

Rules of Criminal Procedure for the Metropolitan Courts

ARTICLE 1 General Provisions

7-101. Scope and title.

A. **Scope.** These rules shall govern the procedure in all metropolitan courts.

B. **Construction.** These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every metropolitan 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 Metropolitan Courts.

D. **Citation form.** These rules shall be cited by set and rule numbers, as in NMRA, Rule 7-____.

[As amended, effective January 1, 1987.]

ANNOTATIONS

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.

7-102. Conduct of court proceedings.

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

B. **Nonjudicial proceedings.** Proceedings, 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.

[As amended, effective January 1, 1993.]

ANNOTATIONS

The 1993 amendment, effective January 1, 1993, deleted the former second sentence in Paragraph A, which limited photography in the courtroom and the transmission or sound recording of proceedings for radio or television except upon approval by the court.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 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.

7-103. Rules and forms.

A. **Local rules; approval procedure.** A metropolitan court may from time to time make and amend local rules governing its practice not inconsistent with these rules or other rules of the Supreme Court. Copies of proposed local rules and amendments shall be submitted to the Supreme Court and to the chair of the Supreme Court's Rules for Courts of Limited Jurisdiction Committee for review. The Rules for Courts of Limited Jurisdiction Committee shall review any proposed local rule for content, appropriateness, style and consistency with the other local rules, statewide rules and forms and the laws of New Mexico, and it shall advise the Supreme Court and the chief judge of the metropolitan court of its opinion regarding the proposed rules. Any local rule or local rule amendment promulgated by a metropolitan court shall not become effective until such rule is approved by order of the Supreme Court, filed with the clerk of the Supreme Court and published in the Bar Bulletin or in the New Mexico Rules Annotated.

B. **Forms.** Forms used in the metropolitan courts shall be substantially in the form approved by the Supreme Court.

C. **Local rules committee.** The chief judge of a metropolitan court may form a local rules committee to implement the provisions of this rule. The local rules committee shall include at least one member from the Rules for Courts of Limited Jurisdiction Committee.

[As amended, effective January 1, 1987; as amended by Supreme Court Order 05-8300-22, effective December 15, 2005.]

ANNOTATIONS

The 2005 amendment, approved by Supreme Court Order 05-8300-22, effective December 15, 2005, added the second and third sentences of Paragraph A and a new Paragraph C of this rule providing authority for the metropolitan court local rules, the appointment of a local rules committee and the procedure for approval of local rules by the Supreme Court.

7-104. Time.

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, 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, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents' day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

B. **Enlargement.** When by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done, but it may not extend the time for commencement of trial, or for taking an appeal.

C. **For motions.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[As amended, effective August 1, 2004.]

ANNOTATIONS

The 2004 amendment, effective August 1, 2004, amended Paragraph A to delete "by local rule of the metropolitan 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"; 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 metropolitan court on and after August 1, 2004. See the prior rule for cases filed prior to that date.

7-105. Assignment and designation of judges.

A. **Assignment.** The metropolitan court is divided into two divisions: a criminal division and a civil division.

Criminal cases filed in the metropolitan court shall be assigned among the criminal division judges of the metropolitan court as equitably as possible on a random basis. 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 recused, is excused or the chief judge has assigned another judge; or
- (3) with the approval of the assigned judge, the agreed upon judge and all of the parties.

B. Reassignment.

(1) **Recusal.** Upon recusal, the chief judge of the metropolitan court shall assign another judge pursuant to these rules to preside over the case;

(2) **Excusal.** Upon the filing of a notice of excusal, the judge or clerk of the 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 metropolitan court to preside over the case and this agreement shall be contained in the notice of excusal. If the parties do not file a notice of agreement naming a new judge at the time the excusal is filed, or if the agreed upon judge does not agree to accept the case, the chief judge of the metropolitan court shall randomly assign another metropolitan court judge to preside over the case;

(3) **Certification to district court.** If all metropolitan court judges in the district have been excused or have recused themselves, no later than ten (10) days after filing of the last notice of excusal or recusal the chief judge of the metropolitan

court shall either appoint a pro tem judge in accordance with the provisions of Section 34-8A-4.2 NMSA 1978 or certify by letter to the district court of the county in which the action is pending the fact of such excusal or recusal and the district court shall designate another judge to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel and to the metropolitan court. The chief judge of the metropolitan court also may appoint a pro tem judge or send certification to the district court if the chief judge determines, after consultation with the metropolitan court judges, that such action is appropriate.

C. Subsequent proceedings. All proceedings shall be conducted in the metropolitan court or at another location designated by the chief judge of the metropolitan court. The clerk of the metropolitan court shall continue to be responsible for the court file and shall perform such further duties as may be required.

D. Unavailability of judge. At any time during the pendency of the proceedings if the assigned judge is unavailable, the chief judge may designate another judge to hear any matter. Upon appearance of the designated judge, the parties may move to continue the case until the original judge is available to hear the matter by stipulating to an extension of the time limitations set forth in Rule 7-506 NMRA, or the parties may exercise their rights to excuse the designated judge pursuant to these rules. If any designated judge is excused, the chief judge may designate another judge to preside over the matter.

[As amended, effective September 1, 1989; November 1, 1995; May 1, 2002; as amended by Supreme Court Order 06-8300-24, effective December 18, 2006.]

ANNOTATIONS

Cross references. — For forms on certificate of excusal or recusal, see Rules 4-102 and 9-102 NMRA.

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

For termination of magistrate judge's jurisdiction upon filing of statement of disqualification, see 35-3-7 NMSA 1978.

For recusal of magistrate when certain conflicts are present, see 35-3-8 NMSA 1978.

The 1995 amendment, effective November 1, 1995, rewrote the rule heading, rewrote Paragraph A, deleted former Paragraph B relating to procedure for replacing a recused judge, and redesignated former Paragraph C as Paragraph B and rewrote that paragraph.

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

The 2006 amendment, approved by Supreme Court Order 06-8300-24, effective December 18, 2006, replaced Paragraph A of the rule with a new Paragraph A; added new Paragraph B; redesignated former Paragraph B as Paragraph C; amended Paragraph C relating to subsequent proceedings to permit proceedings to be conducted at a location other than the metropolitan court and to delete the last sentence that provided for designation of a new judge; deleted former Paragraph C that provided for agreement of the parties on a trial judge; and added a new Paragraph D relating to the unavailability of an assigned judge.

The procedure prescribed by Rule 7-105 NMRA to designate a judge when an assigned judge is unavailable is permissive and is not the only procedure that may be used to designate another judge when an assigned judge is unavailable. *State v. Donahoo*, 2006-NMCA-147, 140 N.M. 788, 149 P.3d 104.

Rulings by a judge who is not the assigned judge. – Where the assigned judge is unavailable, a co-equal judge, who is not assigned to defendant's case and who is not designated by the parties to preside over the case, has jurisdiction to preside over a portion of the case. *State v. Donahoo*, 2006-NMCA-147, 140 N.M. 788, 149 P.3d 104.

7-106. Excusal; recusal; disability.

A. **Definition of parties.** "Party" as used in this rule shall be the defendant, the state, a municipality, a county or person filing the complaint or citation.

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.

D. **Procedure for excusing a judge.** 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. When a judge is designated to hear any matter because of the unavailability of the assigned judge, subject to the limitations in Paragraph C of this rule, the parties shall exercise their right to the excusal either in writing or orally when the designated judge first calls the case. In all other instances, 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. No judge 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 metropolitan 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 7-105 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 metropolitan court judge to file a certificate of recusal or not less than five (5) days after the filing of an order in the metropolitan 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 metropolitan court. The district court shall make such investigation as the court deems warranted and enter an order in the action, either prohibiting the metropolitan court judge from proceeding further or finding that there are insufficient grounds to reasonably question the metropolitan 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 metropolitan court certifying the issue of recusal to the district court pursuant to Paragraph G of this rule, the metropolitan court judge may enter a stay of the proceedings pending action by the district court. If the metropolitan 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 metropolitan 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 metropolitan 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 court 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, 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 metropolitan court judge is in fact disabled or unavailable, the court shall designate another judge to preside over the case.

[As amended, effective May 1, 1986; July 1, 1988; September 1, 1989; September 1, 1990; November 1, 1995; May 1, 2002; as amended by Supreme Court Order 06-8300-24, effective December 18, 2006.]

ANNOTATIONS

Cross references. — For territorial limits of magistrate's jurisdiction, see 35-3-6 NMSA 1978.

For termination of magistrate's jurisdiction upon filing of statement of disqualification, see 35-3-7 NMSA 1978.

For recusal of magistrate when certain conflicts are present, see 35-3-8 NMSA 1978.

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 paragraph from the third sentence to the end; redesignated former Paragraph H as present Paragraph I and added present Paragraph H.

The 2006 amendment, approved by Supreme Court Order 06-8300-24, effective December 18, 2006, in Paragraph A substituted "a municipality, a county or person filing the complaint or citation" for "or an attorney representing the defendant or the state"; deleted the last sentence of Paragraph B relating to excusal of a judge scheduled to hear a preliminary hearing; added the second sentence of Paragraph D providing for the excusal of a judge designated to hear a matter because of the unavailability of the assigned judge; and amended Paragraph I to substitute "metropolitan court judge" for "magistrate".

Peremptory excusal where charges refiled. — Because of the metropolitan court's unique rules pertaining to refiled criminal charges, where charges are dismissed without prejudice and later refiled, a defendant must exercise the right of peremptory excusal of a judge within ten days of arraignment on the original charges. The time for filing a notice of excusal does not begin to run anew when the identical charges are refiled and the case is assigned to the same judge. *Walker v. Walton*, 2003-NMSC-014, 133 N.M. 766, 70 P.3d 756.

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.

Disqualification of judge as affecting validity of decision in which other nondisqualified judges participated, 29 A.L.R.5th 722.

7-107. Entry of appearance.

A. **How entered.** 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. For the purpose of this rule, an attorney may enter an appearance by:

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

(2) any communication 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.

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

C. **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.]

ANNOTATIONS

Cross references. — For forms on certificate of excusal or recusal, see Rules 4-102 and 9-102 NMRA.

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

The 2000 amendment, effective September 15, 2000, in Subsection B, inserted "With permission of the court" at the beginning and deleted "with the clerk of the court or the judge if there is not clerk" at the end and deleted the third sentence which read "Upon the making of an oral entry of appearance, the clerk of the court or the judge shall enter in the file the name, office address and telephone number of the attorney".

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 may enter 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".

7-108. Non-attorney prosecutions.

A. **Peace officers.** Peace officers may file criminal complaints against persons in the metropolitan court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the trial jurisdiction of the court.

B. **Other authorized appearances.** 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.

C. **Trial procedures.** Peace officers and government employees appearing on behalf of a governmental entity as provided in Paragraph B, on complaints they have filed, shall be authorized 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.

D. **Special prosecutor.** Nothing 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.

E. **District attorney.** Nothing 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.

[As amended, effective March 15, 1986; July 1, 1988; as amended by Supreme Court Order 08-8300-10, effective May 8, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order 08-8300-10, effective May 8, 2008, deleted "and individual citizens acting in their own behalf" in Paragraphs A and C.

Officer may not continue magistrate or municipal 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.

7-109. Presence of the defendant; appearance of counsel.

A. **Presence required.** Except as provided in these rules, the defendant shall be present at the arraignment and at every stage of the trial including the impaneling of the jury, the return of the verdict and the imposition of any sentence.

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

- (1) is voluntarily absent after the proceeding has commenced; or
- (2) engages in conduct which justifies excluding the defendant from the proceeding.

