# Rules of Criminal Procedure for the Metropolitan Courts

# Article 1

**General Provisions**

## 7-101. Scope and title.

A.

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

B.

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

C.

Title. These rules shall be known as the Rules of Criminal Procedure for the Metropolitan Courts.

D.

Citation form. These rules shall be cited by set and rule numbers, as in SCRA 1986, Rule 7-

[As amended, effective January 1, 1987.]

COMPILER'S ANNOTATIONS

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

22 C.J.S. Criminal Law § 1 et seq.

## 7-102. Conduct of court proceedings.

A.

Judicial proceedings. Judicial proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants, and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound-recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; and no such action shall be done or permitted except upon express approval of the supreme court.

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.

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.

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

## 7-103. Rules and forms.

A.

Rules. The metropolitan court may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules of the supreme court. Any rule promulgated by the metropolitan court shall not become effective until such rule is approved by the supreme court.

B.

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

[As amended, effective January 1, 1987.]

## 7-104. Time.

A.

Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of metropolitan 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, or for taking an appeal.

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.

## 7-105. Designation of judge.

A.

Procedure for replacing a judge who has been excused. Upon receipt of a notice of excusal, the judge or clerk of the 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 metropolitan court judge in the district to try the cause, the presiding metropolitan court judge of the district shall, by random selection, designate another metropolitan court judge to try the cause. If all metropolitan court judges 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 judge of the metropolitan court 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 judge to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel and to the metropolitan court.

B.

Procedure for replacing a recused judge. Upon the filing of a certificate of recusal, the judge or clerk of the 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 of the filing of certificate of recusal naming another metropolitan court judge in the district to try the cause, the presiding metropolitan court judge of the district shall, by random selection, designate another metropolitan court judge to try the cause. If all metropolitan court judges in the district have been excused or have recused themselves, after the filing of the last notice of excusal or recusal, the presiding judge of the metropolitan court shall, within ten (10) days, 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.

C.

Subsequent proceedings. After the designation, the excused judge shall, within ten (10) days, send to the designated judge a copy of all proceedings in the action. Upon designation of a new judge, all proceedings shall continue to be conducted in the original metropolitan court district. The clerk of the metropolitan 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 judge may not be disqualified by either party except for causes set out in Article 6, Section 18 of the Constitution of New Mexico.

[As amended, effective September 1, 1989.]

COMPILER'S ANNOTATIONS

Cross-references. - For form on statement of disqualification, see Form 4-103.

For forms on certificate of disqualification or recusal, see Forms 4-102 and 9-102.

The 1989 amendment, effective for cases filed in the metropolitan courts on and after September 1, 1989, rewrote this rule to the extent that a detailed comparison would be impracticable.

## 7-106. Excusal; recusal; disability.

A.

Excusal; procedure. Whenever a party to any criminal action or proceeding of any kind files a notice of excusal, the judge's jurisdiction over the cause terminates immediately. The notice is effective only if filed no later than fifteen (15) days after the defendant is arraigned.

B.

Extent of excuse. No judge may be excused from hearing arraignment or bond proceedings. Any excusal of a judge scheduled to hear a preliminary hearing must be filed at least four (4) days prior to the hearing. 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 judge 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 metropolitan court judge shall be designated by the presiding judge of the court to conduct any further proceedings in the action.

E.

Failure to recuse. If a party believes that one or more of the conditions in Paragraph D of this rule exists, the party may file a notice of excusal, naming the condition or conditions, and the metropolitan court judge shall thereupon proceed in accordance with Rule 7-105. If in any case of disqualification the metropolitan court judge 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 metropolitan court judge from proceeding further and designating another or striking the notice of excusal as ineffective or groundless.

F.

Disability of metropolitan court judge. If by reason of absence, death, sickness or other cause, the metropolitan court judge before whom the cause is pending is unable or unavailable to perform his duties, the case may be assigned by the presiding judge to any judge regularly sitting in or assigned to the court.

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

COMPILER'S ANNOTATIONS

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

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

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

The 1988 amendment, effective for cases filed in the metropolitan courts on or after July 1, 1988, deleted the former last sentence in Paragraph A, which read "In a petition for restitution, the statement must be filed within five (5) days of service".

The 1989 amendment, effective for cases filed in the metropolitan courts on and after September 1, 1989, in Paragraph A, substituted "notice" for "statement" in both sentences, in the second sentence substituted "after the defendant is arraigned" for "after the mailing of notification of the appointment of the trial judge", and deleted the former third sentence, which read "In a petition for restitution, the statement must be filed within five (5) days of service"; in Paragraph B, added the second sentence; in Paragraph C, substituted "notice of peremptory excusal" for "notice of election to excuse" near the end; in Paragraph D, deleted the former Subparagraph "(1)" designation at the beginning and the former third sentence, which read "If all metropolitan judges have been disqualified or have recused themselves the case shall be transferred to the district court", and deleted former Subparagraph (2), relating to use

of a judge pro tempore in certain cases where all metropolitan court judges are disqualified; in Paragraph E, substituted "a notice of excusal" for "a statement to that effect" and "shall thereupon proceed in accordance with Rule 7-105" for "shall thereupon recuse himself" in the first sentence, in the second sentence inserted "in any case of disqualification" and substituted "disqualification" for "excusal", and, in the last sentence, substituted "notice of excusal" for "excusal statement"; in Paragraph F, substituted "notice of excusal" for "excusal statement"; and deleted former Paragraph G, which prohibited collection of costs or fees for filings under this rule.

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

## 7-107. Entry of appearance.

A.

Written entry of appearance. Whenever counsel undertakes to represent a defendant in any criminal action, he will file a written entry of appearance in the cause, unless he has been appointed by written order of the court. For the purpose of this rule, the filing of any pleading signed by counsel constitutes an entry of appearance.

B.

Oral entry of appearance. An attorney may enter an appearance on behalf of a defendant by oral communication with the court, provided a written entry of appearance is filed with the clerk of the court or the judge if there is no clerk, within three (3) days thereafter. Upon the making of an oral entry of appearance, the clerk of the court or the judge shall enter in the file the name, office address and telephone number of the attorney.

C.

Duration of representation. An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by the court.

COMPILER'S ANNOTATIONS

Cross-references. - For forms on certificate of disqualification or recusal, see Forms 4-102 and 9-102.

For form on statement of disqualification, see Form 4-103.

## 7-108. Non-attorney prosecutions.

A.

Peace officers and private citizens. Peace officers and individual private citizens acting in their own behalf may file criminal complaints against persons in the metropolitan court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the trial jurisdiction of the court.

B.

Other authorized appearances. A governmental entity may appear and prosecute any misdemeanor proceeding if the appearance is by an employee of the governmental entity authorized by the governmental entity to institute or cause to be instituted an action on behalf of the governmental entity.

C.

Trial procedures. Peace officers, government employees appearing on behalf of a governmental entity as provided in Paragraph B, and individual private citizens acting in their own behalf, on complaints they have filed, shall be authorized to testify and present evidence to the court. In the court's discretion, such parties may also ask questions of witnesses, either directly or through the court, and may make statements bringing pertinent facts and legal authorities to the court's attention.

D.

Special prosecutor. Nothing in this rule shall be construed to allow an attorney licensed to practice law in this state to prosecute a case for any party without first having been duly appointed as a special prosecutor by the district attorney for the judicial district in which the court is located.

E.

District attorney. Nothing in this rule shall be construed to prevent the district attorney in the judicial district in which the complaint is filed from dismissing the case or entering an appearance and assuming prosecutorial control over the case.

