

# Rules of Civil Procedure for the Magistrate Courts

## Article 1

### General Provisions

#### 2-101. Scope and title.

A.

Scope. These rules shall govern the civil procedure in all magistrate courts.

B.

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

C.

Title. These rules shall be known as the Rules of Civil Procedure for the Magistrate Courts.

USE THE ZOOM COMMAND TO VIEW THE FOLLOWING FORM:

D.

Citation form. These rules shall be cited by set and rule numbers, as in SCRA 1986, Rule 2-\_\_\_\_\_.

[As amended, effective January 1, 1987.]

Cross-references. - As to magistrate court juries and jurors, see 35-8-1 to 35-8-5 NMSA 1978. As to attachment in magistrate courts, see 35-9-1 to 35-9-8 NMSA 1978. As to forcible entry or unlawful detainer, see 35-10-1 to 35-10-6 NMSA 1978. As to replevin, see 35-11-1 to 35-11-3 NMSA 1978. As to garnishment, see 35-12-1 to 35-12-19 NMSA 1978.

Effective dates. - Pursuant to a supreme court order dated September 24, 1986, the above provisions of this rule are effective for cases filed in the magistrate courts on or after January 1, 1987.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts § 85.  
Power of court to adopt general rule requiring pretrial conference as distinguished from exercising its discretion in each case separately, 2 A.L.R.2d 1061.  
21 C.J.S. Courts §§ 174 to 177.

## **2-102. Conduct of court proceedings.**

A.

Judicial proceedings. The purpose of judicial proceedings is to ascertain the truth. Such proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; they shall not be done or permitted.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial §§ 30 to 44.  
88 C.J.S. Trial §§ 36 to 54.

## **2-103. Rules and forms.**

A.

Rules. Each magistrate court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law, these rules or regulations prescribed by the administrative office of the courts. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants, and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court. Proposed rules or amendments shall be submitted to the director of the administrative office of the courts and shall not become effective until approved by him.

B.

Forms. Forms used in the magistrate courts shall be substantially in the form approved by the supreme court.

[As amended, effective January 1, 1987.]

Cross-references. - For civil and criminal forms for the district courts and courts of limited jurisdiction, see Judicial Pamphlets 4 and 9.

Effective dates. - Pursuant to a supreme court order dated September 24, 1986, the above provisions of this rule are effective for cases filed in the magistrate courts on or after January 1, 1987.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts §§ 82 to 86.  
Power of court to prescribe rules of pleadings, practice or procedure, 110 A.L.R. 22; 158 A.L.R. 705.

Constitutionality, construction and application of statutes or rules of court which permit setting aside a plea and giving judgment by default, or dismissing suit, because of disobedience of order, summons or subpoena duces tecum requiring production of documents, 144 A.L.R. 372.

Pretrial conference, power of court to adopt general rule requiring, 2 A.L.R.2d 1061.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Contempt based on violation of court order where another court has issued contrary order, 36 A.L.R.4th 978.

21 C.J.S. Courts § 170.

## **2-104. Time.**

A.

Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any magistrate court, 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, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal 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 under Rule 2-305 or for taking an appeal under Rule 2-705.

C.

For motions; affidavits. 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 him and the notice or paper is served upon him by mail, three (3) days shall be added to the prescribed period.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 56 Am. Jur. 2d Motions, Rules, and Orders § 10; 62 Am. Jur. 2d Process §§ 33, 34.

Inclusion or exclusion of first and last day for purposes of statute of limitations, 20 A.L.R. 1249.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 A.L.R.2d 1364.

Inclusion or exclusion of first and last day in computing the time for performance of an act or event which must take place a certain number of days before future date, 98 A.L.R.2d 1331.

Vacating judgment or granting new trial in civil case, consent as ground of after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A.L.R.3d 815.

Validity of service of summons or complaint on Sunday or holiday, 63 A.L.R.3d 423.

Amendment, after expiration of time for filing motion for new trial, in civil case, or motion made in due time, 69 A.L.R.3d 845.

60 C.J.S. Motions and Orders § 8; 66 C.J.S. Notice § 18; 71 C.J.S. Pleading §§ 98, 114, 219; 72 C.J.S. Process §§ 41, 55.

## **2-105. Designation of judge.**

A.

Assignment of cases. The magistrate before whom the case is to be tried shall be designated at the time the complaint is filed.

B.

Procedure for replacing a magistrate who has been excused.

(1)

In magistrate districts which have presiding magistrates as defined in Section 35-1-37 NMSA 1978. Upon receipt of a notice of excusal, the magistrate or clerk of the magistrate court shall give written notice to the parties to the action. Upon failure of counsel for all parties to file a stipulation within five (5) days of the filing of a notice of excusal naming another magistrate in the district to try the cause, the presiding magistrate of the district shall, by random selection, designate another magistrate to try the cause. If all magistrates in the district have been excused or have recused themselves, within ten (10) days after the filing of the last notice of excusal or recusal, the presiding magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused or recused magistrate and to the designated magistrate.

(2)

In magistrate districts which do not have presiding magistrates as defined in Section 35-1-37 NMSA 1978. Upon excusal, the parties or their counsel may, by agreement, designate another magistrate of the same or an adjoining magistrate district to conduct any further proceeding in the cause. If the excused magistrate has not received notice of such an agreement within five (5) days after the date the notice of excusal is filed, the excused magistrate shall within ten (10) days after the date the notice of excusal was filed, certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused magistrate, and to the designated magistrate.

C.

Procedure for replacing a recused magistrate.

(1)

In magistrate districts which have presiding magistrates as defined in Section 35-1-37 NMSA 1978, if the magistrate recuses himself from sitting in the action, the magistrate or clerk of the magistrate court shall give written notice to the parties to the action. Upon failure of counsel for all parties to file a stipulation within ten (10) days after the filing of the certificate of recusal naming another magistrate in the district to try the cause, the presiding magistrate of the district shall, by random selection, designate another magistrate to try the cause. If all magistrates in the district have been excused or have recused themselves, within ten (10) days after the filing of the last notice or excusal or recusal, the presiding magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused or recused magistrate and to the designated magistrate.

(2)

In magistrate districts which do not have presiding magistrates as defined in Section 35-1-37 NMSA 1978, upon recusal of the magistrate, the parties or their counsel may, by agreement, designate another magistrate of the same or an adjoining magistrate district to conduct any further proceeding in the cause. If the recused magistrate has not received notice of such an agreement within ten (10) days after the notice of recusal is filed, the excused magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the recused magistrate, and to the designated magistrate.

D.

Subsequent proceedings. After the designation, the excused magistrate shall within ten (10) days send to the designated magistrate a copy of all proceedings in the action. Upon designation of a new magistrate, all proceedings shall continue to be conducted in the original magistrate district. The clerk of the magistrate court of the original magistrate district shall continue to be responsible for the court file and shall perform such further duties as may be required. The designated magistrate may not be excused by either party except for causes set out in Article 6, Section 18 of the Constitution of New Mexico.

[As amended, effective May 1, 1986, October 1, 1987 and September 1, 1989.]

Cross-references. - As to disqualification of magistrate, see 35-3-7 NMSA 1978. For form on certification of disqualification or recusal, see Form 4-102. As to jurisdiction of magistrate to sit in any action arising in another magistrate district when designated by district judge because of unavailability of a magistrate in that magistrate district, see 35-3-6 NMSA 1978.

The 1987 amendment, effective for cases filed in the magistrate courts on or after October 1, 1987, in Paragraph B(1), inserted "or notice of recusal" in the second sentence, substituted "If all magistrates in the district have been excused or have recused themselves, within ten (10) days after the filing of the last notice of excusal or recusal, the presiding magistrate shall certify" for "In the event that all magistrates in the district are excused, the presiding magistrate shall, on the eleventh day thereafter, certify" in the third sentence, and inserted "or recused" in the last sentence; in the second sentence of Paragraph (B)(2), inserted "or recused", "date the notice of" and "or recusal is filed" and substituted "within ten (10) days after the date the notice of excusal or recusal was filed" for "on the sixth day thereafter."

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, deleted references to "notice of recusal" following "notice of excusal" in Paragraphs B(1) and B(2); in the second sentence in Paragraph B(1), substituted "five (5) days" for "ten (10) days" and "notice of excusal" for "statement of excusal"; in the second sentence in Paragraph B(2), deleted "or recused" following "the excused"; added present Paragraph C; rewrote former Paragraph C and redesignated it as present Paragraph D; and made minor stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judges §§ 86, 248 to 261.  
Interlocutory ruling or order of one judge as binding on another in same case, 132 A.L.R. 14.

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

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

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

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 22 A.L.R.3d 922.

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

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

48A C.J.S. Judges §§ 36, 98 to 185.

## **2-106. Excusal; recusal; disability.**

A.

Excusal; procedure. Whenever a party to any civil action or proceeding of any kind files a notice of excusal, the magistrate's jurisdiction over the cause terminates immediately. The notice of excusal is effective only if filed no later than fifteen (15) days after the date that the answer is filed. In a restitution case, the notice must be filed within five (5) days of service.

B.

Extent of excuse. No party shall excuse more than one judge.

C.

Provisional notice of peremptory election to excuse. If a party has excused a judge as provided herein, any party who has not excused one judge and who wishes to excuse any other judge who could be assigned to preside over the trial, must, within ten (10) days of the clerk's written notice, file a provisional notice of peremptory excusal with the clerk of the court, naming the judge to be excused.

D.

Recusal; procedure. Whenever the magistrate before whom the action is pending is disqualified by the terms of the New Mexico Constitution or the Code of Judicial Conduct, he shall recuse himself from sitting in the action by giving notice to all parties. Upon recusal, another magistrate shall be designated to conduct any further proceedings in the action in the manner provided by Rule 2-105 of these rules for cases of disqualification.

E.

Failure to recuse. If a party believes that one or more of the conditions in Paragraph D of this rule exists, he may disqualify the judge by filing a notice of excusal, naming the condition or conditions, and the magistrate shall thereupon proceed in accordance with Rule 2-105 of these rules. If in any case of disqualification the magistrate fails or refuses to recognize the disqualification, any party may certify that fact by letter to the district court of the county in which the action is pending. The district court shall make such investigation as it deems warranted and enter an order in the action, either prohibiting the magistrate from proceeding further and designating another or striking the notice of excusal as ineffective or groundless.

F.

Disability of magistrate. If by reason of absence, death, sickness or other cause, the magistrate before whom the cause is pending is unable or unavailable to perform his duties, 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 it deems warranted and, if it finds that the magistrate is in fact disabled or unavailable, shall thereupon designate another magistrate of the county or, if none is available, of any other county to preside over the cause.

G.



Subsequent proceedings. After the designation, the excused or recused magistrate shall within ten (10) days send to the designated magistrate a copy of all proceedings in the action. Upon designation of a new magistrate, all proceedings shall continue to be conducted in the original magistrate district. The clerk of the magistrate court of the original magistrate district shall continue to be responsible for the court file and shall perform such further duties as may be required. The designated magistrate may not be excused by either party except for causes set out in Article 6, Section 18 of the Constitution of New Mexico.

[As amended, effective May 1, 1986, July 1, 1988 and September 1, 1989.]

Cross-references. - As to recusal of magistrate, see N.M. Const., art. VI, § 18, Canon 21-300, Code Jud. Cond., and 35-3-8 NMSA 1978. As to disqualification of magistrate, see 35-3-7 NMSA 1978. For form on certification of disqualification or recusal, see Form 4-102.

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, deleted "in a civil action or no later than fifteen (15) days after the defendant is arraigned in a criminal action" from the end of the second sentence in Paragraph A; deleted the former first and second sentences in Paragraph B, which read "No judge may be excused from hearing arraignment proceedings or setting bond. Any excusal of a judge scheduled to hear a preliminary hearing must be filed at least four (4) days prior to the hearing."; and, in Paragraph E, substituted "Paragraph D" for "Paragraph A" in the first sentence and deleted "under Rule 2-105 or under this paragraph" following "If in any case of disqualification" in the second sentence.

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, in Paragraph A, substituted references to notice of excusal for references to statement of excusal in three places; in Paragraph C, substituted "notice of peremptory excusal" for "notice of election to excuse" near the end; in Paragraph E, substituted "may disqualify the judge by filing a notice of excusal" for "may file a statement to that effect" near the beginning of the first sentence and "notice of excusal" for "disqualification statement" in the last sentence; and substituted present Paragraph G for former Paragraph G, which read "No costs or fees of any kind shall be collected by any court for any filing or proceeding under this rule".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judges §§ 86, 248 to 261. Disqualifying relationship by affinity in case of judge or juror as affected by dissolution of marriage, 117 A.L.R. 800.

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

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

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

Power of successor judge taking office during termtime to vacate, etc., judgment

entered by his predecessor, 11 A.L.R.2d 1117.

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

Mandamus as remedy to compel assertedly disqualified judge to recuse self or certify his disqualification, 45 A.L.R.2d 937; 56 A.L.R. Fed. 494.

Relationship to attorney in case as disqualifying judge, 50 A.L.R.2d 143.

Prior representation or activity as attorney or counsel as disqualifying judge, 72 A.L.R.2d 443; 16 A.L.R.4th 550.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 22 A.L.R.3d 922.

Disqualification of judge to relative's ownership of stock in corporation which is party to action or proceeding, 25 A.L.R.3d 1331.

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

Disqualification of judge or one acting in judicial capacity to preside in a case in which he has a pecuniary interest in the fine, penalty or forfeiture imposed upon the defendant, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

48A C.J.S. Judges §§ 36, 98 to 185.

## **2-107. Pro se and attorney appearance.**

A.

Pro se appearance by an individual. A party to any civil action may appear, prosecute, defend and appeal any proceeding:

(1) if the party is an individual party, in person;

(2) if the property is community property, one spouse may appear for both spouses.

B.

Other authorized appearances. A party to any civil action may appear, prosecute and defend any proceeding:

(1) if the party is brought into the suit by a writ of garnishment or attachment, and such party is a partnership, by one of its general partners;

(2) if the party is brought into the suit by writ of garnishment or attachment and such party is a corporation, by an officer, director or general manager of the corporation upon the filing of a notarized certificate to so act on behalf of the corporation;

(3) if the action is brought pursuant to the provisions of the Uniform Owner-Resident Relations Act [47-8-1 to 47-8-51 NMSA 1978] and the appearance is by:

(a) the "owner", as defined by the provisions of the Uniform Owner-Resident Relations Act;

(b) a licensed real estate agent authorized by such owner; or

(c) the person authorized to manage the premises;

(4) if the party is a corporation whose voting shares are held by a single shareholder or closely knit group of shareholders all of whom are natural persons active in the conduct of the business and the appearance is by an officer or general manager who has been authorized to appear on behalf of the corporation;

(5) if the party is a general partnership which meets all of the following qualifications:

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

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

(c) the appearance is by a general partner who has been authorized to appear by the general partners; or

(6) if the party is a governmental entity and the appearance is by an employee of the governmental entity authorized by the entity to institute or cause to be instituted an action on behalf of the governmental entity.

C.

Attorney appearance. A party may appear, prosecute, defend and appeal any proceeding by an attorney.

D.

Applicability. A collection agency may not file a suit unless the collection agency appears by a licensed attorney-at-law.

[As amended, effective July 1, 1987 and July 1, 1988.]

