistrate took judicial notice of the testimony and based solely on the judicially-noticed testimony, issued a determination of probable cause; defendant proceeded to a jury trial without challenging the preliminary hearing; and defendant claimed that defendant was deprived of the right to a preliminary hearing,

defendant had no remedy for the error in the preliminary hearing. *State v. Perez*, 2014-NMCA-023, cert. denied, 2014-NMCERT-001.

Law reviews. — For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 411 to 420, 424 to 432.

Civil liability of witness in action under 42 USCS § 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892.

22 C.J.S. Criminal Law § 340 et seq.

6-203. Arrests without a warrant; probable cause determination.

A. **General rule.** In all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release, a probable cause determination shall be made to determine if a person shall remain in custody. The probable cause determination shall be made by a magistrate, metropolitan, or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier. The court may not extend the time for making a probable cause determination beyond forty-eight (48) hours. Saturdays, Sundays, and legal holidays shall be included in the forty-eight (48) hour computation, notwithstanding Rule 6-104(A) NMRA.

B. **Conduct of determination.** The probable cause determination shall be nonadversarial and may be held in the absence of the defendant and of counsel. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. No witnesses shall be required to appear unless the court determines there is a basis for believing the appearance of one or more witnesses might lead to a finding that there is no probable cause. If the complaint and any attached statements fail to make a written showing of probable cause, an amended complaint or a statement of probable cause may be filed within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier, with sufficient facts to show probable cause for detaining the defendant.

C. **Probable cause determination; conclusion.**

(1) ***No probable cause found*.** If the court finds that the complaint fails to establish probable cause to believe that the defendant has committed an offense and no amendment is filed with sufficient facts to show probable cause for detaining the defendant, the court shall order the immediate personal recognizance release of the defendant from custody pending further proceedings. The defendant’s release shall be

subject only to the conditions that the defendant shall appear before the court as directed and shall not violate any federal, state, or local criminal law. The court shall not impose any additional conditions of release under Rule 6-401 NMRA.

(2) ***Probable cause found*.** If the court finds that there is probable cause that the defendant committed an offense, the court shall make such finding in writing. If the court finds probable cause, the court shall review the conditions of release. If no conditions of release have been set and the offense is a bailable offense, the court may set conditions of release immediately or within the time required under Rule 6-401 NMRA.

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order No. 07-8300-025, effective November 1, 2007; as amended by Supreme Court Order No. 13-8300-041, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-023, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019.]

Committee commentary. — When a defendant has been arrested without a warrant and remains in custody, the Fourth Amendment to the United States Constitution requires a judicial determination of probable cause within forty-eight hours after arrest. *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that any significant pretrial restraint on liberty requires a prompt judicial determination of probable cause); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that a judicial determination "of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*").

A probable cause proceeding to determine probable cause to detain pending trial is not to be confused with a first appearance hearing, *see* Rule 6-501 NMRA, or a preliminary examination to determine probable cause to prosecute under Article II, Section 14 of the New Mexico Constitution, *see* Rule 6-202 NMRA. The determination of probable cause to detain can be made in a nonadversarial proceeding and may be held in the absence of the defendant and of counsel. *See Gerstein*, 420 U.S. at 119-22 (concluding that a probable cause determination does not need to be "accompanied by the full panoply of adversary safeguards — counsel, confrontation, cross-examination, and compulsory process for witnesses"). The probable cause determination is required only to assure in warrantless arrest cases that there is probable cause to detain the defendant pending trial.

Prior to amendments in 2013, Paragraph C of this Rule required the court to dismiss the complaint without prejudice if the court found no probable cause. However, as explained supra, the sole purpose of a probable cause determination is to decide "whether there is probable cause for detaining the arrested person pending further proceedings." *Gerstein*, 420 U.S. at 120 (emphasis added). Accordingly, in 2013, this Rule was

amended to clarify that a court should not dismiss the criminal complaint against the defendant merely because the court has found no probable cause.

Failure to make a probable cause determination does not void a subsequent conviction. *See Gerstein*, 420 U.S. at 119.

[Adopted by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, effective for all cases pending or filed on or after February 1, 2019, authorized the court to set conditions of release immediately upon finding probable cause that the defendant committed an offense; in Subparagraph C(2), added the first sentence, after “bailable offense, the court”, deleted “shall” and added “may”, after “may set conditions of release”, deleted “in accordance with” and added “immediately or within the time required under”, and deleted “If the court finds that there is probable cause the court shall make such finding in writing.”.

The 2017 amendment, approved by Supreme Court Order No. 17-8300-023, effective December 31, 2017, provided that when a defendant is released following a court finding that the complaint failed to establish probable cause to believe that the defendant committed a criminal offense, the defendant’s release shall be subject only to the conditions that the defendant shall appear before the court as directed and shall not violate any federal, state, or local criminal law; in Subparagraph C(1), after “release of the defendant from custody pending”, deleted “trial” and added the remainder of the subparagraph.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-042, effective December 31, 2013, limited the extension of time for making a probable cause determination; required the personal recognizance release of the defendant from custody pending trial if no probable cause is found; in Paragraph A, added the third and fourth sentences; in Paragraph C, Subparagraph (1), added the title, after “the court shall”, deleted “dismiss the complaint without prejudice and”, after “order the immediate”, added “personal recognizance”, and after “release of the defendant”, added the remainder of the sentence, and in Subparagraph (2), added the title.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-025, effective November 1, 2007, amends Paragraph A to provide for a probable cause determination to be made by a magistrate, metropolitan or district court judge; amends Paragraph B to provide that a written showing of probably cause within 48 hours after custody commences or at the first appearance whichever occurs earlier; amends Paragraph C to provide for a dismissal of the complaint if the complaint or any amended complaint fails to show probable cause.

The 1991 amendment, effective for cases filed in the magistrate courts on or after November 1, 1991, in Paragraph A, substituted "promptly but in any event within forty-eight (48) hours" for "within a reasonable time, but in any event within twenty-four (24) hours" in the second sentence and deleted the former last sentence of the paragraph, relating to expiration of the prescribed period on a Saturday, Sunday, or legal holiday.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, added "arrests without a warrant" to the catchline; rewrote Paragraph A; deleted former Paragraph B, relating to time of determination, and redesignated former Paragraphs C and D as present Paragraphs B and C; in present Paragraph B, inserted "whether there is probable cause" near the beginning, substituted "nonadversarial" for "nonadversary" in the first sentence, and added the last sentence; and in present Paragraph C, added "Probable cause determination;" to the paragraph heading, rewrote the first sentence, and added the second, third, and fourth sentences.

Cross references. — For probable cause determination form, *see* Rule 9-207A NMRA.

For statement of probable cause, *see* Rule 9-215 NMRA.

Test at preliminary hearing is not whether guilt is established beyond a reasonable doubt, but whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused. *State v. Vallejos*, 1979-NMCA-089, 93 N.M. 387, 600 P.2d 839, cert. denied, 93 N.M. 205, 598 P.2d 1165.

Evidence found to support belief that defendant committed crime. — While no evidence was presented at the preliminary hearing on the cause of death of the victim, the magistrate still had probable cause to believe that the defendant committed the crime of murder where the evidence showed that the defendant shot the deceased, who remained in the hospital until his death. *State v. Vallejos*, 1979-NMCA-089, 93 N.M. 387, 600 P.2d 839, cert. denied, 93 N.M. 205, 598 P.2d 1165.

Arrest and release on same day. — Where a defendant is arrested without a warrant and released from custody on the same day as the arrest, the Rules of Criminal Procedure do not contemplate a probable cause determination by either the district court under Rule 5-301(A) NMRA 2003 or the magistrate court under Paragraph A of this rule. *State v. Gomez*, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 411 to 432.

22 C.J.S. Criminal Law § 339.

6-204. Issuance of warrant for arrest and summons.

A. **Issuance.** Upon the docketing of any criminal action the court may issue a summons or an arrest warrant.

B. **Basis for warrant.** The court may issue an arrest warrant only upon a sworn statement of the facts showing probable cause that an offense has been committed. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. Before ruling on a request for a warrant, the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses produced by the affiant, provided that such additional evidence shall be reduced to writing and supported by oath or affirmation. The court also may permit a request for an arrest warrant by any method authorized by Paragraph G of Rule 6-208 NMRA for search warrants and may issue an arrest warrant remotely provided the requirements of Paragraph H of Rule 6-208 NMRA and this rule are met.

C. **Preference for summons.** If the offense is within magistrate court trial jurisdiction, the court shall issue a summons, unless in its discretion, the court finds that the interests of justice may be better served by the issuance of a warrant for arrest.

D. **Form.** The warrant shall be signed by the court and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged. It shall command that the defendant be arrested and brought before the court. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place. A summons or arrest warrant shall be substantially in the form approved by the Supreme Court.

[As amended, effective July 1, 1988; as amended by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013; as amended by Supreme Court Order No. 15-8300-008, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed on or after December 31, 2019.]

Committee commentary. — Paragraph A was amended in 2013 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 6-208 NMRA and the related committee commentary for more information.

Paragraph C was amended in 2019 to be consistent with Rule 5-208 NMRA, which was amended at the same time.

[Adopted by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013, as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-018, effective for all cases filed on or after December 31, 2019, removed the showing of good cause requirement for a magistrate court to issue a warrant for arrest, and revised the committee commentary; and in Paragraph C, after "in its discretion", deleted "and for good cause shown".

The 2015 amendment, approved by Supreme Court Order No. 15-8300-008, effective December 31, 2015, designated the first sentence of former Paragraph A as present Paragraph A and designated the remainder of former Paragraph A as present Paragraph B; in present Paragraph A, after "summons or", added "an"; in present Paragraph B, added the heading, "Basis for warrant.", and in the first sentence, after "arrest warrant", deleted "or summons"; and redesignated the succeeding paragraphs accordingly.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013, provided for alternate methods for requesting and issuing arrest warrants; and in Paragraph A, added the last sentence.

Cross references. — For forms on criminal summons, certificate of mailing, and return, *see* Rule 9-208 NMRA.

For form of affidavit for arrest warrant, *see* Rule 9-209 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 408 to 410, 421, 422.

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

22 C.J.S. Criminal Law § 334 et seq.

6-205. Summons; service; failure to appear.

A. **Methods of service.** Service of a summons shall be by mail unless the court directs that personal service be made.

B. **Issuance.** Upon receipt of a complaint, the clerk shall docket the action, forthwith issue a summons and deliver it for service. Upon the request of the prosecution, separate or additional summons shall issue against any defendant. Any defendant may waive the issuance or service of summons.

C. **Execution; form.** The summons shall be signed by the judge or the clerk, be directed to the defendant, and must contain:

(1) the name of the court and county in which the complaint is filed, the docket number of the case, and the name of the defendant to whom the summons is directed;

(2) a direction that the defendant appear at the time and place set forth;

(3) the name and address of the prosecuting attorney, if any, otherwise the address of the law enforcement entity filing the complaint;

(4) The summons shall be substantially in the form approved by the supreme court.

D. **Summons; time to appear.** Service shall be made at least ten (10) days before the defendant is required to appear. If service is made by mail an additional three (3) days shall be added pursuant to Rule 6-104. Service by mail is complete upon mailing.

E. **Summons; service of copy.** The summons and complaint shall be served together. The prosecution shall furnish the person making service with such copies as are necessary.

F. **Summons; by whom served.** In criminal actions any process may be served by the sheriff of the county where the defendant may be found, or by any other person who is over the age of eighteen (18) years and not a party to the action.

G. **Summons; service by mail.** A summons and complaint may be served upon any defendant by the clerk of the court, the judge or the prosecutor mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served. If a defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may:

(1) issue a warrant for the defendant's arrest, and thereafter the action shall be treated as if the warrant had been the first process in the action; or

(2) direct that service of such summons and complaint may be made by a person authorized by Paragraph F of this rule in the manner prescribed for personal service by Paragraph H of this rule.

H. **Summons; how served.** Service may be made within the state as follows:

(1) upon an individual other than a minor or an incapacitated person by delivering a copy of the summons and of the complaint to him personally; or if the defendant refuses to receive such, by leaving same at the location where he has been found; and if the defendant refuses to receive such copies or permit them to be left, such action shall constitute valid service. If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15)

years; and if there be no such person available or willing to accept delivery, then service may be made by posting such copies in the most public part of the defendant's premises, and by mailing to the defendant at his last known mailing address copies of the process;

(2) upon a domestic or foreign corporation by delivering a copy of the summons and of the complaint to an officer, a managing or a general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant; upon a partnership by delivering a copy of the summons and of the complaint to any general partner; and upon other unincorporated association which is subject to suit under a common name, by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by law to receive service and the statute so requires, by also mailing a copy to the unincorporated association. If the person refuses to receive such copies, such action shall constitute valid service. If none of the persons mentioned is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge thereof.

Service shall be made with reasonable diligence, and the original summons with proof of service shall be returned to the clerk of the court from which it was issued.

I. **Return.** If service is made by mail pursuant to Paragraph G of this rule, return shall be made by the defendant appearing as required by the summons. If service is by personal service pursuant to Paragraph H of this rule, the person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. When service is made by the sheriff or a deputy sheriff, proof thereof shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff, proof thereof shall be made by affidavit. Where service within the state includes mailing, the return shall state the date and place of mailing.

J. **Construction of terms.** Wherever the terms "summons", "process", "service of process" or similar terms are used, such shall include the summons, complaint and any other papers required to be served.

[As amended, effective January 1, 1990.]

ANNOTATIONS

The 1989 amendment, effective for cases filed in the magistrate courts on or after January 1, 1990, rewrote the rule heading which read "Service of summons; failure to appear"; substituted Paragraph A for former Paragraph A, which read "A summons shall be served in accordance with the rules governing service or process in civil actions in

magistrate court"; deleted former Paragraph B, relating to failure to appear; and added Paragraphs B to J.

Cross references. — For service of process in civil actions, *see* Rule 2-202 NMRA.

For forms on criminal summons, certificate of mailing and return, *see* Rule 9-208 NMRA.

For form of affidavit for bench warrant, *see* Rule 9-211 NMRA.

For forms on bench warrant and return, *see* Rule 9-212 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 659, 861.

22 C.J.S. Criminal Law § 334 et seq.

6-206. Arrest warrants.

A. **To whom directed.** Whenever a warrant is issued in a criminal action, including by any method authorized by Rule 6-208(G) NMRA, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus police officer, or an Indian tribal or pueblo law enforcement officer. The warrant may limit the jurisdictions in which it may be executed. A copy of the warrant shall be docketed in the case file. The person obtaining the warrant shall cause it to be entered into a law enforcement information system. Upon arrest the defendant shall be brought before the court without unnecessary delay.

B. **Arrest.** The warrant shall be executed by the arrest of the defendant. If the warrant is in the possession of the arresting officer at the time of the arrest, a copy shall be served on the defendant upon arrest. If the warrant is not in the officer's possession at the time of arrest, the officer shall inform the defendant of the offense and of the fact that a warrant has been issued and shall serve the warrant on the defendant as soon as practicable.

C. **Return.** The arresting officer shall make a return of the warrant, or any duplicate original, to the court as captioned on the warrant and notify immediately all law enforcement agencies, previously advised of the issuance of the warrant for arrest, that the defendant has been arrested. The return shall be docketed in the case file.

D. **Duty to remove warrant.** If the warrant has been entered into a law enforcement information system, upon arrest of the defendant, the person executing the warrant shall cause it to be removed from the system. If the court withdraws the warrant, the court shall cause the warrant to be removed from the warrant information system.

[As amended, effective July 1, 1999; March 1, 2000; as amended by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — Paragraph A was amended in 2013 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 6-208 NMRA and the related committee commentary for more information.

[Adopted by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective December 31, 2020, made certain technical amendments; in Paragraph A, after “authorized by”, deleted “Paragraph G of”, after “Rule 6-208”, added “(G)”, and after “a campus”, deleted “security” and added “police”; and in Paragraph C, after “to the court”, deleted “which issued” and added “as captioned on”.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013, provided for alternate methods for requesting and issuing arrest warrants; in Paragraph A, in the first sentence, after "in a criminal action", added "including by any method authorized by Paragraph G of Rule 6-208 NMRA"; and in Paragraph C, after "shall make a return", added "of the warrant, or any duplicate original".

The 2000 amendment, effective March 1, 2000, has the arresting officer make a return to the court which issued the warrant instead of returning it to the magistrate and made gender neutral changes.

The 1999 amendment, effective July 1, 1999, added the second sentence in Paragraph A, added the last sentence in Paragraph C, and substituted Paragraph D, relating to the duty to remove warrants, for former Paragraph D, relating to severance of offenses or defendants.

Cross references. — For forms on warrant for arrest and return where defendant is found, *see* Rule 9-210 NMRA.

For forms on bench warrant and return, *see* Rule 9-212 NMRA.

For the statutory requirement that the state police maintain a criminal identification system, *see* Section 29-3-1 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 408 to 410, 421, 422.

22 C.J.S. Criminal Law § 334 et seq.

6-207. Bench warrants.

A. **Failure to appear or act.** If any person who has been ordered by the magistrate judge to appear at a certain time and place or to do a particular thing fails to appear at such specified time and place in person, or by counsel when permitted by these rules, or fails to do the thing so ordered, the court may issue a warrant for the person's arrest. The warrant may limit the jurisdictions in which it may be executed. A copy of the warrant shall be docketed in the case file. Unless the judge has personal knowledge of such failure, no bench warrant shall issue except upon a sworn written statement of probable cause. The court shall not issue a bench warrant for failure to pay fines, fees, or costs unless the defendant has failed to timely respond to a summons issued in accordance with Rule 6-207.1 NMRA.

B. **Law enforcement information system.** If a bench warrant is issued in a felony, misdemeanor, or driving while under the influence of intoxicating liquor or drugs proceeding, upon execution of the bench warrant, the court shall cause the warrant to be entered into a warrant information system maintained by a law enforcement agency.

C. **Execution and return.** A bench warrant shall be executed and returned in the same manner as an arrest warrant. The return shall be docketed in the case file.

D. **Duty to remove warrant.** If the warrant has been entered into a law enforcement information system, upon arrest of the defendant, the person executing the warrant shall cause it to be removed from the system. If the court withdraws the warrant, the court shall cause the warrant to be removed from the warrant information system.

[As amended, effective July 1, 1999; as amended by Supreme Court Order No. 17-8300-001, effective for all cases pending or filed on or after April 17, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-001, effective April 17, 2017, prohibited the magistrate court from issuing a bench warrant for failure to pay fines, fees, or costs unless the defendant has failed to timely respond to a summons; and in Paragraph A, added the last sentence of the paragraph.

The 1999 amendment, effective July 1, 1999, added the second sentence in Paragraph A, added Paragraphs B and C, redesignating former Paragraph B as Paragraph C, and in Paragraph C, added the last sentence and made a minor stylistic change.

Compiler's notes. — The 2015 amendment to Rule 6-207 NMRA, approved by Supreme Court Order No. 15-8300-015, effective December 31, 2015, was withdrawn by Supreme Court Order No. 15-8300-025, effective December 1, 2015.

Cross references. — For form on affidavit for bench warrant, *see* Rule 9-211 NMRA.

For forms on bench warrant and return, *see* Rule 9-212 NMRA.

For the statutory requirement of the state police to maintain a criminal identification system, *see* Section 29-3-1 NMSA 1978.

6-207.1. Payment of fines, fees, and costs.

A. **Payment arrangements.** The court shall assess the defendant's ability to pay any fines, fees, or costs at the time of sentencing and shall consider the following types of payment arrangements in the order of priority set forth below.

(1) ***Full payment at time of sentencing.*** If the defendant is able to pay the full amount at the time of sentencing, the court shall require the defendant to do so.

(2) ***Full payment within thirty (30) days of sentencing.*** If the defendant cannot pay the full amount at the time of sentencing but will be able to pay within thirty (30) days, the court shall require the defendant to do so.

(3) ***Agreement to pay.*** If the defendant cannot pay the full amount within thirty (30) days after the date of sentencing, the court may permit the defendant to enter into an agreement to pay in installments. The court shall retain the authority to enforce an agreement to pay regardless of whether the defendant remains on probation or whether the defendant was placed on probation at all. An agreement to pay shall

(a) be based on the defendant's individual circumstances;

(b) require the largest possible payment amounts that the judge determines the defendant can make successfully;

(c) require the first installment to be due no later than thirty (30) days after the date of sentencing;

(d) schedule subsequent installments in intervals of thirty (30) days or less; and

(e) schedule all payments to be made within the shortest practicable period of time.

(4) ***Modification of the agreement to pay.*** The court may, for good cause shown, modify the agreement to pay up to three (3) times, either by allowing the defendant additional time for payment or by reducing the amount of one or more installments. The court shall document the good cause shown with written findings in the case file.

B. **Community service in lieu of payment.** If the court finds at any time that the defendant is unable to pay all or part of the assessed fines, fees, or costs, the court shall permit the defendant to perform community service in lieu of payment of all or part of the assessed fines, fees, or costs owed to the court. The defendant shall receive credit toward the fines, fees, or costs at the rate of the prevailing federal hourly minimum wage or as otherwise required by law. If the defendant performs community service in lieu of payment, all hours must be completed by the deadline set by the court. If the defendant fails to perform community service as ordered by the court, the failure to perform community service shall be treated the same as a failure to pay, and the court shall follow the procedures set forth in Paragraphs C and D of this rule.

C. **Failure to comply; issuance of summons or bench warrant.**

(1) ***Issuance and content of summons.*** If the defendant fails to make a payment as ordered by the court, request a modification of an agreement to pay before the payment due date, or perform community service by the deadline set by the court, the court shall issue a summons within five (5) days of the deadline. The summons shall

(a) instruct the defendant to either pay or appear at the court within fifteen (15) days after the date that the summons is issued;

(b) if the summons does not set a specific hearing date and time, state that the defendant may request a hearing before the judge and that ability to pay will be addressed at any hearing; and

(c) notify the defendant that a bench warrant shall be issued if the defendant fails to timely respond to the summons.

(2) ***Service of summons.*** The court may serve a summons under this paragraph using any method of service permitted by the Rules of Criminal Procedure for the Magistrate Courts.

(3) ***Issuance of bench warrant.*** If a defendant fails to comply with a summons issued under Subparagraph (C)(1) of this rule, the court shall issue a bench warrant for failure to pay or perform community service no later than five (5) days after the appearance date on the summons. Once the defendant has been arrested or has surrendered on the warrant, the court shall hold a hearing under Paragraph D of this rule, unless the defendant has satisfied all outstanding obligations to the court by making payment in full or by performing community service in lieu of payment.

(4) ***Subsequent failure to comply.*** The first time the defendant misses a payment under an agreement to pay or fails to perform community service by the deadline set by the court, the court shall follow the procedure set forth in Subparagraphs (C)(1) through (C)(3) of this rule. If the defendant subsequently fails to comply with an order to pay or to perform community service, the court may issue a bench warrant and is not required to issue a summons prior to issuing a bench warrant.

Prior to issuing a bench warrant, the court may attempt to contact the defendant and make satisfactory arrangements to address the defendant's noncompliance. Once the court has issued a second bench warrant for failure to comply, the court shall not grant the defendant an extension or a renewed agreement to pay, except upon a written finding of exceptional circumstances.

