UNANNOTATED

# Rules of Criminal Procedure for the District Courts

# ARTICLE 1
# General Provisions

## 5-101. Scope and title.

A. **Scope.** These rules govern the procedure in the district courts of New Mexico in all criminal proceedings.

B. **Construction.** These rules are intended to provide for the just determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

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

D. **Citation form.** These rules shall be cited by set and rule numbers, as in NMRA, Rule 5-___.

**Committee commentary.** — The 1974 amendments to this rule eliminated a reference to proceedings in the magistrate courts. The adoption of revised magistrate rules, the Rules of Criminal Procedure for the Magistrate Courts, requires the attorney and magistrate to look to those rules for certain proceedings in felony cases which are handled by the magistrate.

This rule does not specifically provide that these rules apply to prosecutions for criminal contempt. Compare Paragraph B of Rule 11-1101 NMRA. New Mexico decisions suggest, but do not definitely hold, that indirect or constructive criminal contempt proceedings would be governed by the applicable rules of criminal procedure. *See*, *State v. New Mexico Printing Co.*, 25 N.M. 102, 177 P. 751 (1918). *Compare, Norton v. Reese*, 76 N.M. 602, 417 P.2d 205 (1966) with *Seven Rivers Farms, Inc. v. Reynolds*, 84 N.M. 789, 508 P.2d 1276 (1973). *See also*, 34-1-4 and 39-3-15A NMSA 1978.

## 5-102. Rules and forms.

A. **Approval procedure.** Each district court may from time to time recommend to the Supreme Court local rules governing its practice in criminal cases. Copies of proposed local rules and amendments shall be submitted to the Supreme Court and to the chair of the Supreme Court's Local Rules Committee ("the committee") for review. If the proposed local rule amends an existing local rule, a mark-up copy shall be submitted to the Supreme Court and the committee. The committee shall review any

proposed local rule for content, appropriateness, style, and consistency with the other local rules, statewide rules and forms, and the laws of New Mexico, and shall advise the Supreme Court and the chief judge of the district of its opinion and recommendation regarding the proposed rules. Local rules and forms shall not conflict with, duplicate, or paraphrase statewide rules or statutes. The committee shall consult with the chief judge, or the chief judge's designee, regarding any revisions recommended by the committee. Following the consultation, the committee shall report its recommendations to the Supreme Court, and shall bring to the Court's attention any differences of opinion between the committee and the chief judge. No local rule shall take effect unless:

(1) approved by an order of the Supreme Court;

(2) filed with the clerk of the Supreme Court; and

(3) published in accordance with Rule 23-106(L)(9) and (10) NMRA.

B. **Definition.** A "local rule" whether called a rule, order, or other directive, is a rule which governs the procedure in a judicial district in suits of a criminal nature. An order, which is consistent with local rules, statewide rules and forms, and the laws of New Mexico, that is entered in an individual case and served on the parties shall not be considered a local rule.

C. **Applicability.** This rule shall not apply to technical specifications for electronic transmission adopted by a district court to permit electronic transmission of documents to the court if the technical specifications are limited to the form of the documents to be transmitted and are consistent with any technical specifications approved by the Supreme Court and the provisions of Rule 5-103.2 NMRA.

D. **Periodic review of local rules required.** Every two years beginning on January 1, 2019, the chief judge of each odd-numbered judicial district shall review the district's local rules and submit a report to the committee identifying any local rules that are no longer needed by the district and confirming that the district's local rules do not conflict with, duplicate, or paraphrase statewide laws, rules, and forms. Every two years beginning on January 1, 2020, the chief judge of each even-numbered judicial district shall review the district's local rules and submit a report to the committee identifying any local rules that are no longer needed by the district and confirming that the district's local rules do not conflict with, duplicate, or paraphrase statewide laws, rules, and forms. The committee shall review each report submitted under this paragraph and submit a recommendation to the Supreme Court by June 30 of the year the report was submitted for any proposed changes to the district's local rules that may be warranted.

[As amended, effective September 1, 1991; January 1, 1997; July 1, 1997; April 1, 1999; as amended by Supreme Court Order No. 16-8300-015, effective for all cases pending or filed on or after December 31, 2016.]

## 5-103. Service and filing of pleadings and other papers.

A. **Service; when required.** Except as otherwise provided in these rules, every written order; every pleading subsequent to the initial indictment, information, or complaint; every paper relating to discovery required to be served upon a party, unless the court otherwise orders; every written motion other than one which may be heard ex parte; and every written notice, appearance, demand, designation of record on appeal, and similar paper shall be served upon each of the parties.

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

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

(1) "Delivering a copy" means:

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

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 5-103.1 NMRA or Rule 5-103.2 NMRA;

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

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

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

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

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

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

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

E. **Filing of papers and pleadings by a party represented by counsel.** The clerk shall not file a pleading or paper of a defendant who is represented by an attorney, unless the paper is a request to dismiss counsel or to appear pro se. If the paper is a request to dismiss counsel or to appear pro se, the clerk shall serve a copy of the request on all counsel of record in the proceedings. Except for a request to dismiss counsel or to appear pro se, all documents or items received by the court from a defendant who is represented by an attorney shall be forwarded, without filing, to the defendant's attorney of record. Nothing in this paragraph shall restrict a defendant's right to file pro se post-conviction motions under Rule 5-802 NMRA.

F. **Filing with the court defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. "Filing" shall include filing a facsimile copy or filing an electronic copy as may be permitted under Rule 5-103.1 NMRA or 5-103.2 NMRA. If a party has filed a paper using electronic or facsimile transmission, that party shall not subsequently submit a duplicate paper copy to the court. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

G. **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 service indicating the date and method of service signed by an attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit shall be filed with the clerk or endorsed on the pleading, motion, or other paper required to be served.

H. **Filing and service by the court.** Unless otherwise ordered by the court, the court shall serve all written court orders and notices of hearing on the parties. For papers served by the court, the certificate of service need not indicate the method of service. For purposes of Rule 5-104(C) NMRA, papers served by the court shall be deemed served by mail, regardless of the actual manner of service, unless the court's certificate of service unambiguously states otherwise. The court may, in its discretion, serve papers in accordance with the method described in Subparagraph (C)(1)(e) of this rule.

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

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

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

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

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

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

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

[As amended, effective December 1, 1998; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

**Committee commentary.** — Paragraphs A, B, C, and D of this rule are substantially the same as Paragraphs A, B, C, and E of Rule 1-005 NMRA. The exceptions from filing papers with the court found in Paragraph C of Rule 1-005 have been omitted from this rule.

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

[Amended October 15, 1998; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

## 5-103.1. Service and filing of pleadings and other papers by facsimile.

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the

court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each judicial district shall designate one or more telephone numbers to receive fax filings.

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

C. **Paper size and quality.** No facsimile document shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 5-118 NMRA of these rules.

D. **Filing pleadings or papers by facsimile.** A pleading or paper may be filed with the court by facsimile transmission if:

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

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

(3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and

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

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

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

G. **Service by facsimile.** Any document required to be served by Paragraph A of Rule 1-005 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has:

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

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

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

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

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

I. **Conformed copies.** Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by facsimile transmission.

[Adopted, effective January 1, 1997; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005.]

## 5-103.2. Electronic service and filing of pleadings and other papers.

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

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

(2) “document” includes the electronic representation of pleadings and other papers; and

(3) "EFS" means the electronic filing system approved by the Supreme Court for use by the district courts to file and serve documents by electronic transmission in criminal proceedings.

B. **Electronic filing authorized; registration by attorneys required.**

(1) A district court may, by local rule approved by the Supreme Court, implement the mandatory filing of documents by electronic transmission in accordance with this rule through the EFS by parties represented by attorneys. Self-represented parties are prohibited from electronically filing documents and shall continue to file documents through traditional methods. Parties represented by attorneys shall file documents by electronic transmission even if another party to the criminal proceeding is self-represented or is exempt from electronic filing under Paragraph M of this rule. For purposes of this rule, unless a local rule approved by the Supreme Court provides

otherwise, “criminal proceedings” includes proceedings under Article 2 of the Children’s Court Rules and does not include proceedings sealed under Rule 5-123 NMRA.

(2) Unless exempted under Paragraph M of this rule, attorneys required to file documents by electronic transmission shall register with the EFS through the district court’s web site. Every registered attorney shall provide a valid, working, and regularly checked email address for the EFS. The court shall not be responsible for inoperable email addresses or unread email sent from the EFS.

C. **Service by electronic transmission.** Any document required to be served by Paragraph A of Rule 5-103 NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail or if the attorney for the party to be served has registered with the court’s EFS. Documents filed by electronic transmission under Paragraph A of this rule may be served by an attorney through the court’s EFS, or an attorney may elect to serve documents through other methods authorized by this rule, Rule 5-103 NMRA, or Rule 5-103.1 NMRA. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic mail, a party served by electronic mail notifies the sender of the electronic mail that the pleading or paper cannot be read, the pleading or paper shall be served by any other method authorized by Rule 5-103 NMRA designated by the party to be served. The court may serve any document by electronic transmission to an attorney who has registered with the EFS under this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Format of documents; protected personal identifier information; EFS user guide.** All documents filed by electronic transmission shall be formatted in accordance with the Rules of Criminal Procedure for the District Courts and shall comply with all procedures for protected personal identifier information under Rule 5-123 NMRA. The district court may make available a user guide to provide guidance with the technical operation of the EFS. In the event of any conflicts between these rules and the user guide, the rules shall control.

E. **No fees charged for use of the EFS.** No fees shall be charged for the filing or service of documents by electronic transmission through the EFS.

F. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary. If an attorney files or serves multiple documents in a case by a single electronic transmission, the applicable electronic services fee under Paragraph E of this rule shall be charged only once regardless of the number of documents filed or parties served.

G. **Time of filing.** For purposes of filing by electronic transmission, a “day” begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court. For any

questions of timeliness, the time and date registered by the court's computer will be determinative. For purposes of electronic filing only, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes of meeting statute of limitations or any other filing deadlines, notwithstanding rejection of the attempted filing or its placement into an error queue for additional processing.

H. **Signatures.**

(1) All electronically filed documents shall be deemed to contain the filing attorney's signature pursuant to Rule 5-206 NMRA. Attorneys filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document.

(2) If a document filed by electronic transmission contains a signature block from an original paper document containing a signature, the signature in the electronic document may represent the original signature in the following ways:

(a) by scanning or other electronic reproduction of the signature; or

(b) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.

(3) All electronically filed documents signed by the court shall be scanned or otherwise electronically produced so that the judge's original signature is shown.

I. **Demand for original; electronic conversion of paper documents.**

(1) Original paper documents filed or served electronically, including original signatures, shall be maintained by the attorney filing the document and shall be made available, upon reasonable notice, for inspection by other parties or the court. If an original paper document is filed by electronic transmission, the electronic version of the document shall conform to the original paper document. Attorneys shall retain original paper documents until final disposition of the case and the conclusion of all appeals.

(2) For cases in which electronic filing is mandatory, if an attorney who is exempt under Paragraph M of this rule or a self-represented party files a paper document with the court, the clerk shall convert such document into electronic format for filing. The filing date shall be the date on which the paper document was filed even if the document is electronically converted and filed at a later date. The clerk shall retain such paper documents as long as required by applicable statutes and court rules.

J. **Electronic file stamp and confirmation receipt; effect.** The clerk of the court's endorsement of an electronically filed document shall have the same force and effect as a manually affixed file stamp. When a document is filed through the EFS, it shall have

the same force and effect as a paper document and a confirmation receipt shall be issued by the system that includes the following information:

(1) the case name and docket number;

(2) the date and time of filing as defined under Paragraph G of this rule;

(3) the document title;

(4) the name of the EFS service provider;

(5) the email address of the person or entity filing the document; and

(6) the page count of the filed document.

K. **Conformed copies.** Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by electronic transmission. A file-stamped copy of a document filed by electronic transmission can be obtained through the court's EFS. Certified copies of a document may be obtained from the clerk's office.

L. **Proposed documents submitted to the court.**

(1) A document that a party proposes for issuance by the court shall be transmitted by electronic mail to an email address designated by the court for that purpose. A judge may direct the party to submit a hard copy of the proposed document in addition to, or in lieu of, the electronic copy. The court's user guide shall give notice of the email addresses to be used for purposes of this paragraph. The user guide also may set forth the text to be included in the subject-line and body of the email.

(2) Proposed documents shall not be electronically filed by the party's attorney in the EFS. Any party who submits proposed documents by email under this paragraph shall not engage in ex parte communications in the email and shall serve a copy of the email and attached proposed documents on all other parties to the action.

(3) Documents issued by the clerk under this rule shall be sent to the requesting party by email or through the EFS as appropriate, and the requesting party is responsible for electronically filing the document in the EFS if necessary and serving it on the parties as appropriate. Any document issued by a judge under this rule will be electronically filed by the court in the EFS and served on the parties as required by these rules.

M. **Requests for exemptions from local rules establishing mandatory electronic filing systems.**

(1) An attorney may file a petition with the Supreme Court requesting an exemption, for good cause shown, from any mandatory electronic filing system that may

be established by this rule and any district court local rules. The petition shall set forth the specific facts offered to establish good cause for an exemption. No docket fee shall be charged for filing a petition with the Supreme Court under this subparagraph.

(2) Upon a showing of good cause, the Supreme Court may issue an order granting an exemption from the mandatory electronic filing requirements of this rule and any local rules. An exemption granted under this subparagraph remains in effect statewide for one (1) year from the date of the order and may be renewed by filing another petition in accordance with Subparagraph (1) of this paragraph.

(3) An attorney granted an exemption under this paragraph may file documents in paper format with the district court and shall not be charged an electronic filing fee under this rule or local rule for doing so. When filing paper documents under an exemption granted under this paragraph, the attorney shall attach to the document a copy of the Supreme Court exemption order. The district court clerk shall scan the attorney's paper document into the electronic filing system including the attached Supreme Court exemption order. No fee shall be charged for scanning the document. The attorney remains responsible for serving the document in accordance with these rules and shall include a copy of the Supreme Court exemption order with the document that is served.

(4) An attorney who receives an exemption under this paragraph may nevertheless file documents electronically in any district court that accepts such filings without seeking leave of the Supreme Court provided that the attorney complies with all requirements under this rule, and complies with all applicable local rules for the district court's electronic filing system. By doing so, the attorney does not waive the right to exercise any exemption granted under this paragraph for future filings.

N. **Technical difficulties.** Substantive rights of the parties shall not be affected when the EFS is not operating through no fault of the filing attorney.

[Approved, effective July 1, 1997; as amended, effective January 1, 1999; as amended by Supreme Court Order No. 06-8300-028, effective January 15, 2007; as amended by Supreme Court Order No. 18-8300-022, effective for all cases pending or filed on or after January 14, 2019.]

## 5-104. Time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) for electronic filing, at midnight; and

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

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

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

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

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

B. **Extending time.**

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

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

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

(2) ***Exceptions.*** The court shall not extend the time for a determination of probable cause, for filing a motion for new trial, for filing a notice of appeal, for filing a motion for acquittal, for filing a notice of intent to seek the death penalty, for filing petitions for writs of certiorari seeking review of denials of habeas corpus petitions by the district court, or for filing a motion for an extension of time for commencement of trial, except as otherwise provided in these rules.

C. **Additional time after certain kinds of service.** When a party may or must act within a specified time after service and service is made by mail, facsimile, electronic transmission, or by deposit at a location designated for an attorney at a court facility under Rule 5-103(C)(1)(e) NMRA, three (3) days are added after the period would otherwise expire under Paragraph A. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

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

[As amended, effective October 1, 1995; as amended by Supreme Court Order No. 06-8300-023, effective December 18, 2006; by Supreme Court Order No. 09-8300-009, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-030, effective for all cases pending or filed on or after December 31, 2016.]

**Committee commentary.** — This rule is derived from civil procedure Rule 1-006 NMRA.

In 2014, the Joint Committee on Rules of Procedure amended the time computation rules, including Rules 1-006, 2-104, 3-104, 5,104, 6-104, 7-104, 8-104, 10-107, and 12-308 NMRA, and restyled the rules to more closely resemble the federal rules of procedure. *See* Fed. R. Civ. Pro. 6; Fed. R. Crim. Pro. 45. The method of computing time set forth in this rule may be expressly superseded by other rules. *See, e.g.*, Rule 5-301 NMRA (requiring the court to make a probable cause determination within forty-eight (48) hours of a warrantless arrest, notwithstanding the time computation provisions in this rule).

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

[As amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

## 5-105. Designation of judge.

A. **Assignment of cases.** The judge before whom the case is to be tried shall be designated at the time the information or indictment is filed, under local district court rule.

B. **Procedure for replacing a district judge who has been excused or recused.** In the event a district judge has been excused or recused, the clerk shall assign a district judge of another division at random, in the same fashion as cases are originally assigned or pursuant to local district court rule. If all district judges in the district have been excused or recused, the clerk of the district court shall notify the chief justice of the Supreme Court of New Mexico, who shall designate a judge, justice, or judge pro tempore to hear all further proceedings.

C. **Automatic recusal.** If a criminal proceeding is filed in any county of a judicial district against a judge or an employee of the district, a judge from another district shall be designated in accordance with procedures ordered by the chief justice.

D. **Designation of temporary judge.** If the state is seeking a search or arrest warrant and all of the judges of a judicial district are ineligible to hear the matter or have recused themselves, the clerk shall immediately certify the case to the Supreme Court for designation of a judge to hear all matters in the proceedings until such time as a judge may be agreed upon by the parties or designated in accordance with this rule.

E. **Excuse of judge appointed by chief justice.** Any judge designated by the chief justice may not be excused except under Article VI, Section 18 of the New Mexico Constitution.

[As amended, effective November 15, 2000; as amended by Supreme Court Order No. 17-8300-026, effective for all cases pending or filed on or after December 31, 2017.]

## 5-106. Peremptory challenge to a district judge; recusal; procedure for exercising.

A. **Definition of parties.** "Party," as used in this rule, shall mean a defendant, the state, or an attorney representing the defendant or the state. A party may not excuse a judge after the party has requested that judge to perform any discretionary act.

B. **Extent of excuse or challenge.** No judge may be excused from conducting an arraignment or first appearance, setting initial conditions of release, reviewing a lower court's order setting or revoking conditions of release, or presiding over a pretrial detention hearing or a preliminary examination in a case where a pretrial detention motion has been filed. No party shall excuse more than one judge.

C. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

D. **Procedure for excusing a district judge.** The statutory right to excuse the judge before whom the case is pending must be exercised by a party filing a peremptory election to excuse with the clerk of the district court within ten (10) days after the later of

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

(2) service by the clerk of notice of assignment or reassignment of the case to a judge;

(3) completion of publication of notice of reassignment in the case of a mass reassignment; or

(4) filing of a notice of appeal from a lower court.

E. **Notice of reassignment.** After the arraignment or the filing of a waiver of arraignment, if the case is reassigned to a different judge, the clerk shall give notice of reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the reassignments to all parties by publishing notice for four (4) consecutive weeks on the State Bar website and in two (2) consecutive issues of the New Mexico Bar Bulletin. Service of notice by publication is complete on the date printed on the second issue of the Bar Bulletin.