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

- (1) a corporation may appear by counsel for all purposes;
- (2) the metropolitan court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the absence of the defendant.

ANNOTATIONS

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

7-110. Withdrawn.

ANNOTATIONS

Compiler's notes. — Pursuant to a court order dated April 24, 1989, this rule, relating to definition of "record", was withdrawn for all cases filed in the metropolitan courts on or after September 1, 1989.

7-110A. 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.** The court may require the defendant to appear through the use of a simultaneous audio-visual communication for:

- (1) an arraignment, initial appearance or bail hearing; 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, 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.]

ANNOTATIONS

Cross references. — For filing by fax, see Rule 7-210 NMRA.

For filing electronically, see Rule 7-211 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".

7-111. Contempt.

A. Jurisdiction. A metropolitan judge 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;
- (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 metropolitan court in criminal cases.

[As amended, effective January 1, 1996.]

Committee commentary. — Section 35-3-9 NMSA 1978 provides statutory authority to magistrates to punish for contempt. The statute limits the jurisdiction of the magistrate to punish for disorderly behavior or breach of the peace tending to interrupt or disturb a judicial proceeding in progress before the magistrate or for disobedience of any lawful order or process of the magistrate court. The statute requires a hearing in all instances and limits the punishment to \$25.00 or imprisonment for three days, or both. A right of appeal to the district court is provided in the same manner as in other criminal actions. It would thus appear that the legislature intended that the magistrate's power to punish for contempt would be limited to criminal contempt where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders. *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957).

There is no magistrate court rule or statute which is similar to Rule 5-112 of the Rules of Criminal Procedure for the District Courts granting the court authority to hold an attorney in contempt of court if he willfully fails to comply with the criminal rules. However, there is no indication that Section 35-3-9, *supra*, is not intended to include attorneys as well as others who may fail to observe the requirements of the statute.

Rule 6-111 adopts the general provisions of the statute regarding contempt proceedings and limits the magistrate's authority to punish for criminal contempt. However, the rule provides for a fine of \$250.00 and imprisonment not to exceed 30 days, or both such fine and imprisonment.

This rule limits the jurisdiction of the metropolitan judge to punish for criminal contempt and follows the basic authority granted by Section 35-3-9, *supra*, and Rule 6-111. However, the punishment is expanded to the limit of the court's jurisdiction. There being

no prohibition in either the statute or magistrate rule against summary proceedings, the rule contemplates summary proceedings in those limited situations where the contemptuous conduct occurred in the actual presence of the court. Under such circumstances, if the contempt is of such a kind that it will necessitate immediate action in order to maintain the dignity and authority of the court, then the court can act summarily. *Ex parte Terry*, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888). In *State v. Sanchez*, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976), the court upheld a trial judge having found a defense witness in contempt for failure to answer questions on cross examination and that such conduct in the presence of the court could be punished by the court's contempt power in a summary proceeding.

Notice and hearing. When the contempt takes place outside the presence of the court, the contemnor must be given notice before punishment may be imposed. *Cooke v. United States*, 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925); *In re Fullen*, 17 N.M. 394, 128 P. 64 (1913); *Wollen v. State*, 86 N.M. 1, 518 P.2d 960 (1974); *State v. Diamond*, No. 4294 (N.M. Ct. App., filed February 7, 1980).

If the contempt is not punished summarily, the alleged contemnor must be charged by a sworn affidavit, information or verified motion. *State v. Clark*, 56 N.M. 123, 241 P.2d 328 (1952); *Escobedo v. Agriculture Prods. Co.*, 86 N.M. 466, 525 P.2d 393 (1974).

Personal service on the alleged contemnor is required to be effective as notice in a criminal contempt proceeding. Service on the alleged contemnor's attorney is sufficient if the contempt is civil. *Lindsey v. Martinez*, 90 N.M. 737, 568 P.2d 262 (Ct. App. 1977); *Roybal v. Martinez*, 92 N.M. 630, 593 P.2d 71 (Ct. App. 1979). The rule as drafted provided for notice and hearing when the contempt is not punished summarily.

If the metropolitan court is a "magistrate court," the rule is within the authority granted by statute except for the punishment which may be imposed. If it is not a "magistrate court" and the provisions of 35-3-9, *supra*, are inapplicable, the common law duty and power of the courts to guard their proceedings from interference and to punish for contempts is authority for the rule. *State v. Kayser*, 25 N.M. 245, 181 P. 278 (1919); *State v. Magee Pub. Co.*, 29 N.M. 455, 224 P. 1028 (1924).

See Reporter's Addendum to Rules of Criminal Procedure for the District Courts [now Rule 5-902] on contempt of court.

ANNOTATIONS

The 1996 amendment, effective January 1, 1996, made stylistic changes in Paragraph A; redesignated former Paragraphs B and C as Paragraphs C and B, respectively; in Paragraph B, rewrote the introductory language, added Subparagraph (4), and rewrote the last paragraph; in Paragraph C, rewrote the paragraph heading, inserted "direct" near the beginning and made stylistic changes; and added Paragraph D.

Scope of authority to punish for contempt. — Because the power to punish for contempt is an inherent power of the court, the court should be allowed to exercise its power to the limits of its authority and should not be bound by 35-3-9 NMSA 1978, which limits sentencing to three days. *State v. Jones*, 105 N.M. 465, 734 P.2d 243 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Contempt based on violation of court order where another court has issued contrary order, 36 A.L.R.4th 978.

Intoxication of witness or attorney as contempt of court, 46 A.L.R.4th 238.

Lack of notice to contemnor at time of contemptuous conduct of possible criminal contempt sanctions as affecting prosecution for contempt in federal court, 76 A.L.R. Fed. 797.

7-112. 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 metropolitan 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 metropolitan 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, 1994.]

ARTICLE 2

Initiation of Proceedings

7-201. 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, or the specific section of the county or municipal ordinance 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; or

(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.

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 metropolitan court.

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

C. Where commenced. Unless otherwise provided by law, the action must be commenced in the metropolitan 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 metropolitan 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 metropolitan 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.]

ANNOTATIONS

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

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, rewrote Paragraphs A and D.

The 1991 amendment, effective for cases filed in the metropolitan 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 metropolitan 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 Subparagraph (3) of Paragraph A which related to a criminal citation complying with the provisions of 31-1-6 NMSA 1978.

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).

Custodial arrest following breath alcohol test is not "initiation of judicial criminal proceedings". — A person issued a citation and placed under custodial arrest for driving while under the influence of intoxicating liquor does not have a constitutional right to counsel immediately following a breath alcohol test since this does not amount to "initiation of judicial criminal proceedings" or prosecutorial commitment, nor is the period following administration of the test a "critical stage." *State v. Sandoval*, 101 N.M. 399, 683 P.2d 516 (Ct. App. 1984).

Charging defendants generally. — The state may charge defendant with violating the same statute in two different ways. Moreover, the state need not specify which statutory subsections were violated. *State v. Watkins*, 104 N.M. 561, 724 P.2d 769 (Ct. App.), cert. denied, 104 N.M. 522, 724 P.2d 231 (1986).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 408 et seq.

22 C.J.S. Criminal Law § 321 et seq.

7-202. Preliminary examination.

A. **Subpoena of witnesses.** If the court determines that a preliminary examination must be conducted, subpoenas shall be issued for any witness required by the parties. The witness shall be examined in the defendant's presence and may be cross-examined.

B. **Record of hearing.** A record shall be made of the preliminary examination. If the defendant is bound over for trial in the district court, the record shall be filed with the clerk of the district court with the bind-over order. A duplicate of the tape may be

requested by any party within six (6) months following the preliminary hearing. The taped record may be disposed of by the metropolitan court after the expiration of six (6) months following the preliminary hearing.

C. Findings of court. If, upon completion of the examination, it appears to the court that there is no probable cause to believe that the defendant has committed an offense, the court shall discharge the defendant. If the court finds that there is probable cause to believe that the defendant committed an offense not within metropolitan court trial jurisdiction, it shall bind the defendant over for trial. If the defendant is bound over for trial by the metropolitan court, the district attorney shall file with the clerk of the metropolitan court:

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

(2) if an order is entered by the district court extending the time for filing an information, a copy of such order. If the court finds that there is probable cause to believe that the defendant committed only an offense within metropolitan court trial jurisdiction, the action shall be set for trial as soon as possible.

D. Time. A preliminary examination shall be held within a reasonable time but in any event no later than ten (10) days following the initial appearance if the defendant is in custody and no later than sixty (60) days if he is not in custody. Failure to comply with the time limits shall not affect the validity of any indictment for the same criminal offense.

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

F. Bail bond. If the defendant is bound over for trial by the metropolitan court or indicted, the metropolitan court shall transfer any bond to the district court. Unless the proceedings are remanded to the metropolitan 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.]

ANNOTATIONS

Cross references. — For forms 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.

The 1992 amendment, effective for cases filed in the metropolitan 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 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.

7-203. Probable cause determination.

A. **General rule.** A probable cause determination shall be made 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. The probable cause determination shall be made by a metropolitan 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. If a metropolitan court judge is not reasonably available, the determination shall be made by a district judge.

B. **Conduct of determination.** The determination of whether there is probable cause 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 that there is a basis for believing that 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 at the time of the probable cause determination with sufficient facts to show probable cause for detaining the defendant.

C. **Probable cause determination; conclusion.** If the court finds that there is no probable cause to believe that the defendant has committed an offense, the court shall dismiss the complaint without prejudice and order the immediate release of the defendant. 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 7-401. 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.]

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 metropolitan courts on or after September 1, 1990, rewrote this rule.

The 1991 amendment, effective for cases filed in the metropolitan 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, relating to expiration of the prescribed period on a Saturday, Sunday, or legal holiday.

7-204. Issuance of warrant for arrest and summons.

A. **Issuance.** The court may issue an arrest warrant or summons 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.

B. **Preference for summons.** 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.

C. **Form.** The warrant shall be signed by the court and shall contain the name of the defendant or, if his name is unknown, any name or description by which he 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.

ANNOTATIONS

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

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

7-205. Service of summons; failure to appear.

A. **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 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, shall be shown on every summons, 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 7-104. 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 any authorized law enforcement officer, 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 or the prosecution 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 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 a full-time salaried law enforcement officer, proof thereof shall be by certificate; and when made by a person other than a full-time salaried law enforcement officer, 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 warrants by police officers, see 3-13-2 NMSA 1978.

For duty of sheriff to execute process and orders of magistrate and municipal courts, see 4-41-14 NMSA 1978.

For form for criminal summons, see Rule 9-208 NMRA.

The 1989 amendment, effective for cases filed in the metropolitan courts on and after January 1, 1990, in Paragraph A, deleted "by local rule" following "courts directs" and deleted the former second and third sentences, which read "The summons and complaint shall be served together" and "The prosecution shall furnish the person making service with such copies as are necessary", respectively; redesignated former Paragraph B as the second sentence and Subparagraph (1) in Paragraph G, and added the remainder of Paragraph G; and added present Paragraphs B to F and H to J.

7-206. Arrest warrants.

A. To whom directed. Whenever a warrant is issued in a criminal action, 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 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.]

ANNOTATIONS

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

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

The 1999 amendment, effective July 1, 1999, added the second sentence in Paragraph A, the last sentence in Paragraph C, and Paragraph D.

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.

7-207. Bench warrants.

A. **Failure to appear or act.** If any person who has been ordered by the metropolitan 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.]

ANNOTATIONS

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 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 Paragraphs B and D, redesignating former Paragraph B as Paragraph C, and in Paragraph C added the last sentence and made a minor stylistic change.