D. **Failure to comply hearing.** The court shall hold a failure to comply hearing as set forth in a summons, at the defendant's request, or following the defendant's arrest or surrender on a bench warrant, unless the defendant has satisfied all outstanding obligations to the court by making payment in full or performing community service in lieu of payment. If the defendant has been arrested and remains in custody, the court shall hold the hearing within three (3) days of the defendant's arrest. The defendant may appear at the hearing through an audio or audio-visual communication under Rule 6-110A NMRA. At the hearing the court shall determine the basis for the defendant's failure to pay or to perform community service as ordered by the court. If the court finds that the defendant is financially unable to pay, the court may modify the agreement to pay under Subparagraph (A)(4) of this rule; convert the unpaid fines, fees, or costs to community service; revoke any unpaid portion of a fine; or grant other appropriate relief. If the court finds that the defendant has willfully refused to pay or to perform community service, the court may order the defendant committed to jail under Section 33-3-11 NMSA 1978.

[Adopted by Supreme Court Order No. 17-8300-001, effective for all cases pending or filed on or after April 17, 2017; as amended by Supreme Court Order No. 17-8300-022, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — If the defendant has failed to pay fines, fees, or costs owed to the court or to perform community service as ordered by the court, the court should issue a summons. The summons may set a specific hearing date and time. Alternatively, the summons may set a deadline by which the defendant must pay, request a modification to the agreement to pay, or request a hearing. In addition to issuing summonses for failure to pay, the court should develop and implement alternative methods for providing supplementary notice to the defendant through automated means, such as automated telephone calls, email messages, or text messages.

If the defendant requests a hearing prior to the issuance of bench warrant under Subparagraph (C)(3) of this rule, the court shall not issue a bench warrant prior to the hearing date.

Prior to assessing jail in lieu of payment, the court must afford the defendant adequate procedural due process protections and determine the defendant's ability to pay. The court must notify the defendant that ability to pay will be addressed at any hearing, provide the defendant with an opportunity to present and dispute information relevant to the defendant's ability to pay, and document any willful failure to pay with written findings in the court file. *See Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 2520

(2011). “It shall be a defense that the defendant did not willfully refuse to obey the order of the court or that [the defendant] made a good faith effort to obtain the funds required for the payment.” NMSA 1978, § 31-12-3(C) (1993); *see Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that imprisoning a person for failure to pay fines, without considering the reasons for the inability to pay, violates the constitutional guarantee of equal protection).

[Adopted by Supreme Court Order No. 17-8300-001, effective for all cases pending or filed on or after April 17, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-022, effective December 31, 2017, in Paragraph D, changed “Rule 8-109A NMRA” to “Rule 6-110A NMRA”.

6-208. Search warrants.

A. **Issuance.** A warrant may be issued by the court to search for and seize any of the following:

(1) property that has been obtained or is possessed in a manner which constitutes criminal offense;

(2) property designed or intended for use or that is or has been used as the means of committing a criminal offense;

(3) property that would be material evidence in a prosecution for a criminal offense; or

(4) a person for whose arrest there is probable cause or who is unlawfully restrained. A warrant shall issue only on a sworn written statement of the facts showing probable cause for issuing the warrant.

B. **Contents.** A search warrant shall be executed by a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer, an Indian tribal or pueblo law enforcement officer, or a civil officer of the United States authorized to enforce or assist in enforcing any federal law. The warrant shall state the date and time it was issued by the judge and shall contain or have attached the sworn written statement of facts showing probable cause for its issuance and the name of any person whose sworn written statement has been taken in support of the warrant. A search warrant shall direct that it be served between the hours of 6:00 a.m. and 10:00 p.m., according to local time, unless the issuing judge, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time.

C. **Form.** A search warrant shall be substantially in the form approved by the Supreme Court.

D. **Execution.** A search warrant shall be executed within ten (10) days after the date of issuance. The officer seizing property under the warrant shall give to the person from whom or from whose premises the property was taken a copy of the affidavit for search warrant, a copy of the search warrant, and a copy of the inventory of the property taken or shall leave the copies of the affidavit for search warrant, the search warrant, and inventory at the place from which the property was taken.

E. **Return.** The return of the warrant, or any duplicate original, shall be made promptly after execution of the warrant to the magistrate court issuing the warrant. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if the person is present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken and shall be signed by the officer and the person or persons in whose presence the inventory was taken. The court shall upon request deliver a copy of the inventory to the person from whom or whose premises the property was taken and to the applicant for the warrant.

F. **Probable cause.** As used in this rule, “probable cause” shall be based on substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

G. **Methods for requesting warrant.** A request for a search warrant may be made using any of the following methods, provided that the request should be made in writing whenever possible:

(1) by hand-delivery of an affidavit substantially in the form approved by the Supreme Court with a proposed search warrant attached;

(2) by oral testimony in the presence of the judge provided that the testimony is reduced to writing, supported by oath or affirmation, and served with the warrant; or

(3) by transmission of the affidavit and proposed search warrant required under Subparagraph (1) of this paragraph to the judge by telephone, facsimile, electronic mail, or other reliable electronic means.

H. **Testimony, oaths, remote transmissions, and signatures.**

(1) Before ruling on a request for a warrant the judge may require the affiant to appear personally, telephonically, or by audio-video transmission and may examine under oath the affiant and any witnesses the affiant may produce, provided that any

additional evidence shall be reduced to writing, supported by oath or affirmation, and served with the warrant.

(2) If the judge administers an oath or affirmation remotely to the affiant or any witnesses the affiant may produce, the means used must be designed to ensure that the judge confirms the identity of the affiant and any witnesses the affiant may produce.

(3) If the judge issues the warrant remotely, it shall be transmitted by reliable electronic means to the affiant and the judge shall file a duplicate original with the court. Upon the affiant's acknowledgment of receipt by electronic transmission, the electronically transmitted warrant shall serve as a duplicate original and the affiant is authorized, but not required, to write the words "duplicate original" on the transmitted copy. The affiant may request that the duplicate original warrant filed by the judge be sealed or lodged in accordance with Rule 6-114 NMRA.

(4) Any signatures required under this rule by the judge or affiant may be by original signature, a copy of an original signature, a computer generated signature, or any other signature otherwise authorized by law.

[As amended by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — In 2013, Paragraphs G and H were added to permit multiple methods for requesting and issuing warrants. *See* Rule 5-211(F) NMRA and the related committee commentary for more information.

It is the obligation of each court to track the warrants it has issued and the warrants returned to it. The requirement in Paragraph H(3) of this rule that the judge file a duplicate original of a warrant issued remotely reaffirms this existing duty. Warrants issued via traditional means should already be tracked. Warrants issued remotely are no different. If a judge is concerned that filing a warrant prematurely may create a public and law enforcement safety issue, the warrant may be filed under seal, provided an appropriate order is entered in accordance with Paragraph F of Rule 6-114 NMRA.

[Adopted by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017, provided that a request for a search warrant should be made in writing whenever possible, and made certain technical revisions to the rule; in Paragraph E, after "property was taken, if", deleted "they are" and added "the person is"; in Paragraph F, after "shall be based", deleted

“upon” and added “on”; in Paragraph G, in the introductory clause, after “following methods”, added “provided that the request should be made in writing whenever possible”; and in Subparagraph H(1), after “provided that”, deleted “such” and added “any”.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013, provided for multiple methods for requesting and issuing warrants; in Paragraph A, in the introductory sentence, after "and seize any", added "of the following"; in Paragraph B, in the second sentence, after "The warrant", added "shall state the date and time it was issued by the judge and"; in Paragraph E, in the first sentence, after "The return", added "of the warrant, or any duplicate original"; added Paragraph G; in Paragraph H, added the title of the paragraph; in Subparagraph (1) of Paragraph H, after "for a warrant the", deleted "court" and added "judge" and after "affiant to appear personally", added "telephonically, or by audio-video transmission"; and added Subparagraphs (2) through (4) of Paragraph H.

Cross references. — For form of affidavit for search warrant, *see* Rule 9-213 NMRA.

For forms on search warrant, authorization for nighttime search and return and inventory, *see* Rule 9-214 NMRA.

For notice of trial form, *see* Rule 9-501 NMRA.

For application for inspectorial search order, *see* Rule 9-801 NMRA.

For forms on inspection order and return, *see* Rule 9-802 NMRA.

Showing of probable cause is not limited to written statements. — A "showing" of probable cause required under Article II, Section 10 of the New Mexico Constitution is not limited to a writing that the issuing judge sees rather than hears or ascertains by other means. Rather, the plain meaning of "showing" as used in Article II, Section 10 is a presentation or statement of facts or evidence that may be accomplished through visual, audible, or other sensory means. *State v. Boyse*, 2013-NMSC-024, *rev'g* 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

A search warrant may be obtained by telephone. — Where a police officer, who was investigating cruelty to animals, prepared a detailed, type-written affidavit as part of an application for a search warrant of defendant’s property; the officer contacted the on-call magistrate judge by telephone; over the telephone, the judge administered an oath to the officer who then read the written affidavit to the judge; the judge approved the search warrant over the telephone; and the officer noted the judge’s approval on the search warrant form and executed the search warrant, the search warrant was valid because Article II, Section 10 of the New Mexico Constitution allows for requesting and approving search warrants by telephone. *State v. Boyse*, 2013-NMSC-024, *rev'g* 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

Citizen-informer rule. — In order to apply the citizen-informer rule, the affidavit must affirmatively set forth circumstances which would allow a neutral magistrate to determine the informant's status as a citizen-informer. *State v. Hernandez*, 1990-NMCA-127, 111 N.M. 226, 804 P.2d 417.

Nighttime searches. — Where defendant challenged the denial of his motion to suppress evidence from a nighttime search, since the search was conducted on people who were seen to be active in nighttime, and probable cause was developed in the nighttime, the search was constitutional. *State v. Garcia*, 2002-NMCA-050, 132 N.M. 180, 45 P.3d 900, cert. denied, 132 N.M. 193, 46 P.3d 100.

Separate reasonable cause for authorization to execute a nighttime search is required. *State v. Scott*, 2006-NMCA-003, 138 N.M. 751, 126 P.3d 567, cert. granted, 2006-NMCERT-001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Searches and Seizures §§ 108 to 233.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

Lawfulness of search of person or personal effects under medical emergency exception to warrant requirement, 11 A.L.R.5th 52.

79 C.J.S. Searches and Seizures § 128 et seq.

6-209. Service and filing of pleadings and other papers.

A. **Service; when required.** Unless the court otherwise orders, every pleading subsequent to the citation or complaint, every written order, every paper relating to conditions of release or bond, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, demand, and similar paper shall be served upon each of the parties.

B. **Service; how made.** When service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney’s or party’s last known address. Service by mail is complete upon mailing.

C. **Definitions.** As used in this rule:

(1) "Delivering a copy" means:

(a) handing it to the attorney or to the party;

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 6-210 NMRA or Rule 6-211 NMRA;

(c) leaving it at the attorney's or party's office with a clerk or other person in charge, or, if there is no one in charge, leaving it in a conspicuous place in the office;

(d) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion residing there; or

(e) leaving it at a location designated by the court for serving papers on attorneys, if the following requirements are met:

(i) the court, in its discretion, chooses to provide such a location; and

(ii) service by this method has been authorized by the attorney, or by the attorney's firm, organization, or agency on behalf of the attorney.

(2) "Mailing a copy" means sending a copy by first class mail with proper postage.

D. **Filing by a party; certificate of service.** All papers after the citation or complaint required to be served upon a party, together with a certificate or affidavit of service indicating the date and method of service, shall be filed with the court within a reasonable time after service.

E. **Filing with the court defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note on the form the filing date and forthwith transmit them to the office of the clerk. "Filing" shall include filing a facsimile copy or filing an electronic copy as may be permitted under Rule 6-210 NMRA or Rule 6-211 NMRA. If a party has filed a paper using electronic or facsimile transmission, that party shall not subsequently submit a duplicate paper copy to the court. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices, except as provided in Paragraph A of Rule 6-201 NMRA, which prohibits the filing of an unsigned citation or complaint.

F. **Proof of service.** Except as otherwise provided in these rules or by order of court, proof of service shall be made by the certificate of an attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit

shall be filed with the clerk or endorsed on the pleading, motion, or other paper required to be served.

G. **Motions.** Whenever, by these rules, a party is required to "move" within a specified time or a motion is required to be "made" within a specified time, the motion shall be deemed to be made at the time it is filed or at the time it is served, whichever is earlier.

H. **Filing and service by the court.** Unless otherwise ordered by the court, the court shall serve all written court orders and notices of hearing on the parties. The court may file papers before serving them on the parties. For papers served by the court, the certificate of service need not indicate the method of service. For purposes of Rule 6-104(C) NMRA, papers served by the court shall be deemed served by mail, regardless of the actual manner of service, unless the court's certificate of service unambiguously states otherwise. The court may, in its discretion, serve papers in accordance with the method described in Subparagraph (C)(1)(e) of this rule.

I. **Filing and service by an inmate.** The following provisions apply to documents filed and served by an inmate confined to an institution:

(1) If an institution has a system designed for legal mail, the inmate shall use that internal mail system to receive the benefit of this rule.

(2) The document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.

(3) Whenever service of a document on a party is permitted by mail, the document is deemed mailed when deposited in the institution's internal mail system addressed to the parties on whom the document is served.

(4) The date of filing or mailing may be shown by a written statement, made under penalty of perjury, showing the date when the document was deposited in the institution's internal mail system.

(5) A written statement under Subparagraph (4) of this paragraph establishes a presumption that the document was filed or mailed on the date indicated in the written statement. The presumption may be rebutted by documentary or other evidence.

(6) Whenever an act must be done within a prescribed period after a document has been filed or served under this paragraph, that period shall begin to run on the date the document is received by the party.

[As amended, effective March 1, 2000; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-007, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Paragraph I governs the filing and service of documents by an inmate confined to an institution. A court generally will not consider pro se pleadings filed by an inmate who is represented by counsel. *See, e.g., State v. Martinez*, 1981-NMSC-016, ¶ 3, 95 N.M. 421, 622 P.2d 1041 (providing that no constitutional right permits a defendant to act as co-counsel in conjunction with the defendant's appointed counsel); *State v. Boyer*, 1985-NMCA-029, ¶ 15, 103 N.M. 655, 712 P.2d 1 (explaining that "once a defendant has sought and been provided the assistance of appellate counsel, that choice binds the defendant, absent unusual circumstances" (citation omitted)).

[Adopted by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-007, effective December 31, 2016, provided an exception to the rule that the clerk of the magistrate court shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form; and in Paragraph (E), in the fourth sentence, after "practices", added "except as provided in Paragraph A of Rule 6-201 NMRA, which prohibits the filing of an unsigned citation or complaint."

The 2014 amendment, approved by Supreme Court Order No. 14-8300-016, effective December 31, 2014, authorized the court to designate a place of service on attorneys; provided for the filing and service of orders and notices by the court; provided for the filing and service of documents by an inmate; in Paragraph A, after "complaint, every", added "written" and after "written order", deleted "not entered in open court"; in Paragraph B, in the second sentence, after "last known address", deleted "or, if no address is known, by leaving it with the clerk of the court"; in Paragraph C, added "Definitions. As used in this rule:", in Paragraph C (1), changed "Delivery of" to "Delivering", and after "a copy", deleted "within this rule", added Paragraph C (1)(e), added Paragraph C (2) and deleted former Paragraph C (5) which provided that delivery included placing a copy in a box maintained by the attorney for purposes of serving the attorney; in Paragraph D, in the title, after "Filing", added "by a party" and after "affidavit of service", added "indicating the date and method of service"; in Paragraph E, in the first sentence, after "The filing of", deleted "pleadings and other", deleted the former third sentence which provided that a paper filed by electronic means constituted a written paper, and added the current third sentence; and added Paragraphs H and I.

The 2000 amendment, effective March 1, 2000, inserted "pleadings and other" in the rule heading and amended this rule to more clearly require notice to the public defender in criminal cases for post-conviction cases when a case is dismissed without prejudice.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 773, 1009.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

22 C.J.S. Criminal Law § 324 et seq.

6-210. Service and filing of pleadings and other papers by facsimile.

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each magistrate district shall designate one or more telephone numbers to receive fax filings.

B. **Facsimile transmission by court of notices, orders or writs; receipt of affidavits.** Facsimile transmission may be used by the court for issuance of any notice, order or writ or receipt of an affidavit. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ.

C. **Paper size and quality.** No facsimile copy shall be filed with the court unless it is: on plain paper eight and one-half by eleven (8½ x 11) inches in size; legible; and typewritten or printed using a pica (10 pitch) type style or a twelve (12) point typeface. The right, left, top and bottom margins shall be at least one (1) inch. The pages shall be consecutively numbered at the bottom.

D. **Pleadings or papers faxed directly to the court.** A pleading or paper may be faxed directly to the court if:

(1) a fee is not required to file the pleading or paper;

(2) only one copy of the pleading or paper is required to be filed;

(3) the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and

(4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

E. **Facsimile copy filed by an intermediary agent.** Facsimile copies of pleadings or papers filed in person by an intermediary agent are not subject to the restrictions of Paragraph D of this rule.

F. **Time of filing.** If facsimile transmission of a pleading or paper faxed is begun before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If facsimile transmission is begun after the close of business, the pleading or paper will be considered filed on the next court business day. For any questions of timeliness the time and date affixed on the cover page by the court's facsimile machine will be determinative.

G. **Transmission by facsimile.** A notice, order, writ, pleading or paper may be faxed to a party or attorney who has:

(1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;

(2) a letterhead with a facsimile telephone number; or

(3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

Service by facsimile is accomplished when the transmission of the pleading or paper is completed.

H. **Proof of service by facsimile.** Proof of facsimile service must include:

(1) a statement that the pleading or paper was transmitted by facsimile transmission and that the transmission was reported as complete and without error;

(2) the time, date and sending and receiving facsimile machine telephone numbers; and

(3) the name of the person who made the facsimile transmission.

I. **Demand for original.** A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile transmission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

J. **"Signed" defined.** As used in these rules, "signed" includes an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[Adopted, effective January 1, 1997.]

Committee commentary. — New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. *See* Section 14-15-4 NMSA 1978.

6-211. Electronic service and filing of pleadings and other papers.

A. **Definitions.** As used in these rules:

(1) "electronic transmission" means the transfer of data from computer to computer other than by facsimile transmission; and

(2) "document" includes the electronic representation of pleadings and other papers.

B. **Registration for electronic service.** The clerk of the Supreme Court shall maintain a register of attorneys who agree to accept documents by electronic transmission. The register shall include the attorney's name and preferred electronic mail address.

C. **Electronic transmission by the court.** The court may send any document by electronic transmission to an attorney registered pursuant to Paragraph B of this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Filing by electronic transmission.** Documents may be filed by electronic transmission in accordance with this rule and any technical specifications for electronic transmission:

(1) in any court that has adopted technical specifications for electronic transmission;

(2) if a fee is not required or if payment is made at the time of filing.

E. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary.

F. **Service by electronic transmission.** Service pursuant to Rule 6-209 of these rules may be made by electronic transmission on any attorney who has registered pursuant to Paragraph B of this rule and on any other person who has agreed to service in this manner.

G. **Time of filing.** If electronic transmission of a document is received before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If electronic transmission is received after the close of business, the document will be considered filed on the next business day of the court. For any

questions of timeliness, the time and date registered by the court's computer will be determinative.

H. **Demand for original.** A party shall have the right to inspect and copy any document that has been filed or served by electronic transmission if the document has a statement signed under oath or affirmation or penalty of perjury.

I. **Proof of service by electronic transmission.** Proof of service by electronic transmission shall be made to the court by a certificate of an attorney or affidavit of a non-attorney and shall include:

(1) the name of the person who sent the document;

(2) the time, date and electronic address of the sender;

(3) the electronic address of the recipient;

(4) a statement that the document was served by electronic transmission and that the transmission was successful.

[Approved, effective July 1, 1997.]

ANNOTATIONS

Cross references. — For definition of "signed", *see* Rule 6-210 NMRA.

ARTICLE 3
Pleadings and Motions

6-301. General rules of pleading; captions.

A. **Caption.** Pleadings and papers filed in the magistrate court shall have a caption or heading which shall briefly include:

(1) the name of the court as follows:

"State of New Mexico

County of _____

Magistrate Court";

(2) the names of the parties; and

(3) a title that describes the cause of action or relief requested. The title of a pleading or paper shall have no legal effect in the action.

B. **Plaintiff.** All actions shall be brought in the name of the state or political subdivision, as plaintiff.

C. **Adoption by reference.** Statements made in one part of a pleading may be adopted by reference in another part of the same pleading.

[As amended, effective December 17, 2001.]

ANNOTATIONS

The 2001 amendment, effective December 17, 2001, inserted "captions" in the rule heading; added Paragraph A; and redesignated former Paragraphs A and B as present Paragraphs B and C.

Attorney general or district attorney must represent state in criminal proceeding. — Although 36-1-18A NMSA 1978 does not require the district attorney to appear in a nonrecord court, such as the metropolitan court, 36-1-19 NMSA 1978 prohibits anyone other than the attorney general's office or district attorney's office from representing the state in a criminal proceeding, except on order of the court and with the consent of those offices. *State v. Baca*, 1984-NMCA-096, 101 N.M. 716, 688 P.2d 34.

6-302. Pleas allowed.

A. **Pleas and defenses.** The plea shall be one of the following: guilty, not guilty, or no contest. No other pleas shall be permitted. A plea of not guilty shall not operate as a waiver of any defense or objection. Defenses and objections not raised by the plea shall be asserted in the form of motions to dismiss or for appropriate relief. In actions not within magistrate trial jurisdiction, no plea shall be entered.

B. **Failure or refusal of defendant to enter a plea.** If the defendant fails to enter a plea, or stands mute, the court shall enter a plea of not guilty on behalf of such defendant.

C. **Rejection of pleas.** The court shall reject a plea of guilty or no contest if justice would not be served by acceptance of such plea.

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, revised the types of pleas permitted within magistrate trial jurisdiction,

provided that if a defendant stands mute during a plea hearing, the court shall enter a plea of not guilty on behalf of the defendant, and provided that the court shall reject a plea of guilty or no contest if justice would not be served by acceptance of such plea; in the rule heading, deleted “motions”; in Paragraph A, changed the heading from “Pleadings” to “Pleas and defenses”, deleted “In actions within magistrate trial jurisdiction, the pleadings shall consist of the complaint and the plea.”, added “or no contest”, deleted “not guilty by reason of insanity and nolo contendere”, and added “A plea of not guilty shall not operate as a waiver of any defense or objection.”; in Paragraph B, in the heading, added “Failure or”, and added “or stands mute”; and added Paragraph C.

Motions for abatement. — Proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode. Since such procedures would promote judicial economy, the overriding state interest being the efficient prosecution of all crimes and especially felonies, a defendant in such a situation would have a right to move the inferior court for an abatement to abide the event in district court; and should a defendant in such a case, for whatever reason, fail to so move, he might well have thereby waived any right to complain of piecemeal prosecution. *State v. Tanton*, 1975-NMSC-057, 88 N.M. 333, 540 P.2d 813.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 443 to 511.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 A.L.R.2d 326.

22 C.J.S. Criminal Law § 355 et seq.

6-303. Amendment of complaints and citations.

A. **Defects, errors and omissions.** A complaint or citation shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, because of any defect, error, omission, imperfection or repugnancy therein which does not prejudice the substantial rights of the defendant upon the merits. The court may at any time prior to a verdict cause the complaint or citation to be amended with respect to any such defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

B. **Surplusage.** Any unnecessary allegation contained in a complaint or citation may be disregarded as surplusage.

C. **Variances.** No variance between those allegations of a complaint, citation or any supplemental pleading which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be grounds for acquittal of the defendant unless such variance prejudices substantial rights of the defendant. The court

may at any time allow the complaint or citation to be amended in respect to any variance to conform to the evidence. If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant such other relief as may be proper under the circumstances.