F. **Service of excusal.** Any party electing to excuse a judge shall serve notice of that election on all parties.

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

H. **Recusal.** No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in that action. On receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

I. **Disability during trial.** If by reason of death, sickness, or other disability the judge before whom a jury trial has commenced is unable to proceed with the jury trial, any other judge regularly sitting in or assigned to the court, on certifying familiarity with the record of the jury trial, may proceed with and finish the jury trial or, if appropriate, may grant a mistrial. In a nonjury trial, on motion of the defendant, a mistrial shall be granted on disability of the trial judge.

J. **Disability after verdict or finding of guilt.** If by reason of death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other eligible judge may perform those duties on certifying familiarity with the record of the trial.

[As amended, effective August 1, 1989; September 1, 1990; June 1, 1994; as amended by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended by Supreme Court Order No. 15-8300-019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme

Court Order No. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

**Committee commentary.** — This rule governs the exercise of the statutory right to excuse the judge before whom the case is pending. *See* NMSA 1978, § 38-3-9 (1985). Paragraph B precludes a party from exercising this right in certain pretrial proceedings, including arraignment and pretrial release and detention hearings. Paragraph B does not prevent a judge from recusing under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or on motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

Reassignment of a judge usually occurs in individual cases in which a party has excused the trial judge or the judge recuses himself or herself. When this happens, the clerk easily can and does provide individual notice of the reassignment to the parties by mail.

When a judge retires, dies, is disabled, or assumes responsibility for different types of cases (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory excusal may choose to excuse the successor judge. Providing individual notice by mail to every party in each of those cases is administratively difficult, expensive, and time consuming. Clerks sometimes provide notice of reassignment in an alternative manner—usually through publication in the Bar Bulletin, on the State Bar's website, or both.

The 2008 amendment formally incorporates into Rule 5-106 NMRA the use of notice by publication in that situation—now identified as a "mass reassignment." The amended rule requires that the specified notice be published on the State Bar's website for four (4) consecutive weeks and in two (2) consecutive issues of the New Mexico Bar Bulletin, and provides that a party who has not yet exercised a peremptory excusal may do so within ten (10) days after the date of the second Bar Bulletin.

When a judge's entire caseload is reassigned, the publication notice need not contain the caption of each affected case, but must contain the names of the initially-assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example, when an additional judge is appointed in a judicial district and a part of other judges' caseloads are assigned to the new judge. When this occurs, if the number of pending cases reassigned from any judge exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may publish that list in the Bar Bulletin, publish a notice in

the Bar Bulletin that directs the reader to the court's website where the list will be posted, or post notice on the State Bar's website.

Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. When actual notice is not achieved through publication, the trial court has ample authority to accept a late recusal. *See* Rule 5-104(B) NMRA (providing that the court may permit an act to be done after a deadline has passed for cause shown).

[Adopted by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

## 5-107. Entry of appearance.

A. **Written order.** 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. **Continuation 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.

## 5-108. Nonadmitted and nonresident counsel.

A. **Nonadmitted counsel.** Except as otherwise provided in Paragraph C of this rule, counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory, may upon compliance with Rule 24-106 NMRA, participate in proceedings before New Mexico courts only in association with counsel licensed to practice law and in good standing in New Mexico, who, unless excused by the court, must be present in person in all proceedings before the court. New Mexico counsel must sign the first motion or pleading and New Mexico counsel's name and address must appear on all subsequent pleadings. New Mexico counsel shall be deemed to have signed every subsequent pleading and shall therefore be subject to the provisions of Rule 5-206 NMRA of the Rules of Criminal Procedure for the District Courts.

B. **Nonresident counsel licensed in New Mexico.** In order to promote the speedy and efficient administration of justice by assuring that a court has the assistance of attorneys who are available for court appointments, for local service, for docket calls and to prevent delays of motion hearings and matters requiring short notice, the court

may require a nonresident counsel licensed to practice and in good standing in New Mexico to associate resident New Mexico counsel in connection with proceedings before the court.

C. **Discovery matters; counsel not licensed in New Mexico.** Counsel who are not New Mexico residents and who are not licensed to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory may, without associating New Mexico counsel, participate in discovery proceedings which arise out of litigation pending in another state or territory. However, in a specific proceeding, the court may require association of New Mexico counsel.

[As amended by Supreme Court Order No. 13-8300-040, effective December 31, 2013.]

## 5-109. Court-appointed attorneys.

A. **Fee schedule.** In any criminal cases in which the court is required to appoint counsel to represent an indigent defendant, the court shall follow the fee schedule established by the public defender department for such cases, except that the court may award a greater fee in those cases where:

(1) the court finds that the complexity of the case warrants such an award; or

(2) exceptional circumstances otherwise exist.

B. **Award of attorney fees.** In setting the greater amount of attorney fees to be awarded under this rule, the court shall state in the record its reasons in support of the award of the attorney fees.

## 5-110. Clinical education.

A. **Purpose.** To permit a clinical program for the University of New Mexico School of Law.

B. **Procedure.** Any law student admitted to the clinical program at the University of New Mexico School of Law shall be authorized under the control and direction of the dean of the law school to advise persons and to negotiate and to appear before the courts and administrative agencies of this state, in civil and criminal matters, under the active supervision of a member of the state bar of New Mexico designated by the dean of the law school. Such supervision shall include assignment of all matters, review and examination of all documents and signing of all pleadings prepared by the student. The supervising lawyer need not be present while a student is advising a client or negotiating, but shall be present during court appearances. Each student in the program may appear in a given court with the written approval of the judge presiding over the case and shall file in the court a copy of the order granting approval. The law school shall report annually to the supreme court.

C. **Eligible students.** Any full-time student in good standing in the University of New Mexico School of Law who has received a passing grade in law school courses aggregating thirty or more semester hours (or their equivalent), but who has not graduated, shall be eligible to participate in a clinical program if he meets the academic and moral standards established by the dean of the school.

## 5-110.1. Clinical education; out-of-state law school approved programs.

Law students may advise persons and appear before the district courts in criminal matters in accordance with Rules 1-094 and 1-094.1 of the Rules of Civil Procedure for the District Courts.

[Adopted, effective October 1, 1995.]

## 5-111. Record.

A. **Definition.** As used in the Rules of Criminal Procedure, "record" shall mean:

(1) stenographic notes which must be transcribed when a "record" is required to be filed;

(2) a statement of facts and proceedings stipulated to by the parties for purpose of review; or

(3) any mechanical, electrical or other recording, including a videotape recording of any proceeding, including grand jury proceedings, when such method of mechanical, electrical or other recording has been approved by the court administrator.

B. **Broadcast or reproduction.** Except for the disclosures provided for in Rule 5-506, no broadcast or reproduction of any mechanical, electrical or other recording shall be made for any person other than an official of the court.

**Committee commentary.** — The adoption of this rule provided the express authority for use of a tape recorded record. *See e.g.*, *State v. Lard*, 86 N.M. 71, 519 P.2d 307 (Ct. App. 1974). In *State ex rel. Moreno v. Floyd*, 85 N.M. 699, 516 P.2d 670 (1973), the supreme court approved a tape recording as the record of a preliminary hearing for use by the defendant. *See also*, Rule 6-110 NMRA [now withdrawn].

## 5-112. Suspended.

[As amended by Supreme Court Order No. 15-8300-020, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 16-8300-016, effective for all cases pending or filed on or after December 31, 2016;

suspended by Supreme Court Order No. 21-8300-032, effective November 22, 2021, until further order of the court.]

## 5-113. 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, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter, while the appeal is pending, may be so corrected with leave of the appellate court.

**Committee commentary.** — Paragraph A of this rule was derived from Rule 1-061. Application of this rule, where constitutional error is alleged, is governed by federal constitutional law. In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, rehearing denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967), the court said that "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." In *Fahy v. Connecticut*, 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963), the supreme court said that: "the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction".

In *State v. Anaya*, 81 N.M. 52, 462 P.2d 637 (1969), the Chapman and Fahy tests were followed. The evidence in *State v. Anaya* pointed overwhelmingly to the defendant's guilt. There was "no reasonable possibility that the question and answer concerning a subsequent offense contributed to the defendant's conviction." *See also*, *State v. Pope*, 78 N.M. 282, 430 P.2d 779 (1967). In *State v. Mann*, 87 N.M. 427, 535 P.2d 70 (Ct. App. 1975), the court held that infringement of a right to confrontation could never be treated as harmless error.

This rule purports to cover error in the admission or exclusion of evidence. However, Paragraph A of Rule 11-103 also deals with error in rulings on evidence. Under Rule 5-613, the Rules of Evidence, insofar "as they are not in conflict with these rules", apply to and govern the trial of criminal cases. The commentaries to the Rules of Evidence indicate that Rule 11-103 does not purport to change the harmless error rule, citing, inter alia, Rule 1-061 and *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705, rehearing denied, 386 U.S. 987, 87 S. Ct. 1283, 18 L. Ed. 2d 241 (1967). *See* 56 F.R.D. 183, 195 (1973).

## 5-114. Decorum of grand jury proceedings.

In addition to the persons authorized by law to be present during testimony before the grand jury, upon motion of the state or request of the grand jury, the district court may designate one or more bailiffs or security officers to be present during testimony before the grand jury, upon a showing that it is reasonably necessary to preserve the decorum of the proceedings or the safety of the participants in the grand jury proceedings. All deliberations of the grand jury will be conducted in a private room outside the hearing or presence of any person other than grand jury members.

**Committee commentary.** — This rule was adopted by the supreme court to provide a procedure for the designation of a bailiff or other security officer to be present during testimony of witnesses.

Subsequent to the adoption of this rule, the legislature amended Section 31-6-4 NMSA 1978 to provide during the taking of testimony before the grand jury for the presence of security officers. Section 31-6-7 NMSA 1978 provides that "the district court shall assign court reporters, bailiffs, interpreters, clerks or other persons as required to aid the grand jury in carrying out its duties". *See Davis v. Traub*, 90 N.M. 498, 565 P.2d 1015 (1977), where prior to the adoption of this rule and the amendment of Section 31-6-4 NMSA 1978, the New Mexico Supreme Court held under former Sections 31-6-4 and 31-6-7 NMSA 1978 that only members of the legal staff of the attorney general and district attorney were authorized to be present during the taking of testimony of the grand jury. Under this rule a bailiff or security officer may be designated to be present at the grand jury only during the taking of testimony, upon a showing that a witness may disrupt the decorum of the proceedings or otherwise create a risk to the safety of the grand jurors. Section 31-6-4 NMSA 1978 (as amended by Laws 1981, Chapter 262, Section 2) provides that such security personnel may be present only by leave of the court and only if they are not potential witnesses or interested parties.

## 5-115. Conduct of court proceedings.

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

B. **Nonjudicial proceedings.** Proceedings, other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges in open court, may properly be photographed in, or broadcast from, the courtroom with the permission and under the supervision of the court.

C. **Appearance of the defendant and witnesses before the court.** A defendant shall not be required to appear before the jury in distinctive clothing that would give the appearance that the defendant is incarcerated. Except by order of the court, the defendant may not appear before the jury in any visible restraint devices, including handcuffs, chains, or stun belts, a visible bullet proof vest, or any other item which, if visible to the jury, would prejudice the defendant in the eyes of the jury. When the

defendant appears in court for a jury trial in any restraint device, the court shall state on the record, outside the presence of the jury, the kind of restraint device used and the reasons why the defendant is being restrained. Before requiring a witness to appear before the jury in prison clothing or any visible restraint the court shall balance the need for courtroom security and the likelihood of prejudice to the defendant in the eyes of the jury.

[As amended by Supreme Court Order No. 05-8300-017, effective October 11, 2005; as amended by Supreme Court Order No. 13-8300-018, effective for all cases pending or filed on or after December 31, 2013.]

**Committee commentary.** — The Committee added Paragraph C to ensure that defendants are not prejudiced because of being unduly restrained before the court. When the court is required under Paragraph C to state on the record the kind of restraint device used and the reasons why the defendant is being restrained, the record should be made outside the presence of the jury whether the restraint device is visible to the jury or not.

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

## 5-116. Witness use immunity.

A. **Issuance of order.** If a person has been or may be called to testify or to produce a record, document, or other object in an official proceeding conducted under the authority of a court or grand jury, the district court for the judicial district in which the official proceeding is or may be held may issue a written order requiring the person to testify or to produce the record, document or other object notwithstanding the person's privilege against self-incrimination. The court may issue an order under this rule upon the written application of the prosecuting attorney, the accused, or upon the court's own motion. The written application shall be provided to all parties.

B. **Application.** The court may grant the application and issue a written order pursuant to this rule if it finds the following:

(1) the testimony, or the record, document or other object may be necessary to the public interest; and

(2) the person has refused or is likely to refuse to testify or to produce the record, document or other subject on the basis of the person's privilege against self-incrimination.

C. **Effect of order.** The use of any testimony or other evidence given pursuant to an order issued under this rule is subject to the provisions of Rule 11-413 NMRA.

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014.]

**Committee commentary.** — This rule, together with Rule 11-412 NMRA, creates a procedure for supplanting the privilege against self-incrimination by a grant of use immunity from the court.

There are two types of witness immunity, the so-called "use and derivative use" immunity rule and the so-called "transactional immunity" rule. Use and derivative use immunity was held to be co-extensive with the scope of the Fifth Amendment privilege against self-incrimination in *Kastigar v. United States*, 406 U.S. 441 (1972). *See also Zicarelli v. New Jersey State Comm'n*, 406 U.S. 472 (1972). The so-called "transactional immunity" rule affords the witness considerably broader protection than does the Fifth Amendment privilege. *Kastigar*, 406 U.S. at 453; *see also Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964); *see generally*, Note, 82 Yale L.J. 171 (1972); Note, 58 Va. L. Rev. 1099 (1972); Note, 32 Md. L. Rev. 289 (1972).

Although prior to the 1980 amendments, this rule did not specifically require a party to make a written application for the court to issue a written order granting immunity, the New Mexico Supreme Court held that the application and order must be written. *See Campos v. State*, 91 N.M. 745, 580 P.2d 966 (1978). This rule was amended in 1979 to require a written application in accordance with the *Campos* decision. Prior to the New Mexico Supreme Court's decision in *State v. Belanger*, 2009-NMSC-025, the court could only issue an order granting use immunity upon application of the prosecuting attorney. However, *Belanger* removed that restriction, and this rule has been revised to allow the court to issue an order granting use immunity upon application of the prosecuting attorney, the accused, or upon the court's own motion.

If the court is considering whether to grant a defense witness use immunity over the opposition of the prosecution, *Belanger* provides the following guidance to district courts:

district courts should perform a balancing test which places the initial burden on the accused. The defendant must show that the proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree. If the defendant meets this initial burden, the district court must then balance the defendant's need for the testimony against the government's interest in opposing immunity. A court cannot determine whether a judicial grant of use immunity is necessary "without assessing the implications upon the Executive Branch." *Turkish*, 623 F.2d at 776. In opposing immunity, the State must demonstrate a persuasive reason that immunity would harm a significant governmental interest. If the State fails to meet this burden, and the defendant has already met his burden, the court may then exercise its informed discretion to grant use immunity which our appellate courts would review for abuse of discretion.

*Belanger*, 2009-NMSC-025, ¶ 38.

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

## 5-117. Record; exhibits.

A. **Record of proceedings.** A verbatim record shall be made of all court proceedings, including, but not limited to:

(1) the trial;

(2) arraignment;

(3) release proceedings;

(4) motion hearings;

(5) plea agreement proceedings;

(6) sentencing and habitual offender proceedings;

(7) habeas corpus proceedings; and

(8) extradition proceedings.

B. **Receipt.** The court reporter or tape monitor shall deliver to the clerk of the court a copy of the record of proceedings, all tendered exhibits and a receipt listing the exhibits. Upon receipt of the record and exhibits, the clerk shall sign the receipt and file a copy in the court file.

C. **Return.** Unless otherwise ordered by the court, after notice to the parties or their attorneys in the manner set forth in this rule, all exhibits delivered to the clerk may be returned to the attorney or party tendering the exhibit as evidence.

D. **Notice of disposition of exhibits.** Prior to returning the exhibits to the attorney or party tendering the exhibit as evidence, the clerk shall give written notice to all parties or their attorneys that, unless otherwise ordered by the court, the exhibits in custody of the clerk will be returned to the attorney or party tendering the exhibit or otherwise disposed of after the expiration of sixty (60) days from the date of mailing of such notice. The clerk shall give the written notice required by this paragraph:

(1) within ninety (90) days after final disposition of the case, or

(2) if there is an appeal and a new trial has not been ordered, within thirty (30) days after the filing of the mandate in the district court.

The clerk shall file a notice of the final disposition of the evidence.

E. **Preservation of exhibits.** Upon motion, the court may order any exhibit preserved by the court or disposed of in the manner ordered by the court.

F. **Preservation of biological and physical evidence.** The court shall preserve all evidence that is secured in relation to an investigation or prosecution of a crime and that could be subjected to DNA testing, for not less than the period of time that a person remains subject to incarceration or supervision in connection with the investigation or prosecution.

G. **Disposal of biological and physical evidence.** The court may dispose of evidence before the expiration of the time period set forth in Paragraph F of this rule if:

(1) no other law, regulation or court order requires that the evidence be preserved;

(2) the evidence must be returned to its rightful owner;

(3) preservation of the evidence is impractical due to the size, bulk, or physical characteristics of the evidence; and

(4) the state takes reasonable measures to remove and preserve portions of the evidence sufficient to permit future DNA testing.

H. **Compliance.** The court may comply with the requirements of Paragraphs F and G of this rule, by returning the evidence described in those paragraphs to the appropriate representative of the State.

[Adopted, effective August 1, 1989; as amended, effective November 15, 2000; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

**Committee commentary.** — *See* NMSA 1978, Section 31-1A-2.

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

## 5-118. Form of papers.

Except exhibits and papers filed by electronic transmission pursuant to Rule 5-103.2 of these rules, all pleadings and papers filed in the district court shall be clearly legible, shall be on good quality white paper eight and one-half by eleven (8½ x 11) inches in size, with a left margin of (1) inch, a right margin of one (1) inch, and top and bottom margins of one and one-half (1½) inches; with consecutive page numbers at the bottom; and stapled at the upper left hand corner; and, except for a cover page, shall be typed

or printed using pica (10 pitch) type style or a twelve (12) point typeface. A space of at least two and one-half (2½) by two and one-half (2½) inches for the clerk's recording stamp shall be left in the upper right-hand corner of the first page of each pleading. The contents, except quotations and footnotes, shall be double spaced. Exhibits which are copies of original documents may be reproduced from originals by any duplicating or copying process which produces a clear black image on white paper. The size of any exhibits shall be their original size or any smaller size not less than eight and one-half by eleven (8½ x 11) inches.

[Approved, effective January 1, 1994; as amended effective, December 1, 1998.]