[As amended, effective March 15, 1986 and July 1, 1988.]

COMPILER'S ANNOTATIONS

The 1988 amendment, effective for cases filed in the metropolitan courts on or after July 1, 1988, added present Paragraph B; redesignated former Paragraphs B to D as present Paragraphs C to E; in Paragraph C, inserted "government employees appearing on behalf of a governmental entity as provided in Paragraph B" in the first sentence and deleted "In non-jury trials, and" from the beginning of the second sentence; and, in Paragraph D, substituted "an attorney licensed to practice law in this state" for "a private attorney".

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

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

A.

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

B.

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

(1) is voluntarily absent after the proceeding has commenced; or

(2) engages in conduct which justifies excluding the defendant from the proceeding.

C.

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

(1) a corporation may appear by counsel for all purposes;

(2) the metropolitan court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the absence of the defendant.

COMPILER'S ANNOTATIONS

Cross-references. - For forms on waiver of appearance and certificate of defense counsel, see Form 9-104.

## 7-110. Withdrawn.

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

## 7-111. Contempt.

A.

Jurisdiction. A metropolitan judge has jurisdiction to punish for contempt of its authority only for:

(1) misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice;

(2) misbehavior of court officers in official transactions;

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

B.

Summary disposition. A contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

C.

Disposition upon notice and hearing. A contempt, except as provided in Paragraph B of this rule, shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and describe it as such. The notice may be given:

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

(2) by a summons; or

(3) by a bench warrant.

The defendant shall be entitled to bail as provided in these rules. Upon a finding of guilt, the court shall enter judgment and sentence within the limits of its jurisdiction.

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

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

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

This rule limits the jurisdiction of the metropolitan judge to punish for criminal contempt and follows the basic authority granted by Section 35-3-9, supra, and Rule 6-111. However, the punishment is expanded to the limit of the court's jurisdiction. There being no prohibition in either the statute or magistrate rule against summary proceedings, the rule contemplates summary proceedings in those limited situations where the contemptuous conduct occurred in the actual presence of the court. Under such circumstances, if the contempt is of such a kind that it will necessitate immediate action in order to maintain the dignity and authority of the court, then the court can act summarily. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888). In State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976), the court upheld a trial judge having found a defense witness in contempt for failure to answer questions on cross examination and that such conduct in the presence of the court could be punished by the court's contempt power in a summary proceeding.

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

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

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

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

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

COMPILER'S ANNOTATIONS

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

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

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

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

# Article 2

**Initiation of Proceedings**

## 7-201. Commencement of action.

A.

How commenced. A criminal action is commenced by:

(1) filing with the court a complaint consisting of a sworn statement containing the facts, common name of the offense charged, and where applicable, a specific section number of New Mexico Statutes Annotated, 1978 Compilation, or the specific section of the county or municipal ordinance which contains the offense; or

(2) by issuing a citation if permitted by law. A copy of every citation issued shall be delivered to the person cited, and the original shall be filed as soon as practicable with the metropolitan court.

B.

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

C.

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

D.

Arrest followed by complaint. When a law enforcement officer makes an arrest without warrant he shall take the arrested person to the nearest available metropolitan court without unnecessary delay. In such cases, a complaint shall be filed forthwith by the law enforcement officer and a copy given to the defendant forthwith.

E.

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

COMPILER'S ANNOTATIONS

Cross-references. - For forms on criminal complaint, see Forms 9-201 and 9-202.

Custodial arrest following breath alcohol test is not "initiation of judicial criminal proceedings". - A person issued a citation and placed under custodial arrest for driving

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

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

Determination of untimeliness claims under Paragraph D. - The speedy trial factors set forth in Fed. Rule Crim. P. 48(b) provide a useful guide to the courts in evaluating untimeliness claims under Paragraph D and the analogous magistrate and municipal court rules. State v. Hicks, 105 N.M. 286, 731 P.2d 982 (Ct. App. 1986).

The district court erred in applying an appellate standard of review to affirm the metropolitan court's dismissal of complaint because the district court was instead required to make an independent determination of whether the "forthwith" requirement in Paragraph D was complied with. State v. Hicks, 105 N.M. 286, 731 P.2d 982 (Ct. App. 1986).

Complaint not filed by arresting officer. - Complaint was not jurisdictionally defective even though it was not filed by the arresting officer, as seemingly required by Paragraph D. The complaint was not defective on its face, and the defendant failed to show that he was prejudiced in his defense. State v. Watkins, 104 N.M. 561, 724 P.2d 769 (Ct. App.), cert. denied, 104 N.M. 522, 724 P.2d 231 (1986).

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

22 C.J.S. Criminal Law § 321 et seq.

## 7-202. Preliminary examination.

A.

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

B.

Record of hearing. Upon request, a record shall be made of the preliminary examination. If requested, the record shall be filed with the clerk of the district court within ten (10) days after it is requested or within ten (10) days after the district attorney notifies the metropolitan court of the filing of the information, whichever date is later. If a duplicate copy of the taped record is not requested within sixty (60) days following the date of the preliminary examination or within sixty (60) days after the expiration date of an order extending the time for the filing of an information, whichever is later, the record may be disposed of by the metropolitan court.

C.

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

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

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

D.

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

E.

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

COMPILER'S ANNOTATIONS

Cross-references. - For forms on notice of preliminary examination and certificate of mailing, see Form 9-206.

For form on bind-over order, see Form 9-207.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Civil liability of witness in action under 42 USCS § 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892.

## 7-203. Probable cause determination.

A.

General rule. In all cases within metropolitan court trial jurisdiction, persons taken into custody without a warrant and not released upon some conditions of release, shall be afforded a probable cause hearing.

B.

Time of determination. The hearing shall be held within a reasonable time, but in any event within five (5) days after custody commences.

C.

Conduct of hearing. The hearing shall be nonadversary and may be held in the absence of the defendant and of counsel. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. No witnesses shall be required to appear unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause.

D.

Conclusion. If the court finds probable cause to believe that the defendant has committed an offense, the defendant may be detained or released on conditions of release; otherwise the defendant shall be released immediately.

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

A.

Issuance. The court may issue an arrest warrant or summons only upon a sworn statement of the facts showing probable cause that an offense has been committed. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. Before ruling on a request for a warrant, the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses produced by the affiant, provided that such additional evidence shall be reduced to writing and supported by oath or affirmation.

B.

Preference for summons. The court shall issue a summons, unless in its discretion and for good cause shown, the court finds that the interests of justice may be better served by the issuance of a warrant for arrest.

C.

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

COMPILER'S ANNOTATIONS

Cross-references. - For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, see Form 9-208.

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

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

A.

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

B.

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

C.

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

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

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

(3) the name and address of the prosecuting attorney, if any, shall be shown on every summons, otherwise the address of the law enforcement entity filing the complaint;

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

D.

Summons; time to appear. Service shall be made at least ten (10) days before the defendant is required to appear. If service is made by mail an additional three (3) days shall be added pursuant to Rule 7-104. Service by mail is complete upon mailing.

E.

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

F.

Summons; by whom served. In criminal actions any process may be served by any authorized law enforcement officer, or by any other person who is over the age of eighteen (18) years and not a party to the action.

G.

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

(1) issue a warrant for the defendant's arrest, and thereafter the action shall be treated

as if the warrant had been the first process in the action; or

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

H.