D. **Effect.** No appeal, or motion made after verdict, based on any such defect, error, omission, repugnancy, imperfection, variance or failure to prove surplusage shall be sustained unless it is affirmatively shown that the defendant was in fact prejudiced thereby in the defendant's defense on the merits.

E. **Continuances.** If a complaint or citation is amended, the court shall grant such continuances as justice requires.

[As amended, effective January 1, 1987; May 15, 2001.]

ANNOTATIONS

The 2001 amendment, effective May 15, 2001, inserted "or citation" following "complaint" throughout the rule and added Subsection E, conforming this rule to Rule 5-204 NMRA.

Allowable amendment of complaint. — The magistrate court properly allowed the amendment of a complaint because no additional or different offense was charged and there was no showing that substantial rights of the defendant were prejudiced. *State v. Nixon*, 1976-NMCA-031, 89 N.M. 129, 548 P.2d 91.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 420.

22 C.J.S. Criminal Law § 324 et seq.

6-304. Motions.

A. **Defenses and objections that may be raised.** Any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion.

B. **Motion requirements.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions shall be served on each party as provided by Rule 6 209 NMRA.

C. **Unopposed motions.** The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initialed by the opposing party shall accompany the motion. The motion is not granted until the order is approved by the court.

D. **Opposed motions.** The motion shall recite that concurrence of the opposing party was requested or shall specify why no such request was made. The moving party shall request concurrence from the opposing party unless the motion is a

(1) motion to dismiss;

(2) motion regarding bonds and conditions of release;

(3) motion for new trial;

(4) motion to suppress evidence; or

(5) motion to modify a sentence under Rule 6 801 NMRA.

Notwithstanding the provisions of any other rule, a party may file with any opposed motion a brief or supporting points with citations or authorities. Affidavits, statements, depositions, or other documentary evidence in support of the motion may be filed with the motion.

E. **Response.** Unless otherwise specifically provided in these rules or by order of the court, if a party wants to file a written response to a motion, the written response shall be filed and served within fifteen (15) days after service of the motion. Affidavits, statements, depositions, or other documentary evidence in support of the response may be filed with the response.

F. **Suppression of evidence.**

(1) In cases within the trial court's jurisdiction

(a) a person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence; and

(b) a person aggrieved by a confession, admission, or other evidence obtained through allegedly unconstitutional means may move to suppress such evidence.

(2) Unless otherwise ordered by the court, a motion to suppress shall be filed at least twenty (20) days before trial or the time specified for a motion hearing, whichever is earlier. Except for good cause shown, a motion to suppress shall be filed and decided prior to trial.

(3) Unless otherwise ordered by the court, the prosecution shall file a written response to a motion to suppress within fifteen (15) days after service of the motion. If the prosecution fails to file a response within the prescribed time period, the court may rule on the motion with or without a suppression hearing.

G. **Motions to reconsider.** A party may file a motion to reconsider any ruling made by the court at any time before entry of the judgment and sentence. A motion to reconsider the judgment and sentence or an appealable order entered before or after the judgment and sentence will toll the time to appeal only if the motion is filed within the permissible time for initiating the appeal. The court may rule on a motion to reconsider with or without a hearing.

[As amended, effective January 1, 1987; September 1, 1990; as amended by Supreme Court Order No. 06-8300-037, effective March 1, 2007; as amended by Supreme Court Order No. 13-8300-044, effective for all cases filed or pending on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed or pending on or after December 31, 2019.]

Committee commentary. — Although Paragraph E does not require a written response to every motion, a court may order a party to file a written response to a motion. Alternatively, to facilitate docket and case management, courts are encouraged to issue scheduling orders with specific deadlines for written motions and responses. To the extent any conflict exists, the deadlines in a court order supersede the deadlines in this rule. A motion to suppress evidence under Paragraph F of this rule may be used to suppress or exclude evidence obtained through an unlawful search and seizure or obtained in violation of any constitutional right. *See, e.g., State v. Harrison*, 1970-NMCA-025, 81 N.M. 324, 466 P.2d 890 (motion to exclude lineup identification).

In 2017, the committee moved the suppression provisions from Paragraph B to Paragraph F of this rule and added new time deadlines for motions to suppress and for responses. If a party cannot meet the time deadline for filing either a motion to suppress or a response, the party may ask the court, in its discretion, to grant a time extension under Rule 6-104(B) NMRA, a continuance under Rule 6-601(A) NMRA, or an extension of the time for commencement of trial under Rule 6-506(C) NMRA.

The paragraph addressing suppression motions previously was amended in 2013 in response to *City of Santa Fe v. Marquez*, 2012-NMSC-031, 285 P.3d 637. *Marquez* held that, absent good cause shown, motions to suppress must be filed prior to trial and suppression issues must be adjudicated prior to trial to preserve the state=s right to appeal any order suppressing evidence. *Id*. & 28; *see* Rule 5-212(C) NMRA and committee commentary. Prior to the entry of a final judgment in magistrate court, the state may obtain judicial review of an order suppressing evidence by filing a nolle prosequi and reinstating the charges in district court. *See State v. Heinsen*, 2005-NMSC-035, && 1, 23, 25, 28, 138 N.M. 441, 121 P.3d 1040; *see also* Rule 6-506.1 NMRA. But if the trial court enters an order at trial suppressing evidence and concludes that any remaining evidence is insufficient to proceed against the defendant, the defendant is acquitted, and the defendant=s double jeopardy rights preclude the state from appealing. *See Marquez*, 2012-NMSC-031, & 16; *State v. Lizzol*, 2007-NMSC-024, & 15, 41 N.M. 705, 160 P.3d 886. Adjudicating suppression issues prior to trial ensures that the state=s right to appeal any order suppressing evidence will be preserved.

If a defendant raises a suppression issue at trial, the trial judge may order a continuance under Rule 6-601(A) in order to ascertain whether there is good cause for the defendant=s failure to raise the issue prior to trial. Examples of good cause may include, but are not limited to, failure of the prosecution to disclose evidence relevant to the motion to suppress to the defense prior to trial, failure of either party to provide discovery, or the discovery of allegedly suppressable evidence during the course of the trial. If good cause is shown, the judge may excuse the late motion and hold a suppression hearing. Absent good cause shown, the judge may deny the motion for failure to comply with the rule.

Paragraph G was added in 2019 to affirmatively provide for motions to reconsider, which have long been recognized in common law though not in our rules. *See State v. Suskiewich*, 2014-NMSC-040, & 12, 339 P.3d 614 (AAlthough our procedural rules do not grant the State an express right to file a motion to reconsider a suppression order, the common law has long recognized the validity and utility of motions to reconsider in criminal cases.@). A motion to reconsider filed within the permissible time period for initiating an appeal will toll the time to file an appeal until the motion has been expressly disposed of or withdrawn. A jury verdict is not a ruling of the court and therefore may not be reconsidered pursuant to this rule. *See Jaramillo v. O=Toole*, 1982-NMSC-011, 97 N.M. 345, 639 P.2d 1199 (holding that a magistrate court does not have jurisdiction to set aside a jury verdict).

[Adopted by Supreme Court Order No. 13-8300-044, effective for all cases filed or pending on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed or pending on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-018, effective for all cases filed or pending on or after December 31, 2019, provided for motions to reconsider, provided that motions to reconsider may be filed at any time before entry of the judgment and sentence, provided that the filing of a motion to reconsider a judgment and sentence within the permissible time period for initiating an appeal will toll the time to file the appeal, and revised the committee commentary; and added Paragraph G.

The 2017 amendment, approved by Supreme Court Order No. 17-8300-016, effective December 31, 2017, rewrote the section related to suppression of evidence, made certain technical revisions to the rule, and revised the committee commentary; deleted former Paragraph B, which related to suppression of evidence, and redesignated former Paragraphs C through F as Paragraphs B through E, respectively; in Paragraph B, changed the heading from “Motions and other papers” to “Motion requirements”; in Paragraph C, after “opposing”, deleted “counsel” and added “party”; in Paragraph D, after each occurrence of “opposing”, deleted “counsel” and added “party”; in Paragraph E, after “in these rules”, deleted “any” and added “or by order of the court, if a party

wants to file a written response to a motion, the", and after "shall be filed", added "and served"; and added a new Paragraph F.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-044, effective December 31, 2013, required that motions to suppress be filed and determined prior to trial; and added Subparagraph (2) of Paragraph B.

The 2006 amendment, approved by Supreme Court Order No. 06-8300-037, effective March 1, 2007, deleted former Paragraph B providing motions may be written or oral; deleted former Paragraph D relating to notice of hearings; relettered former Paragraph C as Paragraph B and added Paragraphs C through E to conform this rule with Rule 5-120 NMRA.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, substituted "Defenses and objections which may be raised" for "Subject matter" as the heading of Paragraph A and inserted "before trial" following "raised" near the end of that paragraph.

Cross references. — For comparable district court rule, *see* Rule 5-120 NMRA.

Written motions are always permitted but oral motions are insufficient if the magistrate court directs they be written. *State v. Foster*, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824.

Police required to inquire into ownership of item to be searched. — In cases where the issue of ownership of an item to be searched is in question and the police can easily verify ownership without risk to their safety or the integrity of the search, police officers should be required to inquire into ownership before assuming abandonment. *State v. Celusniak*, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Search of purse left in vehicle being searched. — A police officer who has obtained a valid consent from the driver to search a vehicle cannot search a purse which contained marihuana left in that vehicle when he has not determined whether the consenting party owned the purse. *State v. Celusniak*, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse - state cases, 4 A.L.R.4th 196.

Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 4 A.L.R.4th 1050.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse-state cases, 55 A.L.R. 5th 125.

6-305. Unnecessary allegations.

A. **Examples.** It shall be unnecessary for a complaint to contain the following allegations unless such allegations are necessary to give the defendant notice of the crime charged:

(1) time of the commission of offense;

(2) place of the commission of offense;

(3) means by which the offense was committed;

(4) value or price of any property;

(5) ownership of property;

(6) intent with which an act was done;

(7) description of any place or thing;

(8) the particular character, number, denomination, kind, species or nature of money, checks, drafts, bills of exchange or other currency;

(9) the specific degree of the offense charged;

(10) any statutory exceptions to the offense charged; or

(11) any other similar allegation.

B. **Effect of surplusage.** The state may include any of the unnecessary allegations set forth in Paragraph A of this rule in a complaint without thereby enlarging or amending such complaint, and such allegations shall be treated as surplusage.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 409, 410, 422.

Right of accused to bill of particulars, 5 A.L.R.2d 444.

22 C.J.S. Criminal Law § 331.

6-306. Joinder; consolidation; severance.

A. **Joinder of offenses.** Two or more offenses shall be joined in one complaint with each offense stated in a separate count, if the offenses:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

B. **Consolidation for preliminary examination or trial.** The court may order two or more complaints against a single defendant to be tried or heard on preliminary examination together if the offenses could have been joined in a single complaint. The court may consolidate for preliminary examination or trial two or more defendants if the offenses charged are based on the same or related acts.

C. **Motion for severance.** If it appears that a defendant or the state is prejudiced by a joinder of offenses or consolidation of defendants for trial, the court may order separate trials of offenses, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection in camera any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

[As amended, effective September 1, 1990; September 15, 1997.]

ANNOTATIONS

The 1997 amendment, effective September 15, 1997, deleted former Paragraphs B and C relating to joinder of defendants and effect of joinder and redesignated former Paragraphs D and E as Paragraphs B and C; in Paragraph B, substituted "for preliminary examination or trial" for "of offenses" in the paragraph heading, substituted "court" for magistrate", and rewrote the last sentence; and inserted "motion for" in the paragraph heading and substituted "or consolidation of defendants for trial" for "or of defendants in any complaint or by joinder for trial" in Paragraph C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

ARTICLE 4
Release Provisions

6-401. Pretrial release.

A. **Hearing.**

(1) ***Time.*** The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) first appearance or arraignment, if the defendant is not in custody.

(2) ***Right to counsel.*** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. **Right to pretrial release; recognizance or unsecured appearance bond.** Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community,

community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(11) submit to a drug test or an alcohol test on request of a person designated by the court;

(12) return to custody for specified hours following release for employment, schooling, or other limited purposes;

(13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) *Percentage bond*. The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph L of this rule.

(b) *Property bond*. The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 6-401.1 NMRA.

(c) *Cash or surety bond*. The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph L of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 6-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; findings regarding secured bond.**

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) ***Written findings regarding secured bond.*** The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Pretrial detention.** If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 6-409 NMRA.

H. **Motion for review of conditions of release by the magistrate court.**

(1) ***Motion for review.*** If the magistrate court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The magistrate court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is thereupon released, the court shall file a written order setting forth the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the magistrate court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. **Amendment of conditions.** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial

release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 6-403 NMRA.

J. **Petition to district court.**

(1) ***Case within magistrate court trial jurisdiction.*** A defendant charged with an offense that is within magistrate court trial jurisdiction may file a petition in the district court for review of the magistrate court's order setting conditions of release under this paragraph only after the magistrate court has ruled on a motion to review the conditions of release under Paragraph H of this rule. The defendant shall attach to the district court petition a copy of the magistrate court order disposing of the defendant's motion for review.

(2) ***Felony case.*** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under Rule 5-401(K) NMRA and this paragraph at any time after the defendant's arrest.

(3) ***Petition; requirements.*** A petition to the district court under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate court,

(b) serve a copy on the district attorney, and

(c) provide a copy to the assigned district court judge.

(4) ***Magistrate court's jurisdiction pending determination of the petition.*** Upon the filing of a petition under this paragraph, the magistrate court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate court while the district court petition is pending. The magistrate court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(a) set a hearing no later than ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to magistrate court.*** The district court shall promptly transmit to the magistrate court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate court.

K. **Expedited trial scheduling for defendant in custody.** The magistrate court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release.

L. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

M. **Release from custody by designee.** The presiding judge of the magistrate court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 6-408 NMRA. A designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 6-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

N. **Bind over to district court.** For any case that is not within magistrate court trial jurisdiction, upon notice to the magistrate court, any bond shall be transferred to the district court upon the filing of an information or indictment in the district court.

O. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

P. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

Q. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 07-8300, effective

January 22, 2008; by Supreme Court Order No. 08-8300-044, effective December 31, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — This rule provides "the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution." *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142. This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the District Courts, *see* Rules 5-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 6-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions prior to a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any

particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination as to whether the defendant can afford to pay all or a portion of the cost, or whether the court has the authority to waive the cost, because detaining a defendant due to inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."); *see also* NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond upon the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court "is 'excessive' under the Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to

purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 6-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Although pretrial release hearings are not required to be a matter of record in the magistrate court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13 of the New Mexico Constitution. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the magistrate court must follow the procedures set forth in Rule 6-409 NMRA.

Paragraph H sets forth the procedure for the defendant to file a motion in the magistrate court for review of the conditions of release. Paragraph J sets forth the procedure for the defendant to petition the district court for release or for review of the conditions of release set by the magistrate court. Article II, Section 13 requires the court to rule on a motion or petition for pretrial release "in an expedited manner" and to release a defendant who is being held solely due to financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or a petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph K requires the magistrate court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody due to inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to "the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.").

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph M, a designee must be designated by the presiding magistrate court judge in a written court order. A person may not be appointed as a designee if such person is related within the second degree of blood or

marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph M and Rule 6-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody prior to that defendant's first appearance before a judge.

Paragraph N requires the magistrate court to transfer any bond to the district court upon notice from the district attorney that an information or indictment has been filed. *See* Rule 6-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate court of the filing of an information or indictment in the district court).

Paragraph O of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the magistrate court with respect to matters of pretrial release. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial release hearing the court is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), ***aff'd*** 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 6-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 35-3-7. Paragraph Q of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, provided the mechanism through which a defendant may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution, rewrote the rule to such an extent that a detailed comparison is impracticable, and added the committee commentary.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-044, effective December 31, 2008, in Paragraph A, in the second sentence, changed the phrase "unless the court determines that such release" to the phrase "unless the court makes a

written finding that such release" and in the fourth sentence, changed the phrase "If the court determines that release" to the phrase "If the court makes a written finding that release".

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, amended Paragraph A prohibiting the denial of bail prior to conviction of a person charged with an offense within the magistrate court trial jurisdiction, except when posted by a complaining witness or alleged victim, and the court finds the defendant poses a danger to the complaining witness or alleged victim; amended Paragraph A to add the explanatory note relating to the posting of a community bond; and amended Paragraph H to delete the provision permitting the refund of a cash bond to a personal representative or assignor and providing for the return to the payor.

The second 1990 amendment, effective for cases filed in the magistrate courts on or after December 1, 1990, in Paragraph J, substituted "responsible persons" for "a responsible person" and "by the presiding judge of the magistrate court" for "by the court" in the first sentence, and, in Subparagraph (2), added the language beginning "unless designated" at the end.

The first 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, rewrote Paragraphs A through D; inserted Paragraph E and redesignated former Paragraphs E through L as Paragraphs F through M; rewrote Paragraph F; in Paragraph G, inserted "increase or reduce the amount of bail set or" in the first sentence, substituted "If such amendment of the release order" for "If the imposition of such additional or different conditions" at the beginning of the second sentence, and substituted "Paragraph F" for "Paragraph E" near the end thereof; in Paragraph H, substituted "Subparagraph (1) or (3)" for "Subparagraph (3)"; in Paragraph I, deleted "Paragraph I of" preceding "Rule 5-401" in the third sentence, substituted "Any bail set or condition of release" for "Any condition" at the beginning of the fourth sentence, and made the same substitution near the end of the last sentence; and rewrote Paragraph J.

Cross references. — For form on setting conditions of release and appearance bond, *see* Rule 9-302 NMRA.

For forms on bail bond and justification of sureties, *see* Rule 9-304 NMRA.

For cash receipt, *see* 9-312A NMRA.

For bench warrant, *see* 9-212C NMRA.

For duty of personal representative to take possession of assets of an estate, *see* Section 45-3-709 NMSA 1978.

Constitutional right to bail. — Article II, Section 13 of the New Mexico Constitution affords criminal defendants the right to bail, and although there is a presumption that all

persons are bailable pending trial, the right to bail is not absolute under all circumstances; the trial court must give proper consideration to all of the factors in determining conditions of release, and shall set the least restrictive of the bail options and release conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community. *State v. Brown*, 2014-NMSC-038.

Least restrictive bail option is required. — Where trial court determined that defendant was bailable, and made findings that defendant would not likely commit new crimes, that defendant did not pose a danger to anyone, and that defendant was likely to appear if released, and where trial court failed to give proper consideration to all of the factors in determining conditions of release set forth in analogous rule for the district courts, and trial court failed to set the least restrictive of the bail options and release conditions, it was an abuse of discretion to continue the imposition of bond. *State v. Brown*, 2014-NMSC-038.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8A Am. Jur. 2d Bail and Recognizance §§ 11, 14, 15, 17, 18, 20, 21, 24 to 27, 31, 32, 104, 106.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption great, 89 A.L.R.2d 355.

8 C.J.S. Bail § 1 et seq.

6-401A. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 6-401A NMRA, was recompiled and amended as 6-401.1 NMRA, effective for all cases pending or filed on or after July 1, 2017.

6-401B. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 6-401B NMRA, was recompiled and amended as 6-401.2 NMRA, effective for all cases pending or filed on or after July 1, 2017.

6-401.1. Property bond; unpaid surety.

Any bond authorized by Rule 6-401(E)(2)(b) NMRA shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged, and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

[Effective, October 1, 1987; as amended, effective September 1, 1990; 6-401A recompiled and amended as 6-401.1 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, specified in the heading that the rule applies to “property bonds”, and revised the citation to the property bond provision in Rule 6-401 NMRA; in the heading, deleted “Bail” and added “Property bond”; and after “authorized by”, deleted “Subparagraph (2) of Paragraph A of”, and after “Rule 6-401”, added “(E)(2)(b) NMRA”.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, substituted "Subparagraph (2)" for "Subparagraph (4)" near the beginning of this rule.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 6-401A NMRA was recompiled and amended as 6-401.1 NMRA, effective for all cases pending on or after July 1, 2017.

6-401.2. Surety bonds; justification of compensated sureties.

A. **Justification of sureties.** Any bond submitted to the court by a paid surety under Rule 6-401(E)(2)(c) NMRA shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond. If authorized by law, a paid surety licensed under the Bail Bondsmen Licensing Law may deposit cash with the court in lieu of a surety or property bond, provided that the paid surety executes the appearance bond.

B. **Property bondsman.** If a property bond is submitted by a compensated surety, the bail bondsman or solicitor must be licensed as a property bondsman and must file, in each court in which the bondsman posts bonds, an irrevocable letter of credit in favor of the court, a sight draft made payable to the court, and a copy of the bondsman’s license.

C. **Property bond in certain districts.** A real or personal property bond may be executed for the release of a person under Rule 6-401 NMRA in any magistrate district in which the chief judge of the district court upon concurrence of a majority of the district judges of the district has entered an order finding that the provisions of Paragraph B of this rule will result in the detention of persons otherwise eligible for pretrial release under Rule 6-401 NMRA. If a property bond is submitted by a compensated surety under this paragraph, the bail bondsman or solicitor must be licensed as a property bondsman and must pledge or assign real or personal property owned by the property bondsman as security for the bail bond. In addition, a licensed property bondsman must file, in each court in which the bondsman posts bonds

(1) proof of the licensed bondsman's ownership of the property used as security for the bonds; and

(2) a copy of the bondsman's license. The bondsman must attach to the bond a current list of all outstanding bonds, encumbrances, and claims against the property each time a bond is posted, using the court approved form.

D. **Limits on property bonds.** No single property bond submitted under this rule can exceed the amount of real or personal property pledged. The aggregate amount of all property bonds by the surety cannot exceed ten (10) times the amount pledged. Any collateral, security, or indemnity given to the bondsman by the principal shall be limited to a lien on the property of the principal, must be reasonable in relation to the amount of the bond, and must be returned to the principal and the lien extinguished upon exoneration on the bond. If the collateral is in the form of cash or a negotiable security, it shall not exceed fifty percent (50%) of the amount of the bond and no other collateral may be taken by the bondsman. If the collateral is a mortgage on real property, the mortgage may not exceed one hundred percent (100%) of the amount of the bond. If the collateral is a lien on a vehicle or other personal property, it may not exceed one hundred percent (100%) of the bond. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium authorized by the superintendent of insurance.

[Effective, October 1, 1987; as amended, effective September 1, 1990; 6-401B recompiled and amended as 6-401.2 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, specified in the rule heading that the rule applies to "surety bonds", revised the citation to the surety bond provision in Rule 6-401 NMRA, and changed "he" and "his" to "the bondsman" and "the bondsman's" throughout the rule; in the heading, deleted "Bail" and added "Surety"; in Paragraph A, after "by a paid surety", deleted "pursuant to Paragraph A of" and added "under", and after "Rule 6-401", added "(E)(2)(c) NMRA"; in Paragraph C, in the introductory paragraph, deleted each

occurrence of “pursuant to” and added “under”, after each occurrence of “Rule 6-401”, added “NMRA”; and in Paragraph D, after “submitted”, deleted “pursuant” and added “under”, and after “exceed ten”, added “(10)”.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, in Paragraph A, substituted "submitted to the court by a paid surety pursuant to" for "authorized by Subparagraph (5) of" in the first sentence and added the third sentence; and rewrote Paragraph B to appear as present Paragraphs B, C, and D.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 6-401B NMRA was recompiled and amended as 6-401.2 NMRA, effective for all cases pending on or after July 1, 2017.