## 5-119. Witnesses.

Rule 5-511 NMRA shall apply to and govern the compelling of attendance of witnesses in criminal cases. Out-of-state witnesses may be subpoenaed in the manner provided by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, Sections 31-8-1 to 31-8-6 NMSA 1978. Grand jury subpoenas may be issued pursuant to Sections 31-6-12 and 31-6-13 NMSA 1978.

[Rule 48; Rule 5-613 SCRA; as recompiled and amended, effective December 1, 1998; August 28, 2001.]

## 5-120. Motions.

A. **Motions and other papers.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

B. **Requirement of written motion.** All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought.

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

D. **Opposed motions.** The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from opposing counsel unless the motion is a:

(1) motion to dismiss;

(2) motions regarding bonds and conditions of release;

(3) motion for new trial;

(4) motion for judgment notwithstanding the verdict;

(5) motion to suppress evidence; or

(6) motion to modify a sentence pursuant to Rule 5-801.

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

E. **Response.** Unless otherwise specifically provided in these rules, a written response shall be filed within fifteen (15) days after service of the motion. Affidavits, statements, depositions or other documentary evidence in support of the response may be filed with the response. A motion to reduce bond or modify conditions of release shall not require a written response prior to hearing.

F. **Reply brief.** Any reply brief shall be filed within fifteen (15) days after service of any written response.

[Approved, effective May 3, 1999.]

## 5-121. Orders; preparation and entry.

A. **Preparation of orders.** Upon announcement of the court's decision in any matter the court shall:

(1) allow counsel a reasonable time, fixed by the court, within which to submit the requested form of order or judgment;

(2) designate the counsel who shall be responsible for preparation of the order or judgment and fix the time within which it is to be submitted; or

(3) prepare its own form of order or judgment.

B. **Trial without a jury.** In a case tried without a jury the court shall make a general finding and may in addition, on request made before the general finding, find the facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

C. **Time limit.** Notwithstanding Section 39-1-1 NMSA 1978, if no satisfactory form of order or judgment has been submitted within the time fixed by the court, the court shall take such steps as it may deem proper to have an appropriate form of order or judgment entered promptly.

D. **Examination by counsel.** In all events, before the court signs any order or judgment, counsel shall be afforded a reasonable opportunity to examine the same and make suggestions or objections.

E. **Entry by court.** The court must enter the judgment and order within a reasonable time after submission.

F. **Filing.** Upon the signing of any order or judgment it shall be filed promptly in the clerk's office and such filing constitutes entry thereof.

[Adopted, effective December 1, 1998; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

**Committee commentary for 2009 amendments.** — The 2009 amendment to Paragraph E of this rule supersedes the portion of Section 39-1-1 NMSA 1978 providing that many post-judgment motions are deemed automatically denied if not granted within thirty (30) days of filing. The 2009 amendment to Rule 5-121 NMRA and the corresponding amendments to Paragraph C of Rule 5-614, Paragraph B of Rule 5-801 and Paragraph H of Rule 5-802 NMRA are intended to make clear that the automatic denial provision in Section 39-1-1 NMSA 1978 has no application in cases subject to the Rules of Criminal Procedure for the District Courts. *See* 2006 committee commentary to Rule 1-054.1 NMRA discussing the similar elimination of deemed denied provisions from the Rules of Civil Procedure for the District Courts. As a result of these changes, all post-conviction motions are subject to the same requirement that the court shall enter judgments or orders promptly in accordance with Paragraph E of this rule.

[As amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

## 5-122. Court Interpreters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. **Appointment of court interpreters.**

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

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

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

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

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

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

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

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

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

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

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

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

(1) **Qualifying the court interpreter.** Before appointing a court interpreter to provide interpretation services to a case participant, the court shall qualify the court interpreter in accordance with Rule 11-604 NMRA of the Rules of Evidence. The court may use the questions in Form 9-109 NMRA to assess the qualifications of the proposed court interpreter. A certified court interpreter is presumed competent, but the

presumption is rebuttable. Before qualifying a justice system interpreter or other less qualified non-certified court interpreter, the court shall inquire on the record into the following matters:

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

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

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

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

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

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

(6) **Court interpretation for multiple case participants.** When more than one case participant needs a court interpreter for the same spoken language, the court may appoint the same court interpreter to provide interpretation services for those case participants. When more than one case participant needs court interpretation for a signed language, separate court interpreters shall be appointed for each case participant. If a party needs a separate court interpreter for attorney-client communications during a court proceeding, prior to the commencement of the court

proceeding, the party shall obtain a court interpreter of the party's own choosing and at the party's own expense. If the party is a criminal defendant represented by court-appointed counsel, a court interpreter for attorney-client communications may be paid as allowed under the Indigent Defense Act and Public Defender Act.

(7) **Use of team court interpreters.** To avoid court interpreter fatigue and promote an accurate and complete court interpretation, when the court anticipates that a court proceeding requiring a court interpreter for a spoken language will last more than two (2) hours the court shall appoint a team of two (2) court interpreters to provide interpretation services for each spoken language. For court proceedings lasting less than two (2) hours, the court may appoint one (1) court interpreter but the court shall allow the court interpreter to take breaks approximately every thirty (30) minutes. The court shall appoint a team of two (2) court interpreters for each case participant who needs a signed language court interpreter when the court proceeding lasts more than one (1) hour. If a team of two (2) court interpreters are required under this subparagraph, the court may nevertheless proceed with only one (1) court interpreter if the following conditions are met:

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

(b) the court states on the record that it contacted the Administrative Office of the Courts for assistance in locating two (2) qualified court interpreters but two (2) could not be found; and

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

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

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

(10) **Remote spoken language interpretation.** Court interpreters may be appointed to serve remotely by audio or audio-video means approved by the Administrative Office of the Courts for any proceeding when a court interpreter is otherwise not reasonably available for in-person attendance in the courtroom. Electronic equipment used during the hearing shall ensure that all case participants hear all statements made by all case participants in the proceeding. If electronic equipment is

not available for simultaneous interpreting, the hearing shall be conducted to allow for consecutive interpreting of each sentence. The electronic equipment that is used must permit attorney-client communications to be interpreted confidentially.

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

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

(a) inability to adequately interpret the proceedings;

(b) knowingly making a false interpretation;

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

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

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

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

(g) acting as an advocate; or

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

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

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

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

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

The rule requires the use of certified court interpreters whenever possible but permits the use of less qualified interpreters in some situations. For purposes of this rule, a certified court interpreter may not be reasonably available if one cannot be located or if funds are not available to pay for one. But in all instances, before a court may use a non-certified court interpreter, the court must contact the Administrative Office of the Courts (AOC) for assistance and to confirm whether funds may in fact be available to pay for a certified court interpreter.

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

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

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

responsible for providing court interpretation services for witness interviews or pre-trial transcriptions or translations that the party intends to use for a court proceeding. When the court is responsible for paying the cost of the court interpretation services, the AOC standards control the amounts and procedures for the payment of court interpreters.

Although this rule generally applies to all court interpreters, the court should be aware that in some instances the procedures to follow will vary depending on whether a spoken or signed language court interpreter is used. Courts should also be aware that in some instances when court interpretation services are required for a deaf or hard-of-hearing individual, special care should be taken because severe hearing loss can present a complex combination of possible language and communication barriers that traditional American Sign Language/English interpreters are not trained or expected to assess. If a deaf or hard-of-hearing individual is having trouble understanding a court interpreter and there is an indication that the person needs other kinds of support, the court should request assistance from the AOC for a language assessment to determine what barriers to communication exist and to develop recommendations for solutions that will provide such individuals with meaningful access to the court system.

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

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

## 5-123. Public inspection and sealing of court records.

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

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

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

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

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

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

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

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

C. **Limitations on public access.**

(1) In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(a) grand jury proceedings in which a no bill has been filed under Section 31-6-5 NMSA 1978;

(b) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(c) proceedings commenced upon an application for an order for wiretapping, eavesdropping or the interception of any wire or oral communication under Section 30-12-3 NMSA 1978;

(d) pre-indictment proceedings commenced under Chapter 31, Article 6 NMSA 1978 or Rule 5-302A NMRA [recompiled];

(e) proceedings commenced to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978.

The provisions of this subparagraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

(2) In proceedings to determine competency under Chapter 31, Article 9 NMSA 1978, the following records shall be sealed automatically without order of the court:

(a) A motion for competency evaluation and responsive pleading;

(b) Any court record that contains the details of a competency, forensic, psychiatric, medical, or psychological assessment or evaluation;

(c) Any court record that includes the details of a treatment plan; and

(d) Any court record that includes an assessment of the defendant's dangerousness under Section 31-9-1.2 NMSA 1978 or an assessment of the defendant's risk under Section 31-9-1.6 NMSA 1978.

The provisions of this subparagraph notwithstanding, the register of actions and docket entries used by the court to document activity in the case shall not be sealed without a court order.

D. **Protection of personal identifier information.**

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

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

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

E. **Motion to seal court records required.** Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order.

Any party or member of the public may file a motion for an order sealing the court record. The motion is subject to the provisions of Rule 5-120 NMRA, and a copy of the motion shall be served on all parties who have appeared in the case in which the court record has been filed or is to be filed. Any party or member of the public may file a response to the motion to seal under Rule 5-120 NMRA. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rule 5-202 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

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

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

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

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

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

(d) the proposed sealing is narrowly tailored; and

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

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

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

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

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

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

H. **Sealed court records as part of record on appeal.**

(1) Court records sealed in the magistrate, metropolitan, or municipal court that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court pursuant to Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. **Motion to unseal court records.**

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal is subject to the provisions of Rule 5-120 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

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

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

[Approved by Supreme Court Order No. 10-8300-007, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023 temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; as amended by Supreme Court Order No. 11-8300-009, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as amended by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; approved as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

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

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

the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

For some of the classes of cases identified in Paragraph C, automatic sealing is subject to other statutory disclosure or reporting requirements. For example, under NMSA 1978, Section 34-9-19, the administrative office of the courts (AOC) is required to transmit to the federal bureau of investigation's national instant criminal background check system (NICS) information about a court order, judgment, or verdict regarding each person who has been "adjudicated as a mental defective" or "committed to a mental institution" under federal law. Automatic sealing under Paragraph C therefore does not prevent the AOC from transmitting such information to the NICS in the proceedings described in Subparagraphs C(5) and (6). A person who is the subject of the information compiled and reported by the AOC to NICS has a right to obtain and inspect that information. See NMSA 1978, § 34-9-19(K).

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., Section 7-1-4.2(H) NMSA 1978 (providing for confidentiality of taxpayer information); Section 14-6-1(A) NMSA 1978 (providing for confidentiality of patient health information); Section 24-1-9.5 NMSA 1978 (limiting disclosure of test results for sexually transmitted diseases); Section 29-10-4 NMSA 1978 (providing for confidentiality of certain arrest record information); Section 29-12A-4 NMSA 1978 (limiting disclosure of local crime stoppers program information); Section 29-16-8 NMSA 1978 (providing for confidentiality of DNA information); Section 31-25-3 NMSA 1978 (providing for confidentiality of certain communications between victim and victim counselor); Section 40-8-2 NMSA 1978 (providing for sealing of certain name change records); Section 40-6A-312 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); Section 40-10A-209 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); Section 40-13-7.1 NMSA 1978 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); Section 40-13-12 NMSA 1978 (providing for limits on internet disclosure of certain information in domestic violence cases); Section 44-7A-18 NMSA 1978 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic

sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record. Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

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

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

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal." If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

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

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

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

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court.

Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

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

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

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

[Approved by Supreme Court Order No. 10-8300-007, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-009, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; approved by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017.]

## 5-124. Courtroom closure.

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

courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

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

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

(2) ***Motion of a party, or other interested person or entity.*** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A written motion for courtroom closure shall be filed and served at the time of arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.

(3) ***Response.*** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court.

(4) ***Reply.*** A party may file a written reply within fifteen (15) days after service of the written response, unless a different time period is ordered by the court.

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

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

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

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

(2) ***In camera review.*** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential

information relevant to the motion. Any evidence or argument tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

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

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

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

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

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

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

Certain statutes include exceptions to the general rule that courtroom proceedings should be open to the public and provide that specific types of courtroom proceedings should be closed. *See, e.g*., NMSA 1978, § 24-2B-5.1(B) (testing to identify the human immunodeficiency virus). Additionally, numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., NMSA 1978, § 43-1-19 (limiting the disclosure of information under the Mental Health and Developmental Disabilities Code); committee commentary to Rule 5-123 NMRA (listing statutory confidentiality provisions). Despite these statutory provisions, this rule does not authorize automatic courtroom closure for any type of criminal proceeding. Instead, if a party believes that courtroom closure is warranted for any reason, including

the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph D of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph C of this rule prior to entering any order for courtroom closure.

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

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

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

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id*. ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty*., 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

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

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

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

# ARTICLE 2
# Initiation of Proceedings

## 5-201. Methods of prosecution.

A. **Commencement of prosecution.** A prosecution may be commenced by the filing of

(1) a complaint;

(2) an information; or

(3) an indictment.

B. **Complaint.** A complaint is a sworn written statement of the facts, the common name of the offense, and, if applicable, a specific section number of New Mexico Statutes Annotated which defines the offense. Complaints shall be substantially in the form approved by the court administrator.

C. **Information.** An information is a written statement, signed by the district attorney, containing the essential facts, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes Annotated which defines the offense. It may be filed only in the district court. An information shall be substantially in the form approved by the court administrator, and shall state the names of all witnesses on whose testimony the information is based. On completion of a preliminary examination or acceptance of a waiver of the preliminary examination by the district court, an information shall be filed within thirty (30) days if a defendant is not in custody, and within ten (10) days if a defendant is in custody. Any offenses that are included in the bind-over order but not set forth in the criminal information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses. If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice by the court in which the action is pending.

D. **Indictments.** An indictment is a written statement returned by a grand jury containing the essential facts constituting the offense, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes Annotated which defines the offense. All indictments shall be signed by the foreperson of the grand jury. Indictments shall be substantially in the form prescribed by the court administrator. The names of all witnesses on whose testimony an indictment is based shall appear on the indictment.

[As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022.]

**Committee commentary.** — The Complaint. This rule governs complaints filed in the district court. If a complaint is filed in the district court, the district court shall set a first appearance under Rule 5-301 NMRA and proceed under the Rules of Criminal Procedure for the District Courts. Most complaints are filed in either the magistrate court or the metropolitan court. If the complaint charges solely a petty misdemeanor or misdemeanor, the magistrate or metropolitan court has jurisdiction to try the case. *See* NMSA 1978, § 35-3-4A (1985). If the complaint charges at least one capital, felonious, or other infamous crime, the defendant may be held to answer only on an information or indictment. N.M. Const. art. II, § 14; *see State v. Marrujo*, 1968-NMSC-118, 79 N.M. 363, 443 P.2d 856. If the complaint charges a crime which is not within the jurisdiction of the magistrate or metropolitan court, the magistrate or metropolitan court may only

(1) determine initially if there is probable cause on which to confine the defendant;

(2) advise the defendant of his or her rights at the first appearance;

(3) set and review conditions of release; and

(4) conduct preliminary examinations. *See* NMSA 1978, § 35-3-4 (1985).

Under this rule, Rule 6-201 NMRA, and Rule 7-201 NMRA, a complaint must state the common name of the offense, and, if applicable, the specific section number of the New Mexico Statutes Annotated which defines the offense. Two decisions of the Court of Appeals interpreting the former magistrate rule indicate that the complaint must carefully set forth the name and section number. In *State v. Raley*, 1974-NMCA-024, 86 N.M. 190, 521 P.2d 1031, the Court held that the initials “D.W.I.” were insufficient to state the common name of the offense. In *State v. Nixon*, 1976-NMCA-031, 89 N.M. 129, 548 P.2d 91, the Court held that it is not necessary to charge a specific subsection of the statutes. In both cases, the Court determined that the complaint must be dismissed. However, since the cases were decided under the former magistrate rules, there is no discussion of Rule 6-303 NMRA of the present Rules of Criminal Procedure for the Magistrate Courts governing technical defects in the pleadings. *See also* Rule 5-204 NMRA, an identical rule in the Rules of Criminal Procedure for the District Courts, and commentary.

The Information. This rule allows a prosecution to be commenced by the filing of the information. As a practical matter, the prosecution is generally commenced by the filing of the complaint in the magistrate or metropolitan court followed by either an indictment or a preliminary hearing and information. Nothing, however, prohibits the prosecution from first filing the information. *See State v. Bailey*, 1956-NMSC-123, 62 N.M. 111, 305 P.2d 725. *See also Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965). In that event, the

accused is not required to plead to the information and may move the court to remand the case for a preliminary hearing. *See* Rule 5-601(C) NMRA and commentary. After the preliminary hearing, the defendant can then be tried on the information filed before the preliminary hearing. *State v. Nelson*, 1958-NMSC-018, 63 N.M. 428, 321 P.2d 202.

If the prosecution has been commenced by the filing of a complaint in the magistrate or metropolitan court and a preliminary hearing has been held, Paragraph C of this rule requires that the information be filed within thirty (30) days after completion of the preliminary examination. The information must conform to the bind-over order of the magistrate. *State v. Melendrez*, 1945-NMSC-020, 49 N.M. 181, 159 P.2d 768. It does not have to conform to the complaint which initiated the prosecution in the lower court. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838.

The provision of Paragraph C of this rule requiring the information to contain the essential facts was taken from Rule 7 of the Federal Rules of Criminal Procedure. *See generally*, 1 Orfield, Criminal Procedure under the Federal Rules §§ 7:83-7:87 (1966). The United States Supreme Court has indicated that the pleading under Federal Rule 7 must be tested by two general criteria: (1) whether the pleading contains the elements of the offense to sufficiently apprise the defendant of what he or she must be prepared to meet; (2) whether he or she is accurately apprised of the charge so as to know if he or she is entitled to plead a former acquittal or conviction under the double jeopardy clause of the fifth amendment to the United States Constitution. *Russell v. United States*, 369 U.S. 749, 763-64 (1962). *Compare State v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88, with *State v. Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

This rule must also be read in conjunction with Rule 5-204 and Rule 5-205(A) and (B) NMRA. Rule 5-205(A) and (B) identify certain allegations which need not be included in the pleading. Rule 5-204 indicates that the pleading is not invalid because of defects, errors, and omissions. In addition, the Court of Appeals has held that any asserted failure of the pleading to allege essential facts must be accompanied by a showing of prejudice because of that failure. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896.

Paragraph C of this rule requires that the information be signed by the district attorney. *See* N.M. Const. art. II, § 14. This requirement can be met by the signature of an assistant district attorney. *See* NMSA 1978, § 36-1-2 (1984). The Constitution also indicates that the information may be filed by the attorney general. *See also* NMSA 1978, § 8-5-3 (1933). The deputy or an assistant attorney general would have the same authority as the attorney general. *See* NMSA 1978, § 8-5-5 (1988).

Article XX, Section 20 of the New Mexico Constitution contains language which would indicate that the accused must waive an indictment if the state proceeds by information. However, it has been held that Article II, Section 14 of the Constitution, the section allowing prosecution by information, eliminated the necessity of a waiver of a grand jury indictment. *See State v. Flores*, 1968-NMCA-057, 79 N.M. 420, 444 P.2d 605.