7-208. Search warrants.

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

- (1) property which has been obtained or is possessed in a manner which constitutes a criminal offense;
- (2) property designed or intended for use or which is or has been used as the means of committing a criminal offense;
- (3) property which would be material evidence in a criminal prosecution; or
- (4) 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 or 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 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. **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 and 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.

D. Return. The return shall be made promptly after execution of the warrant to the clerk of the court which issued 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 in whose presence the inventory was taken. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

E. 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. 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 he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

ANNOTATIONS

Cross references. — For form on 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.

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*, 111 N.M. 226, 804 P.2d 417 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — Necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

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

When are facts offered in support of search warrant for evidence of sale or possession of cocaine so untimely as to be stale — state cases, 109 A.L.R.5th 99.

When are facts offered in support of search warrant for evidence of sexual offense so untimely as to be stale — state cases, 111 A.L.R.5th 239.

When are facts relating to marijuana, provided by one other than police or other law enforcement officer, so untimely as to be stale when offered in support of search warrant for evidence of sale or possession of a controlled substance — state cases, 112 A.L.R.5th 429.

7-209. 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 order not entered in open court, 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, 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 it to the attorney or party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

"Delivery of a copy" within this rule means:

- (1) handing it to the attorney or to the party;
- (2) sending a copy by facsimile or electronic transmission when permitted by Rule 7-210 NMRA or Rule 7-211 NMRA;
- (3) 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;
- (4) 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
- (5) placing a copy in a box maintained by the attorney for purposes of serving the attorney.

C. **Filing; 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, shall be filed with the court within a reasonable time after service.

D. Filing with the court defined. The filing of pleadings and other 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 pursuant to Rule 7-210 NMRA or Rule 7-211 NMRA. A paper filed by electronic means in compliance with Rule 7-210 NMRA constitutes a written paper for the purpose of applying these rules. 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.

E. 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.

F. 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.

[As amended, effective March 1, 2000.]

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.

7-210. 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 metropolitan court 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 (8 1/2 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.

7-211. 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 7-209 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 7-210 NMRA.

ARTICLE 3

Pleadings and Motions

7-301. General rules of pleading; captions.

A. **Caption.** Pleadings and papers filed in the metropolitan 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 _____

Metropolitan 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*, 101 N.M. 716, 688 P.2d 34 (Ct. App. 1984).

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

7-302. Pleas allowed.

A. **Pleadings.** 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 no contest. No other pleas or pleadings shall be permitted. A plea of not guilty or not guilty by reason of insanity shall not operate as a waiver of any defense or objection. If the defendant pleads not guilty by reason of insanity, the metropolitan court shall transfer the action to the district court. Defenses and objections not raised by the plea shall be asserted in the form of motions to dismiss or for appropriate relief.

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

C. **Rejection of pleas.** The court shall reject a plea of guilty or nolo contendere if justice would not be served by acceptance of such plea.

ANNOTATIONS

Conviction based on nolo contendere plea may not be sole basis of probation revocation. State v. Baca, 101 N.M. 415, 683 P.2d 970 (Ct. App. 1984).

Rule 5-304F NMRA applies to metropolitan courts. — Since Rule 21(g)(6), N.M.R. Crim. P. (now see Rule 5-304F NMRA), providing for inadmissibility of plea discussions is applicable to district court proceedings on revocation of parole, there is no reason why it should not apply to metropolitan courts. State v. Baca, 101 N.M. 415, 683 P.2d 970 (Ct. App. 1984).

7-303. 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, imperfection 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. **Variations.** 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 the 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 May 15, 2001.]

ANNOTATIONS

The 2001 amendment, effective May 15, 2001, substituted "with respect" for "in respect" in the last sentence in Subsection A and substituted "grounds for the acquittal" for "ground for acquittal" in the first sentence in Subsection C, conforming this rule to Rule 5-204.

7-304. 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.** In cases within the trial court's jurisdiction:

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

(2) a person aggrieved by a confession, admission or other evidence may move to suppress such evidence.

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 7-209 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 7-801 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 06-8300-37, effective March 1, 2007.]

ANNOTATIONS

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

The 1990 amendment, effective for cases filed in the metropolitan 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" 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.

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.

7-305. Unnecessary allegations.

A. **Examples.** It shall be unnecessary for a complaint or citation 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 or political subdivision 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.

7-306. 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 January 1, 1987; September 1, 1990; September 15, 1997.]

ANNOTATIONS

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, rewrote former Paragraph A to appear as present Paragraphs A, B, and C and substituted "may, with leave of the court," for "shall" near the beginning of present Paragraph B; redesignated former Paragraphs B and C as present Paragraphs D and E; and in present Paragraph D, substituted "may" for "shall" near the beginning and deleted Subparagraphs (2) and (3), relating to approval of motions to consolidate and the judge to be assigned to the consolidated case.

The 1997 amendment, effective September 15, 1997, inserted "of" in the paragraph heading of Paragraph A; 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 "offenses; defendants" in the paragraph heading, inserted "or heard on preliminary examination" 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

7-401. Bail.

A. **Right to bail.** 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 determines that such release will not reasonably assure the appearance of the person as required. If the court determines 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 [Chapter 59A, Article 51 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 7-401A; or

(3) the execution of a bail bond with licensed sureties as provided in Rule 7-401B 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 metropolitan 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 defendant, his personal representatives or assigns the sum which has been deposited.

I. **Petition to district court.** A person charged with an offense which is not within metropolitan 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 metropolitan 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 of the Rules of Criminal Procedure for the District Courts. Any bail set or condition of release imposed by the metropolitan 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 metropolitan 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 chief judge of the metropolitan 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 chief judge of the metropolitan court.

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.]

ANNOTATIONS

Cross references. — For form on order 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.

The first 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, rewrote Paragraphs A through D; added present Paragraph E and redesignated former Paragraphs E through L as present Paragraphs F through M; rewrote present Paragraphs F and G; in present Paragraph H, substituted "Subparagraph (1) or (3)" for "Subparagraph (3)"; in present 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 paragraph; and rewrote present Paragraph J.

The second 1990 amendment, effective for cases filed in the metropolitan courts on or after December 1, 1990, in Paragraph J, substituted "by responsible persons" for "by a responsible person" and inserted "chief judge of the metropolitan" in the first sentence; and, in Subparagraph (2), inserted the phrase beginning "unless designated" at the end.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8A Am. Jur. 2d Bail and Recognizance § 1 et seq.

8 C.J.S. Bail; Release and Detention Pending Proceedings § 4 et seq.

7-401A. Bail; unpaid surety.

Any bond authorized by Subparagraph (2) of Paragraph A of Rule 7-401 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.

[Approved, effective October 1, 1987; as amended, effective September 1, 1990.]

ANNOTATIONS

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, substituted "Subparagraph (2)" for "Subparagraph (4)" near the beginning of this rule.

7-401B. 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 7-401 shall be signed by a bail bondsman, as surety,

who is licensed under the Bail Bondsmen Licensing Law [Chapter 59A, Article 51 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 7-401 in any metropolitan 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 7-401. 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.

[Approved, effective October 1, 1987; as amended, effective September 1, 1990.]

ANNOTATIONS

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, in Paragraph A, substituted "submitted to the court by a paid surety pursuant to" for "authorized by Subparagraphs (5) of" near the beginning of the first sentence and added the last sentence; and rewrote former Paragraph B to appear as present Paragraphs B, C, and D.

7-402. 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 7-401, a defendant not released prior to or during trial.

[As amended, effective January 1, 1997.]

ANNOTATIONS

Cross references. — For release pending appeal, see Rule 7-703 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.

Conditions of release. — The court has an affirmative duty to undertake a case-by-case, defendant-by defendant evaluation and to fashion an appropriate disposition regarding conditions of release pending sentencing. *State v. Maestas*, 2007-NMCA-155, 143 N.M. 104, 173 P.3d 26.

Application of blanket policy for release. — Where the court exercised a blanket policy of immediately remanding to custody those defendants who chose to go to trial and were convicted while allowing those defendants who chose to plead guilty to remain out of custody pending sentencing, the court's action could be construed as impermissibly punishing the defendant for exercising his constitutional rights to plead not guilty, to a jury trial and to appeal. *State v. Maestas*, 2007-NMCA-155, 143 N.M. 104, 173 P.3d 26.

Defendant's participation in an alternative sentencing program precludes his later objection to the structure of the program. *State v. Lucero*, 2007-NMCA-127, 142 N.M. 620, 168 P.3d 750, cert. denied, 2007-NMCERT-009.

Where defendant is referred to a post-adjudication, pre-sentencing program, he was not on probation during his time in the program. *State v. Lucero*, 2007-NMCA-127, 142 N.M. 620, 168 P.3d 750, cert. denied, 2007-NMCERT-009.

7-403. 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 7-401; 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. **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.]

ANNOTATIONS

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, in Paragraph A, deleted "Paragraph A of" preceding "Rule 7-401" in Subparagraph (1), deleted former Subparagraph (2), relating to imposing conditions under Paragraph C of Rule 7-401, and redesignated former Subparagraph (3) as present Subparagraph (2); rewrote Paragraph B; and deleted former Paragraph C, relating to record on review.

7-406. 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 7-403 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 bondsman 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 7-407.

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. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

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 7-407, execution may issue thereon.

[Effective, October 1, 1987.]

ANNOTATIONS

Refund of forfeited bond. — Despite the conflict between 31-3-2E NMSA 1978 and this rule, a metropolitan court judge may refund a forfeited bond to a bondsman who is able to apprehend a defendant and bring her back to court, as the conflict concerns substantive law over which the statute controls. 1989 Op. Att'y Gen. No. 89-12.

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.

7-407. 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

Arrest and Preparation for Trial

7-501. Arrest; 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 7-302, 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", 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 of not guilty or a 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 7-202 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 7-401 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.]

Committee commentary. — If it is determined by the judge that the defendant is not represented by counsel, and it further appears that the defendant may be indigent, if the judge decides that no imprisonment will be imposed if the defendant is found guilty, then the court need not advise the defendant of his right to assistance of counsel at every stage of the proceedings and of the defendant's right to representation by an attorney at state expense. However, if the judge decides that imprisonment will be imposed or that this decision cannot be made at this stage of the proceedings, then the judge shall advise the defendant of his right to assistance of counsel at every stage of the proceedings and his right to be represented by an attorney at state expense if he is indigent. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

The defendant may waive counsel so long as the waiver is knowingly, voluntarily and intelligently made and the defendant is aware of the possible disadvantages of proceeding without the assistance of counsel. *State v. Greene*, 91 N.M. 207, 572 P.2d 935 (1977); *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755, 60 L. Ed. 2d 286 (1979).

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 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.

Explanation of rights on appeal. — The rules promulgated by the supreme court do not require that waiver of the right to a jury in a trial de novo in district court on appeal from a metropolitan court conviction must be accompanied by advice to the defendant on the record in district court of his right to a jury trial. *State v. Ciarlotta*, 110 N.M. 197, 793 P.2d 1350 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 433 et seq.

22 C.J.S. Criminal Law § 355 et seq.

7-502. Pleas and plea agreements.

A. **Pleas.** A defendant who elects to waive the right to a trial may enter:

- (1) a plea of guilty;
- (2) a plea of no contest, subject to the approval of the court; or
- (3) if the plea is for a driving while intoxicated or domestic violence offense, after an adverse determination of a pretrial motion on a dispositive issue, enter a conditional plea of guilty or no contest, reserving in writing the right to appeal the adverse determination of the specified pre-trial motion. A conditional plea is subject to approval of the court. A defendant who prevails on appeal shall be allowed to withdraw a conditional plea of guilty or no contest.