6-402. Release.

A. **Release during trial.** A defendant released pending trial shall continue on release during trial under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions or termination of release are necessary to assure the defendant's presence during the trial or to assure that the defendant's conduct will not obstruct the orderly administration of justice.

B. **Release pending sentence or new trial.** A defendant released pending or during trial shall continue on release pending the imposition of sentence or pending final disposition of any new trial under the same terms and conditions as previously imposed, unless the surety has been released or the court has determined that other terms and conditions or termination of release are necessary to assure:

(1) that the defendant will not flee the jurisdiction of the court; or

(2) that the defendant's conduct will not obstruct the orderly administration of justice.

C. **Defendant in custody.** Nothing in this rule shall be construed to prevent the court from releasing pursuant to Rule 6-401 a defendant not released prior to or during trial.

[As amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "defendant" for "person" throughout the rule, substituted "or" for "appeal and" in the Paragraph B heading and deleted "any appeal or" following "disposition of" near the middle of Paragraph B, deleted former Paragraph C relating to release after sentencing and redesignated former Paragraph D as Paragraph C, and made gender neutral changes in Paragraphs A and B.

Cross references. — For release pending appeal, *see* Rule 6-703 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — State court's power to place defendant on probation without imposition of sentence, 56 A.L.R.3d 932.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 A.L.R.3d 474.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780.

6-403. Revocation or modification of release orders.

A. **Scope.** In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release

(1) if the defendant is alleged to have violated a condition of release; or

(2) to prevent interference with witnesses or the proper administration of justice.

B. **Motion for revocation or modification of conditions of release.**

(1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor or on the court's own motion.

(2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. **Issuance of summons or bench warrant.** If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. **Initial hearing.**

(1) The court shall hold an initial hearing as soon as practicable, but if the defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is detained if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center.

(2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.

(3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. **Evidentiary hearing.**

(1) ***Time*.** The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing.

(2) ***Defendant's rights*.** The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. **Order at completion of evidentiary hearing.** At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may

(1) continue the existing conditions of release;

(2) set new or additional conditions of release in accordance with Rule 6-401 NMRA; or

(3) revoke the defendant's release, if the court

(a) finds that there is either

(i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or

(ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and

(b) finds that there is clear and convincing evidence that either

(i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or

(ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation.

G. **Evidence.** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. **Review of conditions.** If the magistrate court enters an order setting new or additional conditions of release and the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may petition the district court for review in accordance with Rule 6-401(J) NMRA. The defendant may petition the district court immediately upon the issuance of the magistrate court order and shall not be required to first seek review or reconsideration by the magistrate court. If, upon disposition of the petition by the district court, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

I. **Expedited trial scheduling for defendant in custody.** The magistrate court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.

J. **Petition to district court for review of revocation order.** If the magistrate court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5-403(K) NMRA.

(1) **Petition; requirements.** The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(2) **Magistrate court's jurisdiction pending determination of the petition.** Upon the filing of the petition, the magistrate court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The magistrate court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate court while the petition is pending.

(3) **District court review.** The district court shall rule on the petition in an expedited manner.

(a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(i) issue an order affirming the revocation order; or

(ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate court.

(b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release under Rule 5-401 NMRA.

(4) **District court order; transmission to magistrate court.** The district court shall promptly transmit the order to the magistrate court, and jurisdiction over the conditions of release shall revert to the magistrate court.

(5) **Appeal.** If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 08-8300-044, effective December 31, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019.]

Committee commentary. — The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014-NMCA-037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968-NMSC-009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id*. ¶ 10 ("If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts."); *State v. Rivera*, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 ("Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line."), *rev'd on other grounds*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. Like other types of proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the court is responsible "for assessing the reliability and accuracy" of the information

presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), ***aff'd*** 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, extended the period of time within which the court must hold an initial hearing when the defendant is not being held in the local detention center, and authorized the court to revoke the defendant's release if the court finds that there is probable cause to believe that the defendant committed a crime; in Subparagraph D(1), added "if the defendant is in custody, the hearing shall be held", and after "the defendant is detained", added "if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center"; added Subparagraph F(3)(a)(i) and new subparagraph designation "(ii)"; in Subparagraph F(3)(b), added new subparagraph designation "(i)" and redesignated former Subparagraph F(3)(b) as Subparagraph F(3)(b)(ii); and after subparagraph designation "(b)", added "finds that there is clear and convincing evidence".

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, clarified the procedures for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release, and added the committee commentary; in the heading, after "Revocation", added "or modification", and after "release", added "orders"; and deleted former Paragraphs A through C and added new Paragraphs A through J.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-044, effective December 31, 2008, added a new Paragraph B and designated former Paragraph B as Paragraph C.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, in Paragraph A, deleted "Paragraph A of" in Subparagraph (1), deleted former Subparagraph (2), relating to imposing conditions authorized under Paragraph C of Rule 6-401, and redesignated former Subparagraph (3) as present Subparagraph (2); rewrote Paragraph B; and deleted Paragraph C, relating to record on review, and former Paragraph D, relating to evidence.

Cross references. — For form on motion for production, *see* Rule 9-409 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 567, 568.

22 C.J.S. Criminal Law § 352.

6-404, 6-405. Reserved.

6-406. Bonds; exoneration; forfeiture.

A. **Exoneration of bond.** Unless otherwise ordered for good cause, a bond shall be automatically exonerated only under the following circumstances:

(1) twelve (12) months after the posting of the bond if the crime is a felony and no charges are pending in the district court;

(2) six (6) months after the posting of the bond if the crime is a misdemeanor or petty misdemeanor and no charges are pending;

(3) at any time prior to entry of a judgment of default on the bond if the district attorney approves;

(4) upon surrender of the defendant to the court by an unpaid surety;

(5) upon dismissal of the case without prejudice, unless the case involves a paid surety; or

(6) upon acquittal, conviction, or dismissal of the case with prejudice.

B. **Surrender of the defendant by a paid surety.** If the paid surety arrests the defendant under Section 31-3-4 NMSA 1978 prior to the entry of a judgment of default on the bond, the court may absolve the paid surety of responsibility to pay all or part of the bond.

C. **Forfeiture.** If the defendant has been released upon the execution of an unsecured appearance bond, percentage bond, property bond, cash bond, or surety bond under Rule 6-401 NMRA, and the defendant fails to appear in court as required, the court may declare a forfeiture of the bond. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Hearing on the defendant, at the defendant's last known address, and on the surety, if any, in the manner provided by Rule 6-407 NMRA. A paid surety may appear in magistrate court without the assistance of an attorney as provided in Rule 6-107 NMRA.

D. **Setting aside forfeiture.** The court may direct that a forfeiture be set aside in whole or in part upon a showing of good cause why the defendant did not appear as required by the bond or if the defendant is surrendered by a surety, if any, into custody prior to the entry of a judgment of default on the bond. Notwithstanding any provision of law, no other refund of the bond shall be allowed.

E. **Judgment of default; execution.** If, after a hearing, the forfeiture is not set aside, the court shall enter a judgment of default on the bond. If the judgment of default is not paid within ten (10) days after it is filed and served on the defendant, at the defendant's last known address, and on the surety, if any, in the manner provided by Rule 6-407 NMRA, execution may issue thereon.

F. **Appeal.** Any aggrieved person may appeal from a judgment or order entered under this rule as authorized by law for appeals in civil actions in accordance with Rule 2-705 NMRA and Rule 1-072 NMRA. An appeal of a judgment or order entered under this rule does not stay the underlying criminal proceedings.

[Effective, October 1, 1987; as amended by Supreme Court Order No. 10-8300-034, effective December 10, 2010; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Under Paragraph A, a bond is automatically exonerated upon a finding of guilty or not guilty. *See* NMSA 1978, § 31-3-10 ("All recognizances secured by the execution of a bail bond shall be null and void upon the finding that the accused person is guilty, and all bond liability shall thereupon terminate.").

Under Paragraph B and NMSA 1978, Section 31-3-4, if a paid surety wants to be discharged from the obligation of its bond, the surety may arrest the defendant and deliver the defendant to the county sheriff. Section 31-3-4 provides that a "paid surety may be released from the obligation of its bond only by an order of the court" and sets forth the circumstances under which the "court shall order the discharge of a paid surety."

Under Paragraph C, the court may declare a forfeiture of any secured or unsecured bond if the defendant fails to appear in court as required. *See* NMSA 1978, § 31-3-2

(failure to appear; forfeiture of bail bonds); *see also State v. Romero*, 2006-NMCA-126, ¶ 12, 140 N.M. 524, 143 P.3d 763 (holding that the court may not declare a forfeiture of bail for violations of conditions of release unrelated to appearance before the court), *aff'd*, 2007-NMSC-030, 141 N.M. 733, 160 P.3d 914.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, revised the circumstances under which a bond is automatically exonerated, clarified the provision relating to the discharge of a paid surety's obligation to pay all or part of the bond, clarified the circumstances under which the court may declare a forfeiture of the bond, and added the committee commentary; in the heading, deleted "Bail"; in Paragraph A, in the introductory clause, after "shall", deleted "only", and after "exonerated", added "only under the following circumstances", in Subparagraphs A(1) and (2), deleted "after", after "months", added "after the posting of the bond", and after "no charges", deleted "have been filed" and added "are pending", in added Subparagraphs A(5) and A(6); in Paragraph B, in the heading, after "Surrender of", deleted "an offender" and added "the defendant", deleted "A person who is released upon execution of a bail bond by a paid surety may be arrested by the paid surety if the court has revoked the defendant's conditions of release pursuant to Rule 6-403 NMRA or if the court has declared a forfeiture of the bond pursuant to the provisions of this rule", after "paid surety", deleted "delivers" and added "arrests", and after "defendant", deleted "to the court" and added "under Section 31-3-4 NMSA 1978"; in Paragraph C, deleted "If there is a breach of condition of a bond," and added "If the defendant has been released upon the execution of an unsecured appearance bond, percentage bond, property bond, cash bond, or surety bond under Rule 6-401 NMRA, and the defendant fails to appear in court as required", after "forfeiture of the", deleted "bail" and added "bond", after "Notice of Forfeiture and", deleted "Order to Show Cause" and added "Hearing", after "on the", deleted "clerk of the court" and added "defendant, at the defendant's last known address, and on the surety, if any", and added the last sentence; in Paragraph D, after "surrendered by", deleted "the" and added "a", after "surety", added "if any", and added the last sentence; in Paragraph E, in the heading and in the paragraph, changed "default judgment" to "judgment of default", after "not set aside", added "the court shall enter", after "bond", deleted "shall be entered by the court", after "served on", added "the defendant, at the defendant's last known address, and on", after "surety,", added "if any", and deleted the last sentence, which provided, "Notwithstanding any provision of law, no other refund of the bail bond shall be allowed."; and in Paragraph F, after "in accordance with", deleted "the", after "Rule 2-705 NMRA", deleted "of the Rules of Civil Procedure for the Magistrate Courts", and after "Rule 1-072 NMRA", deleted "of the Rules of Civil Procedure for the District Courts".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-034, effective December 10, 2010, in Paragraph B, in the last sentence, after "the court may absolve the", deleted "bondsman" and added "the paid surety" and added Paragraph F.

Proper forfeiture of bond. — Where defendant was charged with the felony offense of driving while under the influence of intoxicating liquor, released on bail by the magistrate court in the amount of $5,000 subject to certain conditions, fled to Arkansas after his initial bond hearing, and where appellant bond company, over a year later, took defendant into custody in Arkansas and returned him to New Mexico, the district court did not err in affirming the forfeiture of the bond by the magistrate court where the evidence established that appellant did not take any action in Arkansas prior to the forfeiture hearing in the magistrate court and did not appear at the forfeiture hearing to show “good cause” why the defendant failed to appear at his preliminary hearing, that defendant was not in custody in Arkansas, and that Arkansas did not thwart the efforts of appellant to apprehend defendant; appellant failed to sustain its burden of showing an impediment to defendant’s appearance or that defendant was taken into custody prior to the entry of the magistrate court judgment. *State v. Naegle*, 2017-NMCA-017.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

6-407. Bail bonds; notice.

By entering into a bond in accordance with the provisions of these rules, the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion of the district attorney or upon the court's own motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the obligors at their last known addresses.

[Effective, October 1, 1987.]

6-408. Pretrial release by designee.

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the magistrate court under Rule 6-401(M) NMRA. A designee shall execute Form 9-302 NMRA to release a person from detention prior to the person’s first appearance before a judge if the person is eligible for pretrial release under Paragraph B, Paragraph C, or Paragraph D of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in this rule.

B. **Minor offenses; release on recognizance.**

(1) ***Persons eligible.*** A designee shall release a person from custody on personal recognizance, subject to the conditions of release set forth in Form 9-302 NMRA, if the person has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and is not known to be on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law.

(2) ***Exceptions.*** A person arrested for any of the following offenses is not eligible for release under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5 NMSA 1978;

(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;

(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;

(g) harassment under Section 30-3A-2 NMSA 1978, if the victim is known to be a household member;

(h) stalking under Section 30-3A-3 NMSA 1978;

(i) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(j) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

(k) enticement of a child under Section 30-9-1 NMSA 1978;

(l) criminal sexual contact under Section 30-9-12(D) NMSA 1978;

(m)criminal trespass under Section 30-14-1(E) NMSA 1978, if the victim is known to be a household member;

(n) telephone harassment under Section 30-20-12, if the victim is known to be a household member;

(o) violating an order of protection under Section 40-13-6 NMSA 1978; or

(p) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978.

C. **Pretrial release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for pretrial release based on a risk assessment and a pretrial release schedule approved by the Supreme Court.

D. **Pretrial release under release on recognizance program.** A designee may release a person from custody prior to a person's first appearance before a judge if the person qualifies for pretrial release under a local release on recognizance program that relies on individualized assessments of arrestees and has been approved by order of the Supreme Court.

E. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B, Paragraph C, or Paragraph D of this rule shall have the type of release and conditions of release set by a judge under Rule 6-401 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Under NMSA 1978, Section 31-3-1 and Rule 6-401(M) NMRA, the presiding judge of the magistrate court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. In the past, some courts have used fixed secured bond schedules tied to the level of the charged offense, rather than any individual flight risk of the arrestee, a practice that has been specifically prohibited by new Subparagraph (E)(1)(d) of Rule 6-401 NMRA (as reflected in the 2017 amendment), and that has constitutional implications. *See, e.g*., Memorandum and Opinion Setting out Findings of Fact and Conclusions of Law, *ODonnell v. Harris Cty*., No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017); Opinion, *Jones v. City of Clanton*, No. 2:15-cv-00034-MHT-WC (M.D. Ala. Sept. 14, 2015).

The provisions in this new rule provide more detailed guidance for courts for authorizing release by designees, who are generally detention center or court employees, and contains several situations in which release by designees can be authorized, none of them including fixed secured bond schedules.

Paragraph B of this rule sets out a statewide standard method of automatic release by designees in cases involving minor offenses, where no exercise of discretion is required on the part of the designee. Subparagraph (B)(2) identifies certain offenses excepted from automatic release under Subparagraph (B)(1), including the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as

well as battery, enticement of a child, violating an order of protection, and driving under the influence of intoxicating liquor or drugs.

Paragraph C of this rule will independently permit a designee to release an arrestee if specifically authorized to be released through use of a Supreme Court-authorized risk assessment instrument.

Paragraph D of this rule provides flexibility for individual courts to operate their own Supreme Court-authorized release on recognizance programs that may rely on individualized discretionary assessments of arrestee eligibility by designees, in addition to the release authority authorized in Paragraphs B and C of this rule, so long as they are exercised within the parameters of Court-approved programs.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

6-409. Pretrial detention.

A. **Scope.** This rule governs the procedure for the prosecutor to file a motion for pretrial detention in the magistrate and district court while a case is pending in the magistrate court. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 6-401 NMRA, under Article II, Section 13 and Rule 5-409 NMRA, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled “Expedited Motion for Pretrial Detention” and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file a written expedited motion for pretrial detention at any time in both the magistrate court and in the district court. The motion shall include the specific facts that warrant pretrial detention.

C. **Determination of probable cause.** If a motion for pretrial detention is filed in the magistrate court and a probable cause determination has not been made, the magistrate court shall determine probable cause under Rule 6-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA and shall deny the motion for pretrial detention without prejudice.

D. **Determination of motion by district court.** If probable cause has been found, the magistrate court clerk shall promptly transmit to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate court’s jurisdiction shall then be terminated, and the district court shall acquire exclusive jurisdiction over the case.

E. **Further proceedings in magistrate court.** Upon completion of the hearing, if the case is pending in the magistrate court, the district court shall promptly transmit to the magistrate court an order closing the magistrate court case.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020.]

Committee commentary. —

Paragraph C — Federal constitutional law requires a "prompt judicial determination of probable cause" to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

Paragraph D — Upon the filing of a motion for pretrial detention and a finding of probable cause, the magistrate court is deprived of jurisdiction.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020.]

ANNOTATIONS

The 2020 amendments, approved by Supreme Court Order Nos. 20-8300-013 and 20-8300-021, effective November 23, 2020, provided the district court with exclusive jurisdiction over a case following a magistrate court's finding of probable cause, required the district court to transmit to the magistrate court an order closing the magistrate court case if the case was pending in the magistrate court, and revised the committee commentary; in Paragraph D, after "The magistrate court's jurisdiction", deleted "to set or amend conditions of release", and after "shall acquire exclusive jurisdiction over", deleted "issues of pretrial release until the case is remanded by the district court following disposition of the detention motion under Paragraph E of this rule" and added "the case"; and in Paragraph E, deleted "a copy of either the order for pretrial detention or the order setting conditions of release. The magistrate court may modify the order setting conditions of release upon a showing of good cause, but as long as the case remains pending, the magistrate court may not release a defendant who has been ordered detained by the district court" and added "an order closing the magistrate court case".

ARTICLE 5
Arraignment and Preparation for Trial

6-501. Arraignment; first appearance.

A. **Explanation of rights.** Upon the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:

(1) the offense charged;

(2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;

(3) the right to bail or the possibility of pretrial detention under Rule 5-401(G) NMRA;

(4) the right, if any, to the assistance of counsel at every stage of the proceedings;

(5) the right, if any, to representation by an attorney at state expense;

(6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;

(7) the right, if any, to a jury trial;

(8) in those cases not within the court's trial jurisdiction the right to a preliminary examination;

(9) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(10) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms, including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act, NMSA 1978, Sections 29-11A-1 to -10.

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. **Offense within the court's trial jurisdiction.** If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint, under Rule 6-302 NMRA, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty," the defendant remains in custody, the action shall be set for trial as soon as possible.

C. **Insanity or incompetency.** If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense," after setting conditions of release, the action shall be transferred to the district court. If a question is raised about the defendant's competency to stand trial, the court shall proceed under Rule 6-507.1 NMRA.

D. **Waiver of arraignment or first appearance.** With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea or waiver of first appearance shall be substantially in the form approved by the Supreme Court.

E. **Felony offenses; preliminary examination.** If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district court. If the defendant does not waive preliminary examination the court shall proceed to conduct such an examination in accordance with Rule 6-202 NMRA.

F. **Bail.** If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 6-401 NMRA. However, the court may delay entry of conditions of release for twenty-four (24) hours from the date of the initial appearance, not to exceed the time limits in Rule 6-401(A) NMRA, if

(1) The defendant is charged with a felony offense

(a) involving the use of a firearm;

(b) involving the use of a deadly weapon resulting in great bodily harm or death;

(c) which authorizes a sentence of life in prison without the possibility of parole; or

(d) a public safety assessment instrument approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant.

(2) The court shall immediately give notice to the prosecutor, the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender, of the circumstances in Subparagraph F(1) above that warrant delaying entry of conditions of release.

(3) If the prosecutor does not file an expedited motion for pretrial detention by the date scheduled for the conditions of release hearing, the court shall issue an order setting conditions of release pursuant to Rule 6-401 NMRA.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07-8300-030, effective December 15, 2007; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020, required the magistrate court to inform a defendant, making his or her first appearance in response to a summons, warrant, or arrest, of the possibility of pretrial detention, authorized the magistrate court to delay for twenty-four hours from the date of the initial appearance entry of conditions of release if the defendant is charged with certain felony offenses or if a public safety assessment instrument flags potential new violent criminal activity for the defendant, and required the magistrate court to issue an order setting conditions of release if the prosecutor does not file an expedited motion for pretrial detention by the date scheduled for the conditions of release hearing; in Subparagraph A(3), after "the right to bail", added "or the possibility of pretrial detention under Rule 5-401(G) NMRA"; and in Paragraph F, in the introductory paragraph, after "Rule 6-401 NMRA", added "However, the court may delay entry of conditions of release for twenty-four (24) hours from the date of initial appearance, not to exceed the time limits in Rule 6-401(A) NMRA, if", and added Subparagraphs F(1) through F(3).

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, provided that a court shall proceed under Rule 6-507.1 NMRA if a question is raised about the defendant's competency to stand trial; in Subparagraph A(11), changed "29-11A-1 NMSA 1978" to "NMSA 1978, Sections 29-11A-1 to -10"; added new paragraph designation "C" and redesignated former Paragraphs C through E as Paragraphs D through F, respectively; in Paragraph C, added the paragraph heading, deleted "pleads", added "raises the defense of", deleted "or if an issue is raised as to the mental competency of the defendant to stand trial" and added "at the time of commission of an offense", and added the last sentence; and in Paragraph E, in the paragraph heading, deleted "examination" and added "hearing".

The 2007 amendment, approved by Supreme Court Order No. 07-8300-030, effective December 15, 2007, added Subparagraphs 9, 10 and 11 of Paragraph A, providing for a determination by the court as to whether the defendant has been counseled on immigration, domestic violence and sex offender registration laws.

The 2000 amendment, effective November 1, 2000, rewrote the rule with little substantive change, except for the deletion of former Paragraph F, relating to audio-visual appearances or arraignments.

Cross references. — For explanation of right to, and opportunity to consult with, public defender, *see* Section 31-15-12 NMSA 1978.

For waiver of counsel form, *see* Rule 9-401 NMRA.

For form on transfer order, *see* Rule 9-404 NMRA.

For a discussion of the consequences of a conviction under the Family Violence Protection Act, 40-13-1 NMSA 1978, and the so-called "Brady Bill", 18 U.S.C. Section 922, *see* Civil Form 4-970 NMRA.

Failure to timely hold preliminary examination does not divest jurisdiction. — The magistrate court does not automatically lose jurisdiction upon failing to hold a preliminary examination within the time provisions of Rule 6-202D NMRA. *State v. Tollardo*, 1982-NMCA-156, 99 N.M. 115, 654 P.2d 568.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 632, 635, 825.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

6-502. Pleas and plea agreements.

A. **Pleas.** A defendant who elects to waive the right to a trial may enter:

(1) a plea of guilty; or

(2) a plea of no contest, subject to the approval of the court.