For interpretation of the common name and specific statute section provisions of the information, *see* the discussion of the elements of a complaint, above.

The Indictment. For the law governing the grand jury procedure and return of indictments, *see* NMSA 1978, §§ 31-6-1 to -15 (1969, as amended through 2003). The elements of an indictment are the same as required for an information and would be interpreted by the same criteria. *See, e.g., Cutnose*, 1974-NMCA-130. The state may proceed by indictment in the district court even if the prosecution was initiated originally by the filing of a complaint in the lower court. *See State v. Peavler*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387; *State v. Ergenbright*, 1973-NMSC-024, 84 N.M. 662, 506 P.2d 1209; *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940. This practice was recognized by the Supreme Court in the adoption of Rule 6-202(E) NMRA and Rule 7-202(E) NMRA, which provides that if the defendant is indicted before the preliminary examination, the magistrate or metropolitan court shall take no further action.

[As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00022, effective for all cases filed on or after December 31, 2023.]

## 5-202. General rules of pleadings.

A. **Form.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number and a designation as to the type of pleading.

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

C. **Name of defendant.** In any pleading, the name of the defendant, if known, shall be stated. If the name of the defendant is not known, he may be described by any name or description by which he can be identified with reasonable certainty.

D. **Joinder of defendants.** No complaint, information or indictment may charge more than one defendant. Defendants may be joined for trial pursuant to Rule 5-203.

[As amended, effective March 1, 1991.]

**Committee commentary.** — "Pleading," as used in this rule, includes a complaint, an information or an indictment. *See* Paragraph A of Rule 5-201 NMRA.

Paragraph A of this rule is patterned after Paragraph A of Rule 1-010 NMRA. Paragraph B of this rule is patterned after Paragraph C of Rule 1-010 NMRA.

## 5-203. Joinder; severance.

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

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

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

B. **Joinder of defendants.** A separate complaint, indictment or information shall be filed for each defendant. Two or more defendants may be joined on motion of a party, or will be joined by the filing of a statement of joinder by the state contemporaneously with the filing of the complaints, indictments or informations charging such defendants:

(1) when each of the defendants is charged with accountability for each offense included;

(2) when all of 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

(3) when, even if conspiracy is not charged and not all of the defendants are charged in each count, the several offenses charged:

(a) were part of a common scheme or plan; or

(b) 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.

C. **Motion for severance.** If it appears that a defendant or the state is prejudiced by a joinder of offenses or of defendants by the filing of a statement of 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 March 1, 1991; August 1, 1992.]

**Committee commentary.** — Paragraph A of this rule was derived from American Bar Association Standards Relating to Joinder and Severance, Section 1.1 (Approved Draft 1968). For decisions upholding joinder of offenses under Paragraph A of this rule, *see State v. Riordan*, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974) and *State v. McCallum*, 87 N.M. 459, 535 P.2d 1085 (Ct. App. 1975). *See* Paragraph C of this rule for the provisions on severance. Joinder under Paragraph A(2) of this rule has been suggested

as a possible way of avoiding double jeopardy. *State v. Tanton*, 88 N.M. 5, 536 P.2d 269 (Ct. App. 1975).

As a result of a supreme court order, the committee prepared amendments to Paragraph A of this rule in 1979 which changed Paragraph A of this rule from a permissive to a mandatory rule.

The 1979 supreme court order provided as follows:

When a person is charged with more than one crime and the crimes can be incorporated in one information or indictment in separate counts, this practice shall be followed.

Paragraph B of this rule, providing a liberal procedure for joinder, was derived from American Bar Association Standards Relating to Joinder and Severance, Section 1.2 (Approved Draft 1968). *See* Paragraph C of this rule, providing for severance to avoid an injustice which may result from joinder under Paragraph B of this rule.

Paragraph B of this rule was amended by the committee in 1979 to implement a supreme court order requiring the joinder of certain defendants. The supreme court order provided as follows:

Likewise, if the charges against more than one defendant can be properly filed in one information or indictment, the defendants shall be charged jointly under one case number.

The 1990 amendment of Rule 5-202 and Paragraph B of this rule were made at the request of the state Administrative Office of the Courts to accommodate the automation of the district courts. These amendments have no substantive effect. The 1990 amendments were made to require separate files for each defendant. The state and the defendant will be required to file separate pleadings for each defendant joined pursuant to this rule. Joinder is automatically accomplished under Paragraph B by the filing of a statement of joinder by the state contemporaneously with two or more informations, indictments and complaints. Paragraph B was amended effective August 1, 1992, to make it clear that joinder of defendants is also permissible upon motion of any party if the other conditions of Paragraph B are met.

Paragraph C of this rule was derived in part from American Bar Association Standards Relating to Joinder and Severance, Section 2.2 (Approved Draft 1968). It is almost identical to Rule 14 of the Federal Rules of Criminal Procedure. Paragraph C of this rule requires a showing of prejudice before the court is compelled to sever the trial. Some examples of when prejudice may be shown include: (1) where the defendant might wish to testify in his own behalf on one offense but not on another; *see e.g.*, *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964); (2) where a combined trial might result in the admissibility of evidence of other crimes which would not normally be admissible

under Paragraph B of Rule 11-404; *see e.g.*, *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964).

Paragraph C of this rule also allows the court to sever a joint trial of defendants where justice requires. Some examples cited by the American Bar Association Standards Relating to Joinder and Severance, supra, include: (1) where the number of defendants or the complexity of the evidence is such that the trier of fact probably will be unable to distinguish the evidence and apply the law intelligently as to the charges against each defendant; and (2) where the defendants have antagonistic defenses.

As revised, Paragraph C of this rule allows the admission of a statement of one codefendant deleting all references to the defendant seeking the severance, provided that, as deleted, the statement does not prejudice the defendant seeking severance.

An accused's right of cross-examination, secured by the confrontation clause of the sixth amendment, is violated at the accused's joint trial with a codefendant who does not testify by admission of codefendant's confession inculpating accused, notwithstanding jury instructions that codefendant's confession must be disregarded in determining accused's guilt or innocence. *Bruton v. United States*, 391 U.S. 123 (1968), 88 S. Ct. 1620, 20 L. Ed. 2d 476. *See* Parker v. Randolph, 442 U.S. 62, 99 S. Ct. 2132, 60 L. Ed. 2d 713 (1979) for an exception to the *Bruton* rule allowing the admission of interlocking confessions of codefendants in certain circumstances when accompanied by an appropriate limiting instruction to the jury. *See also State v. Shade & Vincent*, 104 N.M. 710, 726, 726 P.2d 864 (Ct. App. 1986) (cert. quashed, *Vincent v. State*, 104 N.M. 702, 726 P.2d 856).

Even though the court may review the confession or statement given by a codefendant which is produced to show reason for severance, such review may be held in camera, and the statement or confession need not be made part of the record.

[As revised, April 9, 1992.]

## 5-204. Amendment or dismissal of complaint, information and indictment.

A. **Defects, errors and omissions.** A complaint, indictment, or information 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, indictment or information 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, information, or indictment may be disregarded as surplusage.

C. **Variances.** No variance between those allegations of a complaint, indictment, information, or any supplemental pleading which state the particulars of the offense, whether amended or not, and the evidence offered in support thereof shall be grounds for the acquittal of the defendant unless such variance prejudices substantial rights of the defendant. The court may at any time allow the indictment or information 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 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 in the defendant's defense on the merits.

E. **Refiled proceedings.** If an indictment or information is dismissed and a subsequent indictment or information is filed arising out of the same incident, the bond shall continue in effect pending review by the district court.

F. **Effect on bail.** The dismissal of an indictment or information shall not exonerate a bond posted by a paid surety prior to the expiration of the time for automatic exoneration under Rule 5-406(A)(1) or (A)(2) NMRA.

[As amended by Supreme Court Order No. 05-8300-012, effective September 1, 2005; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

**Committee commentary.** — This rule was designed to make clear that criminal pleadings should not be held invalid for any technical defect, error, or omission. *See e.g., State v. Lucero*, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968). The defendant must show that prejudice resulted from the allowance of an amendment to the pleading. *State v. Padilla*, 86 N.M. 282, 523 P.2d 17 (Ct. App.), cert. denied, 86 N.M. 281, 523 P.2d 16 (1974).

## 5-205. Unnecessary allegations.

A. **Generally unnecessary allegations.** It shall be unnecessary for a complaint, indictment or an information 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. **Inclusion by state.** The state may include any of the unnecessary allegations set forth in Paragraph A of this rule in a complaint, indictment or information without thereby enlarging or amending such complaint, indictment or information, and such allegations shall be treated as surplusage the same as if contained in a statement of facts.

C. **Statement of facts.** Upon motion of the defendant, the court may order the state to file a statement of facts setting forth any or all of the unnecessary allegations set forth in Paragraph A of this rule. Such statement of facts shall not enlarge or amend the complaint, indictment or information, and such allegations shall be treated as surplusage.

**Committee commentary.** — Section 14 of Article 2 of the New Mexico Constitution gives the defendant a right to "demand the nature and cause of the accusation." This rule provides a basic procedure for the exercise of an accused's right to determine the "nature of the accusation" to provide more specificity of the factual allegations clarifying what he or she is alleged to have done in violation of the law. *See State v. Crews*, 110 N.M. 723, 739, 799 P.2d 592, 608 (Ct. App. 1989) (recognizing that "[t]he purpose of a statement of facts is to provide the defendant with sufficient information about the nature and character of the crime charged"). A motion for a statement of facts should not be confused with a motion for discovery of the evidence that may prove or disprove those factual allegations, "the cause of the accusation," addressed in the discovery provisions of Rules 5-501 to -512 NMRA.

The statement of facts replaces the bill of particulars, former Trial Court Rule 35-4409 (compiled as 41-6-8 NMSA, 1953 Comp., abrogated by the supreme court with the adoption of these rules). This rule is designed to avoid the technicalities of the bill of particulars without diminishing the basic constitutional right of the defendant. *See State v. Campos*, 79 N.M. 611, 447 P.2d 20 (1968); *State v. Graves*, 73 N.M. 79, 385 P.2d 635 (1963).

For a prerule decision holding that the place of the commission of the offense or the owner of the property were not necessary allegations, *see State v. Lucero*, 79 N.M. 131, 440 P.2d 806 (Ct. App. 1968). For a prerule decision holding that the degrees of the crime need not be set forth in the charge, *see State v. Roy*, 40 N.M. 397, 60 P.2d 647 (1936). As indicated in the rule, any of these allegations could be necessary under certain circumstances to give the defendant notice of the crime charged. *State v. Foster*, 87 N.M. 155, 530 P.2d 949 (Ct. App. 1974).

[As amended by Supreme Court Order No. 13-8300-008, effective for all cases pending or filed on or after May 13, 2013.]

## 5-206. Signing of pleadings.

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper and that to the best of the signer's knowledge, information and belief it is not interposed for delay. If a pleading, motion or other paper is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[As amended, effective August 1, 1989; January 1, 1997.]

**Committee commentary.** — This rule is substantially the same as Rule 1-011.

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

## 5-207. Withdrawn.

## 5-208. Issuance of warrant for arrest and summons.

A. **Time.** On the docketing of any criminal action, the court may issue a summons or arrest warrant.

B. **Preference for summons.** The court shall issue a summons, unless in its discretion, the court finds that the interests of justice would be better served by the issuance of a warrant and if the requirements of Paragraph C of this rule are met.

C. **Basis for warrant.** The court may issue a warrant for arrest on an indictment or a sworn written statement of the facts showing probable cause for issuance of the warrant. The showing of probable cause shall be based on substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. 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 the affiant may produce, but the additional evidence shall be reduced to writing and supported by oath or affirmation. The court may also permit a request for an arrest warrant by any method authorized by Rule 5-211(F) NMRA for search warrants and may issue an arrest warrant remotely if the requirements of Rule 5-211(F) NMRA and this rule are met.

D. **Form.**

(1) **Warrant.** The warrant shall be signed by the court and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged and shall command that the defendant be arrested and brought before the court. The warrant may set conditions of release for the defendant only for:

(a) penalty assessment misdemeanor charges; or

(b) traffic code misdemeanor charges, except for:

(i) driving under the influence of intoxicating liquor or drugs, contrary to Section 66-8-102 NMSA 1978; and

(ii) operating a motorboat while under the influence of intoxicating liquor or drugs, contrary to Section 66-13-3 NMSA 1978.

(2) **Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place. A summons or arrest warrant shall be substantially in the form approved by the Supreme Court.

[As amended by Supreme Court Order No. 12 8300 016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

**Committee commentary.** — When a criminal action is docketed in a magistrate or metropolitan court by the filing of a complaint, either Rule 6-204 NMRA or Rule 7-204 NMRA, which are substantially identical to this rule, will govern the procedure.

Paragraph C of this rule requires a written showing of probable cause before an arrest warrant may be issued. The constitutional basis for this requirement is Article II, Section 10 of the New Mexico Constitution, although that provision does not expressly mention arrest warrants. *Cf. State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

Paragraph C of this rule codified case law allowing the issuance of a warrant on probable cause based on hearsay evidence. This provision was taken from Rule 4(b) of the Federal Rules of Criminal Procedure. *See* 48 F.R.D. 553, 55860 (1970); 62 F.R.D. 27172 (1974). Neither the proposed federal rule nor this rule attempts to establish what constitutes probable cause based on hearsay as that determination can only be made on a case by case basis, taking into account the unlimited variation and sources of information and the varying reliability of the information received by the affiant from others. 62 F.R.D. 271, 27374 (1974). The fact that the information may involve double hearsay does not mean that the affidavit fails to provide probable cause. *State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

Paragraph C was amended in 2012 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 5 211(F) and the related committee commentary for more information.

Paragraph D was amended in 2024 to prevent release of defendants arrested on warrants before the defendant's first appearance or other hearing, with exceptions for penalty assessment misdemeanor charges and certain traffic code misdemeanor charges.

In 2019, this rule was amended to incorporate language from rules governing the courts of limited jurisdiction, which express a preference for the use of a summons when practicable. *See* Rule 6-204 NMRA; Rule 7-204 NMRA; Rule 8-203 NMRA.

[As amended by Supreme Court Order No. 12 8300 016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed on or after December 31, 2019; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

## 5-209. Service of summons; failure to appear.

A. **Service.** A summons shall be served in accordance with Rule 1-004 NMRA unless the court directs service by mail. A copy of the complaint, indictment, or information shall be attached to the summons. 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 under Rule 5-104 NMRA. Service by mail is complete on mailing.

B. **Failure to appear.** 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 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.

(1) ***Exception for initial appearance; returned mail.***

(a) For a defendant's initial appearance in court, if a mailed summons has been returned as not delivered and the defendant has failed to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may either

(i) direct service to be made by a person authorized by Rule 1-004(D) NMRA; or

(ii) issue a warrant for the defendant's arrest with the directive that the defendant be released on the defendant's own recognizance, unless the court makes a finding of fact that supports the imposition of an appropriate bond.

(b) If the summons is returned as not delivered after a warrant has been issued under Paragraph B of this rule, the court may cancel or quash the warrant, waive or suspend the administrative bench warrant fee, and proceed under Subparagraph (1)(a) of this paragraph.

[As amended by Supreme Court Order No. 22-8300-026, effective for all cases pending or filed on or after December 31, 2022.]

**Committee commentary.** — Paragraph A of this rule incorporates Rule 1-004 NMRA as the procedure for service of summons on a defendant. This procedure is more often used in misdemeanor than felony cases. Paragraph B of this rule, providing for arrest if the defendant fails to respond and appear to the summons, was derived from Rule 4(a) of the Federal Rules of Criminal Procedure. See generally, 1 Wright, Federal Practice and Procedure, § 51 (1969).

Subparagraph (B)(1) was added in 2022 to address situations in which a defendant is mailed a summons for the defendant's first appearance in a criminal case and the summons is returned to the court as undelivered or undeliverable. In these instances, the defendant has not received notice to appear. Subparagraph (B)(1) applies only to the first appearance, i.e., bond arraignment, and not to subsequent appearances as the defendant is under an obligation to keep the court apprised of a current mailing address after the defendant's first appearance.

Courts should avoid issuing a warrant or leaving a warrant in place when facts indicate that the defendant did not receive proper notice. In deciding whether facts indicate that an appropriate bond should be imposed, the judge should consider factors such as the defendant's failure to appear history and whether there was contact between the defendant and law enforcement that indicates the defendant received notice.

Warrants issued under Subparagraph (B)(1) of this rule are not bench warrants for failure to appear. Rather, these warrants are arrest warrants issued on the underlying charge as prescribed in Rules 5-208 and 5-210 NMRA.

[As amended by Supreme Court Order No. 22-8300-026, effective for all cases pending or filed on or after December 31, 2022.]

## 5-210. Arrests without a warrant; arrest warrants.

A. **To whom directed.** Whenever a warrant is issued in a criminal action, including by any method authorized Rule 5-211(F) NMRA, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus police officer, or an Indian tribal or pueblo law enforcement officer. The warrant may limit the jurisdictions in which it may be executed. A copy of the warrant shall be docketed in the court as captioned on the warrant. The person obtaining the warrant shall cause it to be entered into a law enforcement information system. Upon arrest the defendant shall be brought before the court without unnecessary delay.

B. **Arrest.** The warrant shall be executed by the arrest of the defendant. If the arresting officer has the warrant in the officer's 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 the officer's possession at the time of the 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 of the warrant, or any duplicate original, to the court as captioned on the warrant and notify immediately all law enforcement agencies, previously advised of the issuance of the warrant for arrest, that the defendant has been arrested. The return shall be docketed in the court as captioned on the warrant.

D. **Arrests without a warrant.** If the defendant is arrested without a warrant, a criminal complaint shall be prepared and a copy given to the defendant prior to transferring the defendant to the custody of the detention facility. If the defendant is not provided a copy of the criminal complaint upon transfer to a detention facility, without just cause or sufficient reason, the complaint may be dismissed without prejudice or defendant may be released from custody. If the defendant is in custody and the court is open, the criminal complaint shall be filed immediately with the court. If the court is not open and the defendant remains in custody, the complaint shall be filed the next

business day of the court. If the defendant is not in custody, the complaint shall be filed with the court as soon as practicable.

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

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

**Committee commentary.** — For the rules governing execution and return of arrest warrants issued by the magistrate, metropolitan and municipal courts, *see* Rules 6-206, 7-206, and 8-205 NMRA, which are substantially identical to this rule. *See also* Rule 5-301 NMRA comm. cmt.

Although not explicit in this rule, under NMSA 1978, Section 33-3-28, detention officers have the same authority as peace officers "with respect to arrests and enforcement of laws when on the premises of a local jail[.]"

Paragraph B of this rule was derived from Rule 4(d)(3) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271-72 (1974). The Court of Appeals has held that "physical possession of the warrant is not essential to a lawful arrest when the validity of the arrest warrant is not involved." *See State v. Grijalva*, 1973-NMCA-061, 85 N.M. 127, 509 P.2d 894.

