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. 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 which 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 except as provided by Rule 6-601 NMRA of these rules.

B. **Nonjudicial proceedings.** Proceedings, other than judicial 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.

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 upon 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.]

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

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

The 2008 amendment, approved by Supreme Court Order 08-8300-07, effective January 29, 2008, added Paragraph C.

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.

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. 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 director of the Administration Office of the Courts and shall not become effective until approved by the director.

B. **Forms.** Forms used or distributed by the magistrate courts shall be submitted to the director of the Administrative 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.

[Approved, effective October 31, 1974; as amended, effective January 1, 1987; as amended by Supreme Court Order 07-8300-34, effective January 22, 2008.]

ANNOTATIONS

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.

The 2007 amendment, approved by Supreme Court Order 07-8300-34, 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.

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 2004 amendment 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.

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.

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 pursuant to 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 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*. Upon the filing of a notice of excusal, 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.

(c) *Reassignment*. If the parties fail to agree on a judge, the selection system administered by the Supreme Court shall, within ten (10) days, 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.

(d) *Designation by district court*. If all magistrate judges in the magistrate district have been excused or have recused themselves, within ten (10) days after service of the last notice of excusal or recusal, 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, 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, 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, within ten (10) days after filing of the last notice of recusal or excusal, 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 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, 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.]

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

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.

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

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

The 2007 amendment, approved by Supreme Court Order 07-8300-34, 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 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 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 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".

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 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 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 such election on all parties.

F. **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.

G. **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 F 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 such 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.

H. **Stay.** If a letter is filed with the district court and magistrate court certifying the issue of recusal to the district court pursuant to Paragraph G 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.

I. **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 such 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 07-8300-34, effective January 22, 2008.]

ANNOTATIONS

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.

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

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 2007 amendment, approved by Supreme Court Order 07-8300-34, 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.

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

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 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".

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, such 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.

[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.]

Committee commentary. — Although this rule requires that a jury trial must be prosecuted by an attorney, this rule 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, a law enforcement officer may act as a prosecutor in all respects.

Prior to December 31, 2008, this rule authorized private citizens to pursue criminal prosecutions in magistrate court, either on their own or through a special prosecutor. In 2013, the Court withdrew former Paragraphs D and E in recognition of the 2008 amendment, which removed the authority for such private prosecutions. Former Paragraph D was entitled "Special prosecutor" and provided that "[n]othing in this rule shall be construed to allow an attorney licensed to practice law in this state to prosecute a case for any party without first having been duly appointed as a special prosecutor by the district attorney for the judicial district in which the court is located." Former Paragraph E was entitled "District attorney" and provided that "[n]othing in this rule shall be construed to prevent the district attorney in the judicial district in which the complaint is filed from dismissing the case or entering an appearance and assuming prosecutorial control over the case." Paragraphs D and E are no longer necessary because they addressed the situation in which a private citizen could pursue a criminal complaint through a special prosecutor. The withdrawal of Paragraphs D and E does not preclude a district attorney from appointing a special prosecutor to prosecute.

[Adopted by Supreme Court Order No. 13-8300-033, effective for all cases filed on or after December 31, 2013.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-44, 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".

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.

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;

(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.]

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

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

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.

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. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

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.

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".

The 2008 amendment, approved by Supreme Court Order No. 08-8300-44, 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".

6-111. Contempt.

A. **Jurisdiction.** A magistrate has jurisdiction to punish for contempt only for:

(1) disorderly behavior in the presence of the court or close enough to the court that it obstructs the administration of justice;

(2) misconduct of court officers in official transactions; and

(3) disobedience or resistance to any lawful order, rule or process of the court.

B. **Disposition upon notice and hearing.** A contempt, except as provided in Paragraph C of this rule, shall be punished only after notice and hearing. The notice shall state the essential facts constituting the contempt charged. The notice may be given:

(1) orally by the judge in open court in the presence of the defendant;

(2) by a summons;

(3) by a bench warrant; or

(4) by an order to show cause.