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, 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;
- (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:
 - (a) 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; or

(b) if the plea is a conditional plea, that the defendant waives the right to a trial unless the defendant prevails on appeal;

(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 [29-11A-1 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 in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, 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. 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 the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(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. If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceeding shall be admissible against the defendant in any criminal proceedings.

(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; May 1, 1997; February 16, 2004; as amended by Supreme Court Order 07-8300-30, effective December 15, 2007.]

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 this rule.

The 2003 amendment, effective February 16, 2004, added "if the plea is for a driving while intoxicated or domestic violence offense" in the first sentence of Subparagraph (3) of Paragraph A and inserted "the right to" in Subparagraph (4)(b) of Paragraph B.

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.

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.

7-503. Disposition without hearing.

A. **General.** The metropolitan court may establish, by rule, procedures governing disposition of cases within metropolitan court trial jurisdiction without a hearing. Any such rule shall specify the offenses to which the rule applies.

B. **Procedure.** An offense shall not be disposed of without a hearing unless the person charged signs an appearance, plea of no contest and waiver of trial. Prior to signing the document, the person charged shall be informed of the right to trial and that the warrant will constitute a plea of no contest and will have the effect of a judgment of guilty by the court.

Provision may be made for the person charged to enter an appearance and plead no contest and remit the appropriate scheduled penalty to the court by mail. If such provision is made, the charging law enforcement officer will deliver the warnings required under this paragraph, provide a form to the person charged for an entry of appearance and plea of no contest, inform the person charged of the scheduled penalty and provide a business reply envelope addressed to the metropolitan court.

Committee commentary. — Those cases which may be disposed of without a hearing include traffic cases, nuisance cases and other similar offenses. All other cases require the presence of the defendant. See Rule 7-109.

7-504. Discovery; cases within metropolitan court trial jurisdiction.

A. **Disclosure by prosecution.** Unless a different period of time is ordered by the trial court, within thirty (30) 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. Such disclosure shall include a written list of the names and addresses of all witnesses whom the prosecution intends to call at the trial, together with any statement made by the witness and any record of any prior convictions of any such witness that is within the knowledge of the prosecution. In cases involving charges of domestic violence, the prosecution may use the district attorney's office as the address for the alleged victim.

B. **Disclosure by defendant.** 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 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 possession, custody and control of defendant which are intended for use by the defendant at trial. Such disclosure shall include a written list of the names and addresses of all witnesses whom the defendant intends to call at the trial, together with any statement made by the witness and any record of any prior convictions of any such witness that is within the knowledge of the defendant.

C. Pre-trial interviews by statement or deposition.

(1) **Statements.** If requested by either party, any person, other than the defendant, with information that is subject to discovery, shall give a statement. A party may obtain the statement by serving a written notice of statement upon the person to be examined and upon the other party not less than fourteen (14) days before the date scheduled for the statement. The party requesting the statement must make reasonable efforts to confer in good faith with opposing counsel and the person to be examined regarding scheduling of a statement before serving a notice of statement. A subpoena, signed by the judge assigned to the case, may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. A subpoena will only be issued upon a showing that the party requesting the subpoena made good faith efforts to procure the appearance of the witness without the need for a subpoena. Either party may record the statement.

(2) **Depositions.** A deposition may be taken pursuant to this rule upon:

(a) agreement of the parties; or

(b) order of the court, upon a showing that the deposition is necessary to avoid injustice.

D. Scope of discovery. Unless otherwise limited by order of the court, the parties may obtain discovery regarding any matter, not privileged, that is relevant to the offense charged or the defense of the accused person, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

E. Time and place of statement or deposition. Unless agreed to by the parties, any statement or deposition allowed under this rule shall be conducted at such time and place as ordered by the court.

F. Deadline for statement or deposition. Absent the prior approval of the assigned trial judge, a statement or deposition may not be scheduled more than one hundred (100) days after arraignment or the filing of a waiver of arraignment. If a party needs an extension of time, the party must obtain court approval prior to the expiration

of the one hundred (100) day period. Failure to comply with this rule shall be deemed a waiver of the right to take a statement or deposition.

G. 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.

H. 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 order such party to permit the discovery or inspection of materials, grant a continuance, or prohibit the party from calling a witness, or prohibit the party from introducing in evidence the material, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney, party or witness in contempt of court.

I. 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, which is a recital of an oral statement; and

(3) stenographic or written statements or notes which are in substance recitals of an oral statement.

[As amended, effective January 1, 1994; October 1, 1996; September 15, 1997; as amended by Supreme Court Order 05-8300-21, effective January 1, 2006; by Supreme Court Order 07-8300-07, effective May 21, 2007; by Supreme Court Order 07-8300-32, effective November 15, 2007.]

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.

ANNOTATIONS

Cross references. — For Order of Production, see Criminal Form 9-410 NMRA.

For Certificate of Disclosure of Information, see Criminal Form 9-412A NMRA.

For Supplemental Certificate of Disclosure of Information, see Criminal Form 9-413A. NMRA.

For Certificate of Non-Compliance, see Criminal Form 9-413B NMRA.

For form on motion for production, see Rule 9-409 NMRA.

For form on order for production, see Rule 9-410 NMRA.

For the duty of the parties in district court civil cases to confer in good faith prior to scheduling depositions to avoid conflicts with the schedules of the witness and parties, see Rule 1-030 NMRA.

For depositions and statements in the district court in criminal cases, see Rule 5-503 NMRA.

For disclosure by the state in district court criminal cases, see Rule 5-501 NMRA.

For disclosure by the defendant in district court criminal cases, see Rule 5-502 NMRA.

For the scope of discovery in district court criminal cases, see Rule 5-503 NMRA.

The 1994 amendment, effective January 1, 1994, designated the existing language as Paragraph A and added the paragraph heading, substituted "The prosecution shall disclose and make available" for "At any time during the pendency of the action, upon request of the defendant, the metropolitan judge may order the prosecution to produce" at the beginning of Paragraph A, inserted "custody and control" near the middle of Paragraph A, deleted the former last sentence of Paragraph A which read "No other discovery proceedings shall be permitted", and added Paragraphs B, C, D, E, and F.

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

The 1997 amendment, effective September 15, 1997, added "Not less than ten (10) days before trial" at the beginning of Paragraphs A and B, inserted "and photographing" and "recorded statements made by witnesses" and made a stylistic change in Paragraph A, inserted "and photographing" and made a stylistic change in 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 2005 amendment, approved by Supreme Court Order 05-8300-21 effective January 1, 2006, added new Paragraph D relating to failure to complete discovery, redesignated Paragraphs D through G as Paragraphs E through F and added to the new Paragraph designated "D" "except as otherwise provided in Paragraph D of this

rule". For provisions of the 2004 version of Rule 7-504 NMRA, see the 2004 NMSA 1978 on New Mexico One Source of Law DVD

The first 2007 amendment, approved by Supreme Court Order 07-8300-07, effective May 21, 2007, amended Paragraph A to increase the amount of time prior to trial for the prosecution to make disclosures and to add the last two sentences relating to the types of disclosures to be made by the state and the address of victims in domestic violence cases; amended Paragraph B to change the time for disclosure by the defendant from 10 days before trial to 45 days after arraignment and to include statements made by witnesses in the required disclosures; deleted Paragraph C relating to the exchange of witnesses not less than 10 days before trial and added a new Paragraph C; deleted Paragraph D and added a new Paragraph D relating to the scope of discovery; added new Paragraph E relating to the time and place of statements and depositions; added new Paragraph F relating to the deadline for taking statements and depositions; relettered former Paragraphs E through G as Paragraphs G through I and deleted former Paragraph H limiting the applicability of the discovery requirements to cases within metropolitan court jurisdiction.

The second 2007 amendment, approved by Supreme Court Order 07-8300-32, effective November 15, 2007, amended Paragraph B to add the last sentence relating to disclosure of the defendant's witness list.

7-505. 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 be called or subpoenaed for a pretrial conference unless ordered by the court.

B. **Pretrial scheduling order.** The court may enter a scheduling order that limits the time:

- (1) to file and hear motions; and
- (2) to complete discovery.

The scheduling order may also include:

- (3) the dates for any conferences or hearings before trial;
- (4) a trial date; and
- (5) any other matters deemed appropriate by the court.

[As amended, effective March 1, 2000; December 17, 2001.]

Committee commentary. — The purpose of this rule is to encourage negotiations to utilize more effectively judicial resources and to expedite the disposition of cases. Pre-trial conferences should be utilized for more than exchange of discovery materials.

ANNOTATIONS

The 2000 amendment, effective March 1, 2000, amended this rule to encourage the use of pre-trial conferences. The last sentence was added to be consistent with Rules 6-505 and 8-505 NMRA.

The 2001 amendment, effective December 17, 2001, inserted "scheduling order" in the rule heading; redesignated the former provisions of the rule as Paragraph A, adding the heading "Pretrial conference" rewrote the second sentence that formerly provided the court may issue subpoenas at the request of a party; and added Paragraph B.

7-506. 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.

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 is filed in the metropolitan 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 metropolitan court;
- (4) in the event of a remand from an appeal, the date the mandate or order is filed in the metropolitan court disposing of the appeal;
- (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 metropolitan 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;

(3) upon stipulation of the parties and approval of the court for a period not exceeding sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to sixty (60) days; or

(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 pursuant to this subparagraph may not exceed thirty (30) days.

D. Time for filing motion. A motion to extend the time period for commencement of trial pursuant to Subparagraph (5) of 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. In event the trial of any person does not commence within the time specified in Paragraph E of this rule or within the period of any extension provided in this rule, the complaint or citation filed against such person shall be dismissed with prejudice.

[As amended, effective August 1, 1999; August 1, 2004.]

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.

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.

Duty of prosecutor — It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule.

Cross-references — See Rule 7-502 NMRA for procedure to withdrawal of a plea by the defendant or rejection plea by the court.

For form on order dismissing criminal complaint with prejudice, see Criminal Form 9-414 NMRA.

The 2004 amendment, effective August 1, 2004, deleted all of former Paragraphs A through E and added new Paragraph A through E of this rule. See Paragraphs A through C of Rule 7-506A NMRA for former Paragraphs A through C of Rule 7-506 NMRA

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

Date of commencement of trial. — Where the state and the defendant were present and prepared to commence a bench trial on the scheduled trial date which was within the 182-day period; on the scheduled trial date, the court agreed to hear the defendant's motion to suppress evidence and took the motion under advisement without hearing opening statements or testimony other than testimony related to the suppression motion; and the case came back for trial after the expiration of the 182-day period, the trial was deemed to have commenced on the originally scheduled trial date within the 182-day period in the absence of any indication in the record of an attempt by the state to circumvent the rule. *State v. Candelario*, 2008-NMCA-119, ____ N.M. ____, 192 P.3d 789.

Delay charged to defendant. — Where the defendant had sufficient notice that the state would amend the complaint to charge the defendant with aggravated DWI second offense which would entitle the defendant to a jury trial instead of a bench trial, and the court granted the defendant's motion for a continuance to prepare for a jury trial, the court did not err in charging the defendant with the delay. *State v. Maestas*, 2007-NMCA-155, 143 N.M. 104, 173 P.3d 26.

Preservation of error. — Where the metropolitan court judge repeatedly asserted that a bench warrant had been issued for the defendant's arrest for failure to appear at trial during the 182-day period; the defendant was not aware that a bench warrant had not been issued for defendant's arrest, and the defendant entered a plea conditioned upon his appeal of whether or not his trial commenced within the 182-day period, the defendant preserved his right to argue on appeal the legal consequence of the fact that

a bench warrant had not been issued for defendant's arrest. State v. Granado, 2007-NMCA-058, 141 N.M. 575, 158 P.3d 1018.