The 1987 amendment rewrote this section to the extent that a detailed comparison is impracticable.

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, added Paragraph B(6).

## **2-108. Withdrawal or substitution of attorneys.**

No attorney or firm who has appeared in a cause may withdraw from it without written consent of the magistrate court, filed with the clerk. Such consent may be conditioned upon substitution of other counsel or the filing by a party of an address at which service may be made upon him, with proof of service thereof on all other parties, or otherwise. Notice of withdrawal or substitution of counsel shall be given to all parties either by withdrawing counsel or by substituted counsel and proof of service filed with the clerk.

If an attorney ceases to act in a cause for a reason other than withdrawal or consent, upon motion of any party, the court may require the taking of such steps as may be advised to insure that the cause will proceed with promptness and dispatch.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 7 Am. Jur. 2d Attorneys At Law §§ 168 to 178.

Construction and effect of statutory provision requiring adverse party to give notice when attorney ceases to act as such, 42 A.L.R. 1347.

Necessity of order of substitution where new attorney is employed to prosecute an appeal, 70 A.L.R. 834.

Adjustment or determination of compensation of discharged attorney as condition of substitution of attorney by court order, 124 A.L.R. 725.

7A C.J.S. Attorney and Client §§ 218 to 233.

## **2-109. Record.**

As used in these rules, "record" shall mean:

A.

Transcript. Stenographic notes which must be transcribed when a "record" is required to be filed;

B.

Stipulated facts. A statement of facts and proceedings stipulated to by the parties for purposes of review; or

C.

Other recording. Any mechanical, electrical or other recording, including a videotape recording when such method of mechanical, electrical or other recording has been approved by the court administrator. No broadcast or reproduction of any mechanical, electrical or other recording shall be made for any person other than an official of the court without the express written consent of the New Mexico Supreme Court.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Evidence § 986.  
31 C.J.S. Evidence § 50(1); 31A C.J.S. Evidence § 194; 32 C.J.S. Evidence § 652.

## **2-110. Contempt.**

A magistrate has jurisdiction to punish for contempt only 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 his court. No person shall be punished for contempt of the magistrate court until given an opportunity to be heard in his defense. Any person found in contempt may be ordered to pay a fine not exceeding two hundred and fifty dollars (\$250) or may be imprisoned not more than thirty (30) days, or in the discretion of the magistrate, may be ordered both to pay such fine and be imprisoned. Any person found guilty of contempt may appeal to the district court pursuant to the rules of procedure governing criminal actions in the magistrate court.

Cross-references. - As to jurisdiction for contempt, see 35-3-9 NMSA 1978. As to rules of procedure governing criminal actions in magistrate court, see Rule 6-101 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 17 Am. Jur. 2d Contempt § 1.

Misconduct of officers in selection or summoning of jurors or grand jurors as contempt of court, 7 A.L.R. 345.

Assault as contempt of court, 18 A.L.R. 212; 55 A.L.R. 1230; 52 A.L.R.2d 1297.

Forcing party or prosecuting witness to withdraw or not to institute action or proceeding as contempt of court, 23 A.L.R. 187.

Communicating with grand jury as contempt, 29 A.L.R. 489.

Affidavit to disqualify judge as contempt, 29 A.L.R. 1273.

Criticism of attitude of the court or judge toward violations of liquor law as contempt, 58 A.L.R. 1001.

Criticism of court's appointment of receiver as contempt, 97 A.L.R. 903.

Refusal of attorney to disclose identity of, whereabouts of, or other information relating to, his client as contempt, 101 A.L.R. 470.

Refusal or failure of clerk of court to comply with direction of court or judge upon ground of its invalidity or supposed invalidity as contempt, 119 A.L.R. 1380.

Alteration, substitution, abstraction, withholding or destruction of pleadings and papers by attorneys as criminal contempt, 151 A.L.R. 750.

Bail jumping after conviction, failure to surrender or to appear for sentencing, and the like, as contempt, 34 A.L.R.2d 1100.

Assaulting, threatening or intimidating witness as contempt of court, 52 A.L.R.2d 1297.

Published article or broadcast as direct contempt of court, 69 A.L.R.2d 676.

Contempt proceedings against prosecution witness for refusal to disclose identity of informer, 76 A.L.R.2d 306.

False or inaccurate report of judicial proceedings as contempt, 99 A.L.R.2d 440.

Release of information concerning forthcoming or pending trial as ground for contempt proceedings or other disciplinary measures against member of the bar, 11 A.L.R.3d

1104.

Effect of witness's violation of order of exclusion, 14 A.L.R.3d 16.

Attack on judiciary as a whole as indirect contempt, 40 A.L.R.3d 1204.

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court, 54 A.L.R.3d 1242.

Picketing court or judge as contempt, 58 A.L.R.3d 1297.

Assault on attorney as contempt, 61 A.L.R.3d 500.

Addressing allegedly insulting remarks to court during course of trial as contempt, 68 A.L.R.3d 273.

Conduct of attorney in connection with making objections or taking exceptions as contempt of court, 68 A.L.R.3d 314.

Power of court to impose standard of personal appearance or attire, 73 A.L.R.3d 353.

Contempt for violation of compromise and settlement the terms of which were approved by court but not incorporated in court order, decree or judgment, 84 A.L.R.3d 1047.

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.

17 C.J.S. Contempt §§ 43 to 61.

## **Article 2**

### **Commencement of Action**

#### **2-201. Commencement of action.**

A.

How commenced. A civil action is commenced by filing with the court a complaint consisting of a written statement of a claim or claims setting forth briefly the facts and circumstances giving rise to the action.

B.

Jurisdiction. Magistrates have jurisdiction in all cases as may be provided by law.

C.

Form of complaint. The complaint shall be in substantially the form approved by the court administrator and the supreme court.

D.

Verified accounts. Accounts duly verified by the oath of the party claiming the same, or his agent, and promissory notes and other instruments in writing not barred by law are sufficient evidence in any suit to create a rebuttable presumption, sufficient to enable the plaintiff to recover judgment for the account thereof.

Cross-references. - As to jurisdiction of magistrate courts, see 35-3-3 NMSA 1978. For form on civil complaint, see Form 4-201.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62 Am. Jur. 2d Process § 5.

Conclusive election of remedies as predicated on commencement of action, or its prosecution short of judgment on the merits, 6 A.L.R.2d 10.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A.L.R.2d 236.

72 C.J.S. Process § 3.

## **2-202. Summons.**

A.

Summons; issuance. Upon receipt of a complaint and payment of the docket fee, the clerk or the magistrate shall docket the action and issue a summons and deliver it to the plaintiff or plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon the request of the plaintiff, separate, additional or amended summons shall issue against any defendants. Any defendant may waive the issuance or service of summons.

B.

Summons; execution; form. The summons shall be signed by the clerk, be directed to the defendant and must contain:

(1) the name of the court in which the action is brought, the name of the county in which the complaint is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed;

(2) a direction that the defendant serve a responsive pleading or motion within twenty (20) days after service of the summons, and file the same, all as provided by law, and a notice that unless the defendant so serves and files a responsive pleading or motion, the plaintiff will apply to the court for the relief demanded in the complaint;

(3) the name and address of the plaintiff's attorney, if any, shall be shown on every summons, otherwise the plaintiff's address.

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

C.

Summons; service of copy. A copy of the summons with a copy of complaint attached and a copy of the form for answer shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary.

D.

Summons; by whom served. In civil actions any process may be served by the sheriff of the county where the magistrate court is located if the defendant may be found therein, or by any other person who is over the age of eighteen (18) years and not a party to the action, except for writs of attachment and writs of replevin, which shall be served by the sheriff or by any person not a party to the action over the age of eighteen (18) years who may be designated by the court to perform such service or by the sheriff of the county where the property or person may be found.

E.

Summons; service by mail. A summons and complaint may be served within the magistrate district upon a defendant of any class referred to in Subparagraph (1) or (2) of Paragraph F of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two (2) copies of a notice and acknowledgement substantially conforming with the form approved by the supreme court and a return envelope, postage prepaid, addressed to the court. If no acknowledgement of service under this subdivision of this rule is received by the court within twenty (20) days after the date of mailing plus three days (3) days as provided by Rule 2-104, service of such summons and complaint shall be made by a person authorized by Paragraph D of this rule, in the manner prescribed by Paragraph F of this rule. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return to the court within twenty (20) days after mailing the notice and acknowledgement of receipt of summons.

The form of the notice and acknowledgement of receipt of summons and complaint shall be substantially in the form approved by the supreme court.

F.

Summons; how served. Personal service shall be made within the magistrate district 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 is 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 is 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;

(3) upon the State of New Mexico:

(a) in garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head of the branch, agency, bureau, department, commission or institution. A copy of the writ of garnishment shall be delivered or mailed by registered or certified mail to the defendant employee;

(b) service of process on the governor, attorney general, agency, bureau, department, commission or institution or head thereof may be made either by delivering a copy of the summons and of the complaint to the head or to his receptionist. Where an executive secretary is employed, he shall be considered as the head;

(4) upon any county by delivering a copy of the summons and of the complaint to the county clerk, who shall forthwith notify the district attorney of the judicial district in which the county sued is situated;

(5) upon a municipal corporation by delivering a copy of the summons and of the complaint to the city clerk, town clerk or village clerk, who in turn shall forthwith notify the head of the commission or other form of governing body;

(6) upon the board of trustees of any land grant referred to in Sections 49-1-1 through

49-10-6 NMSA 1978, process shall be served upon the president or in his absence upon the secretary of such board;

(7) upon a minor, whenever there shall be a conservator of the estate or guardian of the person of such minor, by delivering a copy of the summons and of the complaint to the conservator or guardian. Service of process so made shall be considered as service upon the minor. In all other cases process shall be served by delivering a copy of the summons and of the complaint to the minor, and if the minor is living with an adult a copy of the summons and of the complaint shall also be delivered to the adult residing in the same household. In all cases where a guardian ad litem has been appointed, a copy of the summons and of the complaint shall be delivered to such representative, in addition to serving the minor as herein provided;

(8) upon an incapacitated person, whenever there shall be a conservator of the estate or guardian of the person of such incapacitated person, by delivering a copy of the summons and of the complaint to the conservator or guardian. Service of process so made shall be considered as service upon the ward. In all other cases process shall be served upon the ward in the same manner as upon competent persons;

(9) upon a personal representative, guardian, conservator, trustee or other fiduciary in the same manner as provided in Subparagraph (1) or (2) of this paragraph as may be appropriate.

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.

G.

Return. If service is made by mail pursuant to Paragraph E of this rule, return shall be made by the defendant filing with the court the Notice and Receipt of Summons and Complaint. If service is by personal service pursuant to Paragraph F of this rule, the person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. When service is made by the sheriff (or his deputy), proof thereof shall be by certificate; and when made by a person other than a sheriff (or his deputy), proof thereof shall be made by affidavit. Where service within the state includes mailing, the return shall state the date and place of mailing. Failure to make proof of service shall not affect the validity of service.

H.

Service by publication. Service by publication may not be made, except as provided by law in cases of attachment or replevin.

I.

Alias process. When any process has not been returned, or has been returned without service, or has been improperly served, it shall be the duty of the clerk, upon the application of any party to the suit, to issue other process as the party applying may direct.

J.

Service; applicable statute. Where no provision is made in these rules for service of process, process shall be served as provided for by any applicable statute.

K.

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.]

Cross-references. - As to sheriff or deputy to serve and execute process and orders, see 4-41-14 NMSA 1978. For service by publication in attachment cases, see 35-9-3 NMSA 1978. For forms on civil summons and return, see Form 4-204.

The 1989 amendment, effective for cases filed in the magistrate courts on or after January 1, 1990, rewrote Paragraph A and former Paragraphs B to G, redesignating former Paragraphs B to G as present Paragraphs D, F, E, G, I, and K respectively; added present Paragraphs B and C; in Paragraph I, substituted "clerk" for "court" and "may direct" for "may request"; and added Paragraph J.

Accepting process for service. - Constables could accept civil process for service from any justice of the peace (now magistrate) court within their respective counties. 1964 Op. Att'y Gen. No. 64-65 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 19 Am. Jur. 2d Corporations § 2192; 62 Am. Jur. 2d Process §§ 5, 7 to 20, 31, 32, 47, 65, 131, 164 to 182.

Power to amend nunc pro tunc return of service of summons in divorce suit, 7 A.L.R. 1148.

Appearance to make application for extension of time or continuance, or order in that regard, as waiver of objection to jurisdiction for lack of personal service, 81 A.L.R. 166.

Defects or informalities as to appearance or return day in summons or notice of commencement of action, 97 A.L.R. 746.

Relief as to costs or disbursements as changing special appearance to general appearance, 102 A.L.R. 224.

Return of service of process in action in personam showing personal or constructive service in state as subject to attack by showing that defendant was a nonresident and was not served in state, 107 A.L.R. 1342.

Affidavit of substantial defense to merits in an attachment or garnishment proceeding as

general appearance, 116 A.L.R. 1215.

Power of infant to acknowledge service of process or to bind himself by waiver or estoppel in that regard, 121 A.L.R. 957.

Filing cross-petition or other step amounting to general appearance after judgment based upon valid constructive service as affecting right under statute to open judgment, 122 A.L.R. 159.

Amendment of process or pleading by changing or correcting mistake in name of party, 124 A.L.R. 86.

Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction, 129 A.L.R. 1240.

Necessity, in service by leaving process at place of abode, etc., of leaving a copy of summons for each party sought to be served, 8 A.L.R.2d 343.

What amounts to doing business in a state within statute providing for service of process in action against nonresident natural person or persons doing business in state, 10 A.L.R.2d 200.

Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication, 21 A.L.R.2d 929.

Appealability of order overruling or sustaining motion to quash or set aside service of process, 30 A.L.R.2d 287.

Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 A.L.R.2d 928.

Service of process on person in military service by serving person at civilian abode or residence, or leaving copy there, 46 A.L.R.2d 1239.

Service of process upon dissolved domestic corporation in absence of express statutory direction, 75 A.L.R.2d 1399.

Failure to make return as affecting validity of service or court's jurisdiction, 82 A.L.R.2d 668.

Manner of service of process upon foreign corporation which has withdrawn from state, 86 A.L.R.2d 1000.

Propriety of service of process in an in personam action on resident minor defendant whose only guardian is a nonresident and cannot be served validly either within or without state, 86 A.L.R.2d 1183.

Place or manner of delivering or depositing papers, under statutes permitting service of process by leaving copy at usual place of abode or residence, 87 A.L.R.2d 1163.

Juvenile delinquency and dependency proceedings, necessity of service of process upon infant itself, 90 A.L.R.2d 293.

Construction and effect of provision for service of process against minor on a parent, guardian or other designated person, 92 A.L.R.2d 1336.

Sufficiency of designation of court or place of appearance in original civil process, 93 A.L.R.2d 376.

Attack on personal service as having been obtained by fraud or trickery, 98 A.L.R.2d 551.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons or the like, 6 A.L.R.3d 1179.

Attorney representing foreign corporation in litigation as its agent for service of process in unconnected actions or proceedings, 9 A.L.R.3d 738.

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.  
Construction of phrase "usual place of abode," or similar terms referring to abode,  
residence or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.  
72 C.J.S. Process §§ 6 to 23, 25, 33 to 49, 50, 58 to 72, 77 to 91.