The defendant shall be entitled to bail as provided in these rules. The defendant shall be given sufficient notice of hearing to permit the preparation of a defense. If the defendant is found guilty of contempt, the court shall enter judgment and sentence within the limits of its jurisdiction.

C. **Direct contempt.** A direct contempt may be punished summarily if the judge by written order certifies to having seen or heard the conduct constituting the contempt and that it was committed in the presence of the court. The written order of contempt shall recite the facts and shall be signed by the judge and entered of record.

D. **Appeal.** Any person found guilty of contempt may appeal to the district court pursuant to the rules of procedure governing appeals from the magistrate court in criminal cases.

[As amended, effective January 1, 1996.]

ANNOTATIONS

The 1996 amendment, effective January 1, 1996, designated the existing provisions as Paragraph A and rewrote that paragraph, and added Paragraphs B through D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt, 8 A.L.R.3d 657.

Publication or broadcast, during course of trial, of matter prejudicial to criminal defendant as contempt, 33 A.L.R.3d 1116.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

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. 08-8300-44, 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.

(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.]

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 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.]

ARTICLE 2
Initiation of Proceedings

6-201. Commencement of action.

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

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

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

(3) a citation issued 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;

(4) an order to show cause why a person should not be held in direct or indirect contempt; or

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

A copy of every citation issued shall be delivered to the person cited, and the original shall be filed as soon as practicable with the magistrate court.

B. **Jurisdiction.** Magistrates 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 which are not within magistrate court trial jurisdiction, if the defendant is arrested without a warrant, a criminal complaint shall be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. If the defendant is in custody, 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, 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 next business day of the court, 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 such 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. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

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

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.

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 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 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 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, in Paragraph A, added Subparagraphs (4) and (5).

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 held within a reasonable time but in any event not later than ten (10) days after the first appearance if the defendant is in custody and no later than sixty (60) days after the first appearance if the defendant is not in custody.

(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 that extraordinary circumstances 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 case shall 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.

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 07-8300-25, 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.]

Committee commentary. — 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.]

ANNOTATIONS

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 .

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

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

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

The 2007 amendment, approved by Supreme Court Order 07-8300-25, 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 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".

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 trial.

(2) ***Probable cause found.*** If the court finds probable cause that the defendant committed an offense, 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 shall set conditions of release in accordance with Rule 6-401 NMRA. If the court finds that there is probable cause the court shall make such finding in writing.

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order 07-8300-25, 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.]

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

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

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

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.

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 2007 amendment, approved by Supreme Court Order 07-8300-25, 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 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.

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 and for good cause shown, 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; amended by Supreme Court Order No. 15-8300-008, effective for all cases pending or filed on or after December 31, 2015.]

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

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.

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.

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.

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

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.

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.

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 Paragraph G of Rule 6-208 NMRA, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security 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 which issued 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.]

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

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.

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.

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 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".

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.

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. 15-8300-015, effective for all cases filed on or after December 31, 2015; amended by Supreme Court Order No. 15-8300-025, withdrawing amendments adopted by Supreme Court Order No. 15-8300-015.]

ANNOTATIONS

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.

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.

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 they are 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 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 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:

(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 such 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.]

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

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.

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.

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.

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.]

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 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.

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.

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; motions.

A. **Pleadings.** In actions within magistrate trial jurisdiction, the pleadings shall consist of the complaint and the plea. The plea shall be one of the following: guilty, not guilty, not guilty by reason of insanity and nolo contendere. No other pleas or pleadings shall be permitted. 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. **Refusal of defendant to enter a plea.** If the defendant fails to enter a plea, the court shall enter a plea of not guilty on behalf of such defendant.

[As amended, effective January 1, 1987.]

ANNOTATIONS

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 which 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. **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 may move to suppress such evidence.

(2) Except for good cause shown, motions to suppress must be filed and determined prior to trial.

C. **Motions and other papers.** 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.

D. **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 opposing counsel shall accompany the motion. The motion is not granted until the order is approved by the court.