Failure of appear. — Where for a legitimate reason defendant failed to appear at the time of his scheduled trial; the metropolitan court judge announced that he intended to issue a bench warrant to arrest defendant for failure to appear; defendant appeared in court on the afternoon of the same day of his trial as directed by the judge's office; the judge accepted the defendant's explanation for his failure to appear at trial and did not issue a bench warrant; and defendant was never seized or taken into custody by a police officer because of his failure to appear at the time of trial, the defendant's failure to appear at trial was not an event that extended the 182-day period for commencement of the defendant's trial. State v. Granado, 2007-NMCA-058, 141 N.M. 575, 158 P.3d 1018.

7-506A. 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) prior to commencement of the trial if the charges are within metropolitan court trial jurisdiction; or
- (2) prior to the commencement of a preliminary examination in the metropolitan court, if the charges are not within metropolitan 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 7-406 NMRA of these rules. If the dismissed charges are later filed in the district court, the state shall notify the metropolitan court and the metropolitan court shall transfer any bond to the district court.

C. **Refiled complaints; cases within metropolitan court trial jurisdiction.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the refiled complaint shall be clearly captioned "Refiled Complaint" and shall include the following:

- (1) the court in which the original charges were filed;
 - (2) the case file number of the dismissed charges;
 - (3) the name of the assigned judge at the time the charges were dismissed;
- and

(4) the reason the charges were dismissed.

D. **Procedure after refile.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the case shall be treated as a continuation of the same case, and the trial on the refiled charges shall be commenced within the unexpired time for trial pursuant to Rule 7-506 NMRA, unless the court, after notice and a hearing, finds the refiled complaint should not be treated as a continuation of the same case.

[Approved, effective August 1, 2004.]

ANNOTATIONS

Committee commentary — In 2004, Rule 7-506 NMRA was split into two rules. This rule is former Paragraphs A through D of Rule 7-506 NMRA.

For what is required for a showing of good faith, see *State v. Vigil*, 114 N.M. 431, 839 P.2d 641 (Ct. App. 1992) (state has the burden of demonstrating good-faith that it was not intent to circumvent the operation of the six-month rule); and *State v. Lucero*, 108 N.M. 548, 550, 775 P.2d 750, 752 (Ct. App.), cert. denied, 108 N.M. 433, 773 P.2d 1240 (1989) (amended complaint containing significant changes in the offenses charged superseded the original complaint for purposes of six-month rule). See also *State v. Bolton*, 1997-NMCA-007, 122 N.M. 831, 932 P.2d 1075 (*analysis of Lucero, Delgado and Coburn cases*).

2004 compiler's notes. — Paragraphs A and B of this rule are the same as Paragraphs A through B of Rule 7-506 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 7-506 NMRA. Paragraph D of this rule replaces former Paragraph D of Rule 7-506 NMRA.

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

Cross-references — See Rule 7-502 NMRA for procedure to withdrawal of a plea by the defendant or rejection plea by the court.

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

7-507. Insanity or incompetency; transfer to district court; evaluation.

A. **Transfer to district court.** If the defendant pleads "not guilty by reason of insanity" or "guilty, but mentally ill", action shall be transferred to the district court for further proceedings pursuant to the Rules of Criminal Procedure for the District Courts.

B. Competency to stand trial.

(1) The issue of the defendant's competency to stand trial may be raised by motion, or upon the court's own motion, at any stage of the proceedings.

(2) The issue of the defendant's competency to stand trial shall be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as to the defendant's competency to stand trial. If a reasonable doubt as to the defendant's competency to stand trial is raised prior to trial, the court shall order the defendant to be evaluated as provided by law. The court shall hold a hearing to determine the issue of the defendant's competency to stand trial:

(a) within ten (10) days after the filing of the diagnostic evaluation if the defendant is incarcerated; or

(b) within thirty (30) days after the filing of the diagnostic evaluation if the defendant is not incarcerated.

(3) If a defendant is found incompetent to stand trial the court may:

(a) dismiss the charges; or

(b) transfer the proceedings to the district court.

(4) If the finding of incompetency is made during the trial, the court shall declare a mistrial.

C. Mental examination. Upon motion and upon good cause shown, the court shall order a mental examination of the defendant before making any determination of competency under this rule.

D. Statement made during psychiatric examination. A statement made by a person during a psychiatric examination or treatment subsequent to the commission of the alleged crime shall not be admissible in evidence against such person in any criminal proceeding on any issue other than that of the person's competency to stand trial.

[As amended, effective September 1, 1990; October 1, 1996.]

ANNOTATIONS

Cross references. — For determination of competency, raising the issue, see 31-9-1 NMSA 1978.

For determination of competency, commitment and report, see 31-9-1.2 NMSA 1978.

For sentence upon accepted plea or verdict of guilty but mentally ill, see 31-9-4 NMSA 1978.

For form on transfer order, see Rule 9-404 NMRA.

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, added "evaluation" to the rule heading; designated the former provisions of this rule as Paragraph A and substituted "or 'guilty, but mentally ill'," for "or if an issue is raised as to the mental competency of the defendant to stand trial," therein; and added Paragraphs B through E.

The 1996 amendment, effective October 1, 1996, in Subparagraph B(2), deleted "Within thirty (30) days after receiving an evaluation of the defendant's competency" from the beginning of the last sentence and inserted "hold a hearing to" and "the defendant's" in the last sentence and added Subparagraphs B(2)(a) and B(2)(b); in Subparagraph B(3), added Subparagraph B(3)(b) and deleted former Subparagraphs B(3)(b), B(3)(c), and B(3)(d) relating to staying further proceedings, ordering treatment to enable defendant to attain competency, and review and amend the conditions of release; deleted the former last sentence of Paragraph C relating to payment of costs of the examination if defendant is indigent; deleted former Paragraph D relating to continuing judicial review and redesignated former Paragraph E as Paragraph D; and substituted "competency to stand trial" for "sanity" in Paragraph D.

ARTICLE 6

Trials

7-601. Conduct of trials.

A. **Continuances.** Continuances shall be granted for good cause shown at any stage of the proceedings.

B. **Evidence.** The New Mexico Rules of Evidence shall govern proceedings in the metropolitan court.

C. **Oath of witness.** The court shall administer an oath or affirmation to each witness, substantially in the following form: "You do 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 metropolitan court proceeding or any person with a claim arising out of the same transaction or occurrence giving rise to the metropolitan court proceeding, may at the party's or person's expense, make a record of the testimony in the metropolitan court proceeding. Any person causing a transcription of testimony to be made pursuant to this

rule shall make a copy of the transcription available to all parties in the metropolitan court proceeding.

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

- (1) civil proceedings when permitted by the Rules of Civil Procedure for the Metropolitan Court; 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.

[As amended, effective September 2, 1997; March 21, 2005.]

ANNOTATIONS

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 Paragraph D.

The March 21, 2005 amendment 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.

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.; 88 C.J.S. Trial § 1 et seq.

7-602. Jury trial.

A. **Petty misdemeanor offense.** When authorized by law, 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 and at least twenty-four (24) hours before any time set for trial on the merits. 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.]

Committee commentary. — This rule is a modification on the Magistrate Court Rules to avoid the possibility of enlarging the right to a jury trial to include offenses under municipal ordinances. Although it is believed that all cases tried in the metropolitan court may be tried to a jury upon demand of either party, because of the decision in *City of Tucumcari v. Briscoe*, 58 N.M. 721, 275 P.2d 958, it was decided to limit the rule to permit jury trials in those cases authorized by law when demand is timely made.

See 35-8-1 NMSA 1978; Art. 2, Sec. 12, New Mexico Constitution.

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 metropolitan courts on and after October 1, 1992, 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.

7-603. Trials to juries.

Juries in the metropolitan 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 judge. Whenever the judge is satisfied that there is no reasonable probability that a jury can agree on a verdict, he may discharge it and summon a new jury unless the parties agree that the judge may render judgment.

7-604. Nonjury trials.

In all actions tried upon the facts without a jury the judge shall, at the conclusion of the case, orally announce his decision and enter the appropriate judgment or final order; provided, however, the judge may delay announcing his decision for a period not exceeding thirty (30) days if briefs or further research are required in the case.

[As amended, effective May 1, 1986.]

7-605. Jurors.

A. **Metropolitan jury.** A jury in the metropolitan court consists of six jurors with the same qualifications as jurors in the district court. Whenever a jury is required, the metropolitan judge 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 judge may examine the jurors who have been summoned to determine whether they should be disqualified for cause. 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 juror discloses any basis for his disqualification, he shall be excused.

C. **Peremptory challenges.** If the offense charged is a petty misdemeanor, each party shall then be entitled to one peremptory challenge. If the offense charged is a misdemeanor, each party shall be entitled alternately to two peremptory challenges of

jurors. If peremptory challenges are exercised, the judge shall excuse those jurors challenged.

D. Selection of jury.

(1) The judge shall cause the name of each juror present to be placed on a separate slip of paper which shall be placed in a box. A list of the names of the jurors present shall be prepared by the judge or at his direction, and a copy of the list provided each party or his attorney.

(2) The jurors may be examined by the parties, their attorneys or the judge by questioning all of the 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 alternate juror may be selected, if the judge, at his discretion, so elects. The parties may exercise their peremptory challenges in the selection of the alternate juror, 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 drawing additional slips, the sheriff or other responsible person shall summon a sufficient number of jurors to fill the deficiency.

F. Oath to jurors. The judge shall administer an oath or affirmation in substantially the following form to 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."

[As amended, effective September 1, 1989.]

ANNOTATIONS

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, in Subparagraph (2) of Paragraph D, deleted the "(a)" designation from the beginning, substituted "or individually" for "and individually", and deleted former Item (b) at the end of the present language and the former second sentence, relating to the drawing by the judge of the names of six jurors to be questioned as a group and individually, and the drawing of additional names of jurors to replace those excused for cause or by peremptory challenge, respectively.

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).

7-606. 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, hearing, statement or deposition and give testimony or to produce designated books, documents or tangible things in the possession, custody or control of that person;
 - (d) state the time and date of the hearing, trial, statement or deposition, the name of the judge before whom the witness is to appear or produce documents; and
 - (e) 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) In matters involving trial, hearings or production of documents or tangible things, the judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it 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. 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) In matters involving statements or depositions, no subpoena to appear to give a statement or deposition shall be valid unless signed by the trial judge.
- (5) 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. 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. When the subpoena is issued on behalf of the defendant in criminal actions and when the person whose attendance is commanded is an officer or agent of the state or any 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 7-209 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;

(3) Personal service of the subpoena may be completed by serving the individual or, in the case of a police officer or agent of the state, by serving an on-site supervisor or a representative designated by the agency that employs the individual to be served.

C. 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 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.

D. 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.

E. 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, 1994; May 1, 1994; May 1, 2002; as amended by Supreme Court Order 07-8300-07, effective May 21, 2007.]

ANNOTATIONS

Cross references. — 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.

For payment of subpoenaed witnesses from the jury and witness fee fund, see Section 34-9-11 NMSA 1978.

For the requirement to pay per diem and mileage to witnesses, see Section 38-6-4 NMSA 1978 and Section 10-8-4 NMSA 1978.

For the subpoena of witnesses in the district court in civil cases, see Rule 1-045 NMRA.