## **2-203. Service and filing of papers.**

A.

When required. Unless the court otherwise orders, every pleading subsequent to the complaint, every order not entered in open court, every written motion unless it is one as to which a hearing ex parte is authorized, and every written notice, demand and similar paper shall be served on each party, but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 2-202.

B.

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 himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address, or, if no address is known, by leaving it with the judge or clerk of the court who shall place it in the court file. "Delivery of a copy" within this rule shall mean: handing it to the attorney or to the party; or leaving it at his office with his secretary or other person in charge; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his usual place of abode with some person of his family above fifteen (15) years of age and informing such person of the contents thereof; or leaving it in a mail depository authorized by the attorney to be served. Service by mail shall be deemed complete upon mailing. "Mailing" shall include deposit in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney.

C.

Filing. All original papers, copies of which are required to be served upon parties, must be filed with the court either before service or immediately thereafter.

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 judge or clerk of the court.

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pleading §§ 351, 352.

Appearance for purpose of making application for removal of cause to federal court as a general appearance, 81 A.L.R. 1219.

Affidavit of substantial defense to merits in an attachment or garnishment proceeding as general appearance, 116 A.L.R. 1215.

Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction, 129 A.L.R. 1240.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112. 71 C.J.S. Pleading §§ 409, 411, 413.

## **Article 3**

### **Pleadings and Motions**

#### **2-301. Pleadings allowed; form of motions.**

A.

Pleadings. There shall be a complaint and, if the defendant wishes to contest the plaintiff's claim in any way, an answer. The answer may assert a counterclaim or a setoff. If a counterclaim is filed, a reply may be filed. The complaint may interplead two (2) or more persons who have or may have a claim to funds owed by the plaintiff.

B.

Third-party practice. Any defending party may cause a summons and complaint to be served upon a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by filing a third-party complaint. The third-party plaintiff need not obtain leave to make service if he files the third-party complaint not later than ten (10) days after he serves his original answer. The third-party defendant shall respond to the third-party complaint in the same manner as if it were an original proceeding. Notwithstanding the provisions of any other rule, failure to file a third-party complaint shall not constitute a waiver or forfeiture of any party's rights or claims, nor

shall such failure preclude the joinder of separate causes of action, as may otherwise be provided for in these rules.

C.

Interpleader. Persons having claims for funds from a third party may be named as defendants and required to adjudicate their claims for the funds when their claims are such that the plaintiff is or may be exposed to double or multiple liability. A defendant exposed to similar liability for funds may adjudicate the right to funds by third-party complaint, cross-claim or counterclaim. Any person who is named as a defendant or third-party defendant pursuant to this paragraph shall file an answer within the time set forth in these rules setting forth the facts and circumstances giving rise to such person's claim and any such person is entitled to the funds owed by the plaintiff. The disposition of the proceedings shall be binding upon all parties to the action upon whom service has been made.

D.

Motions. Written motions are not allowed except when permitted by these rules or required by the nature of the proceedings.

E.

Exhibits. An exhibit to a pleading is a part thereof for all purposes.

F.

Signing of pleadings. The signature of a party or his attorney on a pleading constitutes a certificate by him that he has read it, that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is signed with intent to defeat the purpose of this rule, it may be stricken as false and the action may proceed as though it had not been filed.

[As amended, effective October 1, 1987.]

The 1987 amendment effective for cases filed in the magistrate courts on or after October 1, 1987, added the last sentence in Paragraph A, substituted "the provisions of any other rule" for "anything provided for herein" and "in these rules" for "herein" in the last sentence in Paragraph B, added Paragraph C, and redesignated former Paragraphs C, D, and E as present Paragraphs D, E, and F.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 56 Am. Jur. 2d Motions, Rules, and Orders § 1; 61A Am. Jur. 2d Pleading §§ 1 to 3, 339 to 349.

Sufficiency of verification of pleading by person other than party to action, 7 A.L.R. 4.

Perjury in verifying pleadings, 7 A.L.R. 1283.

Setting up counterclaim, setoff or recoupment in reply, 42 A.L.R. 564.

Necessity and sufficiency of reply to answer pleading statute of limitations, 115 A.L.R. 755.

Motion to strike pleading, appealability of order entered on, 1 A.L.R.2d 422.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill or cross action, 1 A.L.R.2d 630.

Dismissal of action for failure or refusal of plaintiff to comply with orders relating to pleadings, 4 A.L.R.2d 348; 56 A.L.R.3d 1109; 27 A.L.R.4th 61; 32 A.L.R.4th 212.

Effect of nonsuit, dismissal or discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous, 12 A.L.R.2d 1059.

Intervention proceedings, appealability of judgment on motion to dismiss in, 15 A.L.R.2d 373.

Pretrial conference, binding effect of court's order entered after, 22 A.L.R.2d 599.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 A.L.R.2d 852.

Judgment on the pleadings, court's power, on motion for, to enter judgment against movant, 48 A.L.R.2d 1175.

Judgment on the pleadings, proper procedure and course of action by trial court, where both parties move for, 59 A.L.R.2d 494.

Statute of limitations, raising defense by motion for judgment on pleadings, 61 A.L.R.2d 300.

Litigant's pleading to the merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 A.L.R.2d 937.

Counsel's right, in summation in civil case, to point out inconsistencies between opponent's pleading and testimony, 72 A.L.R.2d 1304.

Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

Summary judgment, propriety of entering for plaintiff before defendant files or serves answer to complaint or petition, 85 A.L.R.2d 825.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings or directed verdict, 36 A.L.R.3d 1113.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

71 C.J.S. Pleading §§ 63 to 210.

## **2-302. Defenses; answer.**

A.



Answer; when filed. The defendant shall file his answer on or before the appearance date as fixed in the summons.

B.

Defenses; how presented. The answer shall describe in concise and simple language the reasons why the defendant denies the claim of the plaintiff as well as any defenses he may have to the claim of the plaintiff. Defenses shall be raised in the answer and not by motion. A party may file a motion to have the answer clarified or explained. On the filing of such motion, the magistrate may, in his discretion, require a more explicit answer or order a pretrial conference to clarify the issues.

C.

Form of answer. The answer shall be in substantially the form approved by the court administrator and the supreme court.

D.

Permissive counterclaim or setoff. If the defendant possesses a claim or claims against the plaintiff at the time the action is begun, they may be asserted in the answer as a counterclaim or setoff. The facts and circumstances giving rise to the claim or claims must be briefly described, in the form of answer approved by the supreme court.

E.

Nature of claim and amount claimed. The nature of the defendant's claim or claims and the total sum claimed shall comply with applicable law. A claim which exceeds the jurisdiction of the magistrate court shall be amended by the defendant prior to trial to conform to the court's jurisdiction or shall be dismissed without prejudice. There shall be no compulsory counterclaim.

Cross-references. - For form on answer to civil complaint, see Form 4-301.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §§ 13, 15, 68; 61A Am. Jur. 2d Pleading §§ 125, 126.

Right to voluntary dismissal of suit without prejudice before trial as affected by filing counterclaim after motion for dismissal, 71 A.L.R. 1001.

Right to dismissal as affected by filing of, or as affecting, cross-complaint, counterclaim, intervention and the like, 90 A.L.R. 387.

Asking relief in addition to vacation of service of process as waiver of special appearance or of right to rely upon lack of jurisdiction, 111 A.L.R. 925.

Last clear chance doctrine, raising issue of, in reply, 25 A.L.R.2d 277.

Objection before judgment to jurisdiction of court over subject matter as constituting general appearance, 25 A.L.R.2d 833.

Agency, manner and sufficiency of pleading in contract action, 45 A.L.R.2d 583.

Litigant's participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 A.L.R.2d 937.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition, 85 A.L.R.2d 825.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

71 C.J.S. Pleading §§ 99 to 129, 167 to 176.

### **2-303. Judgment on the pleadings.**

A.

For claimant. A party seeking to recover upon a claim or counterclaim may, at any time after an answer or a reply by the adverse party, move for a judgment on the pleadings in his favor upon all or any part thereof.

B.

For defending party. A party against whom a claim or counterclaim is asserted may, at any time, move for a judgment on the pleadings in his favor as to all or any part thereof.

C.

Motion and proceedings thereon. The motion shall be served by mail at least five (5) days before the time fixed for the hearing. The judgment sought shall be rendered forthwith if the pleadings, on file, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A judgment on the pleadings may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

### **2-304. Amended and supplemental pleadings.**

Upon request of either party, the magistrate may permit him to file an amended pleading, or to amend by interlineation, at any stage of the proceeding and upon such terms as may be just. Permission to amend a pleading shall be freely granted if trial of the action on its merits will be advanced. Similar consideration shall apply to supplemental pleadings asserting claims or defenses which have arisen since the date of the pleading to be supplemented. Continuances to meet new matter asserted by way of amended or supplemental pleadings shall be granted if necessary to avoid surprise or other prejudice to the opposing party.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pleading §§ 306 to 338.

Amendment of pleading to correct designation of court or judge, 65 A.L.R. 709.

Declaratory relief, leave to amend complaint, 87 A.L.R. 1205.

Amendment of pleading by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa, 111 A.L.R. 1317; 151 A.L.R. 987.

Amendment of process or pleading by changing or correcting mistake in name of party, 124 A.L.R. 86.

Substitution of plaintiff as proper subject for amendment of complaint, 135 A.L.R. 325.

Last clear chance issue, propriety of amending petition to raise, 25 A.L.R.2d 279.

Amendment to show compliance with statute as to doing business under an assumed or fictitious name or designation and showing the names of the persons interested, 42 A.L.R.2d 567.

Statute of limitations, amendment of pleadings to assert, 59 A.L.R.2d 169.

Assumption of risk, amendment to correct failure to plead specially defense of, 59 A.L.R.2d 253.

Partnership, amending of pleadings so as to deny partnership in action by third person against alleged partners, 68 A.L.R.2d 573.

Notice of claim, amendment to show giving a requisite notice or presenting of claim to municipality or other public body, 83 A.L.R.2d 1208.

Statute of limitations, timely suit to enforce policy as interrupting limitation against claimant's amended pleading to reform it, or vice versa, 92 A.L.R.2d 168.

71 C.J.S. Pleadings §§ 275 to 338.

## **2-305. Dismissal of actions.**

A.

Voluntary dismissal. A claim may be dismissed by the plaintiff by filing a notice of dismissal at any time before filing of the answer. A claim may also be dismissed by the plaintiff, or by the defendant asserting a counterclaim, by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice. The notice or stipulation shall be presented to the magistrate before filing, and he shall endorse thereon an order that the action, claim or counterclaim, as the case may be, is dismissed.

B.

Dismissal for failure to prosecute. Any action pending for six (6) months from the date the complaint is filed, in which the plaintiff or defendant asserting a counterclaim has failed to take all available steps to bring the matter to trial, shall be dismissed without prejudice.

Cross-references. - For form on stipulation of dismissal, see Form 4-304. For form on notice of dismissal of complaint, see Form 4-305. For form on order dismissing action for failure to prosecute, see Form 4-306.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit §§ 10, 41 to 88.

Mandamus to compel a court to take jurisdiction of a cause that it has erroneously dismissed for supposed insufficiency or lack of service, 4 A.L.R. 610.

Right of plaintiff to dismiss an action brought in behalf of himself and other persons, 8 A.L.R. 950; 91 A.L.R. 587.

Waiver of right to dismissal because of plaintiff's failure to furnish security for costs by applying for continuance, 8 A.L.R. 1528.

Forcing party or prosecuting witness to withdraw or not institute action or proceeding as contempt of court, 23 A.L.R. 187.

Dismissal of suit as affecting election of remedies as between damages and specific performance, 26 A.L.R. 111.

Constitutionality of statute forbidding direction of verdict or nonsuit, 29 A.L.R. 1287.

Arbitration agreement made pending action, 42 A.L.R. 727.

Joint tort-feasors, dismissal or nolle prosequi as to part, 66 A.L.R. 206; 104 A.L.R. 846; 124 A.L.R. 1298; 148 A.L.R. 1270.

Right of voluntary dismissal of suit without prejudice before trial as affected by filing counterclaim after motion for dismissal, 71 A.L.R. 1001.

Dismissal of action or proceeding to enforce mechanic's lien because of delay in prosecuting, 79 A.L.R. 847.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case against codefendant, 80 A.L.R. 1186; 114 A.L.R. 759.

Power of attorney general to settle and compromise or dismiss suit or proceeding, 81 A.L.R. 124.

May or must claim for damages from wrongful seizure of property be interposed in action or proceeding in which seizure is made, 85 A.L.R. 644.

Dismissal of action against resident defendant, or failure to get decision against him, as ground of removal to federal court of action in which resident defendant is joined with nonresident, 85 A.L.R. 799.

Constitutionality, construction and effect of statutes relating to exceptions to rule denying contribution or indemnity between joint tort-feasors, 85 A.L.R. 1091; 122 A.L.R. 520; 141 A.L.R. 1207.

What amounts to nonsuit within contemplation of statute extending time for new action in case of nonsuit, 86 A.L.R. 1048.

Nonsuit within contemplation of statute extending time for new action in case of nonsuit, dismissal as to one of several defendants, 86 A.L.R. 1049.

Stage of trial at which plaintiff may take voluntary dismissal, 89 A.L.R. 13; 126 A.L.R. 284.

Right to dismissal as affected by filing of, or as affecting, cross-complaint, counterclaim, intervention and the like, 90 A.L.R. 387.

May question as to qualification or competency of witness be raised by or upon motion for nonsuit or for directed verdict, absent objection on that ground when testimony was given, 93 A.L.R. 788.

Conclusiveness of judgment sustaining demurrer where plaintiff procured dismissal of the suit, 106 A.L.R. 437.

Right to revive by amendment an action dismissed by judgment entered upon plea of

abatement or demurrer, 106 A.L.R. 570.

Reinstatement, after expiration of term, of case which has been voluntarily withdrawn, dismissed or nonsuited, 111 A.L.R. 767.

Raising question of estoppel by prior adjudication by motion to dismiss, 120 A.L.R. 8.

Objectionable evidence, admitted without objection, as entitled to consideration on demurrer to evidence or motion for nonsuit or directed verdict, 120 A.L.R. 205.

Construction and application of rules of court which permit dismissing suit because of disobedience of order, summons or subpoena duces tecum requiring production of documents, 144 A.L.R. 372.

Provision that judgment is "without prejudice" or "with prejudice" as affecting its operation as res judicata, 149 A.L.R. 553.

Relief from stipulations, 161 A.L.R. 1161.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 A.L.R. 496.

Original notice of lis pendens, as effective upon renewal of litigation after dismissal, reversal or nonsuit, reserving right to bring another proceeding, 164 A.L.R. 515.

Delay in issuance or service of summons as requiring or justifying order discontinuing suit, 167 A.L.R. 1058.

Voluntary dismissal or withdrawal of proceedings to probate or contest will, 173 A.L.R. 959.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348; 56 A.L.R.3d 1109; 27 A.L.R.4th 61; 32 A.L.R.4th 212.

Effect of discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Necessity of notice of application or intention to correct error in judgment entry, 14 A.L.R.2d 224.

Appellate review at instance of plaintiff who has requested, induced or consented to dismissal or nonsuit, 23 A.L.R.2d 664.