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

(1) upon an individual other than a minor or an incapacitated person by delivering a copy of the summons and of the complaint to him personally; or if the defendant refuses to receive such, by leaving same at the location where he has been found; and if the defendant refuses to receive such copies or permit them to be left, such action shall constitute valid service. If the defendant be absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years; and if there be no such person available or willing to accept delivery, then service may be made by posting such copies in the most public part of the defendant's premises, and by mailing to the defendant at his last known mailing address copies of the process;

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

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

I.

Return. If service is made by mail pursuant to Paragraph G of this rule, return shall be made by the defendant appearing as required by the summons. If service is by personal service pursuant to Paragraph H of this rule, the person serving the process shall make proof of service thereof to the court promptly and in any event within the time during

which the person served must respond to the process. When service is made by a full-time salaried law enforcement officer, proof thereof shall be by certificate; and when made by a person other than a full-time salaried law enforcement officer, proof thereof shall be made by affidavit. Where service within the state includes mailing, the return shall state the date and place of mailing.

J.

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

[As amended, effective January 1, 1990.]

COMPILER'S ANNOTATIONS

Cross-references. - As to service of warrants by police officers, see 3-13-2 NMSA 1978.

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

As to directing of warrant to a law enforcement officer, see 31-1-4 NMSA 1978.

As to form for criminal summons, see Form 9-208.

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

## 7-206. Arrest warrants.

A.

To whom directed. Whenever a warrant is issued in a criminal action, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer or an Indian tribal or pueblo law enforcement officer. Upon arrest the defendant shall be brought before the court without unnecessary delay.

B.

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

C.

Return. The arresting officer shall make a return to the clerk of the court which issued the warrant and notify immediately all law enforcement agencies, previously advised of the issuance of the warrant for arrest, that the defendant has been arrested.

COMPILER'S ANNOTATIONS

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

## 7-207. Bench warrants.

A.

Failure to appear or act. If any person who has been ordered by the metropolitan judge to appear at a certain time and place or to do a particular thing fails to appear at such specified time and place in person or by counsel when permitted by these rules or fails to do the thing so ordered, the court may issue a warrant for the person's arrest. Unless the judge has personal knowledge of such failure, no bench warrant shall issue except upon a sworn written statement of probable cause.

B.

Execution and return. A bench warrant shall be executed and return thereon made in the same manner as an arrest warrant.

COMPILER'S ANNOTATIONS

Cross-references. - For form on affidavit for bench warrant, see Form 9-211.

For forms on bench warrant and return, see Form 9-212.

## 7-208. Search warrants.

A.

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

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

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

(3) property which would be material evidence in a criminal prosecution; or

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

B.

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

C.

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

D.

Return. The return shall be made promptly after execution of the warrant to the clerk of the court which issued the warrant. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible

person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer and the person in whose presence the inventory was taken. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

E.

Probable cause. As used in this rule, "probable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

COMPILER'S ANNOTATIONS

Cross-references. - For form on affidavit for search warrant, see Form 9-213.

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

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

## 7-209. 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. 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.

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. The date of filing and the identity of the person receiving the papers shall be noted thereon and the papers placed in the court file.

D.

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. The certificate or affidavit shall be filed with the clerk of the court or endorsed on the pleading, motion or other paper required to be served.

E.

Notice. A party giving notice shall provide sufficient information to give actual notice of the event and shall communicate such notice to the attorney for the party to be given notice or to the party himself if he has no attorney. Except as otherwise ordered by the court, notice may be by any method accepted in the usual course of business.

F.

Filing of motions. Whenever, by these rules, 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.

COMPILER'S ANNOTATIONS

Rule 71(e) (now see Rule 7-703E) provides for notice to parties upon filing of criminal appeal. - Defense attorney was not required to provide a certificate of service of process for appeal of DWI case from metropolitan court as specified under Rule 4(d) (see now Paragraph D of this rule), since Rule 71(e) (see now Paragraph E of Rule 7-703) provides that the metropolitan court shall give notice of appeal to the parties upon filing of the notice of appeal. State v. Gallegos, 101 N.M. 526, 685 P.2d 381 (Ct. App. 1984).

# Article 3

**Pleadings and Motions**

## 7-301. General rules of pleading.

A.

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

B.

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

COMPILER'S ANNOTATIONS

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

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

22 C.J.S. Criminal Law § 375 et seq.

## 7-302. Pleas allowed.

A.

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

B.

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

C.

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

COMPILER'S ANNOTATIONS

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

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

## 7-303. Amendment of complaints and citations.

A.

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

B.

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

C.

Variances. No variance between those allegations of a complaint or citation or any supplemental pleading which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be ground for acquittal of the defendant unless such variance prejudices substantial rights of the defendant. The court may at any time allow the complaint or citation to be amended in respect to any variance to conform to the evidence. If the court finds that the defendant has been prejudiced by an amendment, the court may postpone the trial or grant such other relief as may be proper under the circumstances.

D.

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

E.

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

## 7-304. Motions.

A.

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

B.

How made. Motions may be made orally or in writing, unless the court directs they be in writing.

C.

Suppression of evidence. In cases within the trial court's jurisdiction:

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

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

D.

Notice and hearing. No motion shall be decided without a hearing following prior notice to all parties.

[As amended, effective January 1, 1987.]

COMPILER'S ANNOTATIONS

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

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

## 7-305. Unnecessary allegations.

A.

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

(1) time of the commission of offense;

(2) place of the commission of offense;

(3) means by which the offense was committed;

(4) value or price of any property;

(5) ownership of property;

(6) intent with which an act was done;

(7) description of any place or thing;

(8) the particular character, number, denomination, kind, species, or nature of money,

checks, drafts, bills of exchange or other currency;

(9) the specific degree of the offense charged;

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

(11) any other similar allegation.

B.

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

## 7-306. Joinder; consolidation; severance.

A.

Joinder; offenses; defendants.

(1) Two or more offenses shall be joined in one complaint with each offense stated in a separate count, if the offenses:

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

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

(2) Two or more defendants shall initially be joined in the same complaint: (a) when each of the defendants is charged with accountability for each offense included; (b) when all the defendants are charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or (c) when, even if conspiracy is not charged and not all of the defendants are charged in each count, the several offenses charged: (i) were part of a common scheme or plan; or (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of others.

(3) Failure to join offenses or defendants as required by this rule shall not be grounds for dismissal of any complaint, and joinder may be effected by filing an amended complaint.

B.

Consolidation; offenses; defendants.

(1) The court shall order two or more complaints against a single defendant to be tried together if the offenses could have been joined in a single complaint.

(2) The court shall initially consolidate the trials of two or more defendants if the defendants could have been joined in a single complaint.

(3) Motions to consolidate for purposes of plea must be approved by each judge assigned to the cases involved. The judge assigned to the case bearing the lowest case number shall be assigned to the consolidated case. If any judge assigned refuses to approve, the motions may be submitted to the presiding judge who shall approve or disapprove said motions.

(4) Motions to consolidate for purposes of trial must be approved by the presiding judge. The judge assigned to the case bearing the lowest case number shall be assigned to the consolidated case.

C.

Severance. If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants in any complaint, indictment or information, or by joinder for trial, the court may order separate trials of offenses, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the prosecutor to deliver to the court for inspection in camera any statements or confessions made by the defendants which the prosecution intends to introduce in evidence at the trial.

[As amended, effective January 1, 1987.]

# Article 4

**Release Provisions**

## 7-401. Bail.

A.