Paragraph D was added in 1990 to require in warrantless arrest cases that the defendant be given a copy of the criminal complaint prior to being transferred to the custody of a detention facility. Similar language was added to Rules 6-201, 7-201, and 8-201 NMRA. The right to a copy of the criminal complaint was added to Rule 5-210(D) NMRA and its counterparts to ensure that the defendant has notice of the criminal charges. A 2020 amendment to each of the applicable rules explicitly provides alternative remedies in the form of the dismissal of the complaint without prejudice or the defendant's release from custody where a lack of compliance with the complaint delivery requirement is shown to prejudice the defendant.

In 1991, the Supreme Court amended the criminal complaint form to delete the requirement that the complaint be sworn to before a notary or judicial officer before it is filed with the court. Law enforcement officers are required to swear or affirm under penalty of perjury that the facts set in the complaint are true to the best of their information and belief.

There is no absolute requirement that a copy of a criminal complaint be given to a defendant who, because of drugs, alcohol, or rage is unable to read and understand the

charges. Rather, it would be a better practice to place the complaint with other belongings of the defendant until such time as the defendant can understand the nature of the charges.

This rule does not provide a precise definition as to the point in time at which a defendant is deemed to have been transferred to the custody of a detention facility. Nothing in these rules prevents the police from briefly detaining a defendant in a detention facility pending completion of preliminary police investigatory procedures so long as the police have not transferred jurisdiction to release the defendant to the detention facility. The police, however, must be free to release the defendant if, after the preliminary investigation and screening, charges are not filed.

The defendant has a number of rights prior to arraignment or first appearance. These preliminary rights include

(a) The statutory right to 3 telephone calls within 20 minutes after detention; NMSA 1978, § 31-1-5 (1973);

(b) In warrantless arrest and detention cases, the right to be given a copy of the criminal complaint prior to transfer to custody of a detention facility; and

(c) In warrantless arrest and detention cases, the constitutional right to a prompt probable cause determination. *See* Rule 5-301 and comm. cmt.

The court may dismiss criminal charges for denying an accused the right to three (3) telephone calls, the right to a copy of the criminal complaint, or the right to a prompt probable cause determination if the court finds that the denial of one of these rights resulted in prejudice to the defendant or if the court finds that the law enforcement officers acted in bad faith. *See State v. Bearly*, 1991-NMCA-022, 112 N.M. 50, 811 P.2d 83; *see also State v. Gibby*, 1967-NMSC-219, 78 N.M. 414, 432 P.2d 258.

[As revised, effective November 1, 1991; as amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

## 5-211. 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, an Indian tribal or pueblo law enforcement officer, or a civil officer of the United States authorized to enforce or assist in enforcing any federal law. The warrant shall state the date and time it was issued by the judge and shall contain or have attached the sworn written statement of facts showing probable cause for its issuance and the name of any person whose sworn written statement has been taken in support of the warrant. A search warrant shall direct that it be served between the hours of 6:00 a.m. and 10:00 p.m., according to local time, unless the issuing judge, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time.

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

D. **Return.** The return of the warrant, or any duplicate original, shall be made promptly after execution of the warrant. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if the person is present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer and the person 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 on substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

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

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

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

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

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

(1) Before ruling on a request for a warrant the judge may require the affiant to appear personally, telephonically, or by audio-video transmission and may examine under oath the affiant and any witnesses the affiant may produce, provided that any additional evidence shall be reduced to writing, supported by oath or affirmation, and served with the warrant.

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

(3) If the judge issues the warrant remotely, it shall be transmitted by reliable electronic means to the affiant and the judge shall file a duplicate original with the court. Upon the affiant's acknowledgment of receipt by electronic transmission, the electronically transmitted warrant shall serve as a duplicate original and the affiant is authorized, but not required, to write the words "duplicate original" on the transmitted copy. The affiant may request that the duplicate original warrant filed by the judge be sealed or lodged in accordance with Rule 5-123 NMRA.

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

[As amended, effective October 1, 1974 and July 1, 1980; as amended by Supreme Court Order No. 12-8300-016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

**Committee commentary.** — This rule is patterned after Rule 41 of the Federal Rules of Criminal Procedure.

For other court rules governing issuance, etc., of search warrants by the magistrate, metropolitan, or municipal court, *see* Rules 6-208, 7-208, and 8-207 NMRA. These rules are substantially identical and are based on the New Mexico constitutional requirements. *See* N.M. Const., Art. 2, § 10. The court rules replaced the former search warrant statute, repealed in 1972. *See* N.M. Laws 1967, ch. 245, §§ 1 and 2, formerly compiled as 41-18-1 and 41-18-2, 1953 Comp.

“Property” in Paragraph A of this rule is defined in Rule 41(h) of the Federal Rules of Criminal Procedure “to include documents, books, papers and any other tangible objects.” The committee is of the opinion that this would include such things as blood, fingerprints, and handwriting samples. *See Sanchez v. Attorney General*, 1979-NMCA-081, 93 N.M. 210, 598 P.2d 1170.

As amended in 1979, this rule provides a procedure for the obtaining of a search warrant to conduct a search of premises for a person even when a warrant is not required. As stated in the advisory committee note to Rule 41 of the Federal Rules of Criminal Procedure:

> That part of the amendment which authorizes issuance of a search warrant to search for a person unlawfully restrained is consistent with ALI Model Code of Pre-Arraignment Procedure § SS 210.3(1)(d) (Proposed Official Draft, 1975), which specifies that a search warrant may issue to search for ‘an individual * * * who is unlawfully held in confinement or other restraint.’ As noted in the Commentary thereto, *id.* at p. 507: “Ordinarily such persons will be held against their will and in that case the persons are, of course, not subject to ‘seizure.’ But they are, in a sense, ‘evidence’ of crime, and the use of search warrants for these purposes presents no conceptual difficulties.”

In *United States v. Watson*, 423 U.S. 411, 96 S. Ct. 820, 46 L. Ed. 2d 598 (1976), the Court alluded to “the still unsettled question” of whether, absent exigent circumstances, officers acting without a warrant may enter private premises to make an arrest. Some courts have indicated that probable cause alone ordinarily is sufficient to support an arrest entry, *United States v. Fernandez*, 480 F.2d 726 (2d Cir. 1973); *United States ex rel. Wright v. Woods*, 432 F.2d 1143 (7th Cir. 1970). There exists some authority, however, that except under exigent circumstances a warrant is required to enter the defendant's own premises, *United States v. Calhoun*, 542 F.2d 1094 (9th Cir. 1976); *United States v. Lindsay*, 506 F.2d 166 (D.C. Cir. 1974); *Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1970), or, at least to enter the premises of a third party, *Virgin Islands v. Gereau*, 502 F.2d 914 (3d Cir. 1974); *Fisher v. Volz*, 486 F.2d 333 (3d Cir. 1974); *Huotari v. Vanderport*, 380 F. Supp. 645 (D. Minn. 1974).

A warrant must be served between the hours of 6:00 a.m. and 10:00 p.m. unless for reasonable cause shown the issuing judge authorizes the execution at any time. The time periods designated were taken from the definition of “day time” in Rule 41(h) of the Federal Rules of Criminal Procedure.

Paragraph C requires the officer seizing property under the warrant to leave a copy of the affidavit for search warrant, the search warrant, and the inventory at the place from which the property was taken. In *State v. Malloy*, 2001-NMCA-067, 131 N.M. 222, 34 P.3d 611, the State moved to seal affidavits for search warrants in a sexual exploitation of children investigation. The district court ordered the narrative portions of the affidavits be partially and temporarily sealed in order to protect the ongoing investigation and the

identity of the alleged victims. *Id.* ¶ 2. Upon execution, law enforcement delivered copies of the search warrants with the sealed portions redacted to the defendant. *Id.* ¶¶ 3-4. The Court of Appeals held that "the requirement of delivery of the affidavit for search warrant is ministerial and, without a showing of prejudice to the defendant, suppression is not warranted." *Id.* ¶ 1.

Paragraph E of this rule was derived in part from Rule 41(c) of the Federal Rules of Procedure. On the use of hearsay evidence to establish probable cause, *see State v. Perea*, 1973-NMCA-123, 85 N.M. 505, 513 P.2d 1287. *See also*, 48 F.R.D. 553, 630 (1970).

Uncorroborated information given by an unknown informant to support an affidavit for probable cause may be found to be reliable if the information is personal to the informant and other information given by the informant has been corroborated by information supplied by a reliable confidential informant. *State v. Turkal*, 1979-NMSC-071, 93 N.M. 248, 599 P.2d 1045.

The tests for evaluating the supporting affidavit for probable cause were set forth in *Perea*, 1973-NMCA-123, ¶¶ 5-8: (1) technical requirements of elaborate specificity are not required; (2) any inferences to be drawn from statements of the affiant must be drawn by the judge and not the police officer; (3) affidavits are tested by less rigorous standards than those governing the admissibility of evidence at trial; and (4) where affiant is relying on an informant, the affidavit must set forth some of the underlying circumstances supporting the affiant's conclusion that the information is credible or reliable. Only a probability of criminal conduct need be established and common sense should control the magistrate's determination of probable cause, which should be shown great deference by the reviewing court. *State v. Bowers*, 1974-NMCA-135, 87 N.M. 74, 529 P.2d 300. *See also State v. Alderete*, 1975-NMCA-058, 88 N.M. 14, 536 P.2d 278.

As in the federal rule, any additional evidence received by the court when the affiant appears personally must be made a part of the facts showing probable cause. In addition, under this rule, the additional evidence must be reduced to writing and sworn to in order to comply with the constitutional requirement of a "written showing of probable cause."

For cases showing examples of the sufficiency of descriptions in warrants, *see State v. Ferrari*, 1969-NMSC-146, 80 N.M. 714, 460 P.2d 244 (instrumentalities of the crime in a murder case); *State v. Sero*, 1970-NMCA-102, 82 N.M. 17, 474 P.2d 503 (sufficiency of the description of the place to be searched); *State v. Quintana*, 1975-NMCA-034, 87 N.M. 414, 534 P.2d 1126, cert. denied, 88 N.M. 29, 536 P.2d 1084, cert. denied, 423 U.S. 832, 96 S. Ct. 54, 46 L. Ed. 2d 50 (1975) (sufficiency of description of controlled substances).

Absent a showing of prejudice, defects in the return of service will not invalidate the warrant. *See State v. Wise*, 1977-NMCA-074, 90 N.M. 659, 567 P.2d 970, cert. denied,

91 N.M. 4, 569 P.2d 414 (1977); *State v. Baca*, 1974-NMCA-098, 87 N.M. 12, 528 P.2d 656, cert. denied, 87 N.M. 5, 528 P.2d 649 (1974).

In 2012, Paragraphs F and G were added to permit multiple methods for requesting and issuing warrants. Beyond the traditional in-person submission of a written affidavit and proposed warrant, Paragraph F permits requesting a search warrant through oral testimony in the presence of the judge or by submission of the affidavit and proposed search warrant in person, over the telephone, by fax, by email, or by other electronic means. A judge is not required to accept requests for warrants by alternative methods, but, if the judge decides to do so, the judge must ensure that any oath or affirmation administered by remote means is done in a way that allows the judge to confirm the identity of the affiant. For example, the oath or affirmation may be accomplished by audio-visual means that allows the judge to see the person to whom the oath or affirmation is administered. Or the oath or affirmation may be accomplished by telephone or other audio method if done in a way that allows the judge to confirm identity, such as by having the call made through a known law enforcement telephone number with a verifiable badge number given by the officer requesting the warrant. *See, e.g.*, Rule 11-901(A) NMRA. If the judge accepts a request for warrant by remote means, the judge must ensure that the sworn statement of facts offered in support of the warrant is reduced to writing to be served along with the warrant. And if the judge issues the warrant by remote means, the judge must file a duplicate original warrant with the court and the affiant may request that the warrant and affidavit be sealed upon an adequate showing under Rule 5-123 NMRA. Paragraph B was amended to require that the warrant include the date and time of its issuance. All duplicate originals shall reflect the date and time as indicated by the judge. Any signatures required under this rule by the judge or affiant may be by original signature, a copy of an original signature, a computer generated signature, or any other signature otherwise authorized by law. *See, e.g.*, NMSA 1978, Sections 14-15-1 to -6 (Electronic Authentication of Documents Act); Rule 5-103.2(D) NMRA (recognizing possibility for future electronic filing of documents in criminal cases).

[As amended by Supreme Court Order No. 12-8300-016, effective for all cases pending or filed on or after June 29, 2012; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017.]

## 5-212. Motion to suppress.

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

B. **Suppression of other evidence.** A person aggrieved by a confession, admission or other evidence may move to suppress such evidence.

C. **Time for filing.** A motion to suppress shall be filed no less than sixty (60) days prior to trial, unless, upon good cause shown, the trial court waives the time

requirement. Any motion to suppress filed prior to trial shall be decided prior to trial to preserve the state's right to appeal any order suppressing evidence.

D. **Hearing.** The court shall receive evidence on any issue of fact necessary to the decision of the motion. If a motion pursuant to Paragraph A of this rule is granted, the property shall be returned, unless otherwise subject to lawful detention.

[As amended by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013.]

**Committee commentary.** — For the general rule governing motions, *see* Rule 5-601 NMRA.

The aggrieved person under Paragraphs A and B of this rule is the person who has standing to raise the issue. *See State v. Nemrod*, 85 N.M. 118, 509 P.2d 885 (Ct. App. 1973), and *State v. Torres*, 81 N.M. 521, 469 P.2d 166 (Ct. App. 1970).

The motion under Paragraph B of this rule is used to suppress or exclude evidence obtained in violation of any constitutional rights, not only that obtained by an unlawful search and seizure. *See e.g.*, *State v. Harrison*, 81 N.M. 324, 466 P.2d 890 (Ct. App. 1970) (motion to exclude lineup identification).

Paragraph B was amended in 2012 in response to *City of Santa Fe v. Marquez*, 2012-NMSC-031, 285 P.3d 637. Marquez held prospectively "that Rule 5-212(C) requires that motions to suppress be filed before trial and that the district court must adjudicate suppression issues before trial, absent good cause." *Id.* ¶ 28. If a suppression issue is untimely raised, the trial judge may order a continuance in order to ascertain whether there is good cause for the late filing. Examples of good cause may include, but are not limited to, failure of the prosecution to disclose evidence relevant to the motion to suppress to the defense prior to trial, failure of either party to provide discovery, or the discovery of allegedly suppressable evidence during the course of the trial. If good cause is shown, the judge may excuse the late filing and hold a hearing pursuant to Paragraph D. Absent good cause shown, the judge may deny the motion for failure to comply with the rule. If the motion to suppress is granted, the court may declare a mistrial.

At a hearing on a motion to suppress, the Rules of Evidence, except for the rules on privileges, do not apply. *See* Paragraph A of Rule 11-104 NMRA and Subparagraph (1) of Paragraph D of Rule 11-1101 NMRA. For example, hearsay evidence is admissible. *United States v. Matlock*, 415 U.S. 164, 94 Sup. Ct. 988, 39 L. Ed. 2d 242 (1974).

[As amended by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013.]

# ARTICLE 3
# Pretrial Proceedings

## 5-301. Arrest without warrant; probable cause determination; first appearance.

A. **General rule.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release. The probable cause determination shall be made by a magistrate, metropolitan, or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier. The court may not extend the time for making a probable cause determination beyond forty-eight (48) hours. Saturdays, Sundays, and legal holidays shall be included in the forty-eight (48) hour computation, notwithstanding Rule 5-104(A) NMRA.

B. **Conduct of determination.** The determination that there is probable cause shall be nonadversarial and may be held in the absence of the defendant and of counsel. No witnesses shall be required to appear unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause. If the complaint and any attached statements fail to make a written showing of probable cause, an amended complaint or a statement of probable cause may be filed with sufficient facts to show probable cause for detaining the defendant.

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

(1) ***No probable cause found.*** If the court finds that there is no probable cause to believe that the defendant has committed an offense, the court shall order the immediate personal recognizance release of the defendant from custody pending trial.

(2) ***Probable cause found.*** If the court finds that there is probable cause that the defendant committed an offense, the court shall make such finding in writing. If the court finds probable cause, the court shall review the conditions of release. If no conditions of release have been set and the offense is a bailable offense, the court may set conditions of release immediately or within the time required under Rule 5-401 NMRA.

D. **First appearance; explanation of rights.** Upon the first appearance of a defendant before a court in response to summons or warrant or following arrest, the court shall inform the defendant of the following:

(1) the offense charged;

(2) the penalty provided by law for the offense charged;

(3) the right to bail or the possibility of pretrial detention;

(4) the right, if any, to trial by jury;

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

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

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

(8) the right, if any, to a preliminary examination.

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order No. 13-8300-041, effective for all cases pending and filed on or after December 31, 2013; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020.]

**Committee commentary.** — Paragraphs A through C of this Rule address probable cause for pretrial detention under the Fourth Amendment to the United States Constitution, rather than probable cause for prosecution under Article II, Section 14 of the New Mexico Constitution. This rule will govern those cases in which all of the magistrate or metropolitan court judges are unavailable for probable cause determinations or for first appearance proceedings. If a magistrate or metropolitan judge is not available, a district court judge will make probable cause determinations for all persons arrested for felonies or misdemeanors. Since most persons accused of a crime will be taken before a magistrate or metropolitan court for the initial appearance, Rules 6-203 and 7-203 NMRA govern probable cause determinations in the courts of limited jurisdiction.

Under the Fourth Amendment to the United States Constitution, an accused who is detained and unable to meet conditions of release has a right to a probable cause determination. *See Gerstein v. Pugh*, 420 U.S. 103 (1975); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991); *see also* Rule 5-210 NMRA and committee commentary. In *Gerstein*, the Supreme Court explained that when a suspect is arrested and detained without a warrant, there must be a judicial determination of probable cause by a neutral and detached magistrate "promptly after arrest." 420 U.S. at 125. In *Riverside*, the court held:

Taking into account the competing interests articulated in *Gerstein*, we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of

arrest will, as a general matter, comply with the promptness requirement of *Gerstein*. For this reason, such jurisdictions will be immune from systemic challenges.

This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake. In evaluating whether the delay in a particular case is unreasonable, however, courts must allow a substantial degree of flexibility. Courts cannot ignore the often unavoidable delays in transporting arrested persons from one facility to another, handling late-night bookings where no magistrate is readily available, obtaining the presence of an arresting officer who may be busy processing other suspects or securing the premises of an arrest, and other practical realities. Where an arrested individual does not receive a probable cause determination within 48 hours, the calculus changes. In such a case, the arrested individual does not bear the burden of proving an unreasonable delay. Rather, the burden shifts to the government to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a particular case it may take longer than 48 hours to consolidate pretrial proceedings does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends. A jurisdiction that chooses to offer combined proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest.

* * *

Under *Gerstein*, jurisdictions may choose to combine probable cause determinations with other pretrial proceedings, so long as they do so promptly. This necessarily means that only certain proceedings are candidates for combination. Only those proceedings that arise very early in the pretrial process-such as bail hearings and arraignments-may be chosen. Even then, every effort must be made to expedite the combined proceedings.