Res judicata effect of judgment dismissing action, or otherwise denying relief, for lack of jurisdiction or venue, 49 A.L.R.2d 1036.

Dismissal of civil action for want of prosecution as res judicata, 54 A.L.R.2d 473.

Authority of attorney to dismiss or otherwise terminate action, 56 A.L.R.2d 1290.

What dismissals preclude a further suit, under federal and state rules regarding two dismissals, 65 A.L.R.2d 642.

Maintenance of second or successive stockholder's derivative action, 70 A.L.R.2d 1305.

Consideration by trial court, in passing on motion for nonsuit, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 914.

Dismissal of injunction action or bill without prejudice as breach of injunction bond, 91 A.L.R.2d 1312.

Motion to dismiss on ground of obtaining personal service by fraud or trickery, 98 A.L.R.2d 600.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of the facts" or the like, 1 A.L.R.3d 711.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 A.L.R.3d 545.

Dismissal, nonsuit, judgment or direction of verdict on open statement of counsel in civil action, 5 A.L.R.3d 1405.

Dismissal of action because of party's perjury or suppression of evidence, 11 A.L.R.3d 1153.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 A.L.R.3d 452.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 A.L.R.3d 768.

What amounts to "final submission" or "retirement of jury" within statute permitting plaintiff to take voluntary dismissal or nonsuit without prejudice before submission or retirement of jury, 31 A.L.R.3d 449.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings or directed verdict, 36 A.L.R.3d 1113.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party," 66 A.L.R.3d 1087.

27 C.J.S. Dismissal and Nonsuit §§ 7, 11, 45 to 86.

## **2-306. Pretrial conference.**

At any time after the filing of a complaint, the magistrate may, with or without the filing of a motion, order the parties to appear before him to clarify the pleadings and to consider such other matters as may aid in the disposition of the case. The court may issue subpoenas for the attendance of witnesses at the request of a party.

Cross-references. - For form on notice of pretrial conference, see Form 4-307.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 62 Am. Jur. 2d Pretrial Conference and Procedure §§ 1 to 28.

Pretrial conference procedures as affecting right to discovery, 161 A.L.R. 1151.

Relief from stipulations, 161 A.L.R. 1161.

General rule requiring pretrial conference, power of court to adopt, 2 A.L.R.2d 1061.

Disclosure, in pretrial proceedings, of trade secret, formula or the like, 17 A.L.R.2d 383.

Binding effect of court's order entered after pretrial conference, 22 A.L.R.2d 599.

Appealability of order entered in connection with pretrial conference, 95 A.L.R.2d 1361.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

88 C.J.S. Trial § 17(2).

## **Article 4**

### **Parties**

## **2-401. Parties; capacity.**

A.

Real party in interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, personal representative, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. Where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest, the court may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

B.

Capacity to sue or be sued. The capacity of an individual, including those acting in a representative capacity, to sue or be sued shall be determined by the law of this state. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless some statute of this state provides to the contrary.

C.

Minors or incompetent persons. When a minor or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person.

Cross-references. - As to standing of personal representative to sue, see 45-3-703 NMSA 1978. As to powers of guardian of minor, see 45-5-209 NMSA 1978. As to powers of guardian of incapacitated person, see 45-5-312 NMSA 1978. As to power of conservator in administration to sue, see 45-5-424 NMSA 1978. As to power of trustee to sue, see 45-7-401 NMSA 1978. As to power of corporation to sue, see 53-11-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59 Am. Jur. 2d Parties §§ 34 to 40, 241, 245 to 251.

Enforceability by purchaser of business, of covenant of third person with his vendor not to engage in similar business, 4 A.L.R. 1078; 22 A.L.R. 754.

Resale price, right of manufacturer to enforce contract as to, made by retailer with

middleman, 7 A.L.R. 449; 19 A.L.R. 925; 32 A.L.R. 1087; 103 A.L.R. 1331; 125 A.L.R. 1335.

Compensation for services rendered to infant in the litigation, right of next friend to, 9 A.L.R. 1537.

Explosives, violation of statute as ground of action in favor of one injured in person or property by explosion, 12 A.L.R. 1309.

Excessive freight charge, who may maintain action to recover back, 13 A.L.R. 289.

Shares of corporate stock as within statute enabling assignee to maintain action in his own name, 23 A.L.R. 1322.

Mortgagee or other lienholder as entitled to maintain action against third person for damage to property, 37 A.L.R. 1120.

Enforcement of option contained in lease for purchase of property, 38 A.L.R. 1162; 45 A.L.R.2d 1034.

Waste, who may maintain action to recover multiple damages against tenant committing, 45 A.L.R. 774.

Sealed instrument, right of third person to maintain action at law, 47 A.L.R. 5; 170 A.L.R. 1299.

Subcontractor, liability for damages to or loss of profits of contractee in principal contract who discontinues same, 48 A.L.R. 458.

Trust receipt, right of one giving, to maintain action for purchase-price against one to whom he sells, 49 A.L.R. 282; 87 A.L.R. 302; 101 A.L.R. 453; 168 A.L.R. 359.

Dividends wrongfully paid, suit to recover, or to enforce liability of directors for wrongfully declaring them, 55 A.L.R. 8; 76 A.L.R. 885; 109 A.L.R. 1381.

Local improvements, power of municipality to transfer or assign its right to enforce assessment or lien for, 55 A.L.R. 667.

Refusal to deal with corporation as giving stockholder right of action, 59 A.L.R. 1099.

Fire or marine policy taken out by bailee, warehouseman or carrier, right of owner to sue, 61 A.L.R. 720.

Subscription to stock in corporation to be formed, who may enforce, 61 A.L.R. 1504.

Charitable trust, right of trustees to maintain suit to administer or enforce, 62 A.L.R. 881; 124 A.L.R. 1237.

Duty of one learning of action instituted in his name without authority, 63 A.L.R. 1068.

Bondholder's right to maintain action against trustee for money received by trustee to discharge bond or coupon, 64 A.L.R. 1186.

Rendition of judgment against one not a formal party, who has assumed the defense, 65 A.L.R. 1134.

Amendment of verdict as to parties, reassembling jury after discharge, for purpose of, 66 A.L.R. 536.

Amendment of verdict as to parties, reassembling jury after discharge, for purpose of, 66 A.L.R. 549.

Corporate name, right of bondholders to maintain action to prevent use by another corporation, 66 A.L.R. 948; 115 A.L.R. 1241; 72 A.L.R.3d 8.

Promoters, right of corporation to sue on contract made before its organization, 66 A.L.R. 1425.

Devise or bequest of property as compensation for services, parties in action for breach of contract as to, 69 A.L.R. 14; 106 A.L.R. 742.



Care to be exercised or precautions to be taken for protection of third persons, availability in action by third person for damages against public contractor, of provisions in contract as to, 69 A.L.R. 522.

Delay or mistake, right of undisclosed principal to recover against telegraph company because of, 72 A.L.R. 1198.

Automobile liability insurance, who may recover indemnity granted by omnibus coverage clause, 72 A.L.R. 1375; 106 A.L.R. 1251; 126 A.L.R. 544; 143 A.L.R. 1394.

Right of person furnishing material or labor to maintain action on contractor's bond to owner or public body, or on owner's bond to mortgagee, 77 A.L.R. 21; 118 A.L.R. 57.

Right of one brought into action as a party by original defendant upon ground that he is or may be liable to latter in respect to matter in suit, to raise or contest issues with plaintiff, 78 A.L.R. 327.

Partner, party plaintiff in action against, for profits earned subsequently to death or dissolution, 80 A.L.R. 12; 55 A.L.R.2d 1391.

Right of third person to enforce contract between others for his benefit, 81 A.L.R. 1271; 148 A.L.R. 359.

Inducing breach of contract, who may maintain action for, 84 A.L.R. 43; 26 A.L.R.2d 1227.

Tax wrongfully exacted on shares of its stock, corporation paying as proper party to maintain action for its recovery, 84 A.L.R. 107.

Indemnity or liability insurer, parties plaintiff in action against, by injured person, under statutory or policy provisions, 85 A.L.R. 20; 106 A.L.R. 516.

Declaratory judgment, who may petition for, 87 A.L.R. 1205.

Bonds of municipality, taxpayer's right of action for sale at less than par, in violation of statute, 91 A.L.R. 7; 162 A.L.R. 396.

Reciprocal insurance association, proper party plaintiff in actions by, or on behalf of, 94 A.L.R. 836; 141 A.L.R. 765; 145 A.L.R. 1121.

Collective labor agreement, right of individual employee to sue for breach, 95 A.L.R. 10.

Escrow, proper party defendant in action for refusal of depository to deliver instrument or property placed in, notwithstanding performance of conditions of delivery, 95 A.L.R. 293.

Proper party plaintiff to action against tort-feasor for damages to insured property where insurer is entitled to subrogation to extent of loss paid by it, 96 A.L.R. 864; 157 A.L.R. 1242.

Registration lists, who may bring action to purge, 96 A.L.R. 1035.

Bank in charge of liquidating officer who refuses or fails to enforce liability of persons to bank, right of creditors to maintain action for that purpose, and conditions of such right, 97 A.L.R. 169; 116 A.L.R. 783.

Right of individual member of class or group referred to in defamatory publication to maintain action for libel or slander, 97 A.L.R. 281; 70 A.L.R.2d 1382.

Water user as necessary or proper party to litigation involving right of ditch or canal company or irrigation of drainage district from which he takes water, 100 A.L.R. 561.

Ward's right, after majority to maintain action on contracts entered into by guardian on ward's behalf, 102 A.L.R. 269.

Insurance, right of third person to sue upon promise made by beneficiary to insured, to pay proceeds to third person, 102 A.L.R. 594.

Removal of disability, statute providing that an insane person, minor or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed, 109 A.L.R. 954.

Rescission of deed or land contract for grantee's breach of agreement to support grantor, right of heirs of grantor to maintain suit for, 112 A.L.R. 670.

Heir or next of kin, standing to attack gift or conveyance made by ancestor in his lifetime, as affected by will by which he is disinherited in whole or part, 112 A.L.R. 1405.

Bucketshops or bucket-shop transactions, violation of statute relating to, as ground of action by customer or patron, 113 A.L.R. 853.

Bank directors or officers, who may maintain action against, for civil liability for damages resulting from false reports or statements, 114 A.L.R. 478.

Title, joinder of claims to separate parcels in suit to quiet title, or to remove cloud on, or to determine adverse claims of land, 118 A.L.R. 1400.

Holders of mortgage or other lien upon an undivided interest in real property as a necessary or proper party to a suit for partition, 126 A.L.R. 414.

Unauthorized prosecution of suit in name of another as ground of action in tort, 146 A.L.R. 1125.

Vendee under executory contract, right of, to bring action against third person for damage to land, 151 A.L.R. 938.

Decedent's estate, right of creditors to maintain action in interest of, 158 A.L.R. 729.

Massachusetts or business trust, 159 A.L.R. 209.

Timber contract, necessary and proper parties in action growing out of delay in performance of, 164 A.L.R. 423.

Mortgage lienholder as proper or necessary party to suit in respect of contract for sale of mortgaged property, 164 A.L.R. 1044.

Insurance, who may enforce policy containing facility of payment clause, 166 A.L.R. 10.

Defendant's right to bring in third person asserted to be solely liable to the plaintiff, 168 A.L.R. 600.

Contract for joint, mutual or reciprocal wills, parties to action to enforce, 169 A.L.R. 9.

Action at law for desecration of grave, who may maintain, 172 A.L.R. 554.

Dissolved corporation as indispensable party to stockholder's derivative action, 172 A.L.R. 691.

Restrictions on right of action by individual holder of series of corporate bonds or other obligations, validity, construction and application of, 174 A.L.R. 435.

Overcharges, representation of several claimants in action against carrier of public utility to recover, 1 A.L.R.2d 160.

Dismissal of action for plaintiff's failure or refusal to obey court order relating to parties, 4 A.L.R.2d 348; 56 A.L.R.3d 1109; 27 A.L.R.4th 61; 32 A.L.R.4th 212.

Right of municipality, county or other government unit to complain of under assessment or nonassessment of property for taxation, 5 A.L.R.2d 579; 9 A.L.R.4th 428.

Capacity of cotenant to maintain suit to set aside conveyance of interest of another cotenant because of fraud, undue influence or incompetency, 7 A.L.R.2d 1370.

Limitation of actions, change in party after statute has run, 8 A.L.R.2d 6.

Trust beneficiaries as necessary parties to action relating to trust or its property, 9 A.L.R.2d 10.

Release or satisfaction of judgment, who may seek avoidance of, 9 A.L.R.2d 567.

Joinder of sheriff and deputies in action for false imprisonment based on mistake in identity of person arrested under warrant, 10 A.L.R.2d 752.

Right of third person not named in bond or other contract, conditioned for support of, or services to, another, to recover thereon, 11 A.L.R.2d 1010.

Right and capacity of taxpayer to a tax sale by municipal corporation or other taxing unit of its property, 17 A.L.R.2d 745.

Parent or person in loco parentis, child's right to sue for personal tort, 19 A.L.R.2d 423; 41 A.L.R.3d 904.

Representative actions for expulsion from social club or similar society, 20 A.L.R.2d 399.

Representative actions for suspension or expulsion from a church or religious society, 20 A.L.R.2d 500.

Contract made in consideration of naming child as enforceable by child, 21 A.L.R.2d 1067.

Right of owner's employee injured by subcontractor, to recovery against general contract or for breach of contract between the latter and the owner requiring contractor and subcontractors to carry insurance, 22 A.L.R.2d 647.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 A.L.R.2d 395.

Joint liability for slander, 26 A.L.R.2d 1031.

Parties to action for procuring breach of contract, 26 A.L.R.2d 1227; 96 A.L.R.3d 1294.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 A.L.R.2d 409.

Parties in actions involving reemployment of discharged servicemen, 29 A.L.R.2d 1279; 9 A.L.R. Fed. 225.

Who may obtain relief against forfeiture of lease for nonpayment of rent, 31 A.L.R.2d 336.

Guaranty, who may enforce, 41 A.L.R.2d 1213.

Conflict of laws as to proper party plaintiff in contract action, 62 A.L.R.2d 486.

Continuance, amendment of pleadings with respect to parties or their capacity as ground for, 67 A.L.R.2d 477.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 A.L.R.2d 1247.

Guardian's capacity to sue or be sued outside state where appointed, 94 A.L.R.2d 162.

Insurance, proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where insured has paid part of loss, 13 A.L.R.3d 140.

Insurance, proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where loss is entirely covered by insurance, 13 A.L.R.3d 229.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

State Consumer Protection Act, right to private action under, 62 A.L.R.3d 169.

Who is minor's next of kin for guardianship purposes, 63 A.L.R.3d 813.

Bailor's right of direct action against bailee's theft insurer for loss of bailed property, 64 A.L.R.3d 1207.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Condominium, standing to bring action relating to title in real property of, 72 A.L.R.3d 314.

Necessary or proper parties to suit or proceeding to establish private boundary line, 73 A.L.R.3d 948.

Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704.

Liability for interference with invalid or unenforceable contract, 96 A.L.R.3d 1294.

What is "cause" justifying discharge from employment of veteran reemployed under § 9 of the Military Selective Service Act of 1967, 9 A.L.R. Fed. 225.

67A C.J.S. Parties §§ 5, 10, 112 to 120.