For the subpoena of witnesses in the district court in criminal cases, see Rule 5-511 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 07-8300-07, effective May 21, 2007, amended Subparagraph (1) of Paragraph A to permit a subpoena to be issued for the taking of a statement or deposition; amended Subparagraph (2) of Paragraph A to permit blank subpoenas to be issued to the parties for compelling witnesses to attend trial or hearings or to produce documents or tangible things; added Subparagraph (4) of Paragraph A to require the trial judge to sign subpoenas to compel witnesses to appear for pretrial statements or depositions; amended Subparagraph (1)(b) of Paragraph B to permit the defendant to compel the attendance of witnesses without payment of per diem and mileage.

7-607. Blood and breath alcohol test reports; controlled substance chemical analysis reports.

A. **Admissibility.** In any prosecution of an offense within the trial jurisdiction of the metropolitan 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 and the circumstances surrounding receipt and custody of the test sample 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 on blood alcohol, see Rule 9-505 NMRA.

Bracketed material. — The bracketed reference to the department of health 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 metropolitan courts on or after October 1, 1991, added "controlled substance chemical analysis reports" to the catchline; in Paragraph A, rewrote Subparagraph (1)(a) and added Subparagraph (3); in Paragraph B, substituted "breath, blood or controlled substance" for "breath or blood" and inserted "or (3)"; and, in Paragraph C, inserted "chemical analysis of a controlled substance or".

Adoption of rule. — This rule provides for establishing proper calibration of blood alcohol testing devices; its requirements may be met through live testimony, affidavit or certification, or calibration testing records. *Bransford v. State Taxation & Revenue Dep't*, 1998-NMCA-077, 125 N.M. 285, 960 P.2d 827.

Foundation for the admission of breathalyzer tests. — All that is necessary to lay a proper foundation for the admission of breathalyzer test results in a criminal DWI trial is the live testimony of the officer who administered the test as to his familiarity with the testing procedure, the recent calibration of the machine, and his observation that the test administration proceeded without error. *State v. Smith*, 1999-NMCA-154, 128 N.M. 467, 994 P.2d 47, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

Improper admission of blood alcohol test. — The improper admission of a blood alcohol test (BAT) was harmless error since the defendant was charged with driving under the influence of intoxicating liquor or drugs and there was sufficient evidence to support a conviction of the offense without consideration of the BAT results. *State v. Gutierrez*, 1996-NMCA-001, 121 N.M. 191, 909 P.2d 751.

7-608. 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 Sections 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, 1995.]

ANNOTATIONS

The 1995 amendment, effective January 1, 1995, added "preliminary hearings" in the rule heading, inserted "human specimen or a" near the beginning in Paragraph A, and rewrote Paragraph A(1) by adding the subparagraph designations and adding Subparagraphs (b) and (d).

7-609. Instructions to juries.

A. **Procedural instructions.** After the parties have completed their presentation of the evidence and before arguments to the jury, the judge shall orally instruct the jury on the procedure to be followed by it 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, added all of the language at the end of Paragraph A beginning "Such instructions shall be given"; and in Paragraph B, substituted the present paragraph heading for "UJI and requested instructions" and rewrote the paragraph, which read "The judge shall give the jury applicable instructions contained in UJI Criminal and, if requested by a party or on his own motion, and if he deems it appropriate, the judge may give the jury any other appropriate instructions."

7-610. 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.

7-611. Motion for new trial; appeals on the record.

A. **Motion.** In cases which may be appealed on the record, if the defendant has been found guilty, the court, on motion of the defendant, or on its own motion, may grant a new trial if required in the interest of justice.

B. **Time for making motion for new trial.** A motion for new trial shall be made within ten (10) days after verdict or finding of guilty or within such further time as the court may fix during the ten (10) day period. If a motion for new trial is not granted within twenty (20) days from the date it is filed, the motion is automatically denied.

C. **Extension of time for appeal.** If a party timely files a motion for new trial pursuant to this rule, the full time prescribed by Rule 7-703 for the filing of the notice of

appeal shall commence to run and be computed from either the entry of an order expressly disposing of the motion for new trial or the date of any automatic denial of the motion, whichever occurs first. An order granting a motion for new trial is not appealable and renders any prior judgment non-appealable.

[Adopted, effective January 1, 1994.]

ARTICLE 7

Judgment and Appeal

7-701. Judgment.

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. When a citation is issued in lieu of a criminal complaint in accordance with Rule 7-201, the back of the citation may serve as the final order or as the judgment and sentence when no jail time is imposed. The court shall give notice of entry of judgment and sentence.

[As amended, effective October 1, 1992; January 1, 1995.]

Committee commentary. — The rule, as proposed by the committee, requires the court to impose costs against the defendant when there is a conviction. Former Rule 33 of the Rules of Criminal Procedure for the Magistrate Courts (see now Rules 6-701, 6-702 and 6-801) made imposition of costs discretionary with the court.

ANNOTATIONS

Cross references. — For form on judgment and sentence, see Rule 9-601 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 metropolitan courts on and after October 1, 1992, substituted "the defendant has" for "he has" in the second sentence and added the fourth sentence in Paragraph A; 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 525 et seq.

7-702. Advising defendant of right to appeal.

A. **Duty of metropolitan court.** At the time of entering a judgment and sentence, the court shall advise the defendant of the defendant's right:

- (1) if the appeal is an appeal *de novo*, to a new trial in the district court;
- (2) if the appeal is an appeal on the record, to appeal on the record to the district court.

The court shall also advise the defendant that if the defendant wishes to appeal, a notice of appeal must be filed in the district court within fifteen (15) days after entry of the judgment and sentence.

B. **Duty of defendant.** In trial *de novo* appeals, the defendant has the duty of obtaining a trial before the district court within six (6) months of the date of the filing of the notice of appeal in the district court. A defendant shall request a trial date at the time the notice of appeal is filed in the district court.

C. **Automatic affirmance; appeal *de novo*.** Any appeal *de novo* which has not been tried by the district court within six (6) months after the date of the filing of the notice of appeal, will be dismissed and the judgment and sentence will be affirmed, unless the time has been extended by a justice of the New Mexico Supreme Court upon a showing of good cause.

D. **Timely disposition of appeals on the record required.** The district court shall enter a final order in an appeal on the record within six (6) months from the date the notice of appeal was filed in the district court. When a judge has not entered a judgment or final order within six (6) months after the date of filing of the notice of appeal in an appeal on the record case:

(1) the attorneys or *pro se* parties shall file with the clerk of the district court a notice that the judge has had the matter under submission for more than six (6) months. The notice shall state the names of the parties, the district court and metropolitan court docket numbers, the name of the judge assigned to hear the appeal and the date the notice of appeal was filed; and

(2) the judge shall deliver to the chief judge of the judicial district and shall send to the clerk of the Supreme Court a written memorandum explaining all reasons for noncompliance at thirty (30) day intervals beginning six (6) months from the date the notice of appeal was filed.

E. **Appeal log.** For all pending appeals on the record for which notice has been given pursuant to Paragraph D of this rule, the clerk of the district court shall maintain a

written appeal log. The appeal log shall state the names of the parties, the district court and metropolitan court docket numbers, the name of the judge assigned to hear the appeal and the date the notice of appeal was filed. The log shall be available for public inspection and a copy thereof shall be sent monthly to the clerk of the Supreme Court.

[As amended, effective September 1, 1990; January 1, 1994; January 1, 1997; September 2, 1997; October 15, 2002.]

Committee commentary. — The timely disposition of appeals is an essential requirement of justice. It was brought to the committee's attention that the disposition of appeals on the record to the district court take significantly longer than *de novo* appeals.

The above amendments were taken from Rule 12-406 governing the disposition of appeals to the Supreme Court and Court of Appeals and Rule 1-054 requiring disposition in civil cases within 60 days after submission.

ANNOTATIONS

Cross references. — For form on judgment and sentence, see Rule 9-601 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 appear as present 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 1994 amendment, effective January 1, 1994, in Paragraph A, substituted "of the defendant's right" for "of his right" near the beginning, inserted the Subparagraph A(1) designation and inserted "if the appeal is an appeal de novo" in that subparagraph, inserted Subparagraph A(2), and inserted "in the district court" near the end; in Paragraph B, added "In trial de novo appeals" at the beginning, inserted "in the district court" near the middle, and substituted "the time the notice of appeal is filed in the district court" for "the time of filing the notice of appeal" near the end; and inserted "de novo" near the beginning of Paragraph C.

The first 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.

The second 1997 amendment, effective September 2, 1997, added Paragraphs D and E.

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

Scope of duty to advise. — The rules promulgated by the supreme court do not require that waiver of the right to a jury in a trial de novo in district court on appeal from a metropolitan court conviction must be accompanied by advice to the defendant on the record in district court of his right to a jury trial. *State v. Ciarlotta*, 110 N.M. 197, 793 P.2d 1350 (Ct. App. 1990).

Duty of defendant. — The purpose of requiring a prompt request for trial setting is to make clear that an extension of the six-month period for trial is not warranted if the defendant delays requesting a trial setting. *State v. Trujillo*, 1999-NMCA-003, 126 N.M. 603, 973 P.2d 855.

7-703. 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 metropolitan 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 metropolitan court clerk's office. The three (3) day mailing period set forth in Rule 7-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the metropolitan court clerk's office, shall be treated as timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state or its political subdivisions or against a defendant who is represented by a public defender or court appointed counsel.

B. **Notice of appeal.** An appeal from the metropolitan court is taken by:

(1) filing with the clerk of the district court a notice of appeal with proof of service; and

(2) promptly filing with the metropolitan court:

(a) a copy of the notice of appeal which has been endorsed by the clerk of the district court; and

(b) unless the appeal has been filed by the state, a political subdivision of the state or by a defendant represented by a public defender or court appointed counsel, a copy of the receipt of payment of the docket fee.

C. **Content of the notice of appeal.** The notice of appeal shall be substantially in the form approved by the Supreme Court.

D. Service of notice of appeal. At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or each party's attorney in the proceedings in the metropolitan court with a copy of the notice of appeal in accordance with Rule 5-103 NMRA of the Rules of Criminal Procedure for the District Courts; and

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 5-103 NMRA.

E. Docketing the appeal. Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. Record on appeal. Within fifteen (15) days after the appellant files a copy of the notice of appeal in the metropolitan court pursuant to Paragraph B of this rule, the metropolitan court shall file with the clerk of the district court the record on appeal taken in the action in the metropolitan court. For purposes of this rule, the record on appeal shall consist of:

(1) a title page containing the caption of the case in the metropolitan court and names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers and pleadings filed in the metropolitan court;

(3) a copy of the judgment or final order sought to be reviewed with date of filing;

(4) any exhibits; and

(5) if the appeal is from a trial on the record, any transcript of the proceedings made by the metropolitan court. The metropolitan court clerk shall prepare and file with the district court a duplicate of the tape of the proceedings and index log.

The metropolitan court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court.

Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

G. Correction or modification of the record. If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the metropolitan court or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

H. Conditions of release. At the time of the entry of the judgment and sentence, the metropolitan court shall review the conditions of release pending appeal to assure the conditions are sufficient to secure the appearance of the defendant and the judgment of the metropolitan court. The metropolitan court may utilize the criteria listed in Paragraph B of Rule 7-401 NMRA, and may also consider the fact of defendant's conviction and the length of sentence imposed. The conditions of release shall be included on the judgment and sentence. A defendant released pending trial shall continue on release pending an appeal to the district court under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions are necessary to assure the defendant's appearance or to assure that the defendant's conduct will not obstruct the orderly administration of justice. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court. If the court determines that the previously imposed conditions are not sufficient to assure the appearance of the defendant or the orderly administration of justice, the court may increase the amount of the bond on appeal or terminate the conditions of release to assure the appearance of the defendant or the orderly administration of justice. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to or during trial. Upon filing of the notice of appeal, the bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the bond until remand to the metropolitan court.