500 U.S. at 56-58.

There is every reason to believe that the standard set forth in the Riverside decision will be strictly construed by the federal courts. All federal circuit courts except one has held that *Gerstein* requires that the probable cause determination must ordinarily be made within twenty-four hours of arrest. For a discussion of these cases, see the dissenting opinion of Justice Scalia in *Riverside*, 500 U.S. at 63.

A probable cause determination proceeding is not to be confused with a first appearance hearing or a preliminary hearing. The determination of probable cause for detention is not required to be an adversarial proceeding and may be held in the absence of the defendant and of counsel. *See Gerstein*, 420 U.S. at 119-22 (concluding that a probable cause determination does not need to be "accompanied by the full

panoply of adversary safeguards—counsel, confrontation, cross- examination, and compulsory process for witnesses").

Prior to amendments in 2013, Paragraph C of this Rule required the court to dismiss the complaint without prejudice if the court found no probable cause. However, as explained supra, the sole purpose of a probable cause for detention determination is to decide "whether there is probable cause for detaining the arrested person pending further proceedings." *Gerstein*, 420 U.S. at 120 (emphasis added). Accordingly, in 2013, this Rule was amended to clarify that a court should not dismiss the criminal complaint against the defendant merely because the court has found no probable cause for detention.

New Mexico statute also requires that every "accused shall be brought before a court having jurisdiction to release the accused without unnecessary delay." NMSA 1978, § 31-1-5(B) (1973). This language was apparently derived from Rule 5(a) of the Federal Rules of Criminal Procedure. *See generally* 1 *Wright, Federal Practice and Procedure*, § 74 (1969).

The committee did not set forth a test for probable cause determinations as this is a matter of developing case law. The test for probable cause determinations under the New Mexico Constitution for arrest and search warrants based upon information from informants is a higher standard than the United States Supreme Court "totality of circumstances" test under the Fourth Amendment of the United States Constitution. *See Massachusetts v. Upton*, 466 U.S. 727, 732 (1984); *Illinois v. Gates*, 462 U.S. 213, 238 (1983). New Mexico has continued to follow the United States Supreme Court decisions of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969), out of which was derived a two-pronged test of: (1) revealing the informant's basis of knowledge; and (2) providing facts sufficient enough to establish the reliability or veracity of the informant. *See State v. Cordova*, 1989-NMSC-083, 109 N.M. 211, 784 P.2d 30.

This rule does not attempt to spell out what rights the accused may have in every situation; hence, for example, the rule provides that the accused is told of his right "if any" to a trial by jury. On the right to a jury trial for criminal contempt, *see Bloom v. Illinois*, 391 U.S. 194 (1968) and *Taylor v. Hayes*, 418 U.S. 488 (1974).

The right to assistance of counsel at every critical stage of the proceeding is fairly clear under New Mexico practice and procedure. *See State v. Padilla*, 2002-NMSC-016, ¶ 11, 132 N.M. 247, 46 P.3d 1247 ("There is no dispute that a criminal defendant charged with a felony has a constitutional right to be present and to have the assistance of an attorney at all critical stages of a trial. U.S. Const. amends. VI and XIV; N.M. Const. art II, § 14."); *see also* NMSA 1978, § 31-15-10(B) (2001). The only question remaining for the judge handling the first appearance is whether the accused is entitled to representation at state expense. The court must inform a person who is charged with any crime that carries a possible sentence of imprisonment and who appears in court without counsel of the right to confer with an attorney, and, if the person is financially

unable to obtain counsel, of the right to be represented by counsel at all stages of the proceedings at public expense. *See* NMSA 1978, § 31-15-12 (1993); *see also Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding "that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Smith v. Maldonado*, 1985-NMSC-115, ¶ 10, 103 N.M. 570, 711 P.2d 15 (same).

Assuming that the accused is appearing before the court on a felony complaint, the defendant is entitled to be advised of the right to a preliminary hearing to determine probable cause for prosecution. *See* N.M. Const. art. II, § 14.

[As revised, effective November 1, 1991; as amended by Supreme Court Order No. 13-8300-042, effective for all cases pending and filed on or after December 31, 2013.]

## 5-302. Preliminary examination.

A. **Time.**

(1) ***Time limits.*** A preliminary examination shall be scheduled and held with a disposition entered, unless an extension under Subparagraph (A)(2) of this rule is granted, within a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no later than sixty (60) days if the defendant is not in custody, of whichever of the following events occurs latest:

(a) the first appearance;

(b) the first appearance after the refiling of a case previously dismissed by the prosecutor;

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

(d) if the defendant is arrested or surrenders on any warrant, the date the defendant is returned to the court;

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

(f) if the defendant is not arrested on a bench warrant, the date the conditions of release are revoked under Rule 5-403 NMRA, which results in the defendant's continued detention.

(2) ***Extensions.*** On a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant

does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only on a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. An extension for exceptional circumstances shall not exceed sixty (60) days. The time enlargement provisions in Rule 5-104 NMRA do not apply to a preliminary examination.

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

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

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

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

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

(4) ***Cross-examination.*** The witnesses shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses. The court may allow witnesses to appear by two-way audio-visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge.

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

C. **Record of examination.** 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.

D. **Findings of court.**

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

(2) If the court finds that there is probable cause to believe that the defendant committed an offense, it shall bind the defendant over for trial.

E. **Remand for preliminary examination.** The court may remand the case to the magistrate or metropolitan court for a preliminary examination unless a motion for pretrial detention has been filed or a preliminary examination has been previously conducted in the magistrate or metropolitan court.

[As amended, effective June 1, 1999; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022.]

**Committee commentary.** — This rule governs preliminary examinations held in the district court. Most preliminary examinations will be held by the magistrate or metropolitan court and will be governed by Rule 6-202 NMRA or Rule 7-202 NMRA. The magistrate and metropolitan court rules are substantially identical to this rule.

If a preliminary examination is commenced within the time limits of Subparagraph (A)(1) of this rule, but completion of the hearing requires extension into a second day that falls outside the time limits, the district court may grant an extension to complete the disposition of the preliminary examination under Subparagraph (A)(2) of this rule. The district court may extend the time limits for commencing and holding a preliminary examination if the defendant does not consent only on a showing of exceptional circumstances beyond the control of the state or the court. "'Exceptional circumstances,' . . . would include conditions that are unusual or extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately preceding the commencement of the trial; or other circumstances that ordinary experience or prudence would not foresee, anticipate, or provide for." *See* Committee commentary to Rules 6-506 and 7-506 NMRA.

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

If the court dismisses a criminal charge for failure to comply with the time limits in Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal is without prejudice, and the state may later prosecute the defendant for

the same offense by filing either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M. 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d 1387 (explaining that, following dismissal of an indictment, "the State can choose whether to proceed by indictment or information"); *State v. Isaac M.*, 2001-NMCA-088, ¶ 14, 131 N.M. 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude "multiple attempts to show probable cause" because "it is settled law that jeopardy does not attach pretrial"). *Cf.* Fed. R. Crim. P. 5.1(f) ("If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.").

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

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

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

Additionally, the Rules of Evidence remain generally applicable to preliminary examinations, subject to specific exceptions for certain types of evidence not admissible at trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the "Rules of Evidence generally govern proceedings in preliminary examinations," but explaining that Rule 6-608(A) NMRA, which was amended and recompiled as Rule 6-202.1 NMRA in 2022, "provides a specific exception to our hearsay rule for admissibility" of certain types of written laboratory reports).

The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-examine the state's witnesses. Thus, although Rules 5-302.1, 6-202.1, and 7-

202.1 NMRA may permit the state to use a laboratory report at a preliminary examination without calling the laboratory analyst as a witness, the defendant retains the right “to call witnesses to testify as to the matters covered in the report.” Rule 6-202.1(F) NMRA; accord Rule 7-202.1(F) NMRA. And the preliminary examination remains “a critical stage of a criminal proceeding” at which “counsel must be made available to the accused.” *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

Paragraph E of this rule was added in 1980. The contents of this paragraph were formerly found in Rule 5-601(C) NMRA.

Subparagraph (B)(4) of this rule allows for witnesses to appear by audio-visual communication under compelling circumstances. For the purposes of this subparagraph, compelling circumstance may include a witness who resides out of state or is too ill or injured to appear in person. The judge in these proceedings will have the discretion to decide what rises to the level of compelling circumstances for witnesses requesting to appear by audio-visual communication.

[Amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014; amended by Supreme Court Order No. 17-8300-016, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 22-8300-022, effective for all cases pending or filed on or after December 31, 2022.]

## 5-302.1. Exceptions to rules of evidence for preliminary examinations.

A. **Exceptions to hearsay rule.** In any preliminary examination, the following categories of evidence are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) a recording or transcript of a forensic interview of a minor or incompetent victim conducted at a safe house; or

(2) a written report of the conduct and results of a laboratory analysis of a human specimen or a controlled substance enumerated in Sections 30-31-6 to -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, if the report is of an analysis conducted by

(a) the New Mexico State Police crime laboratory;

(b) the scientific laboratory division of the Department of Health;

(c) the Office of the Medical Investigator; or

(d) a laboratory certified to accept human specimens for the purpose of performing laboratory examinations under the federal Clinical Laboratory Improvement Act of 1988.

B. **Exception to authentication rule.** In any preliminary examination, a proffer by counsel is sufficient to meet the authentication and identification requirements of Rule 11-901(A) NMRA with regard to a recording or transcript of a 911 emergency call or a transcript of the computer-aided dispatch (CAD) incident report.

C. **Exception for controlled substance field tests.** In any preliminary examination, the results of a field test conducted for the detection of controlled illegal substances shall not be excluded based on objections to the scientific accuracy or reliability of the field test.

D. **Certification.** Evidence admitted under the exceptions established by Subparagraph (A)(2) of this rule must include a certification form approved by the Supreme Court.

E. **Copies.** A legible copy of the certification form and report must be mailed to the defendant or the defendant's counsel at least four (4) days before the preliminary examination if the defendant is in custody and at least ten (10) days before the preliminary hearing if the defendant is not in custody.

F. **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 this report, nor affect the admissibility of any evidence other than this report.

[Adopted by Supreme Court Order No. 22-8300-023, effective for all cases pending or filed on or after December 31, 2022.]

**Committee commentary.** — Rule 11-803(4) NMRA excepts statements made for and reasonably pertinent to medical diagnosis or treatment from the rule against hearsay, regardless of whether the declarant is available as a witness. This exception includes statements made to a Sexual Assault Nurse Examiner (SANE) for medical diagnosis or treatment. The committee did not include statements made to a SANE or other medical professional in the exceptions established by this rule because those statements are already addressed by Rule 11-803(4) NMRA.

Additionally, Rule 11-803(2) NMRA excepts statements considered excited utterances from the rule against hearsay, regardless of whether the declarant is available as a witness. The committee did not include those statements in the exceptions established by this rule because those statements are already addressed by Rule 11-803(2) NMRA. The exception in Paragraph B of this rule allows for authentication of the 911 recording

or CAD transcript without calling a dispatcher or other police employee to testify to lay that foundation.

[Adopted by Supreme Court Order No. 22-8300-023, effective for all cases pending or filed on or after December 31, 2022.]

## 5-302.2. Grand jury proceedings.

A. **Timing upon filing of criminal complaint.**

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

(a) the first appearance;

(b) the first appearance after the refiling of a case previously dismissed by the prosecutor;

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

(d) if the defendant is arrested or surrenders on any warrant, the date the defendant is returned to the court;

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

(f) the date the conditions of release are revoked or modified under Rule 5-403 NMRA, that result in the defendant's continued detention or release.

(2) ***Extensions*.** On a showing of good cause, the court may extend the time limits for holding a grand jury proceeding or preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only on a showing on the record that exceptional circumstances beyond the control of the state or the court exist and justice requires the delay. An extension for exceptional circumstances shall not exceed sixty (60) days. The time enlargement provisions in Rule 5-104 NMRA do not apply to a preliminary examination or grand jury proceeding.

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

B. **Notice to target; timing.**

(1) ***Content.*** The prosecuting attorney assisting the grand jury shall notify the target of a grand jury investigation in writing that the person is the target of an investigation. The writing shall notify the target of

(a) the nature of the alleged crime being investigated;

(b) the date of the alleged crime;

(c) any applicable statutory citations;

(d) the target's right to testify;

(e) the target's right not to testify;

(f) the target's right to submit exculpatory evidence to the district attorney for presentation to the grand jury; and

(g) the target's right to the assistance of counsel during the grand jury investigation.

Target notices shall be substantially in the form approved by the Supreme Court.

(2) ***Notice and time.*** A prosecuting attorney shall use reasonable diligence to notify a person in writing that the person is a target of a grand jury investigation. The target and the target's attorney shall be notified in writing no later than four (4) business days before the scheduled grand jury proceeding if the target is incarcerated. The target and the target's attorney shall be notified in writing no later than ten (10) business days before the scheduled proceeding if the target is not incarcerated.

(3) ***Notice not required.*** Notice shall not be required if, before the grand jury proceeding, the prosecuting attorney secures a written order of the grand jury judge determining by clear and convincing evidence that notification may result in flight by the target, result in obstruction of justice, or pose a danger to another person, other than the general public.

C. **Evidence.**

(1) ***Lawful, competent, and relevant evidence.*** All evidence presented shall be lawful, competent, and relevant, but the Rules of Evidence shall not apply.

(2) ***Exculpatory evidence.*** The prosecuting attorney shall alert the grand jury to all lawful, competent, and relevant evidence that disproves or reduces a charge or accusation or that makes an indictment unjustified and that is within the knowledge, possession, or control of the prosecuting attorney.

(3) ***Evidence and defenses submitted by target.*** If the target submits written notice to the prosecuting attorney of exculpatory evidence as defined in Subparagraph (2) of this paragraph, or a relevant defense, the prosecuting attorney shall alert the grand jury to the existence of the evidence.

(a) *Form of submission.* The target's submission shall consist of a factual and non-argumentative description of the nature of any tangible evidence and the potential testimony of any witnesses, along with the names and contact information of any witnesses necessary to provide the evidence. The target shall provide its submission to the prosecuting attorney by letter substantially in accordance with Form 9-219 NMRA ("Grand Jury Evidence Alert Letter").

(b) *Cover letter.* The target's submission to the prosecuting attorney shall be accompanied by a cover letter, which will not go to the grand jury. The cover letter may include proposed questions and should include any contextual information, any arguments about the propriety or significance of the requested evidence and defenses, and any other matters that may be helpful to the prosecutor or the grand jury judge.

(c) *Timing.* The target's written notice of evidence shall be provided to the prosecuting attorney no less than forty-eight (48) hours in advance of the scheduled grand jury proceeding.

(4) ***Review of prosecutor's decision not to alert grand jury to target's evidence or defenses.*** The prosecuting attorney assisting the grand jury may only be relieved of the duty to alert the grand jury to the target's evidence or defenses by obtaining a court order before the grand jury proceeding. The prosecuting attorney shall file a motion under seal with the grand jury judge, with written notice to the target, stating why the target's submitted evidence is not exculpatory as defined in Subparagraph (2) of this paragraph or stating why the grand jury should not be instructed on the target's requested defenses. A copy of the target's grand jury evidence alert letter and cover letter shall be attached to the motion. The target may file under seal a response to the motion, and, if no response is filed, the grand jury judge may ask the target for a written response, to be filed under seal, and may convene a hearing. The burden is on the prosecuting attorney to show that the proposed evidence is not exculpatory as defined in Subparagraph (2) of this paragraph. The grand jury judge will give the prosecuting attorney clear direction on how to proceed before the grand jury, making a record of the decision.

D. **Instructions to grand jury.**

(1) ***Elements and defenses.*** The prosecuting attorney who is assisting the grand jury shall provide the grand jurors with instructions setting forth the elements of each offense being investigated and the definitions of any defenses raised by the evidence.

(2) ***Other instructions.*** The prosecuting attorney shall provide the grand jury with other instructions which are necessary to the fair consideration by the grand jury of the issues presented.

E. **Record.** All proceedings in the grand jury room shall be recorded, but the deliberations of the grand jury shall not be recorded. Copies of any documentary evidence and any target's Grand Jury Evidence Alert Letter which was presented to the grand jury shall be made part of the record.

F. **Review by the district court.**

(1) ***Supervisory authority.*** The district court has supervisory authority over all grand jury proceedings.

(2) ***Scope of review.*** Failure to follow the procedures set forth in this rule shall be reviewable in the district court. The weight of the evidence on which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.

[Adopted by Supreme Court Order No. 10-8300-015, effective for target notices filed on or after May 14, 2010; as amended by Supreme Court Order No. 18-8300-004, effective April 23, 2018; 5-302A recompiled and amended as 5-302.2 by Supreme Court Order No. 22-8300-023, effective December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00024, effective for all cases pending or filed on or after December 31, 2023.]

**Committee commentary.** — The district court may extend the time limits for commencing and holding a grand jury proceeding if the defendant does not consent only on a showing of exceptional circumstances beyond the control of the state or the court. "'Exceptional circumstances,' . . . would include conditions that are unusual or extraordinary, such as death or illness of the judge, prosecutor, or defense attorney immediately preceding the commencement of the [proceeding]; or other circumstances that ordinary experience or prudence would not foresee, anticipate, or provide for." Rules 6-506 and 7-506 NMRA comm. cmt.

Under Subparagraph (C)(4) of this rule, the grand jury judge must carefully consider any filings in the case and consider the options before ruling on a prosecutor's request to be relieved of the duty to alert the grand jury to the target's evidence or defenses. The options available to the grand jury judge in considering a request under Paragraph (C)(4) include requesting a response from the defense, holding a hearing on the prosecutor's request or ruling on the request without a hearing.

There is no pre-indictment right of appeal from a decision of the grand jury judge under NMSA 1978, § 31-6-11(B) (2003). *See Jones v. Murdoch*, 2009-NMSC-002, ¶¶ 40-41, 145 N.M. 473, 200 P.3d 523. Nevertheless, "in an extreme case, a party may still seek review in [the Supreme] Court through an extraordinary writ proceeding." *Id*. ¶ 41. A

party seeking an extraordinary writ should be aware of “the high standard and discretionary nature associated with granting such relief” and the writ petition should be filed without undue delay. *See id.*

[Adopted by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013; 5-302A recompiled and amended as 5-302.2 by Supreme Court Order No. 22-8300-023, effective December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00024, effective for all cases pending or filed on or after December 31, 2023.]

## 5-302.3. Citizen grand jury proceedings.

A. **Citizen petition to convene a grand jury.** Under Article II, Section 14 of the New Mexico Constitution, the district court shall order a grand jury to convene on the filing of a petition to investigate criminal conduct or malfeasance proscribed by state law that is signed by not less than the greater of two-hundred (200) registered voters or two percent of the registered voters of the county. A petitioner may use Form 9-200 NMRA.

B. **Duties of the district court.** The district court must make both a factual determination that a citizen petition to convene a grand jury meets the procedural requirements of Article II, Section 14 and a legal determination that the petition seeks a legitimate inquiry into alleged criminal conduct or malfeasance proscribed by state law

(1) ***Verification of petition.*** The district court must verify the signatures contained in the petition. The district court may verify the signatures by any number of methods, including but not limited to:

(a) requiring each signatory to provide an address of record;

(b) verifying other identifying information such as dates of birth and social security numbers;

(c) a handwriting comparison by a qualified witness; or

(d) obtaining testimony from questionable signatories.