## **2-402. Notice of trial; joint or separate trials.**

A.

Notice of trial. After the answer has been filed, the magistrate shall set a date for trial of the action. He shall issue a written notice of trial announcing the time and place thereof, file the original and send copies to all parties not in default. The notice of trial shall be in substantially the form approved by the court administrator and the supreme court.

B.

Consolidation. When actions involving a common question of law or fact are pending before the magistrate, he may make such orders providing for joint trials as may tend to avoid unnecessary costs or delay.

C.

Separate trials. The magistrate in furtherance of convenience or to avoid prejudice may order a separate trial of any claim or issue.

Cross-references. - For form on notice of trial, see Form 4-401.

Court not to dismiss complaint without notice. - The words "he shall issue a written notice of trial announcing the time and place thereof" do not allow the magistrate court to dismiss the complaint of the plaintiff without notice to the plaintiff in the event that a defendant is in default for failure to file a written answer and/or to appear on the return date for the answer. 1971 Op. Att'y Gen. No. 71-110 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Actions §§ 127, 156 to 161; 75 Am. Jur. 2d Trial §§ 7 to 16.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 A.L.R. 1444.

Propriety of consolidation for trial of actions for personal injuries, death or property damage arising out of same accident, 104 A.L.R. 62; 68 A.L.R.2d 1372.  
Right of defendant sued jointly with another or others in action for personal injury or death to separate trial, 174 A.L.R. 734.  
Right to appellate review, on single appellate proceeding, of separate actions consolidated for trial together in lower court, 36 A.L.R.2d 823.  
Maintenance of second or successive stockholder's derivative action, 70 A.L.R.2d 1305.  
Time for making application for consolidation of actions, 73 A.L.R.2d 739.  
Separate trial of issues of liability and damages in tort, 85 A.L.R.2d 9.  
Right of plaintiff suing jointly with others to separate trial or order of severance, 99 A.L.R.2d 670.  
Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A.L.R.3d 456.  
1A C.J.S. Actions §§ 205, 220 to 228; 88 C.J.S. Trial §§ 6 to 10.

## **2-403. Substitution of parties.**

A.

Death or incompetency. If a party dies or becomes incompetent and the claim is not extinguished or barred, the magistrate may, within ninety (90) days after notice of the death or incompetency of the party is made in the file of the pending case, order a substitution of the proper party. If substitution is not so made, the action shall be dismissed as to the deceased or incompetent party, without prejudice.

B.

Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the magistrate directs the person to whom the interest is transferred to be substituted in the action.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 59 Am. Jur. 2d Parties §§ 23, 25, 210 et seq.

Survival of action or cause of action for alienation of affections or criminal conversation, 24 A.L.R. 488; 57 A.L.R. 351.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 A.L.R. 51.

Survival of action or cause of action for breach of contract to marry, 34 A.L.R. 1363.

Abatement of action which does not survive, by death of party pending appeal or writ of error, 62 A.L.R. 1048.

Survival of liability on joint obligation, 67 A.L.R. 608.

Right of one to notice and hearing on motion to add him as a party, or substitute him for an original party, to pending action or proceeding, 69 A.L.R. 1247.

Does a right of action on bond to recover for damages personal in their nature, and not affecting property rights, survive principal's death, 70 A.L.R. 122.

Survival of cause of action for personal injury or death against tort-feasor killed in the same accident, 70 A.L.R. 1319.

Survivability or assignability of action or cause of action in tort for damages for fraudulently procuring purchase or sale of property, 76 A.L.R. 403.

Survival of claim for usury against estate of usurer, 78 A.L.R. 451.

Survival upon death of wrongdoer of husband's or parent's action or right of action for consequential damages arising from injury to wife or minor child, 78 A.L.R. 593.

Survival of action or cause of action for personal injuries upon death of tort-feasor, 78 A.L.R. 600.

Abatement upon death, of cause of action to enforce personal liability of corporate officer, director or trustee, 79 A.L.R. 1517.

Relation between survivability of cause of action and abatability of pending action, 92 A.L.R. 956.

What actions or causes of action involve injury to reputation within statutes relating to survival of causes of action or abatement of actions, 117 A.L.R. 574.

Assignability or survivability of cause of action to enforce civil liability under securities acts, 133 A.L.R. 1038.

Abatement or survival, upon death of party, of action, or cause of action, based on libel or slander, 134 A.L.R. 717.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 A.L.R.2d 544.

Conflict of laws as regards survival of cause of action and revival of pending action upon death of party, 42 A.L.R.2d 1170.

Parties to action for specific performance of contract for conveyance of realty after death of party to the contract, 43 A.L.R.2d 938.

Marriage, right to attack validity after death of party thereto, 47 A.L.R.2d 1393.

Effect of death of appellant upon appeal from judgment of mental incompetence against him, 54 A.L.R.2d 1161.

Death of principal as exoneration, defense or ground for relief, of sureties on bail or appearance bond, 63 A.L.R.2d 830.

Real estate mortgage executed by one of joint tenants as enforceable after his death, 67 A.L.R.2d 999.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 A.L.R.2d 1247.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 A.L.R.2d 342.

Right of trustee in bankruptcy, or his assignee, to sue on turnover order in state court, 84 A.L.R.2d 668.

Enforceability, under statute of frauds provision as to contracts not to be performed within a year, of oral employment contract for more than one year but specifically made terminable upon death of either party, 88 A.L.R.2d 701.

Annulment of marriage, mental incompetency of defendant at time of action as precluding, 97 A.L.R.2d 483.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor or other party obligating himself for performance of primary contract, 5 A.L.R.3d 426.

Divorce or annulment of marriage, power of incompetent spouse's guardian, committee

or next friend to sue for granting or vacation of, or to make a compromise or settlement in such suit, 6 A.L.R.3d 681.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 A.L.R.3d 1427.

Cause of death, official death certificate as evidence of in civil or criminal action, 21 A.L.R.3d 418.

Attorney's death prior to final adjudication or settlement of case as affecting compensation under contingent fee contract, 33 A.L.R.3d 1375.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 A.L.R.3d 518.

Franchise contract, validity, construction and effect of clause in, prohibiting transfer of franchise or contract, 59 A.L.R.3d 244.

Wrongful death, modern status of rule denying a common-law recovery for, 61 A.L.R.3d 906.

Conservator or guardian for an incompetent, priority and preference in appointment of, 65 A.L.R.3d 991.

Husband's death as affecting periodic payment provision of separation agreement, 5 A.L.R.4th 1153.

67A C.J.S. Parties § 56 et seq.

## **Article 5**

### **Discovery and Pretrial Matters**

#### **2-501. Discovery.**

At any time during the pendency of the action, for good cause shown, the magistrate may order either party to produce for inspection and copying any records, papers, documents or other tangible evidence in the possession of that party or available to that party.

If both parties are represented by counsel, the magistrate may, for good cause shown, order further discovery as permitted by the Rules of Civil Procedure.

Cross-references. - As to district court rules for discovery, see Rules 1-026 to 1-037. For form on motion for production, see Form 4-501. For form on order for production, see Form 4-502.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23 Am. Jur. 2d Depositions and Discovery § 21.

Constitutional rights, requiring submission to physical examination or test as violation of,

25 A.L.R.2d 1407.

Physical examination of injured person, power to require in action by his parent or spouse to recover for his injury, 62 A.L.R.2d 1291.

Right of party to have his attorney or physician present during his physical examination at instance of opposing party, 64 A.L.R.2d 497.

Admissibility in civil action of electroencephalogram, electrocardiogram or other record made by instrument used in medical test, or of report based upon such test, 66 A.L.R.2d 536.

Pretrial examination, right to copy of physician's report where there is no specific statute or rule providing therefor, 70 A.L.R.2d 384.

Physical examination of personal injury plaintiff, court's power to order as affected by distance or location of place of examination, 71 A.L.R.2d 973.

Treating physician, reports of, delivered to litigant's own attorney as subject of pretrial or other disclosure, production or inspection, 82 A.L.R.2d 1162.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 A.L.R.2d 1001.

Mandamus or prohibition as available to compel or to prevent discovery proceedings, 95 A.L.R.2d 1229.

Right of party to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court-appointed expert, 7 A.L.R.3d 881.

Timeliness of application for compulsory physical examination of injured party in personal injury action, 9 A.L.R.3d 1146.

Medical malpractice action, scope of defendant's duty of pretrial discovery in, 15 A.L.R.3d 1446.

Right of defendant in personal injury action to designate physician to conduct medical examination of plaintiff, 33 A.L.R.3d 1012.

Patient's statements or declarations, admissibility of physician's testimony as to, other than res gestae, during medical examinations, 37 A.L.R.3d 778.

27 C.J.S. Discovery §§ 20, 21.

## **2-502. Subpoenas.**

A.

For attendance of witnesses; form; issuance. Every subpoena shall be issued by the magistrate or clerk of the court, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The magistrate or clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

B.

For production of documentary evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents or tangible things



designated therein; but the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

- (1) quash or modify the subpoena if it is unreasonable and oppressive, or
- (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

C.

Service. A subpoena may be served by the sheriff, by his deputy, or by any other 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 within the magistrate district and by tendering to him the fees for one (1) day's attendance and the mileage allowed by law, if payment of such fee and mileage is demanded at the time of service of the subpoena. When the subpoena is issued on behalf of the state or an officer or agent thereof, fees and mileage need not be tendered.

D.

Manner of service. Service of a subpoena may be made by mail in the manner provided for serving the summons, complaint and form of answer.

E.

Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the magistrate court from which the subpoena was issued. The magistrate shall not hold any person in contempt of the magistrate court if service of the subpoena has been made by mail unless there has been presented to the court evidence, in addition to that contained in the return and certificate of the judge or clerk of the court, that the person received delivery of the subpoena or that a subpoena was personally served on the person in accordance with Paragraph C of this rule.

Cross-references. - As to contempt, see Rule 2-110. As to sheriff serving and executing process of magistrate courts, see 4-41-14 NMSA 1978. As to per diem and mileage for witnesses, see 38-6-4 NMSA 1978. For forms on subpoena, return for completion by sheriff or deputy and return for completion by other person making service, see Form 4-503.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 81 Am. Jur. 2d Witnesses §§ 5, 9 to 22. Inconvenience or expense as excuse for disobeying subpoena duces tecum, 9 A.L.R. 163.

Mandamus to compel court or judge to require witness to testify or produce documents,

41 A.L.R. 436.

Service of a subpoena as an arrest within constitutional or statutory immunity of members of legislature from arrest, 79 A.L.R. 1214.

Privilege against self-incrimination as justification for refusal to comply with subpoena requiring production of books or documents of private corporation, 120 A.L.R. 1102.

Practice or procedure for testing validity or scope of the command of subpoena duces tecum, 130 A.L.R. 327.

Compelling production of papers in hands of attorney asserting lien, 3 A.L.R.2d 154.

Form, particularity and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 A.L.R.2d 862.

Compelling expert to testify, 77 A.L.R.2d 1182.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Who has possession, custody or control of corporate books or records for purposes of order to produce, 47 A.L.R.3d 676.

97 C.J.S. Witnesses §§ 19 to 34, 45.

## **Article 6**

### **Trials**

#### **2-601. Conduct of trials.**

A.

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

B.

Evidence. Evidence shall be admitted in accordance with the New Mexico Rules of Evidence. At his own expense and for the purpose of preserving testimony, a party may cause a record, as defined in Rule 2-109, to be made. The trial shall be conducted expeditiously, but each party shall be permitted to present his position amply and fairly.

C.

Oath of witnesses. The magistrate shall administer the following oath to each witness: "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?"

Cross-references. - As to Rules of Evidence, see Rule 11-101 et seq.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 17 Am. Jur. 2d Continuance §§ 1 to 26, 43 to 53; 81 Am. Jur. 2d Witnesses §§ 413, 416 to 437.

Evidence contrary to scientific principles or laws of nature, 21 A.L.R. 141.

Validity of proceedings as affected by taking evidence out of court, 43 A.L.R. 1516; 18 A.L.R.3d 572.

Comparative value of positive and negative testimony, 98 A.L.R. 161.

Time during or after civil trial at which court may entertain, or properly grant or deny, motion for continuance of trial, 112 A.L.R. 395.

Right to continuance because counsel is in attendance at another court, 112 A.L.R. 593.

Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or transactions upon which prosecution is predicated, 123 A.L.R. 1453.

Refreshment of recollection by use of memoranda or other writing, 125 A.L.R. 19; 82 A.L.R.2d 473.

Distinction between positive and negative evidence, 140 A.L.R. 530.

Appealability of order granting or refusing stay or continuance under Soldiers' and Sailors' Civil Relief Act because of military service of litigant, 34 A.L.R.2d 1149.

Prejudicial effect, in civil case, of denial of continuance to call nonappearing witness whom adversary had been expected to call, 39 A.L.R.2d 1445.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting foreclosure of mortgages and trust deeds, 40 A.L.R.2d 1262.

Illness of relative or member of family, party litigant's absence from civil case because of, as ground for continuance, 47 A.L.R.2d 1058.

Counsel, withdrawal or discharge, in civil case as ground for continuance, 48 A.L.R.2d 1155.

Counsel, absence because of attendance on legislature, 49 A.L.R.2d 1073.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting matrimonial actions, 54 A.L.R.2d 390.

Bankruptcy proceedings, false oath or account as bar to discharge in, 59 A.L.R.2d 791.

Illness or death of counsel, continuance of civil case because of, 67 A.L.R.2d 497.

Illness or death of party, continuance of civil cases because of, 68 A.L.R.2d 470.

Hostile sentiment or prejudice as ground for continuance in civil case, 68 A.L.R.2d 540.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting negligence actions, 75 A.L.R.2d 1062.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 890.

Mental incompetency of defendant at time of action for annulment of marriage as ground for continuance, 97 A.L.R.2d 483.

Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 5 A.L.R.3d 1272.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 A.L.R.3d 249.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

17 C.J.S. Continuances §§ 1 to 13; 88 C.J.S. Trial §§ 55 to 93; 98 C.J.S. Witnesses §§ 315 to 429.

## **2-602. Jury trial.**

A.

Right preserved. The right of trial by jury exists as provided by law.

B.

Demand. Either party to an action may demand trial by jury. The demand shall be made in the complaint if made by the plaintiff and in the answer if made by the defendant, and the magistrate shall collect from the demanding party the jury fee established by law.

C.

Waiver. If demand is not made as provided in Paragraph B of this rule, or if the jury fee is not paid at the time demand is made, trial by jury is deemed waived.