B. **Advice to defendant.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, which shall include an appearance through an audio-visual proceeding under Rule 6-110A NMRA, informing the defendant of and determining that the defendant understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered, including any possible sentence enhancements;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made;

(4) that if the defendant pleads guilty or no contest there will not be a trial in this case, so that by pleading guilty or no contest the defendant waives the right to a trial;

(5) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(6) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(7) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act [Sections 29-11A-1 to -10 NMSA 1978].

C. **Ensuring that the plea is voluntary.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or no contest results from prior discussions between the government and the defendant or the defendant's attorney.

D. **Plea agreement procedure.**

(1) The government or its agent and the attorney for the defendant or the defendant when acting *pro se* may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the government or its agent will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest, it shall be reduced to writing substantially in the form approved by the Supreme Court, and the court shall require the disclosure of the agreement in open court at the time that the plea is offered. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was instead made with

the expectation that the State would only recommend a particular sentence or not oppose the defendant's request for a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon, the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) If the court accepts a plea agreement that was made in exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement. If the court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court may inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement or that the court's judgment and sentence will embody a different disposition as authorized by law.

(4) If the court finds the provisions of the agreement unacceptable after reviewing it and any presentence report, the court will allow the withdrawal of the plea, and the agreement will be void. This subparagraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

(5) Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to plead guilty or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

E. **Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

[As amended, effective May 1, 1986; January 1, 1987; May 1, 1997; as amended by Supreme Court Order No. 07-8300-030, effective December 15, 2007; as amended by Supreme Court Order No. 08-8300-044, effective December 31, 2008; by Supreme Court Order No. 10-8300-030, effective December 3, 2010.]

Committee commentary. — In 2010, Subparagraph (2) of Paragraph B was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. *See Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, 146 N.M. 556, 212 P.3d 1110 (providing that "if the district court is aware of the defendant's prior convictions that

would require a sentence enhancement if subsequently requested by the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant's sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information").

Subparagraphs (2), (3) and (4) of Paragraph D were also amended in 2010 to clarify the potential consequences of rejected plea recommendations in light of *State v. Pieri*, 2009-NMSC-019, ¶ 29, 146 N.M. 155, 207 P.3d 1132, which held that "if the court rejects a sentence recommendation or a defendant's unopposed sentencing request, and the defendant was aware that the court was not bound by those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea."

[Adopted by Supreme Court Order No. 10-8300-030, effective December 3, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-030, effective December 3, 2010, in Subparagraph (2) of Paragraph B, after "the plea is offered", added "including any possible sentence enhancements"; in Subparagraph (2) of Paragraph D, in the first sentence, after "entry of a plea of guilty or no contest", deleted "in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed", and added the second sentence; in Subparagraph (3) of Paragraph D, in the first sentence, after "the court accepts a plea agreement", added "that was made in exchange for a guaranteed, specific sentence", and added the second sentence; and in Subparagraph (4) of Paragraph D, added the last sentence.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-044, effective December 31, 2008, in Paragraph B, in the first sentence, added the phrase "which shall include an appearance through an audio-visual proceeding under Rule 6-110A NMRA".

The 2007 amendment, approved by Supreme Court Order No. 07-8300-030, effective December 15, 2007, added Subparagraphs 5, 6 and 7 of Paragraph B, providing for a determination by the court as to whether the defendant understands the effect of a plea under immigration, domestic violence and sex offender registration laws.

The 1997 amendment, effective May 1, 1997, rewrote Paragraph A, deleted "further" preceding "trial" and substituted "in this case" for "of any kind" in Subparagraph B(4), substituted "substantially in the" for "on a" in the first sentence of Subparagraph D(2), rewrote Subparagraph D(4), and made gender neutral changes throughout the rule.

Cross references. — For a discussion of the consequences of a conviction under the Family Violence Protection Act, 40-13-1 NMSA 1978, and the so-called "Brady Bill", 18 U.S.C. Section 922, *see* Civil Form 4-970 NMRA.

Plea agreements will be specifically enforced. — Where defendant entered into three plea agreements in which the state agreed that defendant would serve zero to nine years of incarceration, supervised probation, treatment program, or a combination thereof and that the sentences in each case would be served concurrently with each other; and the district court accepted the plea agreements and sentenced defendant to twenty-one years in prison, with sixteen years suspended, for an actual prison term of five year, plus five years of supervised probation, the sentence violated the terms of the plea agreements because the suspended sentence allowed for the possibility that defendant could actually serve more than nine years in prison and defendant was entitled to specific performance of the plea agreements. *State v. Gomez*, 2011-NMCA-120, 267 P.3d 831.

Plea agreement provided for a specific sentence. — Where the plea agreement provided for a maximum sentence of forty years and the court accepted the plea, the plea agreement constituted a promise, not a recommendation, for a sentence within a particular range that the court was bound to enforce and the imposition of a forty-two year sentence, nine of which were suspended, violated the sentence cap in the plea agreement. *State v. Miller*, 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

Plea agreement for a maximum sentence "at initial sentencing". — Where the plea agreement provided for a maximum sentence of forty years "at initial sentencing", the phrase "at initial sentencing" did not transform the limit on sentencing into a limit on the initial period of incarceration because the sentence could not be increased at a later date and the court’s sentence of forty-two years imprisonment, nine of which were suspended, violated the plea agreement. *State v. Miller,* 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

New Mexico does not have a rule formally codifying the conditional plea in magistrate court. *State v. Celusniak*, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Conditional pleas in magistrate court should meet the same requirements of issue preservation and reservation, prosecutorial consent, and court approval as those in district and metropolitan courts. *State v. Celusniak*, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

An accused who has entered into a plea agreement is not an "aggrieved party" entitled to an appeal, although the agreement is not reduced to writing, as required by this rule. *State v. Johnson*, 1988-NMCA-029, 107 N.M. 356, 758 P.2d 306.

Preferred procedure for appeal to Court of Appeals after conditional plea is entered in magistrate court is for the district court to issue a final and appealable order

dismissing the appeal or to issue an order granting the motion to suppress. *State v. Celusniak*, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized, 87 A.L.R.4th 384.

6-503. Disposition without hearing.

A. **General.** This rule establishes procedures governing disposition of cases within magistrate trial court jurisdiction without a hearing. These procedures do not apply to charges of driving while under the influence of intoxicating liquor or drugs, reckless driving, driving while license suspended or revoked, domestic violence, any offense for which a period of incarceration is mandatory, or any offense for which the court imposes a sentence of incarceration. This procedure applies only to penalty assessment misdemeanors for which the monetary penalty is specified by statute, unless the court, by written order, sets forth a schedule of additional offenses for which this procedure may be used together with the monetary penalty ordered by the court for each offense.

B. **Procedure.** An offense shall not be disposed of without a hearing unless the person charged signs an appearance, enters a plea of no contest or guilty and waives trial. Prior to signing the document, the person charged shall be informed of the right to trial, the right to appear personally before the judge, the right to remain silent, the right to present witnesses, and the right to hire a lawyer.

Provision may be made for the person charged to enter an appearance by mail, fax, or e-mail, and, if pleading guilty or no contest, to remit to the court the penalty specified by statute or by the court. A remittance to the court of the specified penalty without a signed appearance, plea and waiver form, shall constitute a guilty plea.

[As amended by Supreme Court Order No. 11-8300-051, effective for cases filed on or after January 31, 2012.]

Committee commentary. — Judges should use sound discretion in setting forth additional offenses to which this procedure may be applied. The court may specify which methods of payment will be accepted.

[Adopted by Supreme Court Order No. 11-8300-051, effective for cases filed on or after January 31, 2012.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-051, effective for cases filed on or after January 31, 2012, provided that the rule apply only to penalty assessment misdemeanors for which the monetary penalty is specified by statute and additional offenses specified by the court for which the court has specified the monetary

penalty, required that defendants be advised of their constitutional rights before they enter a plea or waive trial, and authorized the court to permit defendants to appear by mail, fax or e-mail and to remit penalties to the court; in Paragraph A, deleted the former language, which authorized the court to establish procedures governing the disposition of cases specified by the court without a hearing, and added the current language; in Paragraph B, in the first paragraph, in the first sentence, after "appearance", changed "plea of no contest and waiver of trial" to "enters a plea of no contest or guilty and waives trial", and in the second sentence, after "right to trial", deleted "and that the warrant will constitute a plea of no contest and will have the effect of a judgment of guilty by the court" and added the remainder of the sentence; and in Paragraph B, in the second paragraph, after "enter an appearance", deleted "plead no contest and remit the appropriate scheduled penalty to the court by mail" and added the remainder of the sentence, deleted the former second sentence, which required the charging law enforcement officer to inform the defendant of the defendant's right to trial and that a plea of no contest is a plea of guilty, to provide a form for an entry of appearance and plea of no contest, and to inform the defendant of the scheduled penalty, and added the current second sentence.

6-504. Discovery; cases within magistrate court trial jurisdiction.

A. **Disclosure by prosecution.** Unless a different period of time is ordered by the trial court, within forty-five (45) days after arraignment or the date of filing of a waiver of arraignment, the prosecution shall disclose and make available to the defendant for inspection, copying, and photographing any records, papers, documents, and statements made by witnesses or other tangible evidence in its possession, custody, and control that are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant.

B. **Disclosure by defendant.** Unless a different period of time is ordered by the trial court, within sixty (60) days after arraignment or the date of filing of a waiver of arraignment, the defendant shall disclose and make available to the prosecution for inspection, copying, and photographing any records, papers, documents, and statements made by witnesses or other tangible evidence in the defendant's possession, custody, or control that the defendant intends to introduce in evidence at the trial.

C. **Witness disclosure.** Unless a different period of time is ordered by the trial court, within forty-five (45) days after arraignment or the date of the filing of a waiver of arraignment, the prosecution shall provide to the defendant a list of the names and addresses of the witnesses that the prosecution intends to call for trial. Unless a different period of time is ordered by the trial court, within sixty (60) days after arraignment or the date of the filing of a waiver of arraignment, the defendant shall provide to the prosecution a list of the names and addresses of the witnesses that the defendant intends to call for trial.

D. **Witness interviews.** Upon request of a party, any witness named on the witness list of the opposing party, other than the defendant, shall be made available for interview prior to trial. Either party may request a subpoena under Rule 6-606 NMRA if good faith efforts to secure the interview have been unsuccessful.

E. **Continuing duty to disclose.** If a party discovers additional material or witnesses that the party previously would have been under a duty to disclose and make available at the time of such previous compliance if it were then known to the party, the party shall promptly give notice to the other party of the existence of the additional material or witnesses.

F. **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may:

(1) order the party to provide the discovery or inspection of materials not previously disclosed;

(2) grant a continuance to allow for completion of discovery;

(3) order the party to complete the interview or inspect the materials at the trial setting; or

(4) prohibit the party from calling a witness not disclosed or from introducing in evidence the material not disclosed; or

(5) enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney or party in contempt of court.

G. **Statement defined.** As used in this rule, “statement” means:

(1) a written statement made by a person and signed or otherwise adopted or approved by such person;

(2) any mechanical, electrical, or other recording, or a transcription thereof, that is a recital of an oral statement; and

(3) stenographic or written statements or notes that are in substance recitals of an oral statement.

H. **Applicability.** This rule applies only to cases within magistrate court trial jurisdiction.

[As amended, effective January 1, 1995; October 1, 1996; September 15, 1997; as amended by Supreme Court Order No. 07-8300-025, effective November 1, 2007; as

amended by Supreme Court Order No. 15-8300-006, effective for all cases filed on or after December 31, 2015.]

Committee commentary. — Under Paragraphs A and B, the prosecution and defense are only required to disclose and permit inspection, copying, or photographing of records, papers, documents and recorded statements of witnesses at the place where the records or statements are located. The expense of copying or photographing is to be paid by the party requesting a copy or photograph.

[As amended by Supreme Court Order No. 15-8300-006, effective for all cases filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-006, effective December 31, 2015, changed the time limits for the prosecution and the defendant to provide discovery; changed the time limits for the parties to provide witness lists, provided that the parties may request a subpoena to secure witness interviews, made stylistic changes and revised the committee commentary; in Paragraph A, in the heading, deleted “state” and added “prosecution”, after the heading, deleted “Not less than ten (10) days before trial” and added “Unless a different period of time is ordered by the trial court, within forty-five (45) days after arraignment or the date of filing of a waiver of arraignment”, after “make available”, added “to the defendant”, after “documents, and”, deleted “recorded”, and after “control”, deleted “which” and added “that”; in Paragraph B, after the heading, deleted “Not less than ten (10) days before trial” and added “Unless a different period of time is ordered by the trial court, within sixty (60) days after arraignment or the date of filing of a waiver of arraignment”, after “photographing”, deleted “and”, after “documents”, added “and statements made by witnesses”, after “control”, deleted “which” and added “that”; in Paragraph C, after the heading, deleted “Not less than ten (10) days before trial the prosecution and defendant shall exchange a list of the names and address of the witnesses each intends to call at the trial.” and added the remainder of the paragraph; in Paragraph D, added the second sentence of the paragraph; in Paragraph E, after “witnesses”, deleted “which” and added “that”; in Subparagraph (2) of Paragraph G, after “thereof”, deleted “which” and added “that”; and in Subparagraph (3) of Paragraph G, after “notes”, deleted “which” and added “that”.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-025, effective November 1, 2007, made the second sentence of Paragraph C relating to witness interviews a new Paragraph D; relettered Paragraphs D through G as Paragraphs E through H; and revised Paragraph F to permit witness interviews and document production at the trial setting.

The 1997 amendment, effective September 15, 1997, added "Not less that ten (10) days before trial" at the beginning of Paragraphs A and B; in Paragraph A, inserted "and photographing" and "recorded statements made by witnesses" and substituted

"prosecution" for "state"and made a stylistic change; rewrote Paragraph B; deleted "together with any recorded statement made by the witness" from the end of the first sentence in Paragraph C; and substituted "disclose and make available" for "produce or disclose" in Paragraph D.

The 1996 amendment, effective October 1, 1996, added "cases within magistrate court trial jurisdiction" to the rule heading and added Paragraph G.

The 1995 amendment, effective January 1, 1995, designated the existing language as Paragraph A and rewrote that paragraph, and added Paragraphs B, C, D, E, and F.

Cross references. — For form on order for production, *see* Rule 9-410 NMRA.

For form motion to compel discovery, *see* Criminal Form 9-409A NMRA.

6-505. Pretrial conference; scheduling order.

A. **Pretrial conference.** With or without the filing of a motion, the court may order the parties to appear before the court to expedite the disposition of the case. Witnesses may not be called or subpoenaed for a pretrial conference unless ordered by the court.

B. **Pretrial scheduling order.** The court may enter a scheduling order that limits the time:

(1) to file and hear motions; and

(2) to complete discovery.

The scheduling order may also include:

(3) the dates for any conferences or hearings before trial;

(4) a trial date; and

(5) any other matters deemed appropriate by the court.

[As amended, effective March 1, 2000; December 17, 2001.]

Committee commentary. — The purpose of this rule is to encourage negotiations to utilize more effectively judicial resources and to expedite the disposition of cases. Pre-trial conferences should be utilized for more than exchange of discovery materials.

ANNOTATIONS

The 2001 amendment, effective December 17, 2001, inserted "scheduling order" in the rule heading; designated the former provisions of the rule as Paragraph A, adding the

heading "Pretrial conference" and rewrote the second sentence that formerly provided the court my issue subpoenas at the request of a party; and added Paragraph B.

The 2000 amendment, effective March 1, 2000, amended this rule to encourage the use of pre-trial conferences.

Cross references. — For form on notice of pretrial conference, *see* Rule 9-411 NMRA.

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 411 to 432.

22 C.J.S. Criminal Law § 340 et seq.

6-506. Time of commencement of trial.

A. **Time limits for arraignment.**

(1) ***Defendant not in custody.*** A defendant who is not in custody shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. If the defendant fails to appear by the appearance date on a citation, the court shall issue a summons commanding the defendant to appear for arraignment within thirty (30) days of the initial appearance date on the citation.

(2) ***Defendant in custody.*** A defendant who is in custody shall be arraigned on the complaint or citation as soon as practicable, but in any event no later than three (3) days after the date of arrest if the defendant is being held in the local detention center, or no later than five (5) days after the date of arrest if the defendant is not being held in the local detention center.

(3) ***Following dismissal or discharge of felony charges.*** If all felony charges against the defendant have been dismissed or discharged, and the only remaining charges are within magistrate court trial jurisdiction, the defendant shall be arraigned within thirty (30) days after the date of dismissal or discharge if the defendant is not in custody, or two (2) days after the date of dismissal or discharge if the defendant is in custody.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after whichever of the following events occurs latest:

(1) the date of arraignment or the filing of a waiver of arraignment of the defendant;

(2) if an evaluation of competency has been ordered, the date an order or remand is filed in the magistrate court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the magistrate court;

(4) in the event of a remand from an appeal or request for extraordinary relief, the date the mandate or order is filed in the magistrate court disposing of the appeal or request for extraordinary relief;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in the magistrate court that the preprosecution diversion program has been terminated for failure to comply with the terms, conditions, or requirements of the program.

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(3) upon stipulation of the parties and approval of the court, for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to ninety (90) days;

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period and a written finding that the defendant would not be unfairly prejudiced, the court may grant further extensions that are necessary in the interests of justice; or

(6) if defense counsel fails to appear for trial within a reasonable time, for a period not to exceed one hundred eighty-two (182) days, provided that the aggregate of

all extensions granted under this subparagraph may not exceed one hundred eighty-two (182) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial under Paragraph C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely petition for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice.

[As amended, effective August 1, 1999; effective August 1, 2004; as amended by Supreme Court Order No. 07-8300-025, effective November 1, 2007; by Supreme Court Order No. 08-8300-054, effective January 15, 2009; as amended by Supreme Court Order No. 13-8300-019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. —

Exceptional circumstances. — "Exceptional circumstances," as used in this rule, would include conditions that are unusual or extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately preceding the commencement of the trial; or other circumstances that ordinary experience or prudence would not foresee, anticipate, or provide for. The court may grant an extension for exceptional circumstances only if the court finds that the extension will not unfairly prejudice the defendant. The defendant may move the court to dismiss the case based on a particularized showing that the extension or impending extension would subject the defendant to oppressive pretrial incarceration, anxiety and concern, or the possibility that the defense will be impaired.

Constitutional right to speedy trial. — This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico. *See State v. Urban*, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061, for the factors to be considered.

Duty of prosecutor. — It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule. It is the obligation of both parties to make a good faith effort to complete their separate discovery and to advise the court of non-compliance with Rule 6-504 NMRA.

Computation of time. — Time periods are computed under Rule 6-104 NMRA.

Paragraph A. — Paragraph A of this rule requires arraignment within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. For defendants in custody, arraignment is required within three (3) days after the date of arrest if the defendant is being held in the local jail, or five (5) days after the date of arrest, if the defendant is being held in another jurisdiction. A failure to arraign the defendant within the time limitation will not result in a dismissal of the charge unless the defendant can show some prejudice due to the delay.

Paragraph B. — A violation of Paragraph B of this rule can result in a dismissal with prejudice under Paragraph E of this rule. *See also State v. Lopez*, ¶ 3, 1976-NMSC-012, 89 N.M. 82, 547 P.2d 565. However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. *See State v. Vigil*, 1973-NMCA-089, ¶ 28, 85 N.M. 328, 512 P.2d 88. If the state in good faith files a nolle prosequi under Rule 6-506.1(C) and (D) NMRA and later files the same charge, the trial on the refiled charges shall be commenced within the unexpired time for trial under Rule 6-506 NMRA, unless, under Rule 6-506.1(D) NMRA, the court finds the refiled complaint should not be treated as a continuation of the same case.

[As amended by Supreme Court Order No. 13-8300-019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 17-8300-022, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The second 2017 amendment, approved by Supreme Court Order No. 17-8300-022, effective December 31, 2017, in the last paragraph of the committee commentary, changed “Paragraphs C and D of Rule 6-506A” to Rule 6-506.1(C) and (D)”, and changed “Paragraph D of Rule 6-506A” to “Rule 6-506.1(D)”.

The first 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, revised the provisions relating to time limits for arraignment of defendants who are in custody, for defendants who are not in custody, and following dismissal or discharge of felony charges, and revised the committee commentary; in Paragraph A, in the heading, added “Time limits for”, added subparagraph designations “(1)” and “(2)”, in Subparagraph A(1), added the heading, deleted “The” and added “A”, after the first occurrence of “defendant”, added “who is not in custody”, and added the

last sentence, in Subparagraph A(2), added the heading, after “defendant”, added “who is”, after “citation as soon as”, deleted “practical” and added “practicable”, after “no later than”, deleted “four (4)” and added “three (3)”, and added “if the defendant is being held in the local detention center, or no later than five (5) days after the date of arrest if the defendant is not being held in the local detention center”, and added Subparagraph A(3).

The 2016 amendment, approved by Supreme Court Order No. 16-8300-002, effective May 24, 2016, increased the maximum amount of time for which a defendant may request an extension of time for commencement of trial, removed the provision that the aggregate of all extensions under Subparagraph C(5) may not exceed sixty days, required the court to make certain findings regarding prejudice to the defendant when granting certain extensions of time, and revised the committee commentary to clarify that the court must consider prejudice to the defendant when considering an extension of time based on exceptional circumstances; in Subparagraph C(2), after “a period not exceeding”, deleted “thirty (30)” and added “sixty (60)”; in Paragraph C(5), after “within the time period”, deleted “provided that the aggregate of all extensions granted under this subparagraph may not exceed sixty (60) days” and added “and a written finding that the defendant would not be unfairly prejudiced, the court may grant further extensions that are necessary in the interests of justice”; in the committee commentary, in the paragraph under the heading “Exceptional circumstances”, added the last two sentences of the paragraph, and in the paragraph under the heading “Computation of Time”, added vendor neutral citations to the cases cited.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-019, effective December 31, 2013, provided a time limit after arrest for the arraignment of a defendant in custody, provided for the extension of the time for the commencement of trial, and required dismissal of a complaint with prejudice for noncompliance with the time limit for commencement of trial; in Paragraph A, added the second sentence; and in Paragraph E, deleted the former rule which required that a complaint be dismissed with prejudice if trial did not commence within the prescribed time limit or any extension, and added Subparagraphs (1) and (2).

The 2008 amendment, approved by Supreme Court Order No. 08-8300-054, effective January 15, 2009, in Paragraph E, changed "shall" to "may" and added "or the court may consider other sanctions as appropriate" to the end of the sentence.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-025, effective November 1, 2007, added a new Subparagraph (6) of Paragraph C to provide for an extension of the time for trial if defense counsel fails to appear for trial and amended Subparagraph (4) of Paragraph B to provide for trials to occur within 182 days after a request for extraordinary relief.

The 2004 amendment, effective August 1, 2004, deleted all of former Paragraphs A through E and added new Paragraph A through E of this rule.

Cross references. — For procedure to withdrawal of a plea by the defendant or rejection plea by the court, *see* Rule 6-502 NMRA.

For form on order dismissing criminal complaint with prejudice, *see* Criminal Form 9-414 NMRA.

Nolle prosequi in magistrate court. — Where the State, less that two months after the six-month rule had begun to run, filed a nolle prosequi in magistrate court and refiled the case in district court before the magistrate court ruled on the defendant's motion to suppress, the nolle prosequi was not filed for the purpose of delay or to circumvent operation of the six-month rule because the district court required that nolle prosequis in magistrate court be filed within sixty days after the date when the six-month rule began to run and because no appeal would be permitted from a magistrate court suppression order. *State v. Neal*, 2008-NMCA-008, 143 N.M. 371, 176 P.3d 330.