(2) ***Validity of petition.*** The petition to convene a grand jury must identify with reasonable specificity the alleged criminal conduct or unlawful malfeasance to be investigated. The district court must determine whether the petition seeks to investigate conduct that lies within the permissible scope of grand jury inquiry. If the petition does not reasonably specify alleged conduct that, if true, would warrant a true bill of indictment, the district court must deny the petition.

C. **Assistance of prosecuting attorney.** On the filing of the petition, the district court shall assign the district attorney or the district attorney’s assistants, unless

otherwise disqualified, to assist the district court in notifying the target of the grand jury petition and, if the grand jury is convened, in carrying out the duties of the grand jury.

D. **Notice to target; timing.** If a target of the potential grand jury investigation is identifiable in the citizen petition, the prosecuting attorney assisting the district court shall use reasonable diligence to notify the target in writing no later than thirty (30) days before the scheduled hearing on the validity of the petition. Target notices shall be substantially in the form approved by the Supreme Court. The writing shall notify the target of

(1) the existence of a citizen petition to convene a grand jury to investigate the target for an alleged crime;

(2) the nature of the crime alleged in the petition;

(3) the date of the alleged crime;

(4) any applicable statutory citations;

(5) the target's right to intervene;

(6) the target's right to testify in a subsequent grand jury proceeding;

(7) the target's right not to testify in a subsequent grand jury proceeding;

(8) the target's right to submit exculpatory evidence to the district attorney for presentation to the grand jury in a subsequent grand jury proceeding; and

(9) the target's right to the assistance of counsel during a subsequent grand jury investigation.

E. **Opportunity to intervene.** Before ruling on the validity of the grand jury petition, the district court shall permit any identifiable target of a grand jury investigation initiated by petition to intervene in the matter.

F. **Convening a citizen-petition grand jury.** If the district court determines both that the petition meets the procedural requirements of Article II, Section 14 and seeks to investigate reasonably specific alleged criminal conduct or unlawful malfeasance, the court shall convene a grand jury in accordance with Sections 31-6-1 to -15 NMSA 1978, unless the district court elects to submit the matter to a grand jury that has already been convened, and shall direct the grand jury to make inquiry into all potential violations of law described in the petition that the judge determines are proper subjects of grand jury investigation, under Section 31-6-9 NMSA 1978.

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. S-1-

RCR-2023-00023, effective for all cases pending or filed on or after December 31, 2023.]

**Committee commentary.** — In *Convisser v. Ecoversity*, 2013-NMSC-039, ¶ 1, 308 P.3d 125, the New Mexico Supreme Court held that "determining whether a grand jury petition is supported by the requisite number of 'registered voters' is a judicial function calling for the exercise of judicial discretion." Under Article II, Section 14 of the New Mexico Constitution, "a grand jury shall be ordered to convene by such judge upon the filing of a petition therefor signed by not less than the greater of two hundred registered voters or two percent of the registered voters of the county." The easiest way to verify whether a petition meets this requirement is to require signatories to provide an address. *See Convisser*, 2013-NMSC-039, ¶ 26 (stating that other states with citizen-initiated grand jury provisions most commonly verify signatories through the use of voter addresses). However, voters' addresses are not required. The district court may use other verification aids such as dates of birth, social security numbers, handwriting comparisons by qualified witnesses, or testimony from questionable signatories. *See id*. ¶ 27.

Paragraph B of this rule is consistent with New Mexico case law that requires a district court to determine whether a grand jury inquiry fits within the jurisdiction and scope of the grand jury regarding the substance of the allegation. *See Dist. Ct. of Second Jud. Dist. v. McKenna*, 1994-NMSC-102, ¶ 9, 118 N.M. 402, 881 P.2d 1387 ("[T]he petition to convene a grand jury must contain sufficient information to enable the court to determine whether the petitioners seek a legitimate inquiry into alleged criminal conduct or malfeasance of a public official or whether the petitioners seek nothing more than a witch hunt."); *Cook v. Smith*, 1992-NMSC-041, ¶ 14, 114 N.M. 41, 834 P.2d 418 ("[T]he district court must make, in the first instance, a determination of the legality of the proposed grand jury inquisition. . . . [I]t is sufficient that the petition on its face delimit an area of inquiry that colorably lies within the permissible scope of grand jury inquiry."). Subparagraph (B)(2) of this rule provides additional guidance to the district court on how to conduct that analysis under current case law.

On the filing of the petition to convene a grand jury, the district court shall assign the district attorney or the district attorney's assistants, unless otherwise disqualified, to assist the district court in notifying the target of the grand jury petition and, if the grand jury is convened, in carrying out the duties of the grand jury. *See* NMSA 1978, § 31-6-7(C) (2003). If a district attorney is disqualified for ethical reasons or other good cause under Paragraph C of this rule, the district attorney may appoint a practicing member of the state bar to act as special assistant district attorney who shall have authority to act only in the specific case or matter for which the appointment was made. *See* NMSA 1978, § 36-1-23.1 (1984). If the district attorney's office fails or refuses to act under Paragraph C of this rule, the attorney general is authorized to act on behalf of the state. *See* NMSA 1978, § 8-5-3 (1933).

[Adopted by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. S-1-

RCR-2023-00023, effective for all cases pending or filed on or after December 31, 2023.]

## 5-302A. Recompiled.

## 5-302B. Recompiled.

## 5-303. Arraignment.

A. **Arraignment.** The defendant shall be arraigned on the information or indictment within fifteen (15) days after the date of the filing of the information or indictment or the date of arrest, whichever is later. The defendant may appear at arraignment as follows:

(1) through a two way audio-visual communication in accordance with Paragraph I of this rule; or

(2) in open court.

If the defendant appears without counsel, the court shall advise the defendant of the defendant's right to counsel.

B. **Reading of indictment or information.** The district attorney shall deliver to the defendant a copy of the indictment or information and shall then read the complaint, indictment or information to the defendant unless the defendant waives such reading. Thereupon the court shall ask the defendant to plead.

C. **Bail review.** At arraignment, upon request of the defendant, the court shall evaluate conditions of release considering the factors stated in Rule 5-401 NMRA. If conditions of release have not been set, the court shall set conditions of release.

D. **Pleas.** A defendant charged with a criminal offense may plead as follows:

(1) guilty;

(2) not guilty; or

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

E. **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 the defendant's behalf.

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

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

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

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

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

(5) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(6) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms, including shipping, receiving, possessing or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(7) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act.

G. **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 of the defendant, defense counsel and the attorney for the government as to whether the defendant's willingness to plead guilty or no contest results from prior discussions between the attorney for the government and the defendant or the defendant's attorney.

H. **Record of proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or no contest, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

I. **Audio-visual appearance.** The arraignment or 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 the defendant's counsel are together in one room at the time of the first appearance before the court;

(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; and

(3) no plea is entered by the court except a plea of not guilty.

J. **Waiver of arraignment.** With the consent of the court, a defendant may waive arraignment by filing a written waiver of arraignment and plea of not guilty with the court and serving a copy on the state in time to give notice to interested persons. A waiver of arraignment shall not be filed and is not effective unless signed by the district court judge. A waiver of arraignment and entry of a plea of not guilty shall be substantially in the form approved by the Supreme Court.

[As amended, effective October 1, 1974; October 1, 1976; July 1, 1980; May 19, 1982; October 1, 1983; March 1, 1987; September 1, 1990; August 1, 1992; as amended by Supreme Court Order No. 06-8300-010, effective April 15, 2006; by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

**Committee commentary.** — Paragraphs A, B, D and E of this rule were included in this rule as originally adopted in 1972. Paragraphs A, B and E of this rule conformed to the then existing practice for New Mexico arraignments. By referring only to indictments and informations in Paragraph B of this rule, the rule tacitly acknowledges that misdemeanors will rarely be prosecuted on a complaint in the district court. However, the same procedure would be used for arraignment on a complaint.

Paragraph D of this rule, by eliminating the plea of not guilty by reason of insanity, introduced a change in New Mexico procedure. *See, e.g., State v. Wilson*, 85 N.M. 552, 514 P.2d 603 (1973). The elimination of this plea brought the New Mexico practice into line with the federal practice. *See generally* 1 Wright, Federal Practice and Procedure, § 176 (1969). However, under Rule 5-602 NMRA, the defendant must give notice of the defense of insanity at the arraignment or within twenty (20) days thereafter. *See also* Rule 12.2 of the Federal Rules of Criminal Procedure. 62 F.R.D. 271, 295-98 (1974).

Paragraph G of Rule 5-304 NMRA provides for an inquiry to determine the factual basis of any guilty plea.

Paragraph D of this rule also specifically allows the plea of no contest with the approval of the court. The provision was taken from Rule 11 of the Federal Rules of Criminal Procedure. *See generally* 1 Wright, Federal Practice and Procedure, § 177 (1969). Rule 11(b) of the Federal Rules of Criminal Procedure would add a provision that the court consider the views of the parties and the interests of the public before accepting a plea of no contest. *See* 62 F.R.D. 271, 275 (1974).

A plea of no contest is, for the purposes of punishment, the same as a plea of guilty. *North Carolina v. Alford*, 400 U.S. 25, 35-36 (1970); *cf. State v. Raburn*, 76 N.M. 681, 417 P.2d 813 (1966); *see generally* 62 F.R.D. 271, 277-78 (1974). Consequently, Paragraphs F and G of this rule require the court to give the defendant the same advice given when a plea of guilty is entered and also insure that the plea is voluntary. However, unlike the case in which the defendant pleads guilty, a court need not inquire into whether or not there is a factual basis for the no contest plea. *See* Paragraph G of Rule 5-304 NMRA.

Elimination of the inquiry into the factual basis for the no contest plea is consistent with the use of the plea where the defendant does not want to admit any wrongdoing. A defendant may want to avoid pleading guilty because a guilty plea can be introduced in subsequent litigation. Under Rule 11-410 NMRA, a plea of no contest is not admissible. (The Rules of Evidence contain an inconsistency, however, in that the no contest plea, declared inadmissible under Rule 11-410 NMRA, is declared to be not excluded by the hearsay rule under Paragraph V of Rule 11-803 NMRA.) The fact that the plea of no contest will not be admissible in subsequent litigation should be considered in the court's decision to approve the plea. *See generally*, 63 F.R.D. 271, 277-78, 286 (1974).

Paragraphs F, G and J, governing plea procedures, were added in 1974. They were taken from Rules 11(c), (d) and (g) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 275-86 (1974).

Paragraph F of this rule prescribes the advice the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. Except for Subparagraphs (5), (6) and (7), added in 1990 and 2007, the rule codifies the constitutional requirements set forth in *Boykin v. Alabama*, 395 U.S. 238 (1969). *See also Henderson v. Morgan*, 426 U.S. 637 (1976), holding that the trial judge must explain the nature of the charge of murder, i.e., the court must explain intent to kill to the defendant if intent to kill is an element of the offense, prior to acceptance of a plea of guilty. The trial judge may want to refer to essential elements in UJI Criminal, particularly when they have not been set forth in the accusatory pleading. Although it has been a common practice in New Mexico to also advise the defendant that he is giving up a right to appeal, that advice is not included in either the rule or in the approved form for a guilty plea proceeding. A guilty plea does not prevent an appeal in New Mexico. *Cf. State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Subparagraph (5), requiring the court to "warn" the defendant that a conviction could affect the defendant's immigration or naturalization status, was added in 1990. Subparagraphs (6) and (7), added in 2007, require the court to advise the defendant of certain limitations on the right to bear arms and sex offender registration requirements that might result depending on the crimes that are the subject of the plea. In 2009, Subparagraph (2) was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. *See Marquez v. Hatch*, 2009-NMSC-040, ¶ 13 (providing that "if the district court is aware of the defendant’s prior convictions that would require a sentence enhancement if subsequently requested by

the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant's sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information").

Paragraph G of this rule requires the court to determine that a plea of guilty or no contest is voluntary before accepting either plea. As noted above, Paragraph G of Rule 5-304 NMRA also requires that the court satisfy itself that there is a factual basis for a plea of guilty. Both of these requirements have been in the federal rules since 1966, and also have a basis in constitutional law. *See Santobello v. New York*, 404 U.S. 257 (1971). The court must not only inquire of the defendant, but must, "make a separate and distinct inquiry" of defense counsel and counsel for the government as to the existence of any agreement or discussions relative to the plea. *State v. Lucero*, 97 N.M. 346, 639 P.2d 1200 (Ct. App. 1981).

Finally, it should be noted that Paragraph H of this rule makes it clear that plea proceedings before the court must be on the record. *See Santobello*, 404 U.S. 257.

AUDIO-VISUAL ARRAIGNMENTS.

Paragraph I provides that a defendant may be arraigned by way of a two-way closed circuit audio-video communication between the defendant, his legal counsel and the court and the prosecutor. The committee assumes that proper equipment will be installed prior to conducting an audio-video arraignment pursuant to Paragraph I. Proper equipment includes a direct cable connection to the court's audio recording system to assure that a "record" is made of the arraignment.

*Right of Confrontation.*

Both the United States Constitution and the New Mexico Constitution guarantee a defendant the right to be present in the courtroom to confront his accusers. *See Illinois v. Allen*, 397 U.S. 337, 90 S. Ct. 1057, 25 L.Ed 2d 353 (1970).

Actual presence in the courtroom, however, is not always necessary. The right can be waived in misdemeanor cases by the accused's counsel. The defendant's presence is not required during a pretrial detention hearing. *See United States v. Zuccaro*, 645 F.2d 104, 106 (2d Cir. 1981) (*cert. denied*, 454 U.S. 823, 102 S. Ct. 110, 70 L.Ed2d 96 (1981)). The continued presence of an accused is not required if the accused voluntarily absents himself after the trial has commenced or if the accused engages in conduct which justifies his being excluded from the courtroom. *See* Rule 5-112 NMRA.

Although the general rule is that the accused has a right to a face to face confrontation, this rule is subject to policy or necessity considerations. *See State v. Tafoya*, 105 N.M. 117, 729 P.2d 1371 (Ct. App. 1986), finding that the right to face to face confrontation must give way when necessary to protect a child who is a victim of a sex offense from further mental or emotional harm. In *Tafoya*, the New Mexico Court of Appeals held that a defendant is "present" during a deposition when the defendant is in a control booth in constant contact with his attorney and can view all of the proceedings.

*Use of Audio-Video System during Arraignment Proceedings.*

The use of a two-way audio-video system to arraign a defendant while in jail is apparently becoming fairly common in many areas. Although the use of an audio-video system in which the defendant would participate in the trial from a hospital by use of a single television and a telephone by which he could communicate with counsel may be insufficient, *People v. Piazza*, 92 Misc.2d 813, 401 N.Y.S.2d 371 (1977), the conducting of an arraignment on felony charges via a closed circuit two-way audio-video system has been upheld. *Commonwealth of Pennsylvania v. Terebieniec*, 408 A.2d 1120 (1979).

*Guilty Plea.*

It is clear that a guilty plea cannot be accepted without a record showing that the defendant intelligently and voluntarily entered the plea. *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 170, 23 L. Ed. 2d 274 (1969). Paragraph I limits audio-video arraignments to those proceedings in which the defendant will have his rights explained and enter a plea of not guilty.

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

## 5-304. Pleas.

A. **Alternatives.**

(1) In general. The attorney for the state 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 attorney for the state will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. A judge who presides over any phase of a criminal proceeding shall not participate in plea discussions. A judge, or judge pro tempore, not presiding over the criminal proceeding, may be assigned to participate in plea discussions to assist the parties in resolving a criminal case in a manner that serves the interests of justice.

(2) With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right, on

appeal from the judgment, to review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

B. **Notice.** If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest it shall be reduced to writing substantially in the form approved by the Supreme Court. The court shall require the disclosure of the agreement in open court at the time the plea is offered and shall advise the defendant as required by Paragraph F of Rule 5-303 NMRA. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was instead made with the expectation that the state would only recommend a particular sentence or not oppose the defendant's request for a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

C. **Acceptance of plea.** If the court accepts a plea agreement that was made in exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement. If the court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court may inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement or that the court's judgment and sentence will embody a different disposition as authorized by law.

D. **Rejection of plea.** If the court rejects a 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 either party the opportunity to withdraw the agreement and advise the defendant that if the defendant persists in a 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. This paragraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

E. **Time of plea agreement procedure.** Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at such time, as may be fixed by the court.

F. **Inadmissibility of plea discussions.** Evidence of a plea of guilty, later withdrawn, 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.

G. **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.

H. **Form of written pleas.** A plea and disposition agreement or a conditional plea shall be submitted substantially in the form approved by the Supreme Court.

[As amended, effective August 1, 1989; January 15, 1998; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as provisionally amended by Supreme Court Order No. 22-8300-002, effective for all cases pending or filed on or after January 18, 2022.]

**Committee commentary.** — Paragraphs A through F of this rule provide for a "plea bargaining" procedure. They originally were taken verbatim from proposed Rule 11(e) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 276, 280-86 (1974). Prior to the adoption of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied with the interest of the individual district court judges. The propriety of judicial involvement had been questioned by the Supreme Court. *See State v. Scarborough*, 1966-NMSC-009, ¶ 14, 75 N.M. 702, 410 P.2d 732. By the adoption of this rule, the Court specifically eliminated all judicial involvement in the plea bargaining discussions. Under the rule as originally written, the judge's role was explicitly limited to acceptance or rejection of the bargain agreed to by counsel for the state, defense counsel, and defendant. *See generally* 62 F.R.D. 271, 283-84 (1974). Although not categorically abandoning this approach, the Court's 2022 provisional amendment to the rule temporarily allows for some limited judicial involvement in plea discussions in order to streamline the processing of criminal cases during the COVID-19 public health emergency. For the administrative order issued by the Court in conjunction with the order provisionally approving the rule amendments, *see* Supreme Court Order No. 22-8500-002.

Paragraph B of this rule requires the parties to reduce the agreement to writing. It may be held that the defendant was denied effective assistance of counsel if he is advised to plead guilty without a written plea agreement. *See State v. Lucero*, 97 N.M. 346, 351, 639 P.2d 1200, 1205 (Ct. App. 1981).

With the exception of Paragraph D of this rule, providing for withdrawal of the plea when the court rejects the plea bargain, this rule does not govern the withdrawal of a plea. Withdrawal of a voluntary plea is within the discretion of the court. *State v. Brown*, 33 N.M. 98, 263 P. 502 (1927); *Santobello v. New York*, 404 U.S. 257 (1971).

In *State v. Pieri*, 2009-NMSC-019, ¶ 29, 146 N.M. 155, 207 P.3d 1132, the Court overruled *Eller v. State*, 92 N.M. 52, 582 P.2d 824 (1978), and held that "if the court rejects a sentence recommendation or a defendant's unopposed sentencing request, and the defendant was aware that the court was not bound to those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea." But within the context of a plea that leads to a subsequent request by the state to enhance the sentence for the crime that was the subject of the plea, the Court in *Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, 146 N.M. 556, 212 P.3d 1110, held that if the defendant is not advised of the possible sentence enhancements at the time of the plea "the court should conduct a supplemental plea proceeding to advise the defendant

of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information."