Cross-references. - For constitutional provision as to trial by jury, see N.M. Const., art. II, § 12. As to right to jury trials in magistrate courts, see 35-8-1 NMSA 1978. As to demand for magistrate jury, see 35-8-2 NMSA 1978. As to mileage and compensation for jurors and jury commissioners, see 38-5-15 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Jury §§ 10, 57 to 89.  
Right to jury trial in proceeding for removal of public officer, 3 A.L.R. 232; 8 A.L.R. 1476.  
Statute providing for revocation of license of physician, surgeon or dentist, as denial of right to trial by jury, 5 A.L.R. 94; 79 A.L.R. 323.  
Request by both parties for directed verdict as waiver of submission to jury, 18 A.L.R. 1433; 68 A.L.R.2d 300.  
Attorney's right to trial where he is charged with failure to turn over money or property to client, 22 A.L.R. 1501.  
Statutes giving right to jury trial in contempt proceedings for violating injunction in industrial disputes, 27 A.L.R. 411; 35 A.L.R. 460; 97 A.L.R. 1333; 106 A.L.R. 361; 120 A.L.R. 316; 124 A.L.R. 751; 127 A.L.R. 868; 150 A.L.R. 819.  
Constitutionality of statute requiring party demanding jury to pay jury fees or charges incidental to summoning or impaneling of jurors, 32 A.L.R. 865.  
Reduction or increase of verdict, by court, without giving party affected option to submit to new trial, 53 A.L.R. 779; 95 A.L.R. 1163.  
Equity jurisdiction to cancel insurance policy upon ground within incontestable clause prior to termination of period, as depriving beneficiary of right to jury trial, 73 A.L.R. 1529; 111 A.L.R. 1275.  
Constitutionality, construction and effect of statute providing for jury trial in disbarment proceedings, 78 A.L.R. 1323.  
Statute in relation to subject matter or form of instructions by court as impairing constitutional right to jury trial, 80 A.L.R. 906.  
Declaratory judgment action as infringement of right to jury trial, 87 A.L.R. 1205.

Statute prohibiting new trial on ground of inadequacy of damages, 88 A.L.R. 943.

Determination of facts involved in original quo warranto proceedings in appellate court, 98 A.L.R. 237.

Waiver of right to jury trial as operative after expiration of term during which it was made, or as regards subsequent trial, 106 A.L.R. 203.

Statute providing supplementary proceedings for an infringement of right to jury trial, 106 A.L.R. 383.

Validity and effect of plan or practice of consulting preferences of persons eligible for jury service as regards periods or times of service or character of actions, 112 A.L.R. 995.

Right to jury trial of issues as to personal judgment for deficiency in suit to foreclose mortgage, 112 A.L.R. 1492.

Right to jury trial in suit to remove cloud, quiet title or determine adverse claims, 117 A.L.R. 9.

Right of defendant to waive right of trial by jury where he is not represented by counsel, 143 A.L.R. 445.

Nature and effect of jury's verdict in equity, 156 A.L.R. 1147.

Right to jury trial in action concerning failure of purchaser to remove timber within time fixed by timber contract, 164 A.L.R. 423.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 A.L.R. 383.

Indoctrination by court for persons summoned for jury service as infringing constitutional right of trial by jury, 2 A.L.R.2d 704.

Jury trial in action for declaratory relief, 13 A.L.R.2d 777; 33 A.L.R.4th 146.

Fingerprint, palm print or bare footprint evidence as violating right to jury trial, 28 A.L.R.2d 1141; 45 A.L.R.4th 1178.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon or probation, 29 A.L.R.2d 1074; 44 A.L.R.3d 306.

Right to jury trial in action involving reemployment of discharged serviceman, 29 A.L.R.2d 1279; 9 A.L.R. Fed. 225.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity or for restoration, 33 A.L.R.2d 1145.

Waiver of constitutional right to jury trial in proceeding for adjudication of incompetency or for restoration, 33 A.L.R.2d 1162.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Withdrawal or disregard of waiver of jury trial in civil action, 64 A.L.R.2d 506; 9 A.L.R.4th 1033.

Waiving submission of fact questions to jury, request by each party for directed verdict as, 68 A.L.R.2d 300.

Right to jury trial as invalidated by Rule 50(b), Federal Rules of Civil Procedure, or like state provisions with respect to motion for judgment notwithstanding or in default of verdict, 69 A.L.R.2d 470.

Validity and effect of contractual waiver of trial by jury, 73 A.L.R.2d 1332.

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 A.L.R.2d 1162.

Sufficiency of waiver of full jury, 93 A.L.R.2d 410.

Right to jury trial in juvenile court delinquency proceedings, 100 A.L.R.2d 1241.  
How to obtain jury trial in eminent domain, waiver, 12 A.L.R.3d 7.  
Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.  
Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.  
Statute reducing number of jurors as violative of right to trial by jury, 47 A.L.R.3d 895.  
Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.  
What is "cause" justifying discharge from employment of veteran reemployed under § 9 of the Military Selective Service Act of 1967, 9 A.L.R. Fed. 225.  
50 C.J.S. Juries §§ 10, 84 to 113.

## **2-603. Jurors.**

A.

Magistrate jury. A jury in the magistrate court consists of six jurors with the same qualifications as jurors in the district court. Whenever a jury is required, the magistrate shall select prospective jurors in the manner provided by law.

B.

Challenges for cause. At the time of the trial, the parties, their attorneys or the magistrate 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. Each party shall be entitled to one peremptory challenge. If peremptory challenges are exercised, the magistrate shall excuse those jurors challenged.

D.

Selection of jury.

(1) The magistrate 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 magistrate 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 magistrate by questioning all of the jurors present, as a group, or individually.

Additional slips with jurors' names thereon shall be drawn from the box to replace those excused for cause or by peremptory challenge, who may then be questioned by the parties, their attorneys or the magistrate.

(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 magistrate 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 responsible person shall summon a sufficient number of jurors to fill the deficiency.

F.

Oath to jurors. The magistrate shall administer the following oath to the jurors: "You do solemnly swear (or affirm) that you will truly try the facts of this action and give a true verdict according to the law and evidence given in court."

[As amended, effective September 1, 1989.]

Cross-references. - As to jury trials in magistrate courts, see 35-8-1 NMSA 1978 et seq. As to selecting and impaneling a magistrate jury, see 35-8-3 NMSA 1978. As to drawing and impaneling jurors, see 38-5-1 NMSA 1978 et seq.

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, in the first paragraph of Paragraph D(2), deleted the "(a)" designation from the beginning and "(b) the magistrate may draw six slips with the jurors' names from the box and these six jurors may be questioned as a group and individually" at the end, and made related stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Jury §§ 155, 214, 216, 220, 233, 234, 242, 340, 341.

Unfamiliarity with English as affecting competency of juror, 34 A.L.R. 194.

Statutory grounds for challenge of jurors for cause as exclusive of common-law grounds, 64 A.L.R. 645.

Right to introduce extrinsic evidence in support of challenge to juror for cause, 65 A.L.R. 1056.

Peremptory challenge after acceptance of juror, 3 A.L.R.2d 499.

Validity of requirement of oath of allegiance, 18 A.L.R.2d 294.

Waiver of peremptory challenge or challenges in civil case other than by acceptance of

juror, 56 A.L.R.2d 742.

Right to peremptory challenge as prejudiced by appearance of additional counsel in civil case after impaneling of jury, 56 A.L.R.2d 971.

Professional or business relations between proposed juror and attorney as ground of challenge for cause, 72 A.L.R.2d 673.

Relationship of juror to witness in civil case as ground of disqualification, 85 A.L.R.2d 851.

Confusion of name or identity in drawing, summoning, calling or impaneling juror in civil case, as affecting verdict, 89 A.L.R.2d 1242.

Effect of allowing excessive number of peremptory challenges, 95 A.L.R.2d 957.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of juror, 20 A.L.R.3d 1420.

Number of peremptory challenges allowable in civil case where there are more than two parties involved, 32 A.L.R.3d 747.

Use of peremptory challenge to exclude from jury persons belonging to a class or race, 79 A.L.R.3d 14.

50 C.J.S. Juries §§ 123, 192 to 194, 267 to 269, 273, 275 to 280, 293 to 296; 89 C.J.S. Trials § 494.

## **2-604. Trial by jury.**

Juries in the magistrate court shall hear the evidence in the action which shall be delivered in public in its presence. After hearing the evidence, the members of the jury shall be kept together until five of them agree upon a verdict or are discharged by the magistrate. Whenever the magistrate is satisfied that five jurors cannot agree on a verdict after a reasonable time, he may discharge it and summon a new jury unless the parties agree that the magistrate may render judgment.

Cross-references. - As to trial by magistrate jury, see 35-8-4 NMSA 1978. As to discharge of jury upon failure to agree, see 35-8-5 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Jury § 3.  
89 C.J.S. Trial §§ 462, 473.

## **2-605. Instructions to juries.**

A.

Procedural instructions. After the parties have completed their presentation of the evidence, and before arguments to the jury, the magistrate shall orally instruct the jury on the procedure to be followed by them in deciding the case. Such instructions shall be given in substantially the following form:

"Ladies and gentlemen of the jury:



The case will now be submitted to you for decision. Upon retiring to the jury room and before commencing your deliberations you will select one of your members as foreman. You will then determine the facts in the case from the evidence that has been presented here in open court during the trial. From the facts and the law as you understand it you will decide upon a verdict.

You are the sole judges of all disputed questions of fact. Your verdict should not be based on speculation, guess or conjecture. Neither sympathy nor prejudice should influence your verdict.

You should first decide whether or not the defendant is liable to the plaintiff at all (and whether or not the plaintiff is liable to the defendant on the defendant's counterclaim/setoff). If you find the defendant liable to the plaintiff (or the plaintiff liable to the defendant), you should then determine the amount of damages that should be awarded.

When five or more 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 on his own motion, and if he deems it appropriate, the magistrate may give the jury any other applicable instructions contained in the New Mexico Uniform Jury Instructions (UJI) Civil, but no other instructions on the law shall be given.

Cross-references. - As to the Uniform Jury Instructions - Civil, see Judicial Pamphlet 13.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial §§ 573 to 930.

Necessity of repeating definition of legal or technical term in different parts of instructions in which it is employed, 7 A.L.R. 135.

Use of emphatic words, like "great care," "utmost care" or "highest care," in instructing jury as to duty of carrier to passengers, 32 A.L.R. 1190.

Duty to instruct, and effect of failure to instruct jury as to reduction to present worth of damages for future loss on account of death or personal injury, 77 A.L.R. 1439; 154 A.L.R. 796.

Statutes in relation to subject matter or form of instructions by court as impairing constitutional right to jury trial, 80 A.L.R. 906.

Right of court to instruct or to communicate with jury in civil case in absence of counsel, 84 A.L.R. 220.

Instructions regarding measurement of damages for pain and suffering, 85 A.L.R. 1010.

Instructions regarding determination of life expectancy in action for personal injuries or death, 87 A.L.R. 910.

Instructions defining term "preponderance or weight of evidence," 93 A.L.R. 155.

Furnishing or reading instructions to jury in jury room, after retirement, as error, 96

A.L.R. 899.

Sufficiency of instruction on contributory negligence as respects the element of proximate cause, 102 A.L.R. 411.

Right or duty of court to instruct jury as to presumptions, 103 A.L.R. 126.

Necessity of expert testimony to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 A.L.R. 1149.

Failure to comply with statute, constitutional provision or court rule providing for giving instructions to jury in writing as prejudicial or reversible error, 115 A.L.R. 1332.

"And/or," use of, or comment on use of, in instruction, 118 A.L.R. 1367; 154 A.L.R. 866.

Instructions regarding good or bad character of witnesses as affecting their credibility, 120 A.L.R. 1443.

Propriety, where actual damages are not shown, of instructions on compensatory damages which do not embody jury's right to award small or nominal damages, 122 A.L.R. 853.

Duty of court in civil case to correct, and to give as corrected, a requested instruction which includes a clerical or inadvertent mistake, 125 A.L.R. 685.

Propriety of instruction, or requested instruction, in civil case, as to caution in considering testimony of oral admissions, or as to weight of such admissions as evidence, 126 A.L.R. 66.

Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 A.L.R. 693.

Propriety of instructions on matters of common knowledge, 144 A.L.R. 932.

Comments in judge's charge to jury disparaging expert testimony, 156 A.L.R. 530.

Instructions in ejectment on rule that plaintiff must recover on strength of own title, 159 A.L.R. 646.

Right of plaintiff in *res ipsa loquitur* case to an instruction respecting inference by jury, 173 A.L.R. 880.

Modern view as to propriety and correctness of instructions referable to maxim "*falsus in uno, falsus in omnibus*," 4 A.L.R.2d 1077.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 A.L.R.2d 524.

Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

Provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions, 91 A.L.R.2d 836.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning

capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 102.

Construction and effect of provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

88 C.J.S. Trial §§ 266 to 426; 89 C.J.S. Trial §§ 427 to 448.

## **2-606. Nonjury trials.**

In all actions tried upon the facts without a jury the magistrate shall, at the conclusion of the case, forthwith orally announce his decision and enter the appropriate judgment or final order; provided however, the magistrate 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.]

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 319.

When does jeopardy attach in a nonjury trial, 49 A.L.R.3d 1039.

88 C.J.S. Trial § 203; 89 C.J.S. Trial §§ 574 to 608.

## **Article 7**

### **Judgment and Appeal**

#### **2-701. Judgments; costs.**

A.

Entry of judgment. Following the trial the magistrate shall enter a written judgment in accordance with the verdict of the jury or, if the trial was without a jury, in accordance with his decision. If any setoff or counterclaim is established by the defendant, the amount of the setoff or counterclaim shall be balanced against any sum owed the plaintiff and judgment entered accordingly. The judgment shall be in substantially the form approved by the supreme court.

B.

Demand for judgment. A judgment shall not exceed in amount that claimed in the complaint. A judgment by default shall not award relief different in kind from that claimed in the complaint.

C.

Costs collected by magistrates. Costs shall be collected in accordance with the schedule provided by the court administrator.

D.

Taxable costs. Costs shall be taxed in the judgment of the prevailing party against the losing party in the amount of costs paid by the prevailing party to the magistrate, and any fees actually paid by the prevailing party for service of the complaint, summons and subpoenas and for attendance of witnesses, including expert witnesses, except that no costs shall be taxed against the state; provided, however, that in no case for any party shall taxable expert witness fees exceed one hundred dollars (\$100), plus per diem and mileage.

Cross-references. - As to fees and costs in magistrate courts, see 35-6-1 NMSA 1978 et seq. For witness' per diem and mileage, see 38-6-4 NMSA 1978. For form on judgment, see Form 4-704.

Witness fees taxable. - Witnesses in civil suits in justice of the peace (now magistrate) courts could receive witness fees, which were taxed in favor of the prevailing party. 1964 Op. Att'y Gen. No. 64-48 (opinion rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Costs §§ 14, 26 to 36; 46 Am. Jur. 2d Judgments §§ 152 to 159.

Correction of entry or amendment of judgment nunc pro tunc as affecting intervening liens and property rights, 48 A.L.R. 1182.

Right to costs where judgment is against plaintiff on his complaint and against defendant on his counterclaim, 75 A.L.R. 1400.

Costs in habeas corpus, 81 A.L.R. 151.

Correcting clerical errors in judgments, 126 A.L.R. 956; 14 A.L.R.2d 224.

Date of verdict or date of entry of judgment thereon as beginning of interest period on judgment, 1 A.L.R.2d 479.

Disagreement of jury, entry of final judgment after, 31 A.L.R.2d 885.

Unsuccessful litigant's payment of costs as barring his right to appeal from judgment on merits, 39 A.L.R.2d 194.

Multiple defendants, effect of verdict "for plaintiff" in action against, 47 A.L.R.2d 803.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 A.L.R.2d 927.

Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty, 55 A.L.R.2d 723.

Court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition, 56 A.L.R.2d 213.

Liability of state, or its agency or board, for costs of appeal in civil action to which it is a party, 72 A.L.R.2d 1379.

Sunday or holiday, validity of court's judgment rendered on, 85 A.L.R.2d 595.