Circumventing rule. — The state cannot escape the effect of the six-month rule if the dismissal of an aggravated DWI case in the magistrate court and re-filing in the district court is done to circumvent the six-month rule. *State v. Carreon*, 2006-NMCA-145, 140 N.M. 779, 149 P.3d 95, cert. granted, 2006-NMCERT-011.

State burden of proof not satisfied. — Where the state continued to participate in proceedings in the magistrate court DWI case against defendant, without any plea offer, and dismissed the case in magistrate court several days before the six-month period expired and refiled the case in district court, the state's explanation that it was acting pursuant to the state's policy to file DWI cases in magistrate court to determine whether the defendant will plead to the charge or otherwise settle the case and if the defendant does not plead or settle the case, to dismiss the case in magistrate court and refile it in district court, does not satisfy the state's burden of showing that the dismissal and refiling were not done for a bad reason, including doing so for the purpose of circumventing the six-months rule. *State v. Carreon*, 2006-NMCA-145, 140 N.M. 779, 149 P.3d 95, cert. granted, 2006-NMCERT-011.

Additional six-month period commences if the defendant is arrested for failure to appear. — Where defendant was charged with driving while under the influence of intoxicating liquor, was arraigned on November 5, 2012, but due to numerous delays, was not scheduled for trial until May 9, 2013, one hundred eighty-five days after arraignment, the district court did not err in denying defendant's motion to dismiss based on a violation of the six-month rule, because defendant failed to appear for trial on May 9, 2013, for which a bench warrant was issued; Rule 6-506(B)(5) NMRA is self-executing, and under its terms, an additional six-month period to commence trial begins upon arrest or surrender, and the fact that the arrest warrant was issued after the initial six-month period elapsed is of no consequence, because the rule does not contain such a qualification. *State v. James*, 2017-NMCA-053, cert. denied.

The six month rule begins anew after an arrest for failure to appeal. — The triggering event specified in the six month rule, arrest for failure to appear, is unqualified

in any way, and therefore once defendant was arrested for failure to appear, regardless of whether the failure to appear was willful, the six-month period in which to initiate trial began anew. *State v. Dorais*, 2016-NMCA-049, cert. denied.

6-506.1. Voluntary dismissal and refiled proceedings.

A. **Voluntary dismissal.** The prosecution may dismiss a citation or criminal complaint by filing a notice of dismissal. The notice of dismissal shall be substantially in the form approved by the Supreme Court. Unless otherwise stated in the notice, the dismissal is without prejudice. A notice of dismissal shall be filed:

(1) prior to commencement of the trial; or

(2) after the acceptance of a plea of guilty or no contest, but prior to sentencing.

B. **Bail bond.** The filing of a notice of dismissal under Paragraph A of this rule shall exonerate a bond only as provided in Rule 6-406 NMRA. If the dismissed charges are later filed in the district court, the state shall notify the magistrate court, and the magistrate court shall transfer any bond to the district court.

C. **Refiled complaints.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the refiled complaint shall be clearly captioned "Refiled Complaint" and shall include the following:

(1) the court in which the original charges were filed;

(2) the case file number of the dismissed charges;

(3) the name of the assigned judge at the time the charges were dismissed; and

(4) the reason the charges were dismissed.

D. **Procedure after refile; cases within magistrate court trial jurisdiction.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the case shall be treated as a continuation of the same case, and the trial on the refiled charges shall be commenced within the unexpired time for trial under Rule 6-506 NMRA, unless the court, after notice and hearing, finds the refiled complaint should not be treated as a continuation of the same case. The time between dismissal and refiling shall not be counted as part of the unexpired time for trial under Rule 6-506 NMRA.

E. **Simultaneous cases.** If a complaint, indictment, or information is filed in district court concerning one or more charges pending in magistrate court, the prosecutor shall notify the magistrate court. This notice shall operate as a dismissal of the entire case in magistrate court. The magistrate court shall transfer any bond to the district court.

[Approved, effective August 1, 2004; as amended by Supreme Court Order No. 13-8300-030, effective for all cases pending or filed on or after December 31, 2013; 6-506A recompiled and amended as 6-506.1 by Supreme Court Order No. 17-8300-024, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — In 2004, Rule 6-506 NMRA was split into two rules. This rule is former Paragraphs A through D of Rule 6-506 NMRA.

The court's acceptance of a no contest or guilty plea does not raise a double jeopardy bar to subsequent prosecution if the charges to which the defendant has pled subsequently are dismissed prior to sentencing. *See State v. Angel*, 2002-NMSC-025, ¶ 16, 132 N.M. 501, 51 P.3d 1155 (holding that double jeopardy did not bar subsequent prosecution in district court where the magistrate court accepted the defendant's no contest plea to misdemeanor offenses but dismissed the charges prior to sentencing); *see also State v. Lizzol*, 2007-NMSC-024, ¶ 7, 141 N.M. 705, 160 P.3d 886 (explaining that whether a dismissal constitutes an acquittal, and therefore bars reprosecution on double jeopardy grounds, depends on "whether the trial court's ruling, however labeled, correctly or incorrectly resolved some or all of the factual elements of the crime").

Paragraph E was added in 2017 to address the inefficiency and confusion that may arise when the same charges are pending in both magistrate court and district court, or when charges that were filed together as a single case in magistrate court are split into two cases, one in magistrate court and one in district court. For example, an indictment may be filed in district court that includes the felony charges pending in magistrate court but not the associated misdemeanor charges. Upon notice from the prosecutor, the magistrate court should dismiss its entire case without prejudice. The prosecutor retains discretion to refile charges in either district or magistrate court.

[As amended by Supreme Court Order No. 13-8300-030, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-024, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-024, effective December 31, 2017, revised the provisions for voluntary dismissals, provided for the dismissal of cases in magistrate court when the same charges are pending in both magistrate and district court, made certain technical revisions to the rule, and revised the committee commentary; in Paragraph A, deleted Subparagraph A(1), redesignated former Subparagraph A(2) as Subparagraph A(1), and deleted "if the charges are within magistrate court trial jurisdiction", deleted former Subparagraph A(3) and added a new Subparagraph A(2); in Paragraph B, after "shall", deleted "not", after "exonerate a bond", deleted "prior to the expiration of the time for automatic exoneration pursuant to Subparagraphs (A)(1) or (A)(2) of" and added "only as provided in", and after "Rule 6-406 NMRA", deleted "of these rules"; in Paragraph C, in the introductory clause, after "without prejudice", deleted "or in the case of a felony complaint, discharged", in

Subparagraph C(2), after “dismissed”, deleted “or discharged”, in Subparagraph C(3), after “dismissed”, deleted “or discharged”, and in Subparagraph C(4), after “dismissed”, deleted “or discharged”; in Paragraph D, in the heading, added “cases within magistrate court trial jurisdiction, and after “without prejudice”, deleted “or discharged”; and added Paragraph E.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-030, effective December 31, 2013, required that a notice of dismissal be filed after the acceptance of a plea and before sentencing; expanded the rule to include the discharge of felony complaints; provided that the time between dismissal and refiling a complaint is not counted as part of the time for trial under Rule 6-506 NMRA; added Subparagraph (1) of Paragraph A; in Paragraph C, deleted the former title “Refiled complaints; cases within magistrate court trial jurisdiction” and added the current title and after “without prejudice”, added “or in the case of a felony complaint, discharged”; in Subparagraphs (2), (3), and (4), after “dismissed”, added “or discharged”; and in Paragraph D, in the first sentence, after “without prejudice”, added “or discharged” and added the second sentence.

The 2004 amendment. — Paragraphs A and B of this rule are the same as Paragraphs A through B of Rule 6-506 prior to the August 1, 2004 amendment of that rule. Paragraph C of this rule relating to refiled complaints replaces former Paragraph C of Rule 6-506 NMRA. Paragraph D of this rule replaces former Paragraph D of Rule 6-506 NMRA.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-024, former 6-506A NMRA was recompiled and amended as 6-506.1 NMRA, effective December 31, 2017.

Cross-references. — For form on notice of dismissal of criminal complaint, *see* Criminal Form 9-415 NMRA.

Review of suppression order. — The state may obtain judicial review of a suppression order of a magistrate court by filing a nolle prosequi to dismiss some or all of the charges in the magistrate court after the suppression order is entered, and refiling in the district court for a trial de novo. *State v. Heinsen*, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

Scope of district court review of pretrial motion filed in magistrate court upon refiling in district court. — Where defendant was charged with aggravated driving while under the influence of intoxicating liquor or drugs (DWI), and where the magistrate court granted defendant’s motion to exclude the arresting officer from testifying at trial, based on defendant’s inability to secure a pretrial witness interview with the officer, and where the state sought review of the magistrate court’s order of suppression by refiling the case in district court, the district court erred in deciding defendant’s motion based upon the facts as they existed in the district court, not as they were before the magistrate court. The district court should have conducted an independent review of

the pretrial motion to exclude filed in magistrate court. *State v. Verret*, 2019-NMCA-010.

6-506A. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-024, former 6-506A NMRA was recompiled and amended as 6-506.1 NMRA, effective December 31, 2017.

6-507. Insanity; transfer to district court.

If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense", the action shall be transferred to the district court for further proceedings under the Rules of Criminal Procedure for the District Courts. The magistrate court shall retain jurisdiction over the defendant and conditions of release until the action is filed in district court.

[As amended by Supreme Court Order No. 11-8300-041, effective for cases filed on or after December 2, 2011; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, removed provisions related to the mental competency of the defendant to stand trial; in the rule heading, deleted "or incompetency", deleted "pleads", added "raises the defense of", added "at the time of commission of an offense", and deleted "or if an issue is raised as to the mental competency of the defendant to stand trial".

The 2011 amendment, approved by Supreme Court Order No. 11-8300-041, effective December 2, 2011, added the last sentence to provide for the retention of jurisdiction by the magistrate court until the action is filed in district court.

Cross references. — For form on transfer order, *see* Rule 9-404 NMRA.

6-507.1. Competency; transfer to district court.

A. **Purpose; scope.** This rule is intended to provide a timely, efficient, and accurate procedure for resolving whether a defendant is competent to stand trial. Competency to stand trial is distinct from other questions about a defendant's mental health that may be relevant in a criminal proceeding, such as the substantive defenses of not guilty by reason of insanity at the time of commission of an offense and incapacity to form specific intent.

B. **Definitions.** For purposes of this rule, the following definitions shall apply.

(1) ***Competency*.** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant has,

(a) sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding,

(b) a rational as well as factual understanding of the proceedings against the defendant, and

(c) the capacity to assist in the defendant's own defense and to comprehend the reasons for punishment.

(2) ***Competency evaluation*.** A competency evaluation is an examination of the defendant by a qualified mental health professional, appointed by and acting on behalf of the court, limited to determining whether the defendant is competent to stand trial. Unless otherwise ordered by the court, a competency evaluation shall be limited to a determination of the defendant's competency and shall not state opinions about other matters including the defendant's sanity at the time of the offense or ability to form a specific intent.

C. **Raising a question of competency; who may raise.** A question of the defendant's competency to stand trial shall be raised whenever it appears that the defendant may not be competent to stand trial. The issue shall be raised by a motion for a competency evaluation and may be raised by a party or upon the court's own motion at any stage of the proceedings.

D. **Motion for competency evaluation.**

(1) ***By motion of a party represented by counsel*.** When a question of competence is raised by a party who is represented by counsel, a motion for a competency evaluation shall be in writing and shall contain the following:

(a) a statement that the motion is based on a good faith belief that the defendant may not be competent to stand trial;

(b) a description of the facts and observations about the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without invading the attorney–client privilege;

(c) a statement that the motion is not filed for purposes of delay;

(d) a statement of whether the motion is opposed as provided in Rule 6-304 NMRA;

(e) a completed defendant information sheet, substantially in the form approved by the Supreme Court; and

(f) a request for a competency evaluation.

(2) ***By motion of a self-represented defendant or upon the court's own motion*.** When a question of competence is raised by a party who is self-represented or upon the magistrate court's own motion, the magistrate court shall dispose of the motion by filing an order substantially in the form approved by the Supreme Court that addresses the following:

(a) whether the motion is based on a good faith belief that the defendant is not competent to stand trial;

(b) a description of the facts and observations about the defendant that have formed the basis for the motion;

(c) whether the motion is advanced for purposes of delay;

(d) whether the motion is opposed; and

(e) whether a competency evaluation is requested.

E. **Suspension of proceedings.** Upon the filing of a motion for a competency evaluation, further proceedings in the case shall be suspended until the motion is denied or, if the motion is granted, until the case is remanded from the district court. The filing of a motion for a competency evaluation shall not affect a court's authority to set or review conditions of release under Rule 6-401 NMRA.

F. **Resolution of motion; reasonable belief.** In considering a motion for a competency evaluation, the court shall comply with the following procedures.

(1) ***Unopposed*.** Within two (2) days of the filing of a motion that is unopposed under Subparagraph (D)(1)(d) of this rule, the court shall file an order substantially in the form approved by the Supreme Court finding whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial. The determination shall be based solely upon the allegations in the motion and upon the court's own observations of the defendant.

(2) ***Opposed*.** A response in opposition to a motion for a competency evaluation shall be in writing, shall cite specific facts in opposition to the motion, and shall be filed within five (5) days of the filing of the motion or be deemed waived. Upon the filing of a response in opposition, the court shall do one of the following:

(a) unless the court determines that a hearing on the motion is necessary, file an order substantially in the form approved by the Supreme Court within two (2) days

finding whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial; or

(b) hold a hearing on the motion and file an order substantially in the form approved by the Supreme Court within fifteen (15) days of the filing of the response finding whether there is a reasonable belief that the defendant may not be competent to stand trial.

G. **Transfer to district court; effect on magistrate court proceedings.** An order finding a reasonable belief that the defendant may not be competent to stand trial under Paragraph E of this rule also shall transfer the case to the district court for further proceedings under Rule 5-602.1 NMRA. The order shall be delivered to the district court within two (2) days of the finding of a reasonable belief. When such an order is filed, jurisdiction over the defendant and any conditions of release shall be transferred to the district court. Any conditions of release and any bond set by the magistrate court shall continue in effect unless amended by the district court. The magistrate court shall suspend its case pending remand from the district court.

H. **Remand from district court.** Upon remand from the district court after proceedings to determine the defendant's competency, the magistrate court shall proceed as follows.

(1) ***Defendant found competent*.** If the defendant has been found competent to stand trial, the magistrate court shall resume the proceedings against the defendant as otherwise provided under these rules.

(2) ***Defendant found not competent*.** If the defendant has been found not competent to stand trial, the magistrate court may dismiss the case without prejudice in the interests of justice. Upon dismissal, the magistrate court may advise a person authorized under Section 43-1-10 or 43-1-11 NMSA 1978 to consider initiation of proceedings under the Mental Health and Developmental Disabilities Code. In the alternative, the magistrate court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

Committee commentary. — The magistrate court shall transfer a case to the district court for a competency determination when the court finds that the motion is supported by a reasonable belief that the defendant may not be competent to stand trial. A reasonable belief may arise from the court's own observations or from the factual allegations in a party's motion. If the magistrate court finds a reasonable belief that the defendant may not be competent, the magistrate court shall suspend the proceedings and transfer the case to district court for a determination of competency.

The reasonable belief standard requires the court to consider only whether the movant's subjective, good faith belief that the defendant may not be competent to stand trial is objectively reasonable. *Cf. Kestenbaum v. Pennzoil Co*., 1988-NMSC-092, ¶ 27, 108 N.M. 20, 766 P.2d 280 (discussing the difference between a "subjective good faith belief as opposed to an objective standard of reasonable belief"). In making this determination, the court should evaluate whether the motion demonstrates that the movant's good faith belief is supported by specific, articulable facts that would lead a reasonable person to believe that the defendant may not be competent to stand trial. *Cf. State v. Martinez*, 2018-NMSC-007, ¶ 10, 410 P.3d 186 ("An officer obtains reasonable suspicion when the officer becomes aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring." (internal citation and quotation marks omitted)). This is not a heavy burden, and in most circumstances a motion that meets the requirements of Paragraph D of this rule will satisfy the reasonable belief standard without the need for an evidentiary hearing. Without such a showing, however, a motion for a competency evaluation—whether opposed or unopposed—should be denied. *Cf. State v. Hovey*, 1969-NMCA-049, ¶ 18, 80 N.M. 373, 456 P.2d 206 ("[T]here must be a showing of reasonable cause for the belief that an accused is not competent to stand trial.").

For further discussion of the procedures set forth in this rule, *see* the committee commentary to Rule 5-602.1 NMRA.

Courtroom closure

Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 6-116(A) NMRA ("All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule."); *see also* Rule 6-116 committee commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

ARTICLE 6
Trials

6-601. Conduct of trials.

A. **Continuances.** Continuances shall be granted for good cause shown at any stage of the proceedings.

B. **Evidence.** Evidence shall be admitted in accordance with the New Mexico Rules of Evidence. The trial shall be conducted expeditiously, but each party shall be permitted to present the position of that party amply and fairly.

C. **Oath of witnesses.** The court shall administer an oath or affirmation to each witness substantially in the following form: “Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?”

D. **Competence of court interpreter.** Any party in interest or the court on its own motion may question the interpreter under oath as to the interpreter’s fitness, competence, or impartiality. If the judge finds that the interpreter is incompetent, partial, or otherwise unfit, the interpreter shall be prohibited from acting as an interpreter during the hearing. Interpreters certified by the Administrative Office of the Courts are presumed competent.

[As amended, effective October 1, 1996; September 2, 1997; March 21, 2005; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; as amended by Supreme Court Order No. 16-8300-021, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — This rule is meant to operate in reference to the Court Interpreters Act, 38-10-1 to 38-10-8 NMSA 1978.

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-021, effective December 31, 2016, deleted Paragraphs D through H, relating to the “Record of proceedings”, their use at trial, copies of the record of proceedings, and the definition of “record”; and redesignated former Paragraph I as Paragraph D.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, added Paragraph I providing for questioning of court interpreters.

The 2005 amendment, effective March 21, 2005, revised Paragraph C to add "or affirmation", revised Paragraph D to change "transcription" to "record", revised Paragraph E to delete the reference to Rule 1-032 NMRA of the Rules of Civil Procedure for the District Courts and the out-dated reference to Paragraph N of Rule 5-503 of the Rules of Criminal Procedure for the District Courts, added a new Paragraph F, relating to the form of record, added a new Paragraph G, relating to audio and video copies of court proceedings and added a new Paragraph H, the definition of record.

The 1997 amendment, effective September 2, 1997, added present Paragraph D.

The 1996 amendment, effective October 1, 1996, deleted former Paragraph D relating to a record of the proceeding.

Cross references. — For certification of court interpreters, *see* Section 38-10-5 NMSA 1978.

For court interpreters code of responsibility, *see* Rule 23-111 NMRA.

For interpreter oath, *see* Rule 13-212 NMRA.

For court interpreter pre-deliberation instruction to jury, *see* Rule 14-6022 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial § 180 et seq.

23A C.J.S. Criminal Law § 1145 et seq.

6-602. Jury trial.

A. **Petty misdemeanor offense.** If the offense charged is a petty misdemeanor or an offense punishable by no more than six (6) months in jail, either party to the action may demand a trial by jury. The demand shall be made:

(1) orally or in writing to the court at or before the time of entering a plea; or

(2) in writing to the court within ten (10) days after the time of entering a plea. If demand is not made as provided in this paragraph, trial by jury is deemed waived.

B. **Misdemeanor offense.** If the offense is a misdemeanor or other offense or combination of offenses where the potential or aggregate penalty includes imprisonment in excess of six (6) months, the case shall be tried by jury unless the defendant waives a jury trial with the approval of the court and the consent of the state.

[As amended, effective October 1, 1992.]

ANNOTATIONS

The 1992 amendment, effective for cases filed in the magistrate courts on and after October 1, 1992, inserted "or an offense punishable by no more than six (6) months in jail" in the first sentence in Paragraph A and inserted "or other offense or combination of offenses where the potential or aggregate penalty includes imprisonment in excess of six (6) months" in Paragraph B.

Cross references. — For forms on waiver of trial by jury - misdemeanor offenses and certification and waiver, *see* Rule 9-502 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 672, 677.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Right to jury trial under federal constitution where two or more petty offenses, each having penalty of less than six months' imprisonment, have potential aggregate penalty in excess of six months when tried together, 26 A.L.R. Fed. 736.

50 C.J.S. Juries § 9 et seq.

6-603. Trials to juries.

Juries in the magistrate court shall hear the evidence in the action which shall be delivered in public in its presence. After hearing the evidence, the members of the jury shall be kept together until they unanimously agree upon a verdict or are discharged by the magistrate. Whenever the magistrate is satisfied that a jury cannot agree unanimously on its verdict after a reasonable time, he may discharge it and summon a new jury unless the parties agree that the magistrate may render judgment.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 787.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.

6-603.1. Order of trial.

The order of trial shall be as follows:

A. a qualified jury shall be selected and sworn to try the case;

B. initial instructions as provided in Rule Set 14 NMRA, Uniform Jury Instructions - Criminal shall be given by the court;

C. the state may make an opening statement. The defense may then make an opening statement or may reserve its opening statement until after the conclusion of the state’s case;

D. the state shall submit its evidence;

E. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

F. the defense may then make an opening statement, if reserved;

G. the defense may submit its evidence;

H. the state may submit evidence in rebuttal;

I. the defense may submit evidence in surrebuttal;

J. at any time before submission of the case to the jury, the court may, for good cause shown, permit the state or defense to submit additional evidence;

K. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

L. the instructions to be given shall be determined in accordance with Rule 6-609 NMRA. The court shall then instruct the jury;

M. the state may make a closing argument;

N. the defense may make a closing argument;

O. the state may make a rebuttal argument.

[Adopted by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — This rule was added in 2021 to promote consistency in the framework within which a jury trial proceeds in New Mexico courts having criminal jurisdiction. *See* Rule 5-607 NMRA and the related committee commentary for more information; *see also* Rule 7-603.1 NMRA.

[Adopted by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed on or after December 31, 2021.]

6-604. Nonjury trials.

In all actions tried upon the facts without a jury the magistrate shall, at the conclusion of the case, forthwith orally announce his decision and thereafter enter the appropriate judgment or final order.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 A.L.R.4th 304.

6-605. Jurors.

A. **Magistrate jury.** A jury in the magistrate court consists of six (6) jurors with the same qualifications as jurors in the district court. Whenever a jury is required, the court shall select prospective jurors in the manner provided by law.

B. **Challenges for cause.** At the time of the trial, the parties, their attorneys, or the magistrate judge may examine the prospective jurors who have been summoned to determine whether they should be disqualified for cause. Prospective jurors shall be excused for cause if the examination discloses bias, relationship to a party, or other grounds of actual or probable partiality. If examination of any prospective juror discloses any basis for disqualification, the magistrate judge shall excuse that prospective juror.

C. **Peremptory challenges.** If the highest offense charged is a petty misdemeanor, each party shall be entitled to one peremptory challenge, regardless of the number of charges. If the highest offense charged is a misdemeanor, each party shall be entitled to two peremptory challenges, regardless of the number of charges. If peremptory challenges are exercised, the magistrate judge shall excuse those prospective jurors challenged.