Right to bail. Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, at his first appearance before a court, shall be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court determines, in the exercise of its discretion, that such release will not reasonably assure the appearance of the person as required. When such a determination is made, the court shall, either in lieu of or in addition to the above methods of release, impose the first of the following

conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in custody of a designated person or organization agreeing to supervise the person;

(2) place restrictions on the travel, association or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit with the clerk of the court, in cash, of a percentage of the amount of the bail set, such deposit to be returned as provided in this rule;

(4) require the execution of an appearance bond and bail bond in a specified amount and the filing with the court of an affidavit by an unpaid surety describing the real property which is justification for the bond;

(5) require the execution of a bail bond with sufficient sureties or the deposit of cash in lieu thereof; or

(6) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours or that the person report at specified intervals to a probation officer, law enforcement officer or other person designated by the court.

B.

Factors to be considered in determining conditions of release. In determining which conditions of release will reasonably assure appearance, the court shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, length of residence in the community and record of prior convictions, if any; any indication that the defendant is an alcoholic or addicted to drugs; the defendant's record of appearance at court proceedings or of flight to avoid prosecution.

C.

Additional conditions; conditions to assure orderly administration of justice. After a hearing and upon a showing that there exists a danger that the defendant will commit a serious crime, will seek to intimidate witnesses or will otherwise unlawfully interfere with the orderly administration of justice, the court, upon release of the defendant or any time thereafter, may enter an order:

(1) prohibiting the defendant from possessing any dangerous weapon; or

(2) imposing any other condition necessary to assure the orderly administration of justice. If additional conditions are imposed, the court shall state in the record the reasons for the imposition of such additional conditions. If the court, after a hearing pursuant to this paragraph, enters an order imposing additional conditions to assure the orderly administration of justice, the defendant shall be entitled, upon application, to a review of such conditions pursuant to Paragraph E of this rule and may petition the district court for review pursuant to Paragraph H of this rule.

D.

Explanation of conditions by court. A court authorizing the release of a person under this rule shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violation of the conditions of his release and shall advise such person that a warrant for his arrest will be issued immediately upon any such violation.

E.

Review of conditions of release. A person for whom conditions of release are imposed and who after twenty-four (24) hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release, shall, upon application, be entitled to have a hearing to review the conditions imposed. Unless the conditions of release are amended and the person is thereupon released, the court shall state in the record the reasons for continuing the conditions of release. A person who is ordered released on a condition which requires that he return to custody after specified hours, upon application, shall be entitled to have a hearing to review the conditions imposed. Unless the requirement is removed and the person is thereupon released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release pursuant to this paragraph shall be held by the court imposing the conditions.

F.

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

G.

Return of cash deposit. If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (3) of Paragraph A of this rule, when the conditions of the appearance bond have been performed and the

defendant for whom bail was required has been discharged from all obligations, the clerk shall return to the defendant, his personal representatives or assigns the sum which has been deposited.

H.

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

I.

Release from custody by designee. The provisions of Paragraphs A, B and D of this rule shall, upon arrest, be carried out by a responsible person designated by the court. If a person has not been released by the designee, he shall forthwith be brought before the metropolitan court judge who shall enter an order prescribing conditions of release in accordance with this rule.

J.

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

K.

Forms. Instruments required by this rule shall be substantially in the form approved by the supreme court.

L.

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

[As amended, effective August 1, 1987, and October 1, 1987.]

COMPILER'S ANNOTATIONS

Cross-references. - For form on record of responses to questions at release hearing, see Form 9-301.

For form on release order, see Form 9-302.

For form on appearance bond, see Form 9-303.

For forms on bail bond and justification of sureties, see Form 9-304.

The first 1987 amendment substituted "New Mexico Constitution" for "Constitution of New Mexico" in the first sentence in Paragraph A; deleted "on a form which has been approved by the supreme court" following "execution of an appearance bond" in Paragraph A(3); added present Paragraph A(4) and redesignated former Paragraphs A(4) and A(5) as present Paragraphs A(5) and A(6); in Paragraph C substituted "defendant" for "person" in three places and "Paragraph H" for "Paragraph G" near the end of the Paragraph; deleted the former last sentence in Paragraph F, allowing the court to have defendants, who were at liberty on release, arrested to review conditions of release; deleted former Subsection G, allowing defendants detained after review of conditions to petition for review of such conditions; redesignated former Paragraph I as present Paragraph G, substituting therein "defendant for whom bail was required has been discharged" for "person discharged"; deleted former Paragraph J, relating to justification of sureties; added present Paragraphs J, K and L; redesignated former Paragraph K as present Paragraph M; added Paragraph N; and redesignated former Paragraph M as present Paragraph O, inserting therein "the statutory or constitutional" near the middle and deleting "which may be authorized by statute" from the end of the paragraph.

The second 1987 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1987, in Paragraph A(1) substituted "supervise the person" for "supervise him"; in Paragraph A(4) substituted "by an unpaid surety" for "by the surety"; deleted former Paragraphs J, K, and L, relating to exoneration of bond, property bond, and bail bond, respectively; and redesignated former Paragraphs M, N, and O as present Paragraphs J, K, and L, respectively.

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

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

## 7-401A. Bail; unpaid surety.

Any bond authorized by Subparagraph (4) of Paragraph A of Rule 7-401 shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a

description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undishcarged and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

[Effective October 1, 1987.]

COMPILER'S ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the metropolitan courts on or after October 1, 1987.

## 7-401B. Bail bonds; justification of compensated sureties.

A.

Justification of sureties. Any bond authorized by Subparagraph (5) of Paragraph A of Rule 7-401 shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law [Article 51, Chapter 59A NMSA 1978] and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond.

B.

Property bondsman. A bail bondsman or solicitor licensed as a property bondsman must pledge or assign real or personal property owned by the property bondsman as security for the bail bond. A licensed property bondsman must file, in each court in which he posts bonds, proof of ownership of the property used as security for the bonds and an assignment in favor of the court, such as an irrevocable letter of credit, deed of trust or other similar instrument as well as a copy of his license. The bondsman must attach to the bond a current list of all outstanding bonds, encumbrances and claims against the property each time a bond is posted, using the court approved form. No single property bond can exceed the amount of real or personal property pledged. The aggregate amount of all property bonds by the surety cannot exceed ten times the amount pledged. Any collateral, security or indemnity given to the bondsman by the principal must be reasonable in relation to the amount of the bond and must be returned to the principal and the lien extinguished upon exoneration on the bond. If the collateral is in the form of cash or a negotiable security, it shall not exceed the amount of the bond and no other collateral may be taken by the bondsman. If the collateral is a mortgage on

real property, the mortgage may not exceed one hundred and fifty (150%) percent of the amount of the bond. If the collateral is a lien on a vehicle or other personal property, it may not exceed one hundred and fifty (150%) percent of the bond. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium authorized by the superintendent of insurance.

[Effective October 1, 1987.]

COMPILER'S ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the metropolitan courts on or after October 1, 1987.

## 7-402. Release.

A.

Release during trial. A person released pending trial shall continue on release during trial under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions or termination of release are necessary to assure his presence during the trial or to assure that his conduct will not obstruct the orderly administration of justice.

B.

Release pending sentence, appeal and new trial. A person released pending or during trial shall continue on release pending the imposition of sentence or pending final disposition of any appeal or any new trial under the same terms and conditions as previously imposed, unless the surety has been released or the court has determined that other terms and conditions or termination of release are necessary to assure:

(1) that such person will not flee the jurisdiction of the court; or

(2) that his conduct will not obstruct the orderly administration of justice.