Attorney's personal liability for expenses incurred in relation to services for client, 15 A.L.R.3d 531.

Recoverability under property insurance or insurance against liability for property damage of insured's expenses to prevent or mitigate damages, 33 A.L.R.3d 1262.

Dismissal of plaintiff's action as entitling defendant to recover attorney's fees or costs as "prevailing party" or "successful party," 66 A.L.R.3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims, 66 A.L.R.3d 1115.

20 C.J.S. Costs § 94; 49 C.J.S. Judgments §§ 106 to 108.

## **2-702. Default.**

A.

Entry at time of appearance. If the defendant fails to appear or has not filed an answer within the time prescribed by Rule 2-202, and if the plaintiff proves by an appropriate return that proper service was made upon the defendant, the magistrate may enter judgment for the plaintiff for the amount due, including interest, costs and other items allowed by law. The magistrate may require evidence as to any fact before entering default judgment.

A copy of the default judgment shall forthwith be mailed by the clerk of the court to each party against whom judgment has been entered. The clerk shall endorse on the judgment the date of mailing.

B.

At time of trial. Failure to appear at the time and date set for trial shall be grounds for entering a default judgment against the nonappearing party.

C.

Setting aside default. For good cause shown, within thirty (30) days after entry of judgment and if no appeal has been timely taken, the magistrate may set aside a default judgment.

Cross-references. - For form on default judgment, see Form 4-703. For form on motion to set aside default judgment, see Form 4-704. For form on order setting aside default judgment and giving notice of trial date, see Form 4-705.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 47 Am. Jur. 2d Judgments §§ 1152 to 1213.

Judgment by consent, confession or default of principal as affecting sureties whose obligation is conditioned upon judicial determination of liability or rights of principal, 51 A.L.R. 1489.

Successful defense by one codefendant, or a finding for "defendants," as inuring to benefit of defaulting defendant, 78 A.L.R. 938.

What amounts to waiver by plaintiff of right to enter default judgment against defendant, or of the default itself after entry, 124 A.L.R. 155.

Doctrine of res judicata as applied to judgment by default, 128 A.L.R. 472; 77 A.L.R.2d 1410.

Mistaken belief or contention that defendant had not been served, or had not been legally served, with summons, as ground for setting aside default judgment, 153 A.L.R. 449.

Validity, construction and application of statutes providing for entry of default judgment by clerk without intervention of court or judge, 158 A.L.R. 1091.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 A.L.R. 496.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

49 C.J.S. Judgments §§ 187 to 218.

## **2-703. Relief from judgment or order.**

A.

Clerical mistakes. Clerical mistakes in judgments, orders, or other parts of the file and errors therein arising from oversight or omission may be corrected by the magistrate at any time of his own initiative or on the request of any party after such notice to the opposing party, if any, as the magistrate orders. 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 so corrected with leave of the district court.

B.

Void or satisfied judgments. Upon application made within a reasonable time to the magistrate, and notice to the opposing party, the magistrate may relieve a party or his legal representative from a final judgment for the following reasons:

(1) the judgment is void; or

(2) the judgment has been satisfied, released or discharged. An application for relief from a final judgment of the magistrate court for any other reason, except as provided in Rule 2-702, may be made only by instituting an action in the district court. An order granting or denying relief from a final judgment under this rule may be appealed to the district court in the same manner as other appeals from final judgments of the magistrate court are taken.

Cross-references. - As to appeal to the district court from final judgments to the magistrate court, see Rule 2-705.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judgments §§ 200, 671. Failure to perform the duty to make disclosures which rests upon one because of trust or confidential relation as fraud for which equity, in an independent suit, will relieve against a judgment, 5 A.L.R. 672.

Correcting clerical errors in judgments, 10 A.L.R. 526; 67 A.L.R. 828; 126 A.L.R. 956; 14 A.L.R.2d 224.

Right of infant to set aside consent judgment in action for personal injuries, 15 A.L.R. 667; 20 A.L.R. 1249.

Character of judgment which refers to representative or fiduciary character of one against whom it is rendered, 21 A.L.R. 908.

Reliance of attorney on agreement or supposed agreement of opposing attorney to give notice when case was set for trial as ground for relief from judgment, 29 A.L.R. 1336.

Mental incompetency at the time of rendition of judgment in civil action as ground of attack upon it, 34 A.L.R. 221; 140 A.L.R. 1336.

Judgment on substituted service as within provision for relief from judgment taken through mistake, surprise or excusable neglect, 44 A.L.R. 618.

Correction of entry or amendment of judgment nunc pro tunc as affecting intervening liens and property rights, 48 A.L.R. 1182.

Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 A.L.R. 1219.

Is service of notice or process in proceeding to vacate or modify judgment to be made upon owner of the judgment or upon the attorney, 78 A.L.R. 370.  
Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 A.L.R. 1201.  
Asking relief in addition to vacation of service of process as waiver of special appearance or right to rely upon lack of jurisdiction, 111 A.L.R. 925.  
Perjury as ground of attack on judgment or order of court, 126 A.L.R. 390.  
Secreting witness or other conduct preventing summoning or appearance of witness as ground for relief from judgment, 131 A.L.R. 1519.  
Correction of mistake in judgment entered under warrant of attorney to confess judgment, 144 A.L.R. 830.  
Lapse of time as bar to action or proceeding for relief in respect of void judgment, 154 A.L.R. 818.  
Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment, 164 A.L.R. 537.  
Interlocutory decree as subject to modification after term other than correction of clerical errors, 169 A.L.R. 121.  
Notice contemplated by statute for relief from judgment upon application within specified time after notice, 171 A.L.R. 253.  
Scope and character of meritorious defense as condition of relief from judgment, 174 A.L.R. 10.  
Remedy and procedure to avoid release or satisfaction of judgment, 9 A.L.R.2d 553.  
Power of successor judge taking office during term-time to vacate judgment entered by his predecessor, 11 A.L.R.2d 1117.  
Necessity of notice of application or intention to correct error in judgment entry, 14 A.L.R.2d 224.  
Conditioning the setting aside of judgment or grant of new trial on payment of opposing attorney's fees, 21 A.L.R.2d 863.  
Motion to vacate judgment or order as constituting general appearance, 31 A.L.R.2d 262.  
Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty, 55 A.L.R.2d 723.  
Conduct of parties as curing formal defects of judgment or order as regards appealability, 73 A.L.R.2d 278.  
49 C.J.S. Judgments §§ 228, 237.

## **2-704. 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, or 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.



Magistrate court has no jurisdiction to set aside a jury verdict. *Jaramillo v. O'Toole*, 97 N.M. 345, 639 P.2d 1199 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appeal and Error §§ 702, 776 to 819; 58 Am. Jur. 2d New Trial § 34.

Harmless error, in action involving motor vehicle accident, in admission of evidence as to manner in which participant was driving before reaching the scene of accident, 46 A.L.R.2d 66.

5A C.J.S. Appeal and Error §§ 1676 to 1777; 5B C.J.S. Appeal and Error §§ 1778 to 1800, 1894 to 1907; 66 C.J.S. New Trial § 13.

## **2-705. Appeal.**

A.

Right of appeal. If a party is aggrieved by the final order in a civil action, he may appeal to the district court of the county within which the magistrate court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after entry of the judgment or final order.

B.

Notice of appeal. An appeal from the magistrate court is taken by:

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

(2) filing with the magistrate court:

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

(b) a copy of the receipt of payment of the docket fee.

C.

Docketing the appeal. Upon the filing of the notice of appeal and payment of the docket fee, the clerk of the district court shall docket the appeal in the district court. Within five (5) days after the docketing of the appeal in the district court, the appellant shall give notice of the appeal to the clerk of the magistrate court and to each party to the action or to the attorney for each party who is represented and shall file a certificate in the district court that such notice has been given. No appeal shall be heard unless such certificate is filed with the clerk of the district court.

D.

Transcript of the proceedings. Within ten (10) days after the appellant files a copy of the notice of appeal in the magistrate court pursuant to Paragraph C of this rule, the magistrate shall file with the clerk of the district court a transcript of all proceedings taken in the action in the magistrate court. The transcript shall include:

- (1) title page containing caption of the case in the magistrate 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) copy of the complaint and other pleadings; and
- (3) copy of the judgment or order sought to be reviewed with date of filing noted thereon.

E.

Stay of proceedings to enforce a judgment.

(1) When an appeal is taken, the appellant may obtain a stay of the proceedings to enforce the judgment by posting a supersedeas bond with the clerk of the magistrate court. The stay is effective when the supersedeas bond is approved by the magistrate court and shall continue in effect until final disposition of the appeal. The bond shall be conditioned for the satisfaction of and compliance with the judgment in full as may be modified by the appellate court, together with costs, attorneys' fees and interest, if any. The bond shall be enforceable upon dismissal of the appeal or affirmance of the judgment. If the judgment is reversed or satisfied, the bond is void. The surety, sureties or collateral securing such bond, and the terms thereof, must be approved by and the amount fixed by the magistrate court. If a bond secured by personal surety or sureties is tendered, the same may be approved only on notice to the appellee. Each personal surety shall be required to show a net worth at least double the amount of the bond. When the judgment is for the recovery of money, the amount of the bond shall be such sum as will cover the whole amount of the judgment remaining unsatisfied, together with costs, attorneys' fees and interest, if any. In any event, in determining the sufficiency of the surety or sureties and the extent to which such surety or sureties shall be liable on the bond, or whether any surety shall be required, the court shall take into consideration the type and value of any collateral which is in, or may be placed in, the custody or control of the court and which has the effect of securing payment of and compliance with such judgment.

(2) When an appeal is taken by the state or an officer or agency thereof, or by any political subdivision or institution of the state, or by any municipal corporation, the taking of an appeal shall operate as a stay.

(3) Where an appeal is taken by a fiduciary on behalf of the estate or beneficiary which he represents, the amount of the bond and type of security shall be fixed by the court and, in fixing the same, due regard shall be given to the assets under the control of the

fiduciary and any bond given by such fiduciary.

F.

District court review. At any time after appeal is taken the district court may, upon motion and notice, review any action of, or any failure or refusal to act by, the magistrate court dealing with supersedeas or stay. For purposes of obtaining such review any party may docket the appeal at any time irrespective of whether the record is filed coincident therewith. If the reviewing court shall modify the terms, conditions or amount of a supersedeas bond or if it shall determine that the magistrate court should have allowed supersedeas and failed to do so on proper terms and conditions, it may grant additional time, within which to file in the district court a supersedeas bond complying with the standards prescribed in such determination. Any change ordered by the district court shall be certified by the clerk of the district court, and filed with the magistrate court clerk by the party seeking the review.

G.

Disposal of appeal. The district court shall dispose of appeals by entry of an appropriate order disposing of the appeal. The court in its discretion may accompany the order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases.

H.

Rehearing. Within ten (10) days after entry of an order disposing of the appeal, 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.

I.

Mandate. Process in the form of a mandate, judgment or order may issue at any time after entry of the order disposing of the appeal. Unless otherwise ordered, the mandate, judgment or order will not issue until expiration of ten (10) days after entry of the order, and if timely motion for rehearing is filed, then fifteen (15) days after disposition of such motion for rehearing. Mandate, judgment or order from the district court shall not issue until the time has elapsed for appeal to the court of appeals or supreme court. If an appeal or certiorari is taken to an appellate court, a mandate, judgment or order shall not issue until final disposition of the case.

J.

Rules applicable on appeal. The Rules of Civil Procedure for the District Courts of New Mexico shall apply to and govern the procedure in the district courts on appeal from the magistrate court.

K.

Remand. Upon the judgment of the district court following an appeal from the magistrate court, the district court mandate shall remand the case to the magistrate court for enforcement of the district court's judgment.

[As amended, effective November 1, 1988.]

Cross-references. - As to right of appeal, see 35-13-1 NMSA 1978. As to rules of Civil Procedure for District Courts, see Rule 1-001 et seq. For form on title page of transcript of civil proceedings, see Form 4-708.

The 1988 amendment, effective for cases filed in the magistrate courts on or after November 1, 1988, rewrote this rule to the extent that a detailed analysis would be impracticable.

Magistrate's continuing control over civil judgments expires 15 days after entry of judgment. *State v. Ramirez*, 97 N.M. 125, 637 P.2d 556 (1981).

Rule 1-006E held inapplicable. - A party notified by mail of a judgment entered against him in magistrate court who filed a notice of appeal 16 days later could not take advantage of the three-day extension provision of Subdivision (e) of Rule 6 (now see Paragraph E of Rule 1-006), N.M.R. Civ. P. *Socorro Livestock Mkt., Inc. v. Orona*, 92 N.M. 236, 586 P.2d 317 (1978).

Paragraph B of Rule 1-041 held inapplicable. - Rule 41(b) (now see Paragraph B of Rule 1-041), N.M.R. Civ. P., is inapplicable where a district court dismisses an appeal from a magistrate court and five months later remands the case for execution of judgment to the original court. *Los Alamos County v. Beery*, 101 N.M. 157, 679 P.2d 825 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 50 to 64, 292 to 322.

Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 A.L.R. 725.

Necessity and sufficiency of election to stand on demurrer to support appeal from decision overruling, 21 A.L.R. 264.

Power of legislature to require appellate court to review evidence, 33 A.L.R. 10.

Power of trial court indirectly to extend time for appeal, 89 A.L.R. 941; 149 A.L.R. 740.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 114 A.L.R. 759.

Abandonment of appeal or right of appeal by commencement or prosecution to

judgment of another action, 115 A.L.R. 121.

Right of public officer or board to appeal from judicial decision affecting his or its order or decision, 117 A.L.R. 216.

Provision for future accounting as affecting finality of judgment or decree for purposes of review, 3 A.L.R.2d 342.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 A.L.R.2d 1075.

Order as to joinder of additional parties as reviewable on appeal from final judgment, 16 A.L.R.2d 1043.

Bastardy proceedings, right to appeal from order or judgment entered in, 18 A.L.R.2d 948.

Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings, 21 A.L.R.2d 285.

Appellate review at instance of plaintiff who has requested, induced or consented to dismissal or nonsuit, 23 A.L.R.2d 664.

Sexual psychopathy, appealability of adjudication as to, 24 A.L.R.2d 350.

Decisions appealable as affected by Federal Civil Procedure Rule 54(b) and similar state rules governing entry of judgment on multiple claims, 38 A.L.R.2d 377.

Defeated party's payment or satisfaction of, or other compliance with civil judgment as barring his right to appeal, 39 A.L.R.2d 153.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 A.L.R.2d 927.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 A.L.R.2d 482.

Acceptance of new trial as precluding appellate review of order granting it, 67 A.L.R.2d 191.

Full relief sought, right of winning party to appeal from judgment granting him, 69 A.L.R.2d 701.

Right to appellate review of consent judgment, 69 A.L.R.2d 755.

Appeal from judgment in proceeding for reinstatement of attorney after disbarment, suspension or resignation, 70 A.L.R.2d 329.

Formal requirements of judgment or order as regards appealability, 73 A.L.R.2d 250.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 A.L.R.2d 801.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

Void judgment, appealability of, 81 A.L.R.2d 537.

Nolo contendere or non vult contendere plea as affecting time for appeal, 89 A.L.R.2d 599.

Appealability of order or decree compelling or refusing to compel arbitration, 94 A.L.R.2d 1071; 6 A.L.R.4th 652.