I. Review of terms of release. If the metropolitan 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 metropolitan court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the metropolitan court.

J. Trial de novo appeals. Except as otherwise provided by law for appeals involving driving while under the influence and domestic violence offenses, trials upon appeals from the metropolitan court to the district court shall be de novo.

K. Notice; trial de novo appeals. In trial de novo appeals, the clerk of the district court shall give notice to all parties of the time and date set for a trial de novo not less than ten (10) days prior to the date set for trial. If the defendant is represented by counsel, the clerk shall give written notice to the defendant and the defendant's counsel. Notice to the defendant shall be mailed to the defendant's last known address.

L. Disposition; time limitations. The district court shall try a trial de novo appeal within six (6) months after the filing of the notice of appeal. Any de novo appeal pending in the district court six (6) months after the filing of the notice of appeal without

disposition shall be dismissed and the cause remanded to the metropolitan court for enforcement of its judgment.

M. Extension of time. The time limit specified in Paragraph L of this rule may be extended one time for a period not exceeding ninety (90) days upon a showing of good cause to a justice of the Supreme Court. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause to extend the time period for trial. The petition shall be filed within the six (6) month period, except that it may be filed within ten (10) days after the expiration of the six (6) month period if it is based on exceptional circumstances beyond the control of the party or trial court which justify the failure to file the petition within the six (6) month period. A party seeking an extension of time shall promptly serve a copy on opposing counsel. Within five (5) days after service of the petition, opposing counsel may file an objection to the extension setting forth the reasons for the objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the six (6) month period, it shall fix the time limit within which the defendant must be tried. No other extension of time shall be allowed.

N. Procedure on appeal. Unless there is a conflict with this rule or Rule 7-704 through Rule 7-709 of these rules, the Rules of Criminal Procedure for the District Courts shall govern the procedure on appeal from the metropolitan court. If the appeal is on the record, the parties shall comply with the provisions of Rule 7-706 NMRA.

O. Rehearing; appeals on the record. Within ten (10) days after entry of a judgment or order disposing of an appeal on the record, any party may file a motion for rehearing. The motion shall set forth with particularity the points of law or fact which the movant believes the court has overlooked or misapprehended but shall not contain argument. No response to a motion shall be permitted unless requested by the district court. The motion for rehearing shall be disposed of within fifteen (15) days after it is filed.

P. Disposal of appeals. The district court shall dispose of appeals by entry of a judgment or order disposing of the appeal. The court in its discretion may accompany the judgment or order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the district court upon expiration of whichever of the following events occurs latest:

- (1) fifteen (15) days after entry of the order disposing of the case;
- (2) fifteen (15) days after disposition of a motion for rehearing; or
- (3) if a notice of appeal is filed, upon final disposition of the appeal.

Upon remand of the case by the district court to the metropolitan court, the metropolitan court shall enforce the mandate of the district court.

Q. Remand. Upon expiration of the time for appeal from the final order or judgment of the district court, the district court shall remand the case to the metropolitan court for enforcement of the district court's judgment.

R. Appeal. An aggrieved party may appeal from a judgment of the district court to the New Mexico Supreme Court or New Mexico Court of Appeals, as authorized by law, in accordance with the Rules of Appellate Procedure. The conditions of release and bond approved or continued in effect by the district court during the pendency of the appeal to the district court shall continue in effect pending appeal to the Court of Appeals, unless modified pursuant to Rule 12-205 of the Rules of Appellate Procedure.

S. Return of record. After final determination of the appeal, the clerk of the district court shall return the record on appeal to the metropolitan court clerk.

[As amended, effective July 1, 1988; September 1, 1989; September 1, 1990; January 1, 1994; January 1, 1994; January 1, 1995; January 1, 1997; February 16, 2004.]

Committee commentary. — Section 34-8A-6C NMSA 1978 (as amended by Laws 1980, Chapter 142, Section 4), is so broad as to be in violation of the constitutional prohibition against double jeopardy. The rule as drafted limits appeals by the prosecution to a determination of the validity of the statute or ordinance under which the defendant was prosecuted, thus avoiding the statutory violation mentioned above.

ANNOTATIONS

Cross references. — For form on notice of appeal, certificate of service by attorney, and affidavit of service of a party, see Rule 9-607 NMRA.

For form on title page of transcript of criminal proceedings, see Rule 9-608 NMRA.

The second 1994 amendment, effective January 1, 1994, rewrote this rule.

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

The 1997 amendment, effective January 1, 1997, rewrote Paragraph A; in Paragraph B, inserted "with proof of service" in Subparagraph (1) and added Subparagraph (2)(b); rewrote Paragraphs C, D, and E which formerly related to stay, docketing of the appeal, and transmission, respectively; rewrote Paragraph F; rewrote Paragraph G; rewrote Paragraph H; rewrote the last sentence in Paragraph I; added "appeals" in the Paragraph J heading and deleted "and shall be governed by the Rules of Criminal Procedure for the District Courts" in Paragraph J; substituted "time limit" for "time limits" and made a stylistic change in Paragraph M; rewrote Paragraph N; added Paragraphs

O to R and redesignated former Paragraph O as Paragraph S; and substituted "record on appeal" for "record and any exhibits" in Paragraph S.

The 2003 amendment, effective February 16, 2004, added the last two sentences of Paragraph H and substituted "involving" for "from" in Paragraph J.

This rule does not unconstitutionally abridge right of appeal guaranteed by N.M. Const. art. VI, § 27. *State v. Ball*, 104 N.M. 176, 718 P.2d 686 (1986).

Appeal from the metropolitan court is governed by the crime of which defendants are convicted rather than the type of trial; thus, defendant convicted of eluding an officer and reckless driving was entitled to a trial de novo, even though the trial was on the record. *State v. Krause*, 1998-NMCA-013, 124 N.M. 415, 951 P.2d 1076, cert. denied, 125 N.M. 146, 958 P.2d 104 (1998).

One who agrees not to be aggrieved cannot appeal. — One who agrees not to be aggrieved by entering into a plea and disposition agreement in the metropolitan court, who alleges no constitutional invalidity in the agreement, and who does not seek to have his plea and agreement withdrawn, is not an "aggrieved" party and cannot appeal to the district court. *State v. Bazan*, 97 N.M. 531, 641 P.2d 1078 (Ct. App. 1982), overruled on other grounds *State v. Ball*, 104 N.M. 176, 718 P.2d 686 (1986).

"Aggrieved" defendant. — A defendant who properly has entered a plea of guilty or nolo contendere in metropolitan court is not an "aggrieved" party entitled to appeal to the district court for a trial de novo. *State v. Ball*, 104 N.M. 176, 718 P.2d 686 (1986).

Officer may not continue magistrate or municipal 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.

Prosecution has no right to appeal the metropolitan court's suppression of evidence. *State v. Giraud*, 99 N.M. 634, 661 P.2d 1333 (Ct. App. 1983).

But may appeal order of dismissal. — Since an order of dismissal for failure to timely prosecute is a final judgment, the prosecution may appeal it from the metropolitan court to the district court. *State v. Giraud*, 99 N.M. 634, 661 P.2d 1333 (Ct. App. 1983).

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*, 117 N.M. 273, 871 P.2d 369 (1994).

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*, 117 N.M. 273, 871 P.2d 369 (1994).

Technical deficiency in metropolitan court transcript may be harmless. — Where trial court has sufficient information to proceed with the trial, a technical deficiency in transcript of metropolitan court, such as failure to include all pleadings or metropolitan court's final order, did not deprive trial court of power to proceed with the trial. *State v. Gallegos*, 101 N.M. 526, 685 P.2d 381 (Ct. App. 1984).

Counsel's failure to file timely notice of appeal. — Defendant was denied effective assistance of counsel by counsel's failing to file a timely notice of appeal in district court when counsel was aware of defendant's intent to appeal his metropolitan court judgment and sentence. *State v. Manuelito*, 115 N.M. 394, 851 P.2d 516 (Ct. App. 1993).

Single notice of appeal valid for two convictions where notice identified the two cases and internal wording of notice stated that appeal was taken in both cases. *State v. Gallegos*, 101 N.M. 526, 685 P.2d 381 (Ct. App. 1984).

Failure to preserve issue. — When a defendant fails to show the district court that he preserved issue in metropolitan court, the district court is not required to make an independent determination of whether the metropolitan court six-month rule was violated. *State v. Hoffman*, 114 N.M. 445, 839 P.2d 1333 (Ct. App. 1992).

Ineffective assistance of counsel on appeal. — When the state purports to satisfy a criminal defendant's constitutional right to counsel, ineffective assistance of the appointed counsel may overcome the mandatory precondition to the district court's exercise of jurisdiction under Paragraph J of this rule. *Varela v. State*, 115 N.M. 586, 855 P.2d 1050 (1993).

Dismissal of de novo appeals for failure to appear. — Before a de novo appeal can be dismissed for failure to appear, the court must give the defendant notice of the pending dismissal and 10 days to show cause why the appeal should not be dismissed. *State v. Wilson*, 116 N.M. 802, 867 P.2d 1184 (Ct. App. 1993).

A showing of extreme willfulness is necessary before the district court can dismiss an appeal for failure to appear prior to the expiration of the six-month rule. *State v. Wilson*, 116 N.M. 802, 867 P.2d 1184 (Ct. App. 1993).

Transcripts. — Because transcripts are designated separately from papers in the rules listing the contents of the record on appeal, transcripts are not “papers,” but transcripts that are properly admitted into evidence as exhibits may be part of the record on appeal. *State v. Foster*, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824.

7-704. 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 judgments, final orders or other parts of the file and errors therein arising from oversight or omission may be corrected by the judge 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 judge orders.

[As amended, effective January 1, 1994; January 1, 1997.]

ANNOTATIONS

The 1994 amendment, effective January 1, 1994, deleted the former last sentence of Paragraph B which read "During the pendency of an appeal, such mistakes may be so corrected before the transcript is filed in the district court, and thereafter while the appeal is pending may be corrected with leave of the district court", and added Paragraph C.

The 1997 amendment, effective January 1, 1997, substituted "on the judge's own initiative" for "of his own initiative" in Paragraph B, and deleted former Paragraph C relating to correction or modification of the record.

Technical deficiency in metropolitan court transcript may be harmless. — Where trial court has sufficient information to proceed with the trial, a technical deficiency in transcript of metropolitan court, such as failure to include all pleadings or metropolitan court's final order, does not deprive trial court of power to proceed with the trial. *State v. Gallegos*, 101 N.M. 526, 685 P.2d 381 (Ct. App. 1984).

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.

7-705. Tape recordings of proceedings; appeals on the record.

A. **Taping of proceedings.** A tape recording and index log shall be made of all criminal proceedings in which the metropolitan court is a court of record. When an appeal on the record is specifically permitted by law, the tape recording and index log shall be a part of the record on appeal. The tape recording shall be included in the record on appeal only if the appeal is from a judgment finding the defendant guilty of:

- (1) driving while under the influence of intoxicating liquors or drugs; or

(2) "domestic abuse" of a "household member" as those terms are defined in Section 40-13-2 NMSA 1978 of the Family Violence Protection Act.

If the defendant appeals from the conviction of more than one offense one or more of which is an on the record conviction and one or more of which is a *de novo* appeal conviction, the appeal of all convictions shall be on the record. Unless the defendant appeals an on the record conviction, the appeal shall be a *de novo* appeal even though the proceedings have been recorded.