D. **Selection of jury.**

(1) The court shall cause the name of each prospective juror present to be entered into the court's jury management system. A list of the names of the prospective jurors present shall be prepared at the direction of the magistrate judge, and a copy of the list shall be provided to each party or the party's attorney.

(2) The prospective jurors may be examined by the parties, their attorneys, or the magistrate judge by questioning all of the prospective jurors present, as a group, or individually.

(3) When six (6) qualified jurors have been selected, they shall constitute the jury for the case to be tried.

(4) One (1) or more alternate jurors may be selected at the direction of the magistrate judge. The parties may exercise their peremptory challenges in the selection of the alternate juror or jurors, if their peremptory challenges have not been exhausted in the selection of the other jurors.

E. **Additional jurors.** If a jury cannot be completed by reading the names of those present, the sheriff or responsible person shall summon a sufficient number of jurors to fill the deficiency.

F. **Oath to jurors.** The magistrate shall administer the following oath to the jurors: "You do solemnly swear (or affirm) that you will truly try the facts of this action and give a true verdict according to the law and evidence given in court."

G. **Juror qualification and questionnaire forms; retention schedule; certification of compliance with privacy requirements.** Prior to the examination of prospective jurors under this rule, the court shall require each prospective juror to complete a juror qualification and questionnaire forms as approved by the Supreme Court, which shall be subject to the following protections:

(1) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be kept confidential unless ordered unsealed under the provisions in Rule 6-114 NMRA;

(2) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be destroyed according to the following deadlines:

(a) All copies in the possession of the court shall be destroyed ninety (90) days after expiration of the term of service of the juror or prospective juror unless an order has been entered directing their retention for a longer period of time; and

(b) All copies in the possession of the attorneys, parties, and any other individual or entity shall be destroyed within one hundred twenty (120) days after final disposition of the proceeding for which the juror or prospective juror was called unless permitted by written order of the court to retain the copies for a longer period of time, in which case the court's order shall set the deadline for destruction of those copies; and

(3) On or before the destruction deadline required under this rule, all attorneys and parties shall file a certification under oath in a form approved by the Supreme Court that they have complied with the confidentiality and destruction requirements set forth in this paragraph.

H. **Supplemental questionnaires.** The court may order prospective jurors to complete supplemental questionnaires. Unless otherwise ordered by the court, the party requesting supplemental questionnaires shall be required to pay the actual costs of producing and mailing the supplemental questionnaires. The confidentiality and destruction protections in Subparagraphs (G)(1), (2), and (3) of this rule shall apply to any supplemental questionnaires ordered under this paragraph.

[As amended, effective September 1, 1989; as amended by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

Committee commentary. — Paragraph C was amended in 2015 to clarify the way that peremptory challenges should be counted.

Paragraph G of this rule was added to clarify the procedure for using and retaining juror qualification and questionnaire forms. In cases where an issue may be raised on appeal concerning jury selection or a particular juror, the appellant may consider filing a motion in the district court within ninety (90) days of the jury verdict to request an order requiring the retention of the juror qualification and questionnaire forms for inclusion in the record proper filed in the appellate court. Paragraph G of this rule supersedes

administrative regulations concerning the retention of juror qualification and questionnaire forms.

[Adopted by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-008, effective December 31, 2018, provided additional privacy protections and destruction requirements for information contained in juror questionnaire forms, provided an exception to the confidentiality rules, made certain nonsubstantive changes, and revised the committee commentary; in Paragraph G, after the semicolon, added "certification of compliance with privacy requirements", and after "Supreme Court", added "which shall be subject to the following protections:", added subparagraph designations "(1)" and "(2)", in Subparagraph G(1), after "questionnaire forms,", added "including any electronic copies", after "possession of the court", deleted "as well as in the possession of others, including", and after "individual or entity", added "shall be kept confidential unless ordered unsealed under the provisions in Rule 6-114 NMRA", in Subparagraph G(2), added "All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity", and after "shall be destroyed", added "according to the following deadlines:", added subparagraph designation "(a)", in Subparagraph G(2)(a), added "All copies in the possession of the court shall be destroyed", and after "retention", deleted "of the form" and added "for a longer period of time; and", and added Subparagraphs G(2)(b) and G(3); and in Paragraph H, added the last sentence of the paragraph relating to confidentiality and destruction protections.

The 2015 amendment, approved by Supreme Court Order No. 15-8300-006, effective December 31, 2015, clarified the number of peremptory challenges to which the parties are entitled, made stylistic changes, and revised the committee commentary; in Paragraph A, after "six", added "(6)", after "required, the", deleted "magistrate" and added "court"; in Paragraph B, after each occurrence of "magistrate", added "judge"; in Paragraph C, in the first sentence, after "If the", added "highest", after "challenge", added "regardless of the number of charges", in the second sentence, after "If the", added "highest", after "challenges", added "regardless of the number of charges", and in the third sentence, after "magistrate", added "judge"; in Subparagraph D(1), in the first sentence, after "The", deleted "magistrate" and added "court", and in the second sentence, after "magistrate", added "judge"; and in Subparagraphs D(2) and (4), after "magistrate", added "judge".

The 2013 amendment, approved by Supreme Court Order No. 13-8300-042, effective December 31, 2013, required the names of prospective jurors to be entered into the court's juror management system; required prospective jurors to complete an approved

juror qualification and questionnaire form and supplemental questionnaires, if ordered by the court; provided for the destruction of juror qualification and questionnaire forms; in Paragraph D, Subparagraph (1), deleted the former first sentence, which required the magistrate to place the names of prospective jurors on a slip of paper and place the slips of paper into a box, added the current first sentence, and after “shall be prepared”, deleted “by” and added “at the direction of”, and after “direction of the magistrate”, deleted “or at his direction”; in Subparagraph (2), deleted the former last sentence, which provided for the drawing of additional jurors’ names to replace those excused; in Subparagraph (4), in the first sentence, after “One”, added “or more” and after “selected at the”, added “direction of the” and after “magistrate”, deleted “at his discretion, so elects”; in Paragraph E, after “completed by”, deleted “drawing additional slips” and added “reading the names of those present”; and added Paragraphs G and H.

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, in Subparagraph (2) of Paragraph D, deleted the former "(a)" designation from the beginning and deleted former (b), which read "or (b) the magistrate may draw six slips with the juror's names thereon from the box and these six jurors may be questioned as a group and individually" from the end of the first sentence.

When a magistrate court extends the time for trial beyond the six-month period, the court is not required to create a record of what were the exceptional circumstances that led to the decision to extend the time for trial. *State v. Sharp,* 2012-NMCA-042, 276 P.3d 969, cert. denied, 2012-NMCERT-003.

Law reviews. — For note, "Criminal Law - Discriminatory Use of Peremptory Challenges in Jury Selection: State of New Mexico v. Sandoval," see 19 N.M.L. Rev. 563 (1989).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 679 to 685.

Right of consent to trial of criminal case before less than 12 jurors; and effect of consent upon jurisdiction of court to proceed with less than 12, 70 A.L.R. 279, 105 A.L.R. 1114.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

50 C.J.S. Juries § 155 et seq.

6-606. Subpoena.

A. **Form; issuance.**

(1) Every subpoena shall

(a) state the name of the court from which it is issued;

(b) state the title of the action and action number;

(c) command each person to whom it is directed to attend a trial, interview, or hearing and give testimony or to produce designated books, documents, or tangible things in the possession, custody, or control of that person at a time and place therein specified; and

(d) be substantially in the form approved by the Supreme Court.

(2) All subpoenas shall issue from the court in which the matter is pending.

(3) The judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. Except as provided in Paragraph B of this rule, an attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.

(4) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. **Interviews.** A subpoena to appear to give an interview under Rule 6-504(D) NMRA will be issued only after good faith efforts to secure an interview have been unsuccessful. No subpoena to appear to give an interview shall be valid unless signed by the trial judge. A witness may be required to attend an interview anywhere within jurisdiction of the court.

C. **Service.**

(1) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena on a person named in the subpoena shall be made by delivering a copy thereof to that person and, if that person's attendance is commanded

(a) if the witness is to be paid from funds appropriated by the Legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to the witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (1)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Section 10-8-

4(A) NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Section 10-8-4(D) NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 6-209 NMRA;

(2) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

D. **Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose on the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

(2)

(a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection of the premises and copying of designated books, papers, documents, or tangible things need not appear in person at the hearing or trial.

(b) Subject to Subparagraph (D)(2) of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if that time is less than fourteen (14) days after service, serve on all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except under an order of the court by which the subpoena was issued. An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance,

(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

E. **Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

F. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served on that person may be deemed a contempt of the court punishable by fine or imprisonment.

[As amended, effective January 1, 1987; January 1, 1994; May 1, 1994; May 1, 2002; as amended, by Supreme Court Order No. 07-8300-025, effective November 1, 2007; as amended by Supreme Court Order No. 21-8300-028, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-028, effective December 31, 2021, provided that a subpoena compelling the attendance of a witness will not be issued until good faith efforts to secure a witness interview have proven unsuccessful, provided that a subpoena compelling the attendance of a witness is invalid unless signed by the trial judge, and made technical changes; and in Paragraph B, deleted “A subpoena compelling the attendance of the witness must be signed by the judge.” and added “A subpoena to appear to give an interview under Rule 6-504(D) NMRA will be issued only after good faith efforts to secure an interview have been unsuccessful. No subpoena to appear to give an interview shall be valid unless signed by the trial judge.”

The 2007 amendment, approved by Supreme Court Order No. 07-8300-025, effective November 1, 2007, added Paragraph B providing that a subpoena to compel the attendance of a witness must be signed by the judge; and relettered Subsections B to E as Paragraphs C to F.

The 2002 amendment, effective May 1, 2002, rewrote Paragraph A, which formerly related to attendance of witnesses, deleted former Paragraphs B through D relating to production of documentary evidence, service and manner of service; added present Paragraphs B, C and D; in Subsection E, deleted "magistrate" preceding "court" and deleted the former second sentence relating to service by mail.

Cross references. — For jurisdiction of the magistrate court, *see* Section 35-3-6 NMSA 1978.

For forms on subpoena, return for completion by sheriff or deputy and return for completion by other person making service, *see* Rule 4-503 NMRA.

For forms on subpoena and certificate of service, *see* Rule 9-503 NMRA.

For form on subpoena to produce document or object, *see* Rule 9-504 NMRA.

6-607. Blood and breath alcohol test reports; controlled substance analysis reports.

A. **Admissibility.** In any prosecution of an offense within the trial jurisdiction of the magistrate court, in which prosecution a convicted defendant is entitled to an appeal de novo, the following evidence is not to be excluded under the hearsay rule, even though the declarant may be available as a witness:

(1) a written report of the conduct and results of a chemical analysis of breath or blood for determining blood alcohol concentration if:

(a) the report is of an analysis conducted by a laboratory certified by the scientific laboratory division of the health department to perform breath and blood alcohol tests;

(b) the report is on a form approved by the supreme court and is regular on its face; and

(c) a legible copy of the report was mailed to the donor of the sample at least ten (10) days before trial;

(2) a print-out produced by a breath-testing device which performs an analysis of the defendant's breath to determine blood alcohol concentration if:

(a) the law enforcement officer who operated the device is certified to operate the device by the scientific laboratory of the health and environment department [department of health]; and

(b) upon request, the calibration testing records for a reasonable period of time surrounding the defendant's test are made available to the defendant for inspection prior to trial. The defendant may request a copy to be made of the testing records at the defendant's expense;

(3) a written report of the conduct and results of a chemical analysis of a substance to determine if such substance is a controlled substance and the circumstances surrounding receipt and custody of the test sample if:

(a) the report is of an analysis conducted by an authorized agency of the State of New Mexico or any of its political subdivisions, other than a law enforcement agency or agency under the direction and control of a law enforcement agency;

(b) the report is on a form approved by the supreme court and is regular on its face; and

(c) a legible copy of the report was mailed to the donor of the sample at least ten (10) days before trial.

B. **Proof of mailing; authentication.** If the evidence is a written report of the conduct and results of a chemical analysis of breath, blood or controlled substance prepared pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, except for the portion of the report which is completed by the law enforcement officer, proof of mailing and authentication of the report shall be by certificate on the report.

C. **Admissibility of other evidence.** Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in a chemical analysis of a controlled substance or blood or breath alcohol print-out or report or affect the admissibility of any other relevant evidence.

[As amended, effective October 1, 1987; October 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed in the magistrate courts on or after October 1, 1991, rewrote Paragraph A(1)(a); added Paragraph A(3); inserted "or controlled substance" and "or (3)" and made a related stylistic change in Paragraph B; and inserted "chemical analysis of a controlled substance or" in Paragraph C.

Bracketed material. — The bracketed reference to the department of health in Subparagraph A(2)(a) was inserted by the compiler, as Laws 1991, ch. 25, § 16 repealed former 9-7-4 NMSA 1978, relating to the department of health and environment, and enacted a new 9-7-4 NMSA 1978, relating to the department of health, which is defined as including the scientific laboratory. The bracketed material was not approved by the Supreme Court and is not part of the rule.

Cross references. — For report of analysis blood alcohol, *see* Rule 9-505 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 710, 713, 941 to 950.

22A C.J.S. Criminal Law § 760 et seq.

6-608. Controlled substance test and autopsy reports; preliminary hearings.

A. **Admissibility.** In any preliminary hearing, a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Section 30-31-6 through 30-31-10 NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, is not excluded by the hearsay rule, even though the declarant is available as a witness, if:

(1) the report is of an analysis conducted by:

(a) the New Mexico State Police crime laboratory;

(b) the scientific laboratory division of the Department of Health;

(c) the Office of the Medical Investigator; or

(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations pursuant to the federal Clinical Laboratory Improvement Act of 1988;

(2) the report is regular on its face and is attached to a certification form approved by the Supreme Court; and

(3) a legible copy of the certification form and report was mailed to the defendant or his counsel at least ten (10) days before the preliminary hearing.

B. **Admissibility of other evidence.** Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in such report, nor affect the admissibility of any evidence other than this report.

[As amended, effective January 1, 1987; January 1, 1995.]

ANNOTATIONS

The 1995 amendment, effective January 1, 1995, added "preliminary hearings" in the rule heading, inserted "human specimen or a" near the beginning in Paragraph A, and rewrote Paragraph A(1) by adding the subparagraph designations and adding Subparagraphs (b) and (d).

Cross references. — For the federal Clinical Laboratory Improvement Act of 1988, referred to in Subparagraph A(1)(d), *see* 42 U.S.C. § 463a.

Right of confrontation. — The right of confrontation guaranteed by the Sixth Amendment to the United States Constitution and Article II, Section 14 of the New Mexico Constitution is a trial right that does not apply to probable cause determinations in preliminary examinations. *State v. Lopez*, 2013-NMSC-047, *overruling Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789.

Right of confrontation did not apply at preliminary examination. — Where police officers found a bag containing a green leafy substance and a bag that contained a white powdery substance in defendant's vehicle during a search incident to defendant's arrest for driving with a suspended license; at defendant's preliminary examination, the magistrate court admitted a forensic laboratory report into evidence without an opportunity for the defense to personally cross-examine the laboratory analyst who prepared the report; and the report concluded that the white powdery substance was cocaine and the green leafy substance was marijuana, the magistrate court did not violate defendant's confrontation rights under the United States Constitution and the New Mexico Constitution because the constitutional right of confrontation does not apply to probable cause determinations in preliminary examinations. *State v. Lopez*, 2013-NMSC-047, *overruling Mascarenas v. State*, 1969-NMSC-116, 80 N.M. 537, 458 P.2d 789.

6-609. Instructions to juries.

A. **Procedural instructions.** After the parties have completed their presentation of the evidence and before arguments to the jury, the magistrate shall orally instruct the jury on the procedure to be followed by them in deciding the case. Such instructions shall be given in substantially the following form:

"Ladies and gentlemen of the jury:

The case will now be submitted to you for decision. Upon retiring to the jury room and before commencing your deliberations you will select one of your members as foreman. You will then determine the facts in the case from the evidence that has been presented here in open court during the trial. From the facts and the law as you understand it you will decide upon a verdict.

You are the sole judges of all disputed questions of fact. Your verdict should not be based on speculation, guess or conjecture. Neither sympathy nor prejudice should influence your verdict.

The law which the defendant is accused of violating is as follows: (Read applicable parts of statute.) In order to convict the defendant of this offense, you must find him guilty beyond a reasonable doubt. (Applicable instructions from UJI Criminal, including the instructions on reasonable doubt and criminal intent, may be added here.)

Your verdict must be unanimous. When all of you have agreed upon a verdict, you will return to open court and your foreman will then announce the verdict."

B. **UJI instructions.** If requested by a party or, if the court deems it appropriate, on the court's own motion, the court may give the jury any other applicable instructions contained in the New Mexico Uniform Jury Instructions (UJI) Criminal. Whenever the court determines the jury should be instructed on a subject and no applicable instruction on the subject is found in UJI criminal, the instruction given on that subject shall be brief, impartial and free from hypothesized facts.

[As amended, effective January 1, 1994.]

ANNOTATIONS

The 1994 amendment, effective January 1, 1994, in the last paragraph of Paragraph A, inserted "applicable parts" in the first parenthetical and rewrote the second parenthetical, which read "Applicable instructions from Uniform Jury Instructions U.J.I. Criminal may be added here"; and in Paragraph B, made stylistic changes and deleted "but no other instructions on the law shall be given" following "Criminal" in the first sentence, and added the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1077 et seq.

Duty in instructing jury in criminal prosecution to explain and define offense charged, 169 A.L.R. 315.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery, 58 A.L.R.2d 808.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 A.L.R.2d 524.

Instruction as to entrapment with respect to violation of fish and game laws, 75 A.L.R.2d 709.

Additional instruction to jury after submission of felony case, in accused's absence, 94 A.L.R.2d 270.

Instructions as to presumption of deliberation and premeditation from circumstances attending killing, 96 A.L.R.2d 1435.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 A.L.R.3d 547.

Sympathy to accused as appropriate factor in jury consideration, 72 A.L.R.3d 842.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in criminal trial, 17 A.L.R. Fed. 249.

23A C.J.S. Criminal Law § 1351 et seq.

6-610. Return of verdict; discharge of jurors.

A. **Return.** The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

B. **Several defendants.** If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

C. **Several counts.** If there are two or more counts, the jury may at any time during its deliberations return a verdict or verdicts with respect to a count or counts upon which it has agreed. If the jury cannot agree with respect to all counts, the defendants may be tried again upon the counts on which the jury could not agree.

D. **Conviction of lesser offense.** If so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

E. **Poll of jury.** When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

F. **Irregularity of verdict.** No irregularity in the rendition or reception of a verdict of which the parties have been made aware may be raised unless it is raised before the jury is discharged. No irregularity in the recording of a verdict shall affect its validity unless the defendant was in fact prejudiced by such irregularity.

G. **Discharge of jury.** After the jury has retired to consider their verdict the court shall discharge the jury from the cause when:

(1) their verdict has been received;

(2) the court finds there is no reasonable probability that the jury can agree upon a verdict; or

(3) some other necessity exists for their discharge. The court may in any event discharge the jury if the parties consent to its discharge.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1012 to 1019.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed, 75 A.L.R.4th 91.

Criminal law: propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated, 14 A.L.R.5th 89.

23A C.J.S. Criminal Law § 1395 et seq.

ARTICLE 7
Judgment and Appeal

6-701. Judgment.

A final order shall be entered in every case. If the defendant is found guilty, a judgment of guilty shall be rendered. If the defendant has been acquitted, a judgment of not guilty shall be rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The court shall give notice of the final order in accordance with Paragraph B of Rule 6-209 NMRA. A final order includes, but is not limited to, a judgment and sentence or the back of the traffic citation on a penalty assessment where the defendant pled guilty or no contest and did not receive a deferred sentence. If the traffic citation is the final order, a copy need not be provided to the prosecution unless requested.

[As amended, effective October 1, 1992; January 1, 1995; as amended by Supreme Court Order No. 11-8300-013, effective April 25, 2011.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-013, effective April 25, 2011, required that a final order be entered in every case and provided that a final order may be a judgment and sentence or the back of a traffic citation on a penalty assessment if the defendant pled guilty or no contest and did not receive a deferred sentence and that if the final order is a traffic citation, the final order need not be given to the prosecution unless the prosecution requests a copy.

The 1995 amendment, effective January 1, 1995, deleted "costs" following "Judgment" in the rule heading, deleted the Paragraph A designation and the paragraph heading "Judgment" in former Paragraph A, and deleted former Paragraph B relating to costs against the defendant.

The 1992 amendment, effective for cases filed in the magistrate courts on and after October 1, 1992, in Paragraph A, substituted "the defendant has" for "he has" in the second sentence and added the fourth sentence; and deleted Paragraph C, relating to fine receipts.

Cross references. — For form on judgment and sentence, *see* Rule 9-601 NMRA.

For form on final order on criminal complaint, *see* Rule 9-603 NMRA.

For form on agreement to pay the fine and court costs, *see* Rule 9-605 NMRA.

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. *Cowan v. Davis*, 1981-NMSC-054, 96 N.M. 69, 628 P.2d 314 (1981).

Effect of failure to obtain timely trial date. — Failure to comply with the six-month rule for obtaining a trial date under Paragraph B of Rule 6-702 NMRA, absent an extension, requires a dismissal of the appeal and remand to the magistrate court for

enforcement of its judgment. *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Court has power to impose conditions on deferred or suspended sentences. 1979 Op. Att'y Gen. No. 79-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

24 C.J.S. Criminal Law § 1458 et seq.

6-702. Advising defendant of right to appeal.

At the time of entering a judgment and sentence, the court shall advise the defendant of the defendant's right to a new trial in the district court. The court shall also advise the defendant that if the defendant wishes to appeal, a notice of appeal shall be filed in the district court within fifteen (15) days after entry of the judgment and sentence.

[As amended, effective September 1, 1990; January 1, 1997; October 15, 2002; as amended by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012.]

ANNOTATIONS

The 2012 amendment, approved by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012, eliminated the requirement that appeals be tried by the district court within six months; deleted the paragraph letter and the title, "Duty of magistrate court", of former Paragraph A; in the second sentence, after "shall be filed", added "in the district court"; deleted former Paragraph B, which required the defendant to obtain a trial in district court within six months of an appeal and to request a trial date in the notice of appeal; and deleted former Paragraph C, which provided for automatic affirmance if the appeal was not tried in district court within six months or the time for trial was not extended by the Supreme Court.

The 2002 amendment, effective October 15, 2002, substituted "judgment and sentence" for "conviction" in Paragraph C.

The 1997 amendment, effective January 1, 1997, deleted "or within fifteen (15) days after the filing of the notice of appeal" from the end of Paragraph B, and substituted "the defendant's right" for "his right" in Paragraph A.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, rewrote the introductory paragraph and former Paragraph A to form Paragraph A; in Paragraph B, substituted "The defendant" for "He", deleted "date" following "trial" in the first sentence, and added the second sentence; and in Paragraph C, substituted "Any appeal which has not been" for "If his appeal is not", deleted "his appeal" preceding "will be dismissed", and substituted "the conviction" for "his conviction".

Cross references. — For form on judgment and sentence, *see* Rule 9-601 NMRA.

For form on final order on criminal complaint, *see* Rule 9-603 NMRA.

For form on agreement to pay the fine and court costs, *see* Rule 9-605 NMRA.

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. *Cowan v. Davis*, 1981-NMSC-054, 96 N.M. 69, 628 P.2d 314.