C.

Release after sentencing. After imposition of a judgment and sentence, the court, upon motion of the defendant, shall establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Paragraph B of Rule 7-401, and may also consider the fact of defendant's conviction and the length of sentence imposed. In the event the court requires a bail bond in an amount greater than the amount established for release pending trial, and the surety has not been

discharged by order of the court, a new bond need be furnished only for the additional amount. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court.

D.

Person in custody. Nothing in this rule shall be construed to prevent the court from releasing, pursuant to Rule 7-401, a person not released prior to or during trial.

## 7-403. Revocation of release.

A.

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

(1) impose any of the conditions authorized under Paragraph A of Rule 7-401;

(2) after a hearing pursuant to Paragraph C of Rule 7-401, impose any of the conditions authorized under Paragraph C of Rule 7-401, to assure the orderly administration of justice; or

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

B.

Review of additional conditions. If pursuant to Paragraph A of this rule, conditions authorized by Paragraph A of Rule 7-401 are imposed:

(1) a person for whom such new conditions are imposed and who after twenty-four (24) hours from the time of the imposition of the new conditions continues to be detained as a result of his inability to meet the new conditions of release; or

(2) a person ordered released on a condition which requires that he return to custody after specified hours shall be entitled, upon application, to a review of such conditions pursuant to Paragraph E of Rule 7-401.

C.

Record of review. If the court after a hearing pursuant to Paragraph A of this rule enters an order imposing new conditions, the defendant shall be entitled, upon application, to a review of such conditions pursuant to Paragraph E of Rule 7-401, provided that, in such review, the court shall consider the record of any hearing held pursuant to this rule and any additional evidence the court may permit.

## 7-404, 7-405. Reserved.

## 7-406. Bail bonds; exoneration; forfeiture.

A.

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

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

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

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

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

B.

Surrender of an offender by a paid surety. A person who is released upon execution of a bail bond by a paid surety may be arrested by the paid surety if the court has revoked the defendant's conditions of release pursuant to Rule 7-403 or if the court has declared a forfeiture of the bond pursuant to the provisions of this rule. If the paid surety delivers the defendant to the court prior to the entry of a judgment of default on the bond, the court may absolve the bondsman of responsibility to pay all or part of the bond.

C.

Forfeiture. If there is a breach of condition of a bond, the court may declare a forfeiture of the bail. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Order to Show Cause on the clerk of the court in the manner provided by Rule 7-407.

D.

Setting aside forfeiture. The court may direct that a forfeiture be set aside in whole or in part upon a showing of good cause why the defendant did not appear as required by the bond or if the defendant is surrendered by the surety into custody prior to the entry of a judgment of default on the bond. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

E.

Default judgment; execution. If, after a hearing, the forfeiture is not set aside, a default judgment on the bond shall be entered by the court. If the default judgment is not paid within ten (10) days after it is filed and served on the surety in the manner provided by Rule 7-407, execution may issue thereon.

[Effective October 1, 1987.]

COMPILER'S ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the metropolitan courts on or after October 1, 1987.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - Forfeiture of bail for breach of conditions of release other than that of appearance, 68 A.L.R.4th 1082.

## 7-407. Bail bonds; notice.

By entering into a bond in accordance with the provisions of these rules, the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion of the district attorney or upon the court's own motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the obligors at their last known addresses.

[Effective October 1, 1987.]

COMPILER'S ANNOTATIONS

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the metropolitan courts on or after October 1, 1987.

# Article 5

**Arraignment and Preparation for Trial**

## 7-501. Arraignment or first appearance.

A.

Explanation of rights. Upon the first appearance of the defendant before the metropolitan court in response to a summons or warrant or following arrest, the judge shall inform the defendant of the following:

(1) the offense charged;

(2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;

(3) the right to bail;

(4) the right, if any, to the assistance of counsel at every stage of the proceedings;

(5) the right, if any, to representation by an attorney at state expense;

(6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;

(7) the right, if any, to a jury trial; and

(8) in those cases not within metropolitan court trial jurisdiction the right to a preliminary examination. The judge shall then allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B.

Entry of plea. The court shall thereafter afford the defendant an opportunity to plead to the complaint, in those cases which are within the jurisdiction of the metropolitan court, or the judge will notify the defendant of the date for the preliminary examination in those cases which are not within metropolitan court trial jurisdiction.

C.

Waiver of arraignment.

(1) An arraignment may be waived, by the defendant filing a written plea of not guilty at the time set for arraignment.

(2) A waiver of arraignment may be filed with the case setting division no later than forty-eight (48) hours prior to the scheduled arraignment. The waiver must indicate the date and time of arraignment and the name of the arraigning judge.

(3) Within forty-eight (48) hours of arraignment, a waiver shall be filed in the office of the arraigning judge.

(4) An entry of a plea of not guilty shall be substantially in the form approved by the supreme court.

D.

Audio-visual appearance. The first appearance of the defendant before the court may be through the use of a two-way audio-video communication if the following conditions are met:

(1) the defendant and his counsel are together in one room at the time of the first appearance before the court; and

(2) the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom by members of the public.

E.

Audio-visual arraignment. The arraignment of the defendant before the court may be through the use of a two-way audio-video communication provided that, prior to entry or acceptance of a plea of guilty, the court assures that the plea is made after a knowing, intelligent waiver by the defendant of his right to trial. No plea shall be accepted by the court unless the conditions set forth in Subparagraphs (1) and (2) of Paragraph D of this rule are met.

[As amended, effective March 1, 1987 and October 1, 1987.]

Committee commentary. - If it is determined by the judge that the defendant is not represented by counsel, and it further appears that the defendant may be indigent, if the judge decides that no imprisonment will be imposed if the defendant is found guilty, then the court need not advise the defendant of his right to assistance of counsel at every stage of the proceedings and of the defendant's right to representation by an attorney at state expense. However, if the judge decides that imprisonment will be imposed or that this decision cannot be made at this stage of the proceedings, then the judge shall

advise the defendant of his right to assistance of counsel at every stage of the proceedings and his right to be represented by an attorney at state expense if he is indigent. Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006, 32 L. Ed. 2d 530 (1972).

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

COMPILER'S ANNOTATIONS

The first 1987 amendment, effective for cases filed in the metropolitan courts on and after March 1, 1987, added Paragraph D.

The second 1987 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1987, in Paragraph D, deleted "arraignment or" preceding "first appearance" in the introdoctory paragraph and deleted former Paragraph (3) which read "no plea is entered by the court except a plea of not guilty"; and added Paragraph E.

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

22 C.J.S. Criminal Law § 355 et seq.

## 7-502. Plea agreements.

A.

Pleas. A defendant charged with a non-traffic criminal offense or any of the following traffic offenses: driving while intoxicated, driving while under the influence of drugs, reckless driving, and driving on a suspended or revoked license, may plead as follows:

(1) guilty;

(2) not guilty; or

(3) no contest, subject to the approval of the court.

B.

Refusal to plead. If a defendant refuses to plead or stands mute, the court shall direct the entry of a plea of not guilty on his behalf.

C.

Advice to defendant. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered;

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered;

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty or no contest there will not be a further trial of any kind, so that by pleading guilty or no contest he waives the right to a trial.

D.

Ensuring that the plea is voluntary. The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or no contest results from prior discussions between the government and the defendant or his attorney.

E.

Plea agreement procedure.