B. Satisfactory arrangements. At the time that the copy of the notice of appeal is filed in the metropolitan court, the appellant shall make satisfactory arrangements for payment of the cost of the transcript of proceedings. Payment for the cost of preparing copies of the transcript of proceedings shall not be required if the appellant is the state or a defendant represented by a public defender or counsel appointed by the court. Proof of satisfactory arrangements shall be included with the record on appeal unless the appellant is the state or is represented by a public defender or counsel appointed by the court.

C. Preservation of taped record. Tapes containing the transcript of the proceedings shall be preserved for ninety (90) days after the entry of a final order in the proceedings. Any party desiring to preserve the tapes for a longer period of time may, prior to the expiration of eighty (80) days after the filing of the final order, file a request to preserve the tapes containing the transcript of the proceedings. A request to preserve the tapes containing the transcript of the proceedings shall be accompanied by a designation of the portions of the proceedings to be preserved and satisfactory arrangements for payment of the cost of preparing the transcript of proceedings.

[Adopted, effective January 1, 1994; as amended, effective January 1, 1997; September 2, 1997.]

ANNOTATIONS

The first 1997 amendment, effective January 1, 1997, substituted "record" for "transcript" in the last sentence of Paragraph A; in Paragraph B, substituted "the transcript of" for "duplicate copies of the tape recording of the" in the first sentence, substituted "transcript of" for "taped" and "a public defender or counsel appointed by the court" for "the public defender" in the second sentence, and substituted "is the state or is represented by a public defender or counsel appointed by the court" for "is represented by the public defender or the appellant is the state" in the last sentence; rewrote Paragraph C; and deleted former Paragraph D relating to notice to the parties.

The second 1997 amendment, effective September 2, 1997, in Paragraph A, inserted "When an appeal on the record is specifically permitted by law", added the last sentence of the first paragraph and added Subparagraphs (1) and (2), and added the last undesignated paragraph.

Compiler's notes. — Pursuant to a court order dated December 30, 1993, former Rule 7-705 was recompiled as Rule 7-709 NMRA effective January 1, 1994.

7-706. Statement of appellate issues; appeals on the record.

A. **Statement of appellate issues.** In an appeal on the record, a statement of appellate issues shall be filed with the district court as follows:

(1) the appellant's statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on appeal in the district court; and

(2) the appellee's response shall be filed and served within thirty (30) days after service of the appellant's statement of issues.

B. **Appellant's statement of appellate issues.** The appellant's statement of appellate issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings which shall indicate briefly the nature of the case, the course of proceedings, and the disposition of the metropolitan court. The summary shall include a short recitation of all facts relevant to the issues presented for review, with appropriate references to the record on appeal showing how the issues were preserved in the proceedings before the metropolitan court;

(3) an argument which shall contain the contentions of the appellant with respect to each issue presented in the statement of issues, with citations to the authorities, statutes and parts of the record on appeal relied on. New Mexico decisions, if any, shall be cited; and

(4) a statement of the precise relief sought.

C. **Appellee's statement of appellate issues; response.** The appellee's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph B of this rule, except that a statement of the issues or a summary of proceedings shall not be made unless the appellant's statement of issues or summary of the proceedings is disputed or is incomplete.

D. **References in statement of appellate issues.** References in the statement of appellate issues shall be to the pages of the record on appeal or, if the reference is to a tape recording, the approximate counter numbers of the tape as shown on the index log. If reference is made to evidence the admissibility of which is in controversy, reference shall be to the place in the record on appeal at which the evidence was identified, offered, and received or rejected.

E. Length of statements of appellate issues. Except by permission of the court, the argument portion of the appellant's statement of appellate issues shall not exceed eight (8) pages. Except by permission of the court, the argument portion of appellee's response shall not exceed eight (8) pages.

F. Briefs. Briefs may be filed only by leave of the district court and upon such conditions as the court may direct.

G. Oral argument. Upon motion of a party or on the court's own motion, the court may allow oral argument.

[As adopted, effective January 1, 1994; as amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "service of the notice of filing of the record on appeal in the district court" for "the filing of the transcript of proceedings" in Subparagraph A(1); in Paragraph B, inserted "appellate" in the heading, substituted "appellate issues" for "the issues" in the first sentence, substituted "record on appeal" for "court file, exhibits and the taped record of proceedings" and inserted "proceedings before the" in Subparagraph (2), and inserted "in the statement of issues" and substituted "record on appeal" for "record and transcript" in Subparagraph (3); in Subsection C, added "statement of appellate issues" in the heading, substituted "a summary" for "of the summary" near the middle and inserted "the" and added "or is incomplete" near the end; deleted former Paragraph D relating to briefs and redesignated former Paragraphs E and F as Paragraphs D and E; in Paragraph D, substituted "on appeal or, if the reference is to a tape recording" for "proper or" and "tape" for "record of proceedings" in the first sentence and substituted "record on appeal" for "transcript of proceedings" in the last sentence; substituted "eight (8) pages" for "five (5) pages" in two places in Paragraph E; and added Paragraphs F and G.

7-707. Scope of review by district court; appeals on the record.

A. Preserving questions for review. To preserve a question for review it must appear that a ruling or decision by the metropolitan court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review. Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party.

B. Exceptions. This rule shall not preclude the district court from considering jurisdictional questions or, in its discretion, questions involving:

- (1) general public interest; or
- (2) fundamental error or fundamental rights of a party.

C. **Applicability.** This rule applies to appeals on the record from the metropolitan court to the district court.

[Adopted, effective January 1, 1994.]

7-708. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated October 30, 1996, this rule, relating to disposition by district court, mandate, and appeal, is withdrawn effective January 1, 1997.

7-709. Appeals; dismissals for failure to comply with rules or failure to appear.

A. **By the court.** When an appellant fails to comply with these rules, the district court shall notify the appellant that upon the expiration of ten (10) days from the date of the notice the appeal will be dismissed unless prior to that date appellant shows cause why the appeal should not be dismissed.

B. **Failure to appear; trial de novo appeals.** If the defendant fails to appear at the trial de novo, the district court shall set a hearing within thirty (30) days for the defendant to show good cause why the defendant's appeal should not be dismissed. The clerk of the district court shall mail notice of the hearing to the defendant and to the defendant's counsel at least ten (10) days prior to the hearing. If the defendant fails to show good cause for the failure to appear for trial, the district court may dismiss the appeal and remand the case to the metropolitan court for enforcement of the judgment and sentence. If the district court finds good cause for the defendant's failure to appear, the district court shall reschedule the trial:

(1) prior to the expiration of the six-month time period for trial provided by Rule 7-703; or

(2) within the time fixed by the Supreme Court if the defendant obtains an extension of time for trial pursuant to Rule 7-703.

C. **By motion of the appellee.** If the appellant fails to comply with these rules, the appellee may file a motion in the district court to dismiss the appeal. The motion shall identify the rule violated. The appellant shall have ten (10) days from the date of service to respond to the motion.

[As recompiled, effective January 1, 1994; as amended, effective January 1, 1995; January 1, 1997.]

ANNOTATIONS

The 1995 amendment, effective January 1, 1995, added "or failure to appear" in the rule heading, added Paragraph B, and redesignated former Paragraph B as Paragraph C.

The 1997 amendment, effective January 1, 1997, substituted "date of the notice" for "date thereof" in Paragraph A and substituted "fails" for "shall fail" in Paragraph C.

Compiler's notes. — Pursuant to a court order dated December 30, 1993, former Rule 7-705 was recompiled as Rule 7-709 NMRA effective January 1, 1994.

ARTICLE 8

Special Proceedings

7-801. Modification of sentence.

The metropolitan court may modify but shall 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.

Committee commentary. — The rule, as proposed by the committee, requires the court to impose costs against the defendant when there is a conviction. Former Rule 33 of the Rules of Criminal Procedure for the Magistrate Courts (see now Rules 6-701, 6-702 and 6-801) made imposition of costs discretionary with the court.

ANNOTATIONS

Cross references. — For form on judgment and sentence, see Rule 9-601 NMRA.

For form on agreement to pay the fine and court costs, see Rule 9-605 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 580 et seq.

24 C.J.S. Criminal Law § 1610 et seq.

7-802. 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.

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 metropolitan court.

[As amended, effective September 1, 1989; May 1, 2002.]

ANNOTATIONS

The 1989 amendment, effective for cases filed in the metropolitan 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 relating to issuance of warrants and imposition of sentence, respectively.

7-810. Fugitive complaint.

A. Complaint. A fugitive action may be commenced in the metropolitan 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 metropolitan 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 Chapter 31, Article 4 NMSA 1978.

7-811. 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 receipt of a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending issuance of 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 within the times provided by Paragraph F, the fugitive complaint shall be dismissed without prejudice and the defendant released.

[Adopted, effective October 1, 1996.]

ANNOTATIONS

Cross references. — For Uniform Criminal Extradition Act, see Chapter 31, Article 4 NMSA 1978.

For commitment to await requisition, bail, see 31-4-15 NMSA 1978.

7-812. Transfer of fugitive actions after issuance of a governor's rendition warrant.

If a fugitive action is pending in the metropolitan 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 Chapter 31, Article 4 NMSA 1978.

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Procedure for the Metropolitan Courts. The left-hand column contains the former rule number, and the right-hand column contains the present Rule of Criminal Procedure for the Metropolitan Court (Rule 3-101 et seq.) or the present Rule of Criminal Procedure for the Metropolitan Courts (Rule 7-101 et seq.).

The second table below reflects the antecedent provisions in the former Rules of Procedure for the Metropolitan Courts (right-hand column) of the present Rules of Criminal Procedure for the Metropolitan Courts (left-hand column).

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1	3-101, 7-101	41	7-302
2	Withdrawn	42	7-304
3	3-202	43	7-305
4	3-203, 7-209	44 to 46	7-306
5	3-104, 7-104	47	7-204
6	3-306, 7-505	48	7-205
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17	3-103, 7-103	57	7-401
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21	3-202	61	7-507
22	3-304	62	7-607
23	3-305	62.1	7-608
24	3-401	63	7-605
24.1	3-107	64	7-605
25	3-403	65	7-603
26	3-402	66	7-609

27	3-501	67	7-610
28	3-602	68	7-109
29	3-603	69	7-107
30	3-604	70	7-701, 7-702
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32	3-108	71	7-703
33	3-701	72	3-706
34	3-702	73	3-707
35	3-704	74	3-708
36	3-801	74.1	3-109, 7-110
37	3-802	75	None
37.1	3-803	76	3-710
37.2	3-303	77	None
37.3	3-703	78	3-709
38	7-201	79	3-711
38.1	7-108	80	3-712, 7-705
39	7-303		
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NMRA	Former Rule	NMRA	Former Rule
7-101	1	7-402	58
7-102	10	7-403	59
7-103	14, 17	7-406	None
7-104	5	7-407	None
7-105	11(a)	7-501	56
7-106	11	7-502	56.1
7-107	69	7-503	54
7-108	38.1	7-504	60
7-109	68	7-505	6
7-110	74.1	7-506	55
7-111	12	7-507	61
7-201	38	7-601	8
7-202	52	7-602	63
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7-206	49	7-606	9
7-207	51	7-607	62

7-208	50	7-608	62.1
7-209	4	7-609	66
7-301	40	7-610	67
7-302	41	7-701	70(a), (d), (e)
7-303	39	7-702	70(c)
7-304	42	7-703	71
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7-401	57	7-801	70(b)
7-410A	None	7-802	70.1
7-410B	None		