E. **Opposed motions.** The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The moving party shall request concurrence from opposing counsel 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 pursuant to Rule 6-801 NMRA.

Notwithstanding the provisions of any other rule, counsel 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.

F. **Response.** Unless otherwise specifically provided in these rules, any written response shall be filed 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.

[As amended, effective January 1, 1987; September 1, 1990; as amended by Supreme Court Order 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.]

Committee commentary. — Paragraph B 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 & 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 6-506A 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 suppression issue is untimely raised, the trial judge may order a continuance in order to ascertain whether there is good cause for the late filing. 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 filing and hold a suppression hearing. Absent good cause shown, the judge may deny the motion for failure to comply with the rule.

[Adopted by Supreme Court Order No. 13-8300-044, effective for all cases filed or pending on or after December 31, 2013.]

ANNOTATIONS

Cross references. — For comparable district court rule, *see* 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.

The 2006 amendment, approved by Supreme Court Order 06-8300-37, 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 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.

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. Bail.

A. **Right to bail.** The court shall not deny bail before conviction to a person charged with an offense within the court's trial jurisdiction. Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed pursuant to Paragraph C of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required. If the court finds that the defendant poses a danger to the complaining witness or alleged victim, the court may refuse to allow the complaining witness or alleged victim to post bond for the defendant. This rule does not prevent the use of community funds to post a bond. If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph C of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community:

(1) the execution of a bail bond in a specified amount executed by the person and secured by a deposit of cash of ten percent (10%) of the amount set for bail or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law [59A-51-1 NMSA 1978] provided such paid surety also executes a bail bond for the full amount of the bail set;

(2) the execution of a bail bond by the defendant or by unpaid sureties in the full amount of the bond and the pledging of real property as required by Rule 6-401A NMRA; or

(3) the execution of a bail bond with licensed sureties as provided in Rule 6-401B NMRA or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.

Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.

B. **Factors to be considered in determining conditions of release.** The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, 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 a narcotic drug;

(2) the weight of the evidence against the person;

(3) the history and characteristics of the person, including:

(a) the person's character and physical and mental condition;

(b) the person's family ties;

(c) the person's employment status, employment history and financial resources;

(d) the person's past and present residences;

(e) the length of residence in the community;

(f) any facts tending to indicate that the person has strong ties to the community;

(g) any facts indicating the possibility that the person will commit new crimes if released;

(h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and

(i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an 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 person's release; and

(5) any other facts tending to indicate the person is likely to appear.

C. **Additional conditions; conditions to assure orderly administration of justice.** The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:

(1) the condition that the person not commit a federal, state or local crime during the period of release; and

(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:

(a) a condition that the person 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 person will appear as required and will not pose a danger to the safety of any other person or the community;

(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;

(c) a condition that the person maintain or commence an educational program;

(d) a condition that the person abide by specified restrictions on personal associations, place of abode or travel;

(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) a condition that the person comply with a specified curfew;

(h) a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon;

(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

(j) a condition that the person 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;

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;

(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m)a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

D. **Explanation of conditions by court.** The release order of the court shall:

(1) 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 person's conduct;

(2) advise the person of:

(a) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(c) the consequences of intimidating a witness, victim or informant or otherwise obstructing justice; and

(3) unless the defendant is released on personal recognizance, set forth the circumstances which requires that bail be set.

E. **Detention.** Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied pursuant to Article 2, § 1 of the New Mexico Constitution.

F. **Review of conditions of release.** A person for whom conditions of release are imposed or bail is set by the magistrate court and who after twenty-four (24) hours from the time of transfer to a detention facility continues to be detained as a result of his inability to meet the conditions of release or bail set, shall, upon application, be entitled

to have a hearing to review the conditions imposed or amount of bail set. Unless the release order is amended and the person is thereupon released, the court shall state in the record the reasons for continuing the amount of bail set. A person who is ordered released on a condition which requires that he return to custody after specified hours, upon application, shall be entitled to have a hearing to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release pursuant to this paragraph shall be held by the court imposing the conditions.