(1) The government or its agent and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the government or its agent will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed it shall be reduced to writing on a form approved by the supreme court, and the court shall require the disclosure of the agreement in open court at the time that the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea and advise the defendant that if he persists in his guilty plea or plea of no contest the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Evidence of a plea of guilty, later withdrawn, or a plea of no contest, or of an offer to plead guilty or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

F.

Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

[As amended, effective May 1, 1986.]

## 7-503. Disposition without hearing.

A.

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

B.

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

Provision may be made for the person charged to enter an appearance and plead no

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

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

## 7-504. Discovery.

At any time during the pendency of the action, upon request of the defendant, the metropolitan judge may order the prosecution to produce for inspection and copying any records, papers, documents or other tangible evidence in its possession and which are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant. No other discovery proceedings shall be permitted.

COMPILER'S ANNOTATIONS

Cross-references. - For form on motion for production, see Form 9-409.

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

## 7-505. Pretrial conference.

At any time after the filing of a complaint, with or without the filing of a motion, the judge may 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.

## 7-506. Dismissal of actions.

A.

Voluntary dismissal. A complaint or a count therein may be dismissed by the prosecution by filing a notice of dismissal at any time before trial. Unless otherwise stated in the notice, the dismissal is without prejudice. The notice shall be presented to the judge before filing, and he shall endorse thereon an order that the action or count is dismissed.

B.

Dismissal for failure to prosecute. Any criminal charge within metropolitan court trial jurisdiction which is pending for six (6) months from the date of the arrest of the defendant or the filing of a complaint or citation against the defendant, whichever occurs later, without commencement of a trial by the metropolitan court shall be dismissed with prejudice unless, after a hearing, the judge finds that the defendant was responsible for the failure of the court to commence trial. If a complaint is dismissed pursuant to this paragraph, a criminal charge for the same offense shall not thereafter be filed in any court.

COMPILER'S ANNOTATIONS

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

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

Six-month time period. - Absent a specific definition of the word "months" in Paragraph B, the term should be interpreted to mean calendar months. State v. Bishop, 108 N.M. 105, 766 P.2d 1339 (Ct. App. 1988).

The date on which the complaint or citation is filed should not be included in the computation of the six-month time period. State v. Bishop, 108 N.M. 105, 766 P.2d 1339 (Ct. App. 1988).

Defendant's motion for a continuance created a limited waiver of the six-month rule for the period of 35 days resulting from his requested continuance. State v. Bishop, 108 N.M. 105, 766 P.2d 1339 (Ct. App. 1988).

The purpose of the six-month rule is to encourage the orderly and prompt disposition of criminal cases. State v. Lucero, 108 N.M. 548, 775 P.2d 750 (Ct. App. 1989).

Absent an intent to circumvent the applicable six-month rule, when a prosecutor files a new complaint containing significant changes in the offenses charged, the original complaint is superseded. The six-month rule, therefore, is triggered anew by the subsequent complaint. State v. Lucero, 108 N.M. 548, 775 P.2d 750 (Ct. App. 1989).

If no new facts or charges form the basis of a second complaint, that complaint has no effect on the running of the six-month rule. Under such circumstances, the second complaint should relate back to the first for six-month rule purposes. State v. Lucero, 108 N.M. 548, 775 P.2d 750 (Ct. App. 1989).

State may appeal dismissal of criminal action for failure to prosecute. - Restrictive nature of Rule 71(b), N.M.R.P. Metro. Cts. (see now 7-703B), in providing only two bases for appeal by the state, unconstitutionality of statute and insufficiency of complaint, limits the state's substantive right to appeal provided by New Mexico Constitution and is therefore invalid and retracted, so that state may appeal court's dismissal of criminal action for failure to prosecute. Smith v. Love, 101 N.M. 355, 683 P.2d 37 (1984).

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

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

COMPILER'S ANNOTATIONS

Cross-references. - For form on transfer order, see Form 9-404.

# Article 6

**Trials**

## 7-601. Conduct of trials.

A.

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

B.

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

C.

Oath of witness. The judge shall administer an oath or affirmation to each witness, substantially in the following form: "You do solemnly swear (or affirm) that the testimony you give is the truth, the whole truth and nothing but the truth under penalty of perjury."

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial § 1 et seq.

23A C.J.S. Criminal Law § 1145 et seq.; 88 C.J.S. Trial § 1 et seq.

## 7-602. Jury trial.

A.

Petty misdemeanor offense. When authorized by law, either party to the action may demand a trial by jury. The demand shall be made:

(1) orally or in writing to the court at or before the time of entering a plea; or

(2) in writing to the court within ten (10) days after the time of entering a plea and at least twenty-four (24) hours before any time set for trial on the merits. If demand is not made as provided in this paragraph, trial by jury is deemed waived.

B.

Misdemeanor offense. If the offense is a misdemeanor, the case shall be tried by jury unless the defendant waives a jury trial with the approval of the court and the consent of the state.

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

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

COMPILER'S ANNOTATIONS

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

## 7-603. Trials to juries.

Juries in the metropolitan court shall hear the evidence in the action which shall be delivered in public in its presence. After hearing the evidence, the members of the jury shall be kept together until they unanimously agree upon a verdict or are discharged by the judge. Whenever the judge is satisfied that there is no reasonable probability that a jury can agree on a verdict, he may discharge it and summon a new jury unless the parties agree that the judge may render judgment.

## 7-604. Nonjury trials.

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

[As amended, effective May 1, 1986.]

## 7-605. Jurors.

A.

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

B.

Challenges for cause. At the time of the trial, the parties, their attorneys or the judge may examine the jurors who have been summoned to determine whether they should be disqualified for cause. Jurors shall be excused for cause if the examination discloses bias, relationship to a party, or other grounds of actual or probable partiality. If examination of any juror discloses any basis for his disqualification, he shall be excused.

C.

Peremptory challenges. If the offense charged is a petty misdemeanor, each party shall then be entitled to one peremptory challenge. If the offense charged is a misdemeanor, each party shall be entitled alternately to two peremptory challenges of jurors. If peremptory challenges are exercised, the judge shall excuse those jurors challenged.

D.

Selection of jury.

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

(2) The jurors may be examined by the parties, their attorneys or the judge by questioning all of the jurors present, as a group or individually.

(3) When six qualified jurors have been selected, they shall constitute the jury for the case to be tried.

(4) One alternate juror may be selected, if the judge, at his discretion, so elects. The parties may exercise their peremptory challenges in the selection of the alternate juror, if their peremptory challenges have not been exhausted in the selection of the other jurors.

E.

Additional jurors. If a jury cannot be completed by drawing additional slips, the sheriff or other responsible person shall summon a sufficient number of jurors to fill the deficiency.

F.

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

[As amended, effective September 1, 1989.]

COMPILER'S ANNOTATIONS

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, in Subparagraph (2) of Paragraph D, deleted the "(a)" designation

from the beginning, substituted "or individually" for "and individually", and deleted former Item (b) at the end of the present language and the former second sentence, relating to the drawing by the judge of the names of six jurors to be questioned as a group and individually, and the drawing of additional names of jurors to replace those excused for cause or by peremptory challenge, respectively.

Law reviews. - For note, "Criminal Law-Discriminatory Use of Peremptory Challenges in Jury Selection: State of New Mexico v. Sandoval," see 19 N.M.L. Rev. 563 (1989).

## 7-606. Subpoenas.

A.

For attendance of witnesses. Every subpoena shall be issued by the metropolitan judge 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, day and place therein specified.

B.