Effect of failure to obtain timely trial date. — Failure to comply with the six-month rule for obtaining a trial date under this rule, absent an extension, requires a dismissal of the appeal and remand to the magistrate court for enforcement of its judgment. *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Court has power to impose conditions on deferred or suspended sentences. 1979 Op. Att'y Gen. No. 79-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

24 C.J.S. Criminal Law § 1458 et seq.

6-703. Appeal.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a criminal action may appeal, as permitted by law, to the district court of the county within which the magistrate court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate court clerk's office in accordance with Rule 5-826 NMRA.

B. **Conditions of release.** The appearance bond set to ensure the defendant's appearance for trial shall be released. The court may set an appeal bond to ensure the defendant's appearance in the district court on appeal and may set any conditions of release as are necessary to ensure the appearance of the defendant or the orderly administration of justice. The magistrate court may utilize the criteria listed in Rule 6-401(C) NMRA and may also consider the fact of the defendant's conviction and the length of the sentence imposed. The amount of the appeal bond and the conditions of release shall be included on the judgment and sentence. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to trial. Upon filing of the notice of appeal, the appeal bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the appeal bond until remand to the magistrate court.

C. **Review of terms of release.** If the magistrate court has refused release pending appeal or has imposed conditions of release that the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release that has been endorsed by the clerk of the district court shall be filed with the magistrate court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the magistrate court.

D. **Stay of execution of sentence.** Execution of any sentence, fine, fee, or probation shall be stayed pending the results of the appeal to district court. An abstract of record of the defendant's conviction shall not be prepared and sent in accordance with Section 66-8-135 NMSA 1978 until the later of the following dates:

(1) expiration of the deadline for filing a notice of appeal under this rule if the defendant does not file a notice of appeal; or

(2) ten (10) days after remand from the district court or issuance of mandate by the Court of Appeals or Supreme Court if the defendant does file a notice of appeal under this rule.

[As amended, effective September 1, 1989; September 1, 1990; January 1, 1994; January 1, 1995; January 1, 1997; February 16, 2004; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; by Supreme Court Order No. 08-8300-055, effective January 15, 2009; by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Former Paragraph H was redesignated as Paragraph B and revised to clarify that bond liability terminates upon a finding of guilt pursuant to NMSA 1978, § 31-3-10 (1987). Paragraph D was added to clarify that all aspects of the sentence shall be stayed pending appeal because there were wide variances in interpretation and practice. The provision in Paragraph D regarding preparation and issuance of the abstract of record of the defendant's conviction is intended to reconcile the potentially conflicting ten (10) day deadline in NMSA 1978, Section 66-8-135 and the fifteen (15) day notice of appeal deadline in this rule and NMSA 1978, Section 35-13-1.

[Adopted by Supreme Court Order No. 12-8300-019, effective August 3, 2012.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, revised the citation to Rule 6-401 NMRA to reflect amendments to that rule, and made other stylistic changes to the rule; in Paragraph A, after "Rule 5-826 NMRA", deleted "of the Rules of Criminal Procedure for the District Courts"; in Paragraph B, replaced each occurrence of "assure" with "ensure", after "criteria listed in", deleted "Paragraph B of", and after "Rule 6-401", added "(C)"; and in Paragraph C, replaced each occurrence of "which" with "that".

The 2012 amendment, approved by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012, required that appeals follow the Rules of Criminal Procedure for the District Courts; terminated bond liability upon a finding of guilt; authorized the court to set an appeal bond; specified the criteria for setting conditions of release; stayed all aspects of a sentence pending appeal; provided deadlines for the preparation of an abstract of record of the defendant's conviction; in Paragraph A, added "in accordance with Rule 5-826 NMRA of the Rules of Criminal Procedure for the District Courts", deleted the former third sentence which provided that the three day mailing period did not apply to the time limits for appeal, deleted the former fourth sentence which provided for the filing of a notice of appeal before the filing of the judgment, and deleted the former fifth sentence which provided that no docket fee or cost would be imposed on the state or political subdivision or a defendant represented by a public defender or court appointed counsel; relettered Paragraph H as Paragraph B; in Paragraph B, deleted the former first through the sixth sentences which provided for the review of the conditions of release pending appeal, criteria for setting conditions of release, the continuance of former conditions of release and bond unless changed by the court, and added the first four sentences of the paragraph; added Paragraph D; deleted former Paragraph B which provided for the filing of a notice of appeal; deleted former Paragraph C which required that the notice of appeal substantially conform to the approved form; deleted former Paragraph D which provided for service of the notice of appeal; deleted former Paragraph E which provided for the docketing of the appeal; deleted former Paragraph F which provided for the record on appeal; deleted former Paragraph G which provided for the correction of the record; deleted former Paragraph J which provided for a trial *de novo*; deleted former

Paragraph K which provided for notice of a trial setting by the clerk of the district court; deleted former Paragraph L which required a trial in district court to be held within six months; deleted former Paragraph M which provided for the extension of the time for trial by the Supreme Court; deleted former Paragraph N which provided for the procedure on appeal; deleted former Paragraph O which provided for the disposition of appeals by the district court; deleted former Paragraph P which provided for remand to the magistrate court; deleted former Paragraph Q which provided for appeals to the Supreme Court or to the Court of Appeals; and deleted former Paragraph R which provided for the return of the record.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-055, effective January 15, 2009, in Paragraph L, changed "shall" to "may" and added ", or the court may consider other sanctions as appropriate" to the end of the last sentence.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, amended Paragraph L to delete the time limitations for the disposition of criminal cases and adopt by reference from Rule 5-604 NMRA the following time limits for commencement of trial:

B. **Time limits for commencement of trial.** The trial of a criminal case or habitual criminal proceeding shall be commenced six (6) months after whichever of the following events occurs latest:

(2) if the proceedings have been stayed to determine the competency of the defendant to stand trial, the date an order is filed finding the defendant competent to stand trial;

(3) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed;

(4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal;

(8) the date the court allows the withdrawal of a plea or the rejection of a plea made pursuant to Paragraphs A to F of Rule 5-304 NMRA.

The 2003 amendment, effective February 16, 2004, added the last two sentences in Paragraph H.

The 1997 amendment, effective January 1, 1997, in Paragraph A, substituted "aggrieved by the judgment or final order in a criminal action" for "aggrieved by any final order or judgment" in the first sentence, inserted "in the district court" in the second sentence, and rewrote the last sentence; in Paragraph B, inserted "with proof of service" in Subparagraph (1) and "promptly" in Paragraph (2), and added Subparagraph (2)(b); rewrote Paragraphs C and D which formerly related to stay and docketing of the appeal, respectively; added Paragraph E; redesignated former Paragraph E as Paragraph F

and rewrote that paragraph; added Paragraph G and redesignated former Paragraphs F through K as Paragraphs H through M; rewrote Paragraph H; added the last two sentences in Paragraph I; rewrote Paragraph J; substituted "appeals" for "cases" in Paragraph K; substituted "a trial *de novo* appeal" for "the appeal" in Paragraph L; rewrote Paragraph M; added Paragraph N; deleted former Paragraph L relating to final order and remand to magistrate court; and added Paragraphs O to R.

The 1995 amendment, effective January 1, 1995, added Paragraph I, and redesignated the remaining paragraphs accordingly and made related changes.

The 1994 amendment, effective January 1, 1994, in Paragraph A, deleted "by defendant" in the paragraph heading and rewrote the paragraph, which read "A defendant who is aggrieved by any judgment rendered by the magistrate court may appeal to the district court of the county within which the magistrate court is located within fifteen (15) days after entry of the judgment or final order"; and substituted "any recording of the proceedings" for "any record of proceedings" in Subparagraph E(2).

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, deleted Subparagraph (5) in Paragraph E, which read "the record of the hearing in the magistrate court, if any".

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, added Paragraph K.

Cross references. — For form on notice of appeal, *see* Rule 9-607 NMRA.

For form on title page of transcript of criminal proceedings, *see* Rule 9-608 NMRA.

For notice of appeal, *see* Rule 9-607 NMRA.

For title page of transcript of proceedings, *see* Rule 9-608 NMRA.

For the withdrawal or rejection of a plea by the magistrate court, *see* Rule 6-501 NMRA.

De novo appeal. — Where defendant was charged in magistrate court with driving while intoxicated and waived arraignment; defendant’s trial was delayed more than six months; the magistrate court denied defendant’s motion to dismiss for failure to comply with the six-month rule and extended the time for trial; and on appeal, the district court dismissed the case because the state had failed to respond, in writing, to defendant’s magistrate court motion to dismiss and the magistrate court failed to provide a statement in the record as to the bases upon which the magistrate court found exceptional circumstances to extend the time limit for trial, the district court improperly treated the matter as an appeal-on-the-record appeal instead of as a de novo appeal in which district court would base its decision on an independent determination of whether the violation of the six-month rule warranted dismissal. *State v. Sharp,* 2012-NMCA-042, 276 P.3d 969, cert. denied, 2012-NMCERT-003.

An appeal from a finding of direct criminal contempt shall be tried de novo in the district court. — Where the magistrate court filed an order finding that defendant committed direct criminal contempt during a video arraignment, and where defendant appealed to the district court, the district court did not have jurisdiction to conduct an on-the-record review; the magistrate court is not a court of record, and therefore appeals from the magistrate court shall be tried de novo in the district court. The district court was required to hold a trial de novo, in which the state was required to prove beyond a reasonable doubt that defendant committed direct criminal contempt of the magistrate court. *State ex rel. Bevacqua-Young v. Steele*, 2017-NMCA-081, cert. denied.

Order of dismissal is an appealable final order. — Where, after a hearing pursuant to a "Notice of Probable Cause/Bench Trial", the magistrate court entered an order which dismissed the action due to no probable clause, the order was an appealable final order. *State v. Montoya*, 2008-NMSC-043, 144 N.M. 458, 188 P.3d 1209.

Order suppressing evidence is not a final order. *State v. Heinsen*, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008.

Magistrate court orders suppressing evidence were not final orders in either an actual or practical sense. *State v. Heinsen*, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008.

Former rule applies to appeal pending on effective date of amendments. — N.M. Const., art. IV, § 34, which provides that no act of the legislature shall change rules of procedure in any pending case, applies to court rules as well as to legislation. *State v. DeBaca*, 1977-NMCA-089, 90 N.M. 806, 568 P.2d 1252.

Applicability of rule. — District court erred in reversing defendant's convictions on grounds that Rule 5-604 NMRA was violated; because the case was heard before a magistrate, Rule 5-604 NMRA was inapplicable and this rule should have been applied. *State v. Wilson*, 1998-NMCA-084, 125 N.M. 390, 962 P.2d 636.

Preferred procedure for appeal to Court of Appeals after conditional plea is entered in magistrate court is for the district court to issue a final and appealable order dismissing the appeal or to issue an order granting the motion to suppress. *State v. Celusniak*, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Magistrate controls judgment until opportunity to appeal expires. — A magistrate has continuing control over a criminal judgment only until such time as the aggrieved party's opportunity to file an appeal expires. The time limitation for filing the appeal is 15 days. *State v. Ramirez*, 1981-NMSC-125, 97 N.M. 125, 637 P.2d 556.

Officer may not continue municipal or magistrate case in district court. — A peace officer who has prosecuted a criminal case in magistrate or municipal court may not continue to prosecute the case in district court after an appeal of the magistrate or municipal court judgment has been filed in district court. 1989 Op. Att'y Gen. No. 89-27.

Limited authority of district court upon expiration of six-month period. — Absent a hearing on an appeal from a magistrate court within six months of the date of the notice of appeal, the district court's only authority is to dismiss the appeal and remand the cause to the magistrate court for enforcement of its judgment. *State v. Rivera*, 1978-NMCA-089, 92 N.M. 155, 584 P.2d 202; *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Late filing of appeal. — Because timely filing of an appeal is a mandatory precondition rather than an absolute jurisdictional requirement, a trial court may, under unusual circumstances, use its discretion and entertain an appeal even though it is not timely filed. The decision to dismiss an appeal is extreme and must be determined on a case-by-case basis. *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

Court error may excuse late appeal. — One unusual circumstance which would warrant permitting an untimely appeal is if the delay is a result of judicial error. To deny a party the constitutional right to an appeal because of a mistake on the part of the court runs against the most basic precepts of justice and fairness. *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

Order of remand not final. — When the district court enters an order of remand to the magistrate court that does not resolve the issue of sentencing, the order is not final and appealable. *State v. Montoya*, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. granted, 2005-NMCERT-001.

Sentence must be imposed prior to final order. — The district court must impose a sentence prior to remanding a case to magistrate court for enforcement of the district court's final order. *State v. Cordova*, 1992-NMCA-055, 114 N.M. 22, 833 P.2d 1203.

An accused who has entered into a plea agreement is not an "aggrieved party" entitled to an appeal, although the agreement is not reduced to writing, as required by Rule 6-502. *State v. Johnson*, 1988-NMCA-029, 107 N.M. 356, 758 P.2d 306.

Scope of appeal. — Where defendant did not challenge his convictions on appeal and did not claim to be aggrieved, but only challenged constitutionality of a federal statute and its effect on him, defendant lacked the right to appeal his conviction. *State v. Garcia*, 2003-NMCA-045, 133 N.M. 444, 63 P.3d 1164.

There is no authority provided in the magistrate rules which allows an appeal for other than judgments or final orders from magistrate courts to the district courts. *State v. Heinsen*, 2004-NMCA-110, 136 N.M. 295, 96 P.3d 627, cert. granted, 2004-NMCERT-008.

Failure of counsel to timely appeal conditional plea agreement. - Defense counsel's failure to timely appeal defendant's magistrate court conditional plea agreement presumptively constituted ineffective assistance of counsel and the district court's dismissal of defendant's appeal was improper. *State v. Eger*, 2007-NMCA-039, 141 N.M. 379, 155 P.3d 784.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time, 69 A.L.R.3d 933.

24 C.J.S. Criminal Law §§ 1674 et seq.

6-704. Harmless error; clerical mistakes.

A. **Harmless error.** Error in either the admission or the exclusion of evidence and error or defect in any ruling, order, act or omission by the court or by any of the parties is not grounds for granting a new trial or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice.

B. **Clerical mistakes.** Clerical mistakes in final orders or other parts of the file and errors therein arising from oversight or omission may be corrected by the magistrate at any time on the judge's own initiative or on the request of any party after such notice to the opposing party, if any, as the magistrate orders.

[As amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "on the judge's own initiative" for "of his own initiative" in Paragraph B, and deleted the former last sentence of Paragraph B relating to correction of mistakes before filing the transcript.

Magistrate court had the power to correct clerical error. — Where defendant was charged with two misdemeanor crimes, driving with a suspended license and driving without insurance, and where, following defendant's conviction in the magistrate court, the court noticed that the foreperson had signed both the "guilty" verdict form and the "not guilty" verdict form associated with each count, the district court did not err in denying defendant's motion to dismiss because the signed "not guilty" verdict forms represented clerical error, evidenced by a jury poll, and the magistrate court was empowered to correct the clerical error. *State v. Martinez*, 2020-NMCA-010, cert. denied.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes harmless or plain error under Rule 52 of the Federal Rules of Criminal Procedure - Supreme Court cases, 157 A.L.R. Fed. 521.

6-705. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 12-8300-019, Rule 6-705 NMRA, relating to dismissals of appeals for failure to comply with rules or failure to appear, was withdrawn effective August 3, 2012.

ARTICLE 8
Special Proceedings

6-801. Modification of sentence.

The magistrate court may modify but not increase a sentence or fine at any time during the maximum period for which incarceration could have been imposed. No sentence shall be modified without prior notification to all parties and a hearing thereon. No sentence shall be modified while the appeal is pending. Changing a sentence from incarceration to probation constitutes a permissible reduction of sentence under this rule. No judgment of conviction shall be changed. No fine paid shall be ordered returned.

ANNOTATIONS

Cross references. — For form on judgment and sentence, *see* Rule 9-601 NMRA.

For form on final order on criminal complaint, *see* Rule 9-603 NMRA.

For form on agreement to pay the fine and court costs, *see* Rule 9-605 NMRA.

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. *Cowan v. Davis*, 1981-NMSC-054, 96 N.M. 69, 628 P.2d 314.

Effect of failure to obtain timely trial date. — Failure to comply with the six-month rule for obtaining a trial date under Paragraph B of Rule 6-702 NMRA, absent an extension, requires a dismissal of the appeal and remand to the magistrate court for enforcement of its judgment. *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. *State v. Hrabak*, 1983-NMCA-100, 100 N.M. 303, 669 P.2d 1098.

Court has power to impose conditions on deferred or suspended sentences. 1979 Op. Att'y Gen. No. 79-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

24 C.J.S. Criminal Law § 1660 et seq.

6-802. Return of the probation violator.

A. **Probation.** The court shall have the power to suspend or defer a sentence and impose conditions of probation during the period of suspension or deferral.

B. **Violation of probation.** At any time during probation if it appears that the probationer may have violated the conditions of probation

(1) the court may issue a warrant or bench warrant for the arrest of a probationer for violation of any of the conditions of probation. The warrant shall order the probationer to the custody of the court or to any suitable detention facility;

(2) the court may issue a notice to appear to answer a charge of violation.

C. **Initial hearing.**

(1) **Probationer not in custody.** A probationer who is not in custody shall be noticed to appear not more than fifteen (15) days after the filing of a probation violation or, if no violation is filed, not more than fifteen (15) days after the court has reason to believe that the probationer may have violated the conditions of probation.

(2) **Probationer in custody**. A probationer who is in custody shall be arraigned on the probation violation as soon as practicable, but in any event no later than three (3) days after the probationer is detained if the probationer is being held in the local detention center, or no later than five (5) days after the probationer is detained if the probationer is not being held in the local detention center.

D. **Adjudicatory hearing.** On notice to the probationer, the court shall hold a hearing on the violation charged. If the probationer is in custody the hearing shall be held as soon as practicable, but in any event no later than ten (10) days after the initial hearing. If the probationer is not in custody the hearing shall be held no later than thirty (30) days after the initial hearing. If the violation is established, the court may continue the original probation, revoke the probation, and either order a new probation or require the probationer to serve the balance of the sentence imposed or any lesser sentence. If imposition of sentence was deferred, the court may impose any sentence which might

originally have been imposed, but credit shall be given for time served on probation, unless that credit is specifically prohibited by statute.

E. **Appeals.** The decision of the court to revoke probation may be appealed to the district court as otherwise provided in these rules. The only issue the district court will address on appeal will be the propriety of the revocation of probation. The district court shall not modify the sentence of the magistrate court.

[As amended, effective September 1, 1989; May 1, 2002; as amended by Supreme Court Order No. 13-8300-007, effective for all cases pending or filed on or after May 5, 2013; as amended by Supreme Court Order No. 21-8300-027, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-027, effective December 31, 2021, set certain time limits for initial probation violation hearings and adjudicatory probation violation hearings, distinguishing between in-custody probationers and out-of-custody probationers; added a new Paragraph C and redesignated former Paragraphs C and D as Paragraphs D and E, respectively; and in Paragraph D, changed the paragraph heading from “Hearing” to “Adjudicatory hearing”, and added “If the probationer is in custody the hearing shall be held as soon as practicable, but in any event no later than ten (10) days after the initial hearing. If the probationer is not in custody the hearing shall be held no later than thirty (30) days after the initial hearing.”

The 2013 amendment, approved by Supreme Court Order No. 13-8300-007, effective May 5, 2013, required the court to give credit for time served on probation if the court imposes a new sentence unless the credit is specifically prohibited by statute; and in Paragraph C, in the third sentence, after "time served on probation", added "unless such credit is specifically prohibited by statute".

The 2002 amendment, effective May 1, 2002, in Paragraph A, deleted "violation of probation" in the bold heading and deleted the second sentence relating to the violation of probation; and rewrote Paragraphs B and C formerly relating to issuance of warrants and imposition of sentence, respectively.

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, in Paragraph C, substituted the present second sentence for the former second sentence, which read "Credit must be given for the time served on probation".

Appeal of probation revocation. — Because a probation revocation proceeding in magistrate court is not of record, a defendant who appeals the probation revocation is entitled to a de novo hearing in district court. *State v. Begay*, 2010-NMCA-089, 148 N.M. 685, 241 P.3d 1125, *overruled by State v. Radosevich*, 2018-NMSC-028.

6-810. Fugitive complaint.

A. **Complaint.** A fugitive action may be commenced in the magistrate court by filing a sworn fugitive complaint:

(1) identifying the defendant;

(2) identifying the demanding state for which the defendant's arrest is being made;

(3) stating the grounds for extradition; and

(4) stating either that a warrant for the arrest of the defendant is sought or the date and time of arrest for extradition.

The complaint may be amended by the state without leave of court prior to arraignment.

B. **Where commenced.** A fugitive action shall be commenced in the county in which the defendant has been arrested or where the defendant is expected to be found.

C. **Service of complaint.** If the fugitive is arrested without a warrant, a fugitive complaint shall be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. The complaint shall be filed with the magistrate court at the time it is given to the defendant. If the court is not open at the time the copy of the complaint is given to the defendant, the complaint shall be filed the next business day of the court.

[Adopted, effective October 1, 1996.]

ANNOTATIONS

Cross references. — For Uniform Criminal Extradition Act, *see* 31-4-1 NMSA 1978 et seq.

6-811. Arraignment and commitment hearing prior to issuance of the governor's rendition warrant.

A. **Time.** Within two (2) business days after arrest, the defendant shall be brought before the court for an arraignment and commitment hearing.

B. **Procedure.** At the arraignment, the court shall:

(1) inform the defendant of the defendant's right to retain counsel;

(2) provide the defendant with copies of any documents on which the prosecution will rely at the commitment hearing;

(3) inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to obtain a writ of habeas corpus pursuant to law; and

(4) ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. **Waiver of extradition.** The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. **Identity question.** If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. **Conditions of release.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release on the surrender of the defendant upon issuance of the rendition warrant by the governor.

F. **Time limits for governor's rendition.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending arrest on a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending arrest on a governor's rendition warrant for a period of not more than sixty (60) additional days.

G. **Dismissal of fugitive complaint.** If a governor's rendition warrant is not filed pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as provided by Paragraph F of this rule, the fugitive complaint shall be dismissed without prejudice and the defendant released. The time limits set forth in Paragraph F in this rule do not constitute the deadline for the completion of extradition proceedings under Rule 5-822 NMRA.

[Adopted, effective October 1, 1996; as amended by Supreme Court Order No. 10-8300-030, effective December 3, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-030, effective December 3, 2010, in Paragraph F, after "thirty (30) days pending", deleted "receipt of" and added "arrest on", and in the second sentence, after "release pending", deleted

"issuance of" and added "arrest on"; and in Paragraph G, in the first sentence, after "governor's rendition warrant is not filed", deleted "within the times" and added "pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as", after "Paragraph F", added "of this rule", and added the last sentence.

Cross references. — For Uniform Criminal Extradition Act, *see* 31-4-1 NMSA 1978 et seq.

For commitment to await requisition, bail, *see* Section 31-4-15 NMSA 1978.

6-812. Transfer of fugitive actions after issuance of a governor's rendition warrant.

If a fugitive action is pending in the magistrate court when the governor issues a warrant for the arrest and extradition of the defendant, the fugitive action shall be transferred to the district court for further action.

[Adopted, effective October 1, 1996.]

ANNOTATIONS

Cross references. — For Uniform Criminal Extradition Act, *see* 31-4-1 NMSA 1978 et seq.