Dismissal of appeal or writ of error for want of prosecution as bar to subsequent appeal, 96 A.L.R.2d 312.

Narcotic addict, appealability of order under statute providing for civil commitment of, 98 A.L.R.2d 732.

Arbitration award, appealability of judgment confirming or setting aside arbitration

award, 7 A.L.R.3d 608.

Default judgment, appealability of order setting aside, or refusing to set aside, 8 A.L.R.3d 1272.

Executor's or administrator's right to appeal from order granting or denying distribution, 16 A.L.R.3d 1274.

Party's acceptance of remittitur in lower court as affecting his right to complain in appellate court as to amount of damages for personal injury, 16 A.L.R.3d 1327.

Bankruptcy, right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 A.L.R.3d 914.

Contempt adjudication or conviction, appealability of, 33 A.L.R.3d 448.

Contempt adjudication or conviction as subject to review, other than by appeal or writ of error, 33 A.L.R.3d 589.

Appealability of state court's order or decree compelling or refusing to compel arbitration, 6 A.L.R.4th 652.

4 C.J.S. Appeal and Error §§ 92 to 152; 4A C.J.S. Appeal and Error §§ 590 to 594, 1082 to 1095.

## **Article 8**

### **Special Proceedings**

#### **2-801. Garnishment and writs of execution.**

A.

Issuance of writs of execution. After filing of the judgment, upon request of the prevailing party, the clerk shall issue writs of execution or garnishment.

B.

Execution procedure. Executions shall be made in the manner provided by law. If any judgment debtor is a natural person, no writ of execution or notice thereof shall be levied upon a commercial bank, savings and loan association, credit union or representative payee (defined by federal law as the person designated to receive social security benefits for another) as a writ of garnishment pursuant to 39-4-3 NMSA 1978 except in compliance with this rule. Executions are returnable within sixty (60) days from their date. If an execution is not satisfied within that time, it may, upon request of the judgment creditor, be renewed for additional periods of sixty (60) days by endorsement, in writing, of the magistrate. If any part of the execution has been satisfied, each endorsement of renewal shall state the balance remaining.

C.

Garnishment procedure. After the filing of the judgment, the clerk shall issue a writ of garnishment after the judgment creditor (which phrase includes his attorney, if so

represented) has filed with the clerk an application for a writ of garnishment which includes the judgment debtor's last known address and an affidavit stating that:

- (1) the judgment creditor has a judgment against the judgment debtor, giving the amount of the judgment;
- (2) after diligent inquiry to the best of the judgment creditor's knowledge, the judgment debtor has no property in his possession within this state subject to execution to satisfy the judgment;
- (3) the named garnishee is indebted to the judgment debtor and that the debt is not exempt from garnishment, or holds personal property belonging to the judgment debtor; and
- (4) the named garnishee is or is not a commercial bank, savings and loan association, credit union or representative payee.

D.

Claims of exemption. If the garnishee is a commercial bank, savings and loan association, credit union or representative payee and any judgment debtor is a natural person, on or before the fourth business day following the issuance of the writ of garnishment, the judgment creditor shall mail to each named judgment debtor and to his attorney of record, under separate cover, the application for the writ, writ of garnishment, notice of right to claim exemptions, and two (2) copies of the claim of exemption form, each of which shall be substantially in the form approved by the supreme court.

E.

Certificate of mailing. The judgment creditor shall sign and file a certificate of mailing reflecting the date of mailing copies of the documents listed in Paragraph D of this rule to the judgment debtors and their attorneys.

F.

Hearing. Upon receiving a completed claim of exemption form from a judgment debtor, the clerk shall deliver the same to the assigned judge who shall set a hearing on the claim of exemption which shall be held within five (5) business days after the clerk receives the form. If the judge who heard the original suit is unavailable, the presiding judge shall assign the next available judge who shall hold the hearing within five (5) business days of the clerk's receipt of the claim of exemption form. The date and time for the hearing may be advanced upon application of the judgment debtor and for good cause shown. The order advancing the date and time for the hearing may be issued ex parte.

G.

Notice of hearing. The judge or his designee shall give notice to the judgment creditor and the judgment debtor of the date and time for the hearing. The applicant's notice of hearing shall also include a copy of the claim of exemption form as filed by the judgment debtor. The hearing on the claim of exemption shall be held within five (5) business days after the clerk's receipt of the completed claim of exemption form, notwithstanding any other rule to the contrary.

H.

Service of writ with claim of exemption. If the garnishee is a commercial bank, savings and loan association, credit union or representative payee, the judgment creditor shall attach to the writ of garnishment a copy for each judgment debtor of the notice of right to claim exemptions and two (2) copies of the claim of exemption form to be served upon the garnishee. These forms shall be served with the writ of garnishment on the garnishee.

I.

Answer. The garnishee shall answer the writ of garnishment within twenty (20) days of service. The answer shall be substantially in the form approved by the supreme court.

J.

Judgment. Judgment on the writ of garnishment shall not enter within twenty-five (25) days after the writ is served, unless a hearing on a claim of exemption has been held and an order thereon has been entered prior to the expiration of said twenty-five (25) days. If a claim of exemption form has been filed prior to the entry of judgment on the writ of garnishment, no judgment on the writ of garnishment shall be entered prior to the hearing on the claim of exemption. Judgment may not enter unless the judgment creditor has certified compliance with Paragraph E of this rule. Judgment on the writ of garnishment shall be substantially in the form approved by the supreme court. The judgment creditor shall mail a copy of the judgment on the writ of garnishment to the judgment debtor within three (3) business days of its having been filed by the court.

K.

Sheriff's sale. A sale shall be conducted in the manner provided by law for sales on execution from the district court.

L.

Execution from district court. When any execution issued by a magistrate is returned nulla bona, upon the expiration of the time allowed by rule for appeal, the judgment



creditor may file with the district court of the county in which the magistrate issued the judgment a certified copy of the judgment. Upon payment of the prescribed docket fee, the clerk of the district court shall docket the judgment and execution in the same manner in which judgments of the district court are docketed, and thereafter the clerk may issue process in aid of the judgment as though the judgment had been issued by the district court.

M.

Service. A writ of execution and the writ of garnishment issued pursuant to this rule shall be served wherever the defendant or the garnishee may be found in the State of New Mexico. A writ of garnishment may be served by any person over eighteen (18) years of age who is not a party to the action.

N.

Appeal from judgment. If judgment of the claim of exemption is rendered after expiration of the time for appeal on the main issue in the action, either party aggrieved by the judgment on the claim of exemption may appeal from that judgment to the district court in the same manner as other appeals from final judgments of the magistrate court are taken. If judgment on the claim of exemption is rendered before judgment on the main issue in the cause, the judgment on the claim of exemption shall be deemed interlocutory and included with any appeal taken on the main issue in the action.

[As amended, effective July 1, 1988.]

Cross-references. - As to exemptions in civil actions, see 35-4-2 NMSA 1978. As to docketing money judgments, see 39-1-6 NMSA 1978. As to sales under execution and foreclosure, see 39-5-1 NMSA 1978 et seq. For forms on writ of execution and return, see Form 4-801.

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, substituted present Paragraph A for former Paragraph A which read "After entry of judgment, the magistrate shall issue writs of execution upon request of the prevailing party"; substituted present Paragraphs B through G for former Paragraphs B through G regarding contents of execution, renewal of execution, sheriff's sale, execution from district court, service, and writs of restitution, respectively; and added Paragraphs H through N.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions §§ 27 to 87; 47 Am. Jur. 2d Judicial Sales §§ 82, 99.

Attachment or execution creditor as purchaser within rule that first of two purchasers to obtain possession will prevail, 21 A.L.R. 1031.

Judicial, execution, or tax sale on election day, holiday or Sunday, 58 A.L.R. 1273.

Presence of chattels at place of sale as a condition of a judicial or execution sale, 69 A.L.R. 1194.

Validity of judicial, execution, tax or other public sale as affected by the particular point in courthouse or other place identified by notice, or designated by statute or by mortgage or trust deed, at which the sale was made, or by indefiniteness of notice as regards that point, 120 A.L.R. 660.

Executory contract, vendee's interest under as subject to execution, 1 A.L.R.2d 730.

Irregularities or defects in execution or judicial sale, estoppel of or waiver by parties or participants regarding, 2 A.L.R.2d 6.

"Public sale," what constitutes, 4 A.L.R.2d 575.

Statutory provisions respecting registration of mortgages or other liens on personal property in case of residents of other states as affecting priority of execution lien over lien of chattel mortgage or conditional sale contract, 10 A.L.R.2d 764.

Creditors' rights as affected by grant to one for life, and afterward, either absolutely or contingently, to grantor's heirs or next of kin, 16 A.L.R.2d 713.

Duties, rights and remedies between attorney and client where attorney purchases property of client at or through tax, execution or judicial sale, 20 A.L.R.2d 1280.

Applicability of sales tax to judicial or bankruptcy sales, 27 A.L.R.2d 1219.

Right of creditors of life insured as to options or other benefits available to him during his lifetime, 37 A.L.R.2d 268.

Motor vehicle as exempt from seizure for debt, 37 A.L.R.2d 714.

Note or bond, execution or similar process in action on, not resulting in sale of mortgaged property, as precluding foreclosure of real estate mortgage, 37 A.L.R.2d 959.

Pledgee's right to purchase subject of pledge at judicial sale, 37 A.L.R.2d 1387.

Part payment or promise to pay judgment as affecting time for execution, 45 A.L.R.2d 967.

Appeal or writ of error, ruling on motion to quash execution as ground of, 59 A.L.R.2d 692.

Mere rendition, or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 A.L.R.2d 1162.

Time of conversion of real estate sold under and by court order, 66 A.L.R.2d 1266.

Real estate mortgage executed by one of joint tenants as enforceable after his death, 67 A.L.R.2d 999.

Solid mineral royalty as real or personal property for purposes of execution, 68 A.L.R.2d 735.

Interest of spouse in estate by entirety as subject to judicial sale in satisfaction of his or her individual debt, 75 A.L.R.2d 1172.

Judgment lien, issuance or levy of execution as extending period of, 77 A.L.R.2d 1064.

Propriety of accepting check or promissory note in satisfaction of bid at execution or judicial sale had for cash, 86 A.L.R.2d 292.

Court or place of appearance, sufficiency of designation of in original civil process, 93 A.L.R.2d 376.

Proceeding to restrict execution as means of crediting one tort-feasor with amount paid by another for release or covenant not to sue, 94 A.L.R.2d 391.

Inclusion or exclusion of first and last days in computing time for giving notice of execution or sheriff's sale which must be given a certain number of days before a known future date, 98 A.L.R.2d 1423.

Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 A.L.R.3d 593.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons or the like, 6 A.L.R.3d 1179.

Death of creditor or obligee, validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by, 11 A.L.R.3d 1427.

Joint bank account as subject to attachment, garnishment or execution by creditor of one of the joint depositors, 11 A.L.R.3d 1465.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

Modification of judgment, execution sale as affected by, 32 A.L.R.3d 1019.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

Wrongful execution against business property, injury to credit standing, reputation, solvency or profit potential as elements of damage resulting from, 55 A.L.R.3d 911.  
33 C.J.S. Executions §§ 1, 2, 63, 69, 211.

## **2-802. Exemptions.**

A.

How claimed. Exemptions of personal property provided by law apply to all executions in civil actions and to attachment, replevin and forcible entry or detainer. The person entitled to the exemption or his agent or attorney shall claim the exemption by filing, as a part of the action pending in the magistrate court, a list of the particular property claimed to be exempt and a statement of the grounds for the exemption. The list may be filed at any time after the filing of the complaint, but before the sale of the property or before money garnished is paid to the judgment creditor.

B.

Hearing. Upon the filing of a list of claimed exemptions, the judge shall notify the opposing party that a claim of exemption has been made for the property specified in the list, and notify both parties of a time set for hearing on the claim of exemption. Unless the opposing party consents to the claim of exemption, the judge shall at the time set for hearing receive evidence, determine the issues and enter judgment on the claim of exemption.

C.

Appeal from judgment. If judgment on the claim of exemption is rendered after expiration of the time for appeal on the main issue in the action, either party aggrieved by the judgment on the claim of exemption may appeal from that judgment to the district court in the same manner as other appeals from final judgments of the magistrate court

are taken. If judgment on the claim of exemption is rendered before judgment on the main issue in the cause, the judgment on the claim of exemption shall be deemed interlocutory and included with any appeal taken on the main issue in the action.

[As amended, effective July 1, 1988.]

Cross-references. - As to exemptions in civil actions, see 35-4-2 NMSA 1978. For form on claim of exemptions, see Form 4-803. For form on order of exemption, see Form 4-804.

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, rewrote this rule to the extent that a detailed comparison is impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Debtor's exemption of personalty as attaching to proceeds of sale or exchange thereof, 119 A.L.R. 467.

Motor vehicle as exempt from seizure for debt, 37 A.L.R.2d 714.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

49 C.J.S. Judgments § 471.

## **2-803. Judgment; supplementary proceedings.**

A.

Examinations in aid of judgment or execution. When a judgment for the payment of money has been entered by or docketed in the magistrate court, the judgment creditor or his successor in interest may, in aid of the judgment or execution, examine any person, including the judgment debtor, touching the property of the judgment debtor and his ability to satisfy such judgment. For the purpose of such examination or examinations, the clerk of the court shall, upon request of the judgment creditor or his successor in interest, issue a subpoena directing the person to be examined to appear before the magistrate court at a time and place therein stated for such examination. Such subpoena may be served in the same manner as other subpoenas except that it shall be served not less than three (3) days prior to the date therein stated when the examination is to be conducted.

B.

Deposition in lieu of examination. In lieu of such an examination before the court, the judgment creditor or his successor in interest may take the deposition of the person whom he desires to examine, and such deposition may be taken in the manner now or hereafter provided for taking depositions in causes pending in the district court.

C.

Discovery. In further aid of judgment or execution, the judgment creditor or his successor in interest may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

D.

Notice of deposition. Where such judgment was obtained by default, notice of taking depositions need not be given to the judgment debtor. In all other cases, notice of taking depositions shall be given to the judgment debtor or his attorney of record, if they or any of them be within the state and their addresses be known to the judgment creditor; otherwise, upon affidavit of the judgment creditor or his attorney stating that the judgment debtor and his attorneys of record are out of state or their whereabouts are unknown, the court may enter an order dispensing with such notice. Such subpoena may be served in any county where the person to be examined may be located.

[As amended, effective, July 1, 1988.]

Cross-references. - As to appeal from final judgments of magistrate court, see Rule 2-705. As to exemptions in civil actions, see 35-4-2 NMSA 1978. For form on claim of exemptions, see Form 4-803. For form on order of exemption, see Form 4-804.

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, rewrote this rule to the extent that a detailed comparison is impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 30 Am. Jur. 2d Executions § 88.  
Debtor's exemption of personalty as attaching to proceeds of sale or exchange thereof, 119 A.L.R. 467.

Motor vehicle as exempt from seizure for debt, 37 A.L.R.2d 714.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

49 C.J.S. Judgments § 471.

## **2-804. Withdrawn.**

Compiler's notes. - This rule was withdrawn, effective for cases filed in the magistrate courts on or after July 1, 1988, by an order of the supreme court dated May 26, 1988.