For production of documentary evidence. A subpoena may 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 defendant in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

C.

Issuance. The judge or clerk may 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.

D.

Personal service. A subpoena may be served by any full-time, salaried law enforcement officer of the metropolitan district or any other person who is not a party in the case, and is over 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 metropolitan district and by tendering to him 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 a political subdivision or an officer or agent thereof, fees and mileage need not be tendered.

E.

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

F.

Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the metropolitan court from which the subpoena was issued. The metropolitan judge shall not hold any person in contempt of the metropolitan 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 D of this rule.

COMPILER'S ANNOTATIONS

Cross-references. - For forms on subpoena, return for completion by sheriff or deputy and return for completion by other person making service, see Form 4-503.

For forms on subpoena and certificate of service, see Form 9-503.

For form on subpoena to produce document or object, see Form 9-504.

## 7-607. Blood and breath alcohol test reports.

A.

Admissibility. In any prosecution of an offense within the trial jurisdiction of the metropolitan court, in which prosecution a convicted defendant is entitled to an appeal de novo, the following evidence is not to be excluded under the hearsay rule, even though the declarant may be available as a witness:

(1) a written report of the conduct and results of a chemical analysis of breath or blood for determining blood alcohol concentration and the circumstances surrounding receipt and custody of the test sample if:

(a) the report is of an analysis conducted by an authorized agency of the State of New

Mexico or any of its political subdivisions, other than a law enforcement agency or agency under the direction and control of a law enforcement agency;

(b) the report is on a form approved by the supreme court and is regular on its face; and

(c) a legible copy of the report was mailed to the donor of the sample at least ten (10) days before trial;

(2) a print-out produced by a breath-testing device which performs an analysis of the defendant's breath to determine blood alcohol concentration if:

(a) the law enforcement officer who operated the device is certified to operate the device by the scientific laboratory of the health and environment department; and

(b) upon request, the calibration testing records for a reasonable period of time surrounding the defendant's test are made available to the defendant for inspection prior to trial. The defendant may request a copy to be made of the testing records at the defendant's expense.

B.

Proof of mailing; authentication. If the evidence is a written report of the conduct and results of a chemical analysis of breath or blood prepared pursuant to Subparagraph (1) of Paragraph A of this rule, except for the portion of the report which is completed by the law enforcement officer, proof of mailing and authentication of the report shall be by certificate on the report.

C.

Admissibility of other evidence. Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in a blood or breath alcohol print-out or report or affect the admissibility of any other relevant evidence.

[As amended, effective October 1, 1987.]

COMPILER'S ANNOTATIONS

Cross-references. - For forms on report of analysis of breath and blood alcohol, certificate of receiving clerk, certificate of analyst, certificate of supervisor and certificate of mailing, see Form 9-505.

The 1987 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1987, inserted "and breath" in the catchline; in Paragraph A, added "the following evidence is not to be excluded under the hearsay rule, even though the

declarant may be available as a witness" in the introductory paragraph, designated a portion of the former introductory paragraph as present Paragraph (1), deleting "is not excluded by the hearsay rule, even though the declarant is available as a witness" following "test sample", redesignated former Paragraphs (1), (2), and (3) as Paragraphs (a), (b), and (c), and added Paragraph (2); rewrote Paragraph B, which read "Proof of mailing, and authentication of the report (except for the portion thereof which is completed by a law enforcement officer) shall be by certificate on the report"; and, in Paragraph C, substituted "a blood or breath alcohol print-out or report" for "such report" and "any other relevant evidence" for "any evidence other than this report".

## 7-608. Controlled substance test and autopsy reports.

A.

Admissibility. In any preliminary hearing, a written report of the conduct and results of a laboratory analysis of a controlled substance enumerated in Sections 30-31-6 through 30-31-10 NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, is not excluded by the hearsay rule, even though the declarant is available as a witness, if:

(1) the report is of an analysis conducted by the New Mexico State Police Crime Laboratory or the Office of the Medical Investigator;

(2) the report is regular on its face and is attached to a certification form approved by the supreme court; and

(3) a legible copy of the certification form and report was mailed to the defendant or his counsel at least ten (10) days before the preliminary hearing.

B.

Admissibility of other evidence. Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in such report, nor affect the admissibility of any evidence other than this report.

## 7-609. Instructions to juries.

A.

Procedural instructions. After the parties have completed their presentation of the evidence and before arguments to the jury, the judge shall orally instruct the jury on the

procedure to be followed by it in deciding the case.

B.

UJI and requested instructions. The judge shall give the jury applicable instructions contained in UJI Criminal and, if requested by a party or on his own motion, and if he deems it appropriate, the judge may give the jury any other appropriate instructions.

## 7-610. Return of verdict; discharge of jurors.

A.

Return. The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

B.

Several defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

C.

Several counts. If there are two or more counts, the jury may at any time during its deliberations return a verdict or verdicts with respect to a count or counts upon which it has agreed. If the jury cannot agree with respect to all counts, the defendants may be tried again upon the counts on which the jury could not agree.

D.

Conviction of lesser offense. If so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

E.

Poll of jury. When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

F.

Irregularity of verdict. No irregularity in the rendition or reception of a verdict of which the parties have been made aware may be raised unless it is raised before the jury is discharged. No irregularity in the recording of a verdict shall affect its validity unless the defendant was in fact prejudiced by such irregularity.

G.

Discharge of jury. After the jury has retired to consider their verdict the court shall discharge the jury from the cause when:

(1) their verdict has been received;

(2) the court finds there is no reasonable probability that the jury can agree upon a verdict; or

(3) some other necessity exists for their discharge. The court may in any event discharge the jury if the parties consent to its discharge.

# Article 7

**Judgment and Appeal**

## 7-701. Judgment; costs.

A.

Judgment. If the defendant is found guilty, a judgment of guilty shall be rendered. If he has been acquitted, a judgment of not guilty shall be rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The court shall give notice of entry of judgment and sentence.

B.

Costs. In every case in which there is a conviction, the costs shall be adjudged against the defendant.

C.

Fine receipt. Whenever fines or costs are received by a metropolitan judge in any criminal action, he shall complete the criminal fine receipt, require the defendant's acknowledgment of receipt of the form on all copies and deliver the original to the defendant. If the defendant refuses to acknowledge the receipt, the judge shall note the circumstances of the refusal on the form and send the original to the court administrator.

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

COMPILER'S ANNOTATIONS

Cross-references. - For form on agreement to pay the fine and court costs, see Form 9-605.

For form on judgment and sentence, see Form 9-601.

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

24 C.J.S. Criminal Law § 1458 et seq.

## 7-702. Advising defendant of right to appeal.

At the time of entering a judgment and sentence, the court shall advise the defendant of his right to a new trial in the district court. The court shall also advise the defendant that:

A.

Time limits. His appeal must be filed within fifteen (15) days after entry of the judgment and sentence;

B.

Duty of defendant. He has the duty of obtaining a trial date before the district court within six (6) months of the date of the filing of the notice of appeal; and

C.

Automatic affirmance. If his appeal is not tried by the district court within six (6) months from the date of the filing of the notice of appeal, his appeal will be dismissed and his conviction affirmed, unless the time has been extended by a justice of the New Mexico Supreme Court upon a showing of good cause.

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

COMPILER'S ANNOTATIONS

Cross-references. - For form on judgment and sentence, see Form 9-601.

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

## 7-703. Appeal.

A.