G. **Amendment of conditions.** The court ordering the release of a person on any condition specified in this rule may amend its order at any time to increase or reduce the amount of bail set or impose additional or different conditions of release. If such amendment of the release order results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of Paragraph F of this rule shall apply.

H. **Return of cash deposit.** If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, when the conditions of the appearance bond have been performed and the defendant for whom bail was required has been discharged from all obligations, the clerk shall return to the payor as indicated in the cash receipt.

I. **Petition to district court.** A person charged with an offense which is not within magistrate court trial jurisdiction and who has not been bound over to the district court may file a petition at any time after his arrest with the clerk of the district court for release pursuant to this rule. Jurisdiction of the magistrate court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may proceed in accordance with Rule 5-401 NMRA of the Rules of Criminal Procedure for the District Courts. Any bail set or condition of release imposed by the magistrate court shall continue in effect pending determination of conditions of release by the district court. If, after forty-eight (48) hours from the time the petition is filed, the district court has not taken any action on the petition, the court shall be deemed, at that time, to have continued any bail set or condition of release imposed by the magistrate court.

J. **Release from custody by designee.** Any or all of the provisions of this rule, except the provisions of Paragraphs E, F and G of this rule, may be carried out by responsible persons designated in writing by the presiding judge of the magistrate court. The designated responsible person must utilize the form of receipt authorized by the Supreme Court. No person shall be qualified to serve as a designee if such person or such person's spouse is:

(1) 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; or

(2) employed by a jail or detention facility unless designated in writing by the presiding judge of the magistrate district in which the jail or detention facility is located.

K. **Evidence.** Information stated in, or offered in connection with, any order entered pursuant to this rule need not conform to the Rules of Evidence.

L. **Forms.** Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

M. **Judicial discretion.** Action by any court on any matter relating to bail shall not preclude the statutory or constitutional disqualification of a judge.

[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. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

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.

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.

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 2007 amendment, approved by Supreme Court Order 07-8300-34, 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 2008 amendment, approved by Supreme Court Order No. 08-8300-44, 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".

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. Bail; unpaid surety.

Any bond authorized by Subparagraph (2) of Paragraph A of Rule 6-401 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.]

ANNOTATIONS

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.

6-401B. Bail bonds; justification of compensated sureties.

A. **Justification of sureties.** Any bond submitted to the court by a paid surety pursuant to Paragraph A of Rule 6-401 shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law [Article 51, Chapter 59A NMSA 1978] 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 he posts bonds, an irrevocable letter of credit in favor of the court, a sight draft made payable to the court and a copy of his license.

C. **Property bond in certain districts.** A real or personal property bond may be executed for the release of a person pursuant to Rule 6-401 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 pursuant to Rule 6-401. If a property bond is submitted by a compensated surety pursuant to 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 he 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 pursuant 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 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.]

ANNOTATIONS

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.

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

Cross references. — For release pending appeal, *see* Rule 6-703 NMRA.

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.

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 of release.

A. **Procedure; custody of defendant.** The court on its own motion or upon motion of the prosecuting attorney may at any time have the defendant arrested to review conditions of release. Upon review the court may:

(1) impose any of the conditions authorized under Rule 6-401 NMRA; or

(2) after a hearing and upon a showing that the defendant has been indicted or bound over for trial on a charge constituting a serious crime allegedly committed while released pending adjudication of a prior charge, revoke the bail or recognizance.

B. If the court revokes bail or recognizance, it shall set a new bond in compliance with Rule 6-401 NMRA.

C. **Review of additional conditions.** A person may petition the district court for release, if pursuant to Paragraph A of this rule, new or additional conditions of release are imposed and:

(1) after twenty-four (24) hours from the time of the imposition of the new conditions, the person continues to be detained as a result of his inability to meet the new conditions of release; or

(2) the person is ordered released on a condition which requires that he return to custody after specified hours.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

Cross references. — For form on motion for production, *see* Rule 9-409 NMRA.

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.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, added a new Paragraph B and designated former Paragraph B as Paragraph C.

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. Bail bonds; exoneration; forfeiture.

A. **Exoneration of bond.** Unless otherwise ordered for good cause, a bond shall only be automatically exonerated:

(1) after twelve (12) months if the crime is a felony and no charges have been filed in the district court;

(2) after six (6) months if the crime is a misdemeanor or petty misdemeanor and no charges have been filed;

(3) at any time prior to entry of a judgment of default on the bond if the district attorney approves; or

(4) upon surrender of the defendant to the court by an unpaid surety.

B. **Surrender of an offender by a paid surety.** 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. If the paid surety delivers the defendant to the court 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 there is a breach of condition of a bond, the court may declare a forfeiture of the bail. 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 Order to Show Cause on the clerk of the court in the manner provided by Rule 6-407 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 the surety into custody prior to the entry of a judgment of default on the bond.

E. **Default judgment; execution.** If, after a hearing, the forfeiture is not set aside, a default judgment on the bond shall be entered by the court. If the default judgment is not paid within ten (10) days after it is filed and served on the surety in the manner provided by Rule 6-407 NMRA, execution may issue thereon. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

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 the Rule 2-705 NMRA of the Rules of Civil Procedure for the Magistrate Courts and Rule 1-072 NMRA of the Rules of Civil Procedure for the District Courts. 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.]

ANNOTATIONS

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.

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.]

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;

(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 [29-11A-1 NMSA 1978].

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, pursuant to 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. If the defendant pleads "not guilty by reason of insanity" or if an issue is raised as to the mental competency of the defendant to stand trial, after setting conditions of release, the action shall be transferred to the district court.

C. **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.

D. **Felony offenses; preliminary hearing.** 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 of these rules.

E. **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 of these rules.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order 07-8300-30, effective December 15, 2007.]

ANNOTATIONS

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.

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.

The 2007 amendment, approved by Supreme Court Order 07-8300-30, 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.

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 07-8300-30, effective December 15, 2007; as amended by Supreme Court Order No. 08-8300-44, 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

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.

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.

The 2007 amendment, approved by Supreme Court Order 07-8300-30, 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 2008 amendment, approved by Supreme Court Order No. 08-8300-44, 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 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.

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 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

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.

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.

The 1996 amendment, effective October 1, 1996, added "cases within magistrate court trial jurisdiction" to the rule heading and added Paragraph G.

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 2007 amendment, approved by Supreme Court Order 07-8300-25, 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 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”.

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

Cross references. — For form on notice of pretrial conference, *see* Rule 9-411 NMRA.

The 2000 amendment, effective March 1, 2000, amended this rule to encourage the use of pre-trial conferences.

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.

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. **Arraignment.** The defendant 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. A defendant in custody shall be arraigned on the complaint or citation as soon as practical, but in any event no later than four (4) days after the date of arrest.

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 thirty (30) 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, provided that the aggregate of all extensions granted under this subparagraph may not exceed sixty (60) days; 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.]

Committee commentary. —

Exceptional circumstances. — "Exceptional circumstances," as used in this rule, would include conditions which are unusual or extraordinary such as: death or illness of the judge, prosecutor, or a defense attorney immediately preceding the commencement of the trial; and circumstances which ordinary experience or prudence would not foresee, anticipate, or provide for. 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 four (4) days after the date of arrest. The court anticipates that arraignment for those in custody will take place sooner than four days, but the rule allows four days for those courts in rural counties or for other extraordinary circumstances. 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 of criminal proceedings. *See* Paragraph E of this rule. *See also State v. Lopez*, 89 N.M. 82, 547 P.2d 565 (1976). However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. *State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Where the state in good faith files a nolle prosequi under Paragraphs C and D of Rule 6-506A 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 Paragraph D of Rule 6-506A NMRA, the court finds the refiled complaint should not be treated as a continuation of the same case. *See also* commentary to Rule 6-506A NMRA; *State ex rel. Delgado v. Stanley*, 83 N.M. 626, 495 P.2d 1073 (1972); *State v. Lucero*, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977).