Right of appeal by defendant. A defendant who is aggrieved by any judgment rendered by the metropolitan court may appeal to the district court of the county within which the metropolitan court is located within fifteen (15) days after entry of the judgment or final order.

B.

Right of appeal by prosecution. The municipality, county or state may appeal to the district court of the county within which the metropolitan court is located within fifteen (15) days after entry of the judgment of the metropolitan court dismissing the complaint on the basis that an ordinance, statute or section thereof is invalid or unconstitutional, or that the complaint or a part thereof is not otherwise legally sufficient. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a municipality, county or the state in any such appeal.

C.

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

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

(2) filing with the metropolitan court a copy of the notice of appeal which has been endorsed by the clerk of the district court.

D.

Stay. An appeal from conviction and sentence shall have the effect of a stay of execution of the judgment of the metropolitan court until final determination of the appeal, subject to the defendant being allowed such credit as may be provided by law for time spent in official confinement while awaiting the outcome of the appeal.

E.

Docketing the appeal. The clerk of the district court shall collect the docket fee, or an appropriate affidavit of indigency, for filing an appeal. The metropolitan court shall transmit the order fixing conditions of release and bond, if any, and a transcript of all proceedings taken in the action to the clerk of the district court within ten (10) days after the filing of the notice of appeal. Upon the filing of the notice of appeal, the metropolitan court shall give notice of the appeal to each party in the action or to the attorney for any party who is represented by an attorney.

F.

Transcript. The transcript shall include:

(1) title page containing caption of the case in the metropolitan court and names and mailing addresses of counsel and of the defendant if he is not represented by counsel;

(2) all pleadings including any record of proceedings made by the metropolitan court;

(3) any exhibits;

(4) the judgment sought to be reviewed with date of filing noted thereon; and

(5) the record of the hearing in the metropolitan court, if any.

G.

Conditions of release. Pending final determination of the appeal, the defendant shall be entitled to bail upon a showing to the metropolitan court that a notice of appeal has been filed. The metropolitan court shall establish conditions of release pending appeal sufficient to secure the appearance of the defendant and the judgment of the metropolitan court. The metropolitan court may utilize the criteria listed in Paragraph B of Rule 7-401, and may also consider the fact of defendant's conviction and the length of sentence imposed. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to or during trial.

H.

Review of terms of release. If the metropolitan court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal.

I.

Trial de novo. All trials upon appeals from the metropolitan court to the district court shall be de novo and shall be governed by the Rules of Criminal Procedure for the District Courts.

J.

Disposition; time limitations. The district court shall try the appeal within six (6) months after the filing of the notice of appeal. Any appeal pending in the district court six (6) months after the filing of the notice of appeal without disposition shall be dismissed and the cause remanded to the metropolitan court for enforcement of its judgment.

K.

Extension of time. The time limits specified in Paragraph J of this rule may be extended one time for a period not exceeding ninety (90) days upon a showing of good cause to a justice of the supreme court. The party seeking an extension of time beyond the six (6) month appeal limit of Paragraph J of this rule shall, within said six (6) month period, file with the clerk of the supreme court a certified petition for extension concisely stating the facts petitioner deems to constitute good cause and forthwith serve a copy thereof on the opposing party. No other extension of time shall be allowed.

L.

Final order; remand to metropolitan court. Upon final disposition of the appeal, the district court shall issue a final order on appeal in substantially the form approved by the Supreme Court. If a timely appeal is not taken from the final order of the district court, the district court clerk shall issue a mandate remanding the case to the metropolitan court for enforcement of the district court's final order or such other disposition as may be ordered by the district court.

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

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

COMPILER'S ANNOTATIONS

Cross-references. - For form on notice of appeal, see Form 9-607.

For form on title page of transcript of criminal proceedings and certificate, see Form 9-608.

The 1988 amendment, effective for cases filed in the metropolitan courts on or after July 1, 1988, substituted "upon a showing to the metropolitan court that a notice of appeal

has been filed" for "at the time of filing notice of appeal" in the first sentence in Paragraph G.

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, in Paragraph G, substituted "upon a showing to the metropolitan court that a notice of appeal has been filed" for "at the time of filing notice of appeal" in the first sentence; and added Paragraph L.

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

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

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

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

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

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

State may appeal dismissal of criminal action for failure to prosecute; Paragraph B retracted. - Restrictive nature of Paragraph B of this rule in providing only two bases for appeal by the state, unconstitutionality of statute and insufficiency of complaint, limits the state's substantive right to appeal provided by New Mexico Constitution and is therefore invalid and retracted, so that state may appeal court's dismissal of criminal

action for failure to prosecute. Smith v. Love, 101 N.M. 355, 683 P.2d 37 (1984).

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

Paragraph E of this rule may obviate compliance with Rule 7-209D. - Defense attorney was not required to provide a certificate of service of process for appeal of DWI case from metropolitan court as specified under Rule 7-209D, since Paragraph E of this rule provides that the metropolitan court shall give notice of appeal to the parties upon filing of the notice of appeal. State v. Gallegos, 101 N.M. 526, 685 P.2d 381 (Ct. App. 1984).

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

## 7-704. Harmless error; clerical mistakes.

A.

Harmless error. Error in either the admission or the exclusion of evidence and error or defect in any ruling, order, act or omission by the court or by any of the parties is not grounds for granting a new trial or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice.

B.

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

COMPILER'S ANNOTATIONS

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

## 7-705. Appeals; dismissals for failure to comply with rules.

A.

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

B.

By motion of the appellee. If the appellant shall fail to comply with these rules, the appellee may file a motion in the district court to dismiss the appeal. The motion shall identify the rule violated. The appellant shall have ten (10) days from the date of service to respond to the motion. The court shall entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee.

# Article 8

**Special Proceedings**

## 7-801. Modification of sentence.

The metropolitan court may modify but shall not increase a sentence or fine at any time during the maximum period for which incarceration could have been imposed. No sentence shall be modified without prior notification to all parties and a hearing thereon. No sentence shall be modified while the appeal is pending. Changing a sentence from incarceration to probation constitutes a permissible reduction of sentence under this rule. No judgment of conviction shall be changed. No fine paid shall be ordered returned.

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

COMPILER'S ANNOTATIONS

Cross-references. - For form on judgment and sentence, see Form 9-601.

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

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

24 C.J.S. Criminal Law § 1610 et seq.

## 7-802. Return of the probation violator.

A.

Probation; violation of probation. The court shall have the power to suspend or defer a sentence and impose conditions of probation during the period of suspension or deferral. If probation has been imposed, upon receipt of a sworn affidavit alleging a violation of said probation, the court shall issue a criminal summons to appear and answer to the charge of violation of said probation.

B.

Issuance of warrants. The court shall issue a warrant for the arrest of the defendant when a summons cannot be served, when the defendant fails to appear, or for other good cause shown.

C.

Imposition of sentence. If, upon a hearing, the violation is established with such reasonable certainty as to satisfy the conscience of the court, the court may continue or revoke the probation, and may require the probationer to serve the balance of the sentence imposed or any lesser sentence. If the defendant was serving a suspended sentence, credit must be given for the time served while on suspension.

D.

Appeals. The decision of the court to revoke probation may be appealed to the district court as otherwise provided in these rules. The only issue the district court will address on appeal will be the propriety of the revocation of probation. The district court shall not modify the sentence of the metropolitan court.

[As amended, effective September 1, 1989.]

COMPILER'S ANNOTATIONS

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, in Paragraph C, substituted the present second sentence for the former second sentence, which read "Credit must be given for the time served on probation".