[As amended by Supreme Court Order No. 13-8300-019, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

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.

The 2004 amendment deleted all of former Paragraphs A through E and added new Paragraph A through E of this rule. See Paragraphs A through C of Rule 6-506A NMRA for former Paragraphs A through C of Rule 6-506 NMRA

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.

The 2007 amendment, approved by Supreme Court Order 07-8300-25, 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 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 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).

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.

6-506A. 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) after the acceptance of a plea of guilty or no contest, but prior to sentencing;

(2) prior to commencement of the trial[,] if the charges are within magistrate court trial jurisdiction; or

(3) prior to the commencement of a preliminary examination in the magistrate court, if the charges are not within magistrate court trial jurisdiction.

B. **Bail bond.** The filing of a notice of dismissal under Paragraph A of this rule shall not exonerate a bond prior to the expiration of the time for automatic exoneration pursuant to Subparagraphs A(1) or A(2) of Rule 6-406 NMRA of these rules. 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, or in the case of a felony complaint, discharged, 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 or discharged charges;

(3) the name of the assigned judge at the time the charges were dismissed or discharged; and

(4) the reason the charges were dismissed or discharged.

D. **Procedure after refile.** If a citation or complaint is dismissed without prejudice or discharged 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 pursuant to 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.

[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.]

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").

[As amended by Supreme Court Order No. 13-8300-030, effective for all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

Cross references — For form on notice of dismissal of criminal complaint, *see* Criminal Form 9-415 NMRA.

2004 compiler's notes. — 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.

Applicability of 2004 amendments. — 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.

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.

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.

6-507. Insanity or incompetency; transfer to district court.

If the defendant pleads "not guilty by reason of insanity" or if an issue is raised as to the mental competency of the defendant to stand trial, the action shall be transferred to the district court for further proceedings pursuant to 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.]

ANNOTATIONS

Cross references. — For form on transfer order, *see* Rule 9-404 NMRA.

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.

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. **Record of proceedings.** With prior approval of the judge, a party in a magistrate court proceeding or any person with a claim arising out of the same transaction or occurrence giving rise to the magistrate court proceeding may, at the party's or person's expense, make a record of the testimony in the magistrate court proceeding. Any person causing a record of testimony to be made pursuant to this rule shall make a copy of the transcription available to all parties in the magistrate court proceeding.

E. **Use at trial.** A record of the testimony of a witness may only be used in the magistrate court in:

(1) civil proceedings when permitted by the Rules of Civil Procedure for the Magistrate Courts; and

(2) criminal proceedings if it is admissible under the Rules of Evidence.

F. **Form of record.**

(1) If the record is a stenographic or voice to print real time transcript, the court reporter shall transcribe the record prior to use in the magistrate court.

(2) If the record is an audiotape or videotape recording made pursuant to this rule, the person seeking to use the record in the magistrate court pursuant to this rule shall be responsible for having available appropriate playback equipment and an operator.

(3) If only part of the record of the proceedings is offered in evidence, any adverse party may require the offeror to offer any other part relevant to the part offered, and any party may introduce any other parts, subject to the Rules of Evidence.

G. **Copies.** At the request of any party to the proceeding or the deponent, a person who makes an audio or video record of testimony in the magistrate court shall:

(1) permit any other party or the deponent to review a copy of the audiotape or videotape and the original exhibits, if any; and

(2) furnish a copy of the audiotape or videotape in the format in which it was recorded to the requesting party on receipt of payment of the reasonable cost of making the copy.

H. **Definition.** As used in this rule, "record" means:

(1) stenographic notes which must be transcribed prior to use pursuant to this rule;

(2) a realtime voice-to-print recording which must be transcribed prior to use pursuant to this rule;

(3) a statement of facts stipulated to by the parties; or

(4) any audio or video recording.

I. **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 07-8300-34, effective January 22, 2008.]

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

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.

The 1996 amendment, effective October 1, 1996, deleted former Paragraph D relating to a record of the proceeding.

The 1997 amendment, effective September 2, 1997, added present Paragraph D.

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 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, added Paragraph I providing for questioning of court interpreters.

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

Cross references. — For forms on waiver of trial by jury - misdemeanor offenses and certification and waiver, *see* Rule 9-502 NMRA.

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.

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.

6-604. 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 qualified jurors have been selected, they shall constitute the jury for the case to be tried.

(4) One 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 form; retention schedule.** Prior to the examination of prospective jurors under this rule, the court shall require each prospective juror to complete a juror qualification and questionnaire form as approved by the Supreme Court. All completed juror qualification and questionnaire forms in the possession of the court as well as in the possession of others, including attorneys, parties, and any other individual or entity, 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 the retention of the form.

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.

[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.]

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. *See* NMAC 1.17.230.107 (providing for the retention of juror questionnaires until sixty (60) days after the date of the last possible appeal in a case involving the juror or prospective juror but no less than three (3) years after the date the juror list was created that contains the name of the juror or prospective juror).

[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.]

ANNOTATIONS

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.

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 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”.

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 for 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 compelling the attendance of the witness must be signed by the 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 upon a person named therein shall be made by delivering a copy thereof to such 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 such 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 Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 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 upon 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's 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 (2) of Paragraph D 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 such time is less than fourteen (14) days after service, serve upon 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 pursuant to an order of the court by which the subpoena was issued. Such 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 upon 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 07-8300-25, effective November 1, 2007.]

ANNOTATIONS

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.

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.

The 2007 amendment, approved by Supreme Court Order 07-8300-25, 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.

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

Cross references. — For report of analysis blood alcohol, *see* Rule 9-505 NMRA.

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 repeals former 9-7-4 NMSA 1978, relating to the department of health and environment, and enacts 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.

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.

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

Cross references. — For the federal Clinical Laboratory Improvement Act of 1988, referred to in Subparagraph A(1)(d), *see* 42 U.S.C. § 463a.

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).

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

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.

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.

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 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.

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

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.

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".

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 2002 amendment, effective October 15, 2002, substituted "judgment and sentence" for "conviction" in Paragraph C.

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.

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 of the Rules of Criminal Procedure for the District Courts.

B. **Conditions of release.** The appearance bond set to assure the defendant’s appearance for trial shall be released. The court may set an appeal bond to assure the defendant’s appearance in the district court on appeal and may set such conditions of release as are necessary to assure the appearance of the defendant or the orderly administration of justice. The magistrate court may utilize the criteria listed in Paragraph B of Rule 6-401 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 which 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 which 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 07-8300-34, effective January 22, 2008; by Supreme Court Order 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.]

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 for all cases pending or filed on or after August 3, 2012.]

ANNOTATIONS

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.

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, added Paragraph K.

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 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 1995 amendment, effective January 1, 1995, added Paragraph I, and redesignated the remaining paragraphs accordingly and made related changes.

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 2003 amendment, effective February 16, 2004, added the last two sentences in Paragraph H.

The 2007 amendment, approved by Supreme Court Order 07-8300-34, 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 2008 amendment, approved by Supreme Court Order 08-8300-55, 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 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.

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.

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.

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. **Hearing.** On notice to the probationer, the court shall hold a hearing on the violation charged. 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 such credit is specifically prohibited by statute.

D. **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.]

ANNOTATIONS

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".

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 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".

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.

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

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.

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.

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.

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Criminal Procedure for the Magistrate Courts. The left-hand column contains the former rule

number, and the right-hand column contains the corresponding present Rule of Criminal Procedure for the Magistrate Courts.

The second table below reflects the antecedent provisions in the former Rules of Criminal Procedure for the Magistrate Courts, Rules of Civil Procedure for the Magistrate Courts (Mag. Civ.), and the Rules of Procedure for the Metropolitan Courts (Metro.) (right-hand column) of the present Rules of Criminal Procedure for the Magistrate Courts (left-hand column).

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