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as amended by Supreme Court Order No. 16-8300-025, effective for all cases pending or filed on or after December 31, 2016; as provisionally amended by Supreme Court Order No. 22-8300-002, effective for all cases pending or filed on or after January 18, 2022.]

# ARTICLE 4
# Release Provisions

## 5-401. Pretrial release.

A. **Hearing.**

(1) ***Time.*** If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center;

(b) arraignment, if the defendant is not in custody; or

(c) if the defendant remains in custody pending a hearing under Rule 5-403(D) NMRA, then within three (3) days after the date of the initial hearing conducted under Rule 5-403 NMRA if the defendant is being held in the local detention center, or five (5) days after the date of the initial hearing conducted under Rule 5-403 NMRA if the defendant is not being held in the local detention center.

(2) ***Right to counsel.*** If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

(3) ***Local detention center; defined.*** A "local detention center" is one that is commonly used by the district court in the normal course of business and not necessarily within the territorial jurisdiction of the court.

B. **Right to pretrial release; recognizance or unsecured appearance bond.** Any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be ordered released pending trial on the defendant's personal recognizance or on the execution of an unsecured appearance bond in an amount set by the court. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community. The court may order execution of a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required under Paragraphs E and F of this rule.

C. **Factors to be considered in determining conditions of release.** In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction and the financial resources of the defendant. In addition, the court may take into account the available information about

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

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

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record about appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. **Non-monetary conditions of release.** In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify about the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner;

(11) submit to a drug test or an alcohol test on request of a person designated by the court;

(12) return to custody for specified hours after release for employment, schooling, or other limited purposes; and

(13) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. **Secured bond.** If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) ***Factors to be considered in setting secured bond.***

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) ***Types of secured bond.*** If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) *Percentage bond.* The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph M of this rule.

(b) *Property bond.* The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 5-401.1 NMRA.

(c) *Cash or surety bond.* The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash

of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph M of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; findings about secured bond.**

(1) ***Contents of order setting conditions of release.*** The written order setting conditions of release shall be provided to the defendant before release if the defendant is in custody or within three (3) days of the conditions of release hearing if the defendant is not in custody, and

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

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

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant, or otherwise obstructing justice.

(2) ***Written findings about secured bond.*** The court shall file written findings of the individualized facts justifying a secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Pretrial detention.**

(1) If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

(2) The court may schedule a detention hearing within the time limits set forth in Rule 5-409(F)(1) NMRA and give notice to the prosecutor and the defendant when the defendant is charged with a felony offense:

(a)involving the use of a firearm;

(b) involving the use of a deadly weapon resulting in great bodily harm or death; or

(c) which authorizes a sentence of life in prison without the possibility of parole.

(3) If the prosecutor does not file a motion for pretrial detention by the date scheduled for the detention hearing, the court shall treat the hearing as a pretrial release hearing under this rule and issue an order setting conditions of release.

H. **Case pending in district court; review of conditions of release.**

(1) ***Review.*** If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the initial conditions of release hearing. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is then released, the court shall state in the record the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) ***Work or school release.*** A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) ***Subsequent motion for review.*** The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. **Amendment of conditions.** The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

J. **Record of hearing.** A record shall be made of any hearing held by the district court under this rule.

K. **Cases pending in magistrate, metropolitan, or municipal court; petition for release or review by district court.**

(1) ***Case within magistrate, metropolitan, or municipal court trial jurisdiction.*** A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has reviewed the conditions of release and made a requisite ruling under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G) NMRA. The defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order after the review of the conditions of release.

(2) ***Felony case.*** A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the defendant's arrest.

(3) ***Petition; requirements.*** A petition under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(4) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** On the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court,

unless the case is dismissed or a finding of no probable cause is made. The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) ***District court review.*** The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(a) set a hearing no later than ten (10) days after the filing of the petition and promptly send a copy of the notice to the magistrate, metropolitan, or municipal court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(6) ***District court order; transmission to magistrate, metropolitan, or municipal court.*** The district court shall promptly send to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

M. **Return of cash deposit.** If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

N. **Release from custody by designee.** The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody before the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to

serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

O. **Bind over to district court.** For any case that is not within magistrate or metropolitan court trial jurisdiction, on notice to that court, any bond shall be transferred to the district court on the filing of an information or indictment in the district court.

P. **Evidence.** Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

Q. **Forms.** Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

R. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

**Committee commentary.** — This rule provides "the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution." *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community, and (2) to require the pretrial release of a defendant who is in custody solely because of financial inability

to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142.

This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, *see* Rule 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5-104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5-409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that any release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions before a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination on whether the defendant can afford to pay all or a part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant because of financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 ("[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court."); *see also* NMSA 1978, § 31-3-2(B)(2) (1993) (authorizing the forfeiture of bond on the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release."); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court "is 'excessive' under the Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 of the New Mexico Constitution and Rule 5-409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E.

The court must first consider requiring an appearance bond secured by a cash deposit of ten percent (10%). No other percentage is permitted under the rule. If a cash deposit of ten percent (10%) is inadequate, the court then must consider a property bond involving property that belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit one hundred percent (100%) of the amount of the bond with the court or to purchase a bond from a paid surety. Under Subparagraph (E)(2)(c), the defendant alone has the choice to post the bond by a one hundred percent (100%) cash deposit or a surety. The court does not have the option to set a cash-only bond or a surety-only bond; it must give the defendant the choice of either. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 5-401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303 NMRA (order setting conditions of release). Paragraph F also requires the court

to make written findings justifying the imposition of a secured bond. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make any supplemental findings in a separate document within two (2) days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13 of the New Mexico Constitution. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5-409 NMRA. Paragraph G was amended in 2020 to permit the court to automatically schedule a pretrial detention hearing in certain categories of cases. However, before the hearing, the prosecutor retains the burden of filing an expedited motion for pretrial detention under Rule 5-409 NMRA. If the prosecutor does not file that motion before the hearing, then the court is to set conditions of release rather than consider detention.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 of the New Mexico Constitution requires the court to rule on a motion or a petition for pretrial release "in an expedited manner" and to release a defendant who is being held solely because of financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph L requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody because of inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part because of "the stringent time limitations of the Speedy Trial Act, 18 U.S.C. § 3161"); Am. Bar Ass'n, ABA Standards for Criminal Justice: Pretrial Release, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case. A meaningful review of the progress of the case includes assessment of the parties' compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made

insufficient progress on these measures, then it shall issue an appropriate scheduling order.

Under NMSA 1978, Section 31-3-1 (1972), the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee must be designated by the chief district court judge in a written court order. A person may not be appointed as a designee if the person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph N and Rule 5-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody before that defendant's first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court on notice from the district attorney that an information or indictment has been filed. *See* Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court).

Paragraph P of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence do not apply to proceedings in district court with respect to matters of pretrial release. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial release hearing is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd*, 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 38-3-9 (1985). Paragraph R of this rule does not prevent a judge from filing a recusal either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

## 5-401A. Recompiled.

## 5-401B. Recompiled.

## 5-401.1. Property bond; unpaid surety.

Any bond authorized by Rule 5-401(E)(2)(b) NMRA shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged, and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

[Adopted, effective October 1, 1987; as amended, effective September 1, 1990; 5-401A recompiled and amended as 5-401.1 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

## 5-401.2. Surety bonds; justification of compensated sureties.

A. **Justification of sureties.** Any bond submitted to the court by a paid surety under Rule 5-401(E)(2)(c) NMRA shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond. If authorized by law, a paid surety licensed under the Bail Bondsmen Licensing Law may deposit cash with the court in lieu of a surety or property bond, provided that the paid surety executes the appearance bond.

B. **Property bondsman.** If a property bond is submitted by a compensated surety, the bail bondsman or solicitor must be licensed as a property bondsman and must file, in each court in which the bondsman posts bonds, an irrevocable letter of credit in favor of the court, a sight draft made payable to the court, and a copy of the bondsman’s license.

C. **Property bond in certain districts.** A real or personal property bond may be executed for the release of a person under Rule 5-401 NMRA in any judicial district in which the chief judge of the district upon concurrence of a majority of the district judges of the district has entered an order finding that the provisions of Paragraph B of this rule will result in the detention of persons otherwise eligible for pretrial release under Rule 5-401 NMRA. If a property bond is submitted by a compensated surety under this paragraph, the bail bondsman or solicitor must be licensed as a property bondsman and must pledge or assign real or personal property owned by the property bondsman as

security for the bail bond. In addition, a licensed property bondsman must file, in each court in which the bondsman posts bonds

(1) proof of the licensed bondsman's ownership of the property used as security for the bonds; and

(2) a copy of the bondsman's license.

The bondsman must attach to the bond a current list of all outstanding bonds, encumbrances, and claims against the property each time a bond is posted, using the court approved form.

D. **Limits on property bonds.** No single property bond submitted under this rule can exceed the amount of real or personal property pledged. The aggregate amount of all property bonds by the surety cannot exceed ten (10) times the amount pledged. Any collateral, security, or indemnity given to the bondsman by the principal shall be limited to a lien on the property of the principal, must be reasonable in relation to the amount of the bond, and must be returned to the principal and the lien extinguished upon exoneration on the bond. If the collateral is in the form of cash or a negotiable security, it shall not exceed fifty percent (50%) of the amount of the bond and no other collateral may be taken by the bondsman. If the collateral is a mortgage on real property, the mortgage may not exceed one hundred percent (100%) of the amount of the bond. If the collateral is a lien on a vehicle or other personal property, it may not exceed one hundred percent (100%) of the bond. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium authorized by the superintendent of insurance.

[Adopted, effective October 1, 1987; as amended, effective September 1, 1990; 5-401B recompiled and amended as Rule 5-401.2 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

## 5-402. Release; during trial, pending sentence, motion for new trial and appeal.

A. **Release during trial.** A defendant released pending trial under Rule 5-401 NMRA shall continue on release 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 ensure the defendant's presence during the trial or to ensure that the defendant's conduct will not obstruct the orderly administration of justice.

B. **Release pending sentencing.** A defendant released pending or during trial may continue on release pending the imposition of sentence 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 ensure

(1) that the defendant will not flee the jurisdiction of the court;

(2) that the defendant's conduct will not obstruct the orderly administration of justice; or

(3) that the defendant does not pose a danger to any other person or to the community.

C. **Release after sentencing.** After imposition of a judgment and sentence, the court, on motion of the defendant, may establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Rule 5-401(C) NMRA, and may also consider the fact of defendant's conviction and the length of sentence imposed. The defendant shall be detained unless the district court after a hearing determines that the defendant is not likely to flee and does not pose a danger to the safety of any other person or the community if released. In the event the court requires a secured 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. Nothing in this rule shall be construed as prohibiting the judge from increasing the amount of bond on appeal.

D. **Revocation of release or modification of conditions of release pending appeal.** The taking of an appeal does not deprive the district court of jurisdiction under Rule 5-403 NMRA, and the state may file a motion in the district court for revocation of release or modification of conditions of release on appeal.

[As amended, effective October 15, 1986; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

**Committee commentary.** — Paragraph A of this rule is substantially similar to Rule 46(b) of the Federal Rules of Criminal Procedure. Under most circumstances, the defendant will have had conditions of release set by the magistrate at the initial appearance. This rule makes it clear that when the case is transferred to the district court directly after a preliminary hearing or indirectly by the filing of an indictment, the district court need not set new conditions of release. However, the rule also allows the district court to set other conditions at the time of trial under certain circumstances.

Paragraph C of this rule was added in 1975. The former rule provided that release should automatically continue pending appeal under the same terms and conditions previously imposed, unless the court determined that other conditions were necessary. The amended rule requires a motion for release following the imposition of sentence and specifies the criteria that may be considered in setting conditions of release for an appeal or if a motion for a new trial is pending. The amended rule preserves the original intent of the rule by allowing a defendant to proceed without a new bond pending appeal

if the surety has not been discharged and the court does not set a higher bond. In addition, Paragraph C of this rule incorporates the provisions of former Subdivision (d) of this rule, requiring a bond only for the additional amount if the court decides to increase the amount of the bond.

The amended rule also requires a new determination of conditions of release for a new trial. The conditions of release for an appeal might well be different than the conditions imposed for a new trial. Therefore, the district court, under Rule 5-401 NMRA, may set new conditions of release when a new trial is granted.

The rule was also amended to provide for revocation or modification of conditions of release while the case is on appeal. Paragraph D of this rule allows the state to seek revocation or modification under Rule 5-403 NMRA. *See* commentary to Rule 5-403 NMRA.

[As amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

## 5-403. Revocation or modification of release orders.

A. **Scope.** In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release

(1) if the defendant is alleged to have violated a condition of release; or

(2) to prevent interference with witnesses or the proper administration of justice.

B. **Revocation or modification of conditions of release.**

(1) The court shall consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor, on notice of a non-technical violation of a condition of release by a court pretrial services agency, or on the court's own motion.

(2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. **Issuance of summons or bench warrant; temporary detention of certain defendants.**

(1) On motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings about why amended or revoked conditions of release are unnecessary, or the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or

bench warrant shall include notice of the reasons for the review of the pretrial release decision.

(2) A defendant previously released by any court in this state pending any felony charge or pending a charge for an enumerated misdemeanor, who is arrested and charged with a new felony or new enumerated misdemeanor defined in Rule 5-403.1 NMRA alleged to have occurred during the period of initial release, shall be held without conditions of release pending an initial hearing under Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court with current jurisdiction over the defendant's initial conditions of release.

(3) A defendant previously released by any court in this state pending any felony charge or pending a charge for an enumerated misdemeanor defined in Rule 5-403.1 NMRA, who is charged but not arrested for a new felony or new enumerated misdemeanor alleged to have occurred during the period of initial release, shall be summonsed by the court with current jurisdiction over the defendant's initial conditions of release to an initial hearing required by Paragraph D of this rule, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The initial hearing required by Paragraph D shall be conducted by the court with current jurisdiction over the defendant's initial conditions of release.

D. **Initial hearing.**

(1) The court shall hold an initial hearing as soon as practicable. If the defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is detained if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center. If the defendant is not in custody, the hearing shall be held no later than ten (10) days after the motion or notice of alleged violation is filed.

(2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or if the court is considering revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

(3) If at the conclusion of the initial hearing, the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the time of release from custody if the defendant is in custody, or within three (3) days of the hearing if the defendant is not in custody. If the defendant waives the evidentiary hearing under Paragraph E and the court finds that the conditions of release should be revoked, an order revoking conditions of release, including written findings of the individualized facts justifying revocation, shall be filed within three (3) days of the initial hearing.

E. **Evidentiary hearing.**

(1) ***Time.*** The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing. If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) days after the initial hearing.

(2) ***Defendant's rights.*** The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. **Order at completion of evidentiary hearing.** At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice, and may:

(1) continue the existing conditions of release;

(2) set new or additional conditions of release in accordance with Rule 5-401 NMRA; or

(3) revoke the defendant's release, if the court

(a) finds either

(i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or

(ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and

(b) finds clear and convincing evidence that either

(i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or

(ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to

the defendant at the time of release from custody if the defendant is in custody, or within three (3) days of the hearing if the defendant is not in custody.

G. **Evidence.** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. **Review of conditions.** If the court enters an order setting new or additional conditions of release, the defendant may file a motion to review the conditions under Rule 5-401(H) NMRA. If, on disposition of the motion, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

I. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

J. **Appeal.** If the court revokes the defendant's release, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The appeal shall be heard in an expedited manner. The defendant shall be detained pending the disposition of the appeal.

K. **Petition for review of revocation order issued by magistrate, metropolitan, or municipal court.** If the magistrate, metropolitan, or municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph.

(1) ***Petition; requirements.*** The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(2) ***Magistrate, metropolitan, or municipal court's jurisdiction pending determination of the petition.*** On the filing of the petition, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend conditions of release shall be

suspended pending determination of the petition by the district court. The case shall proceed in the magistrate, metropolitan, or municipal court while the petition is pending.

(3) ***District court review.*** The district court shall rule on the petition in an expedited manner.

(a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(i) issue an order affirming the revocation order; or

(ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly send a copy of the notice to the magistrate, metropolitan, or municipal court.

(b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release in accordance with Rule 5-401 NMRA.

(4) ***Transmission of district court order to magistrate, metropolitan, or municipal court.*** The district court shall promptly send the order to the magistrate, metropolitan, or municipal court, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

(5) ***Appeal.*** If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA.

L. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial release or detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from reviewing a lower court's order revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order Nos. 20-8300-013 and 20-8300-019, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

**Committee commentary.** — The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or

modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014-NMCA-037, ¶¶ 1, 24-25, 321 P.3d 140, *overruled on other grounds by State v. Ameer*, 2018-NMSC-030, ¶ 69, 458 P.3d 390, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968-NMSC-009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id*. ¶ 10 ("If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts."); *State v. Rivera*, 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 ("Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line."), *rev'd on other grounds*, 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

As used in Paragraph D, a "local detention center" is "one that is commonly used by the district court in the normal course of business and not necessarily within the territorial jurisdiction of the court." Rule 5-401(A)(3) NMRA.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial detention hearing is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof"); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), ***aff'd***, 719 F.2d 887 (7th Cir. 1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part because of

"the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case. A meaningful review of the progress of the case includes assessment of the parties' compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is reviewing a lower court's order setting or revoking conditions of release. *See* NMSA 1978, § 38-3-9 (1985). Paragraph L of this rule does not prevent a judge from filing a recusal either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

The 1975 amendment to Rule 5-402 NMRA makes it clear that this rule may be invoked while the defendant is appealing a conviction. *See* Rule 5-402 and commentary.

[As amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023.]

## 5-403.1. Enumerated misdemeanor, non-technical violation defined.

For purposes of Rules 5-403, 6-403, and 7-403 NMRA:

A. An "enumerated misdemeanor" means:

1. battery, contrary to Section 30-3-4 NMSA 1978;

2. aggravated battery, contrary to Section 30-3-5(B) NMSA 1978;

3. negligent use of a deadly weapon, contrary to Section 30-7-4 NMSA 1978;

4. battery against a household member, contrary to Section 30-3-15 NMSA 1978;

5. aggravated battery against a household member, contrary to Section 30-3-16 NMSA 1978;

6. stalking, contrary to Section 30-3A-3 NMSA 1978;

7. violation of an order of protection, contrary to Section 40-13-6 NMSA 1978;

8. criminal sexual contact, contrary to Section 30-9-12 NMSA 1978;

9. harassment, contrary to Section 30-3A-2 NMSA 1978;

10. driving under the influence of intoxicating liquor or drugs, contrary to Section 66-8-102 NMSA 1978; or

11. operating a motorboat while under the influence of intoxicating liquor or drugs, contrary to Section 66-13-3 NMSA 1978.

B. A “non-technical violation” of a condition of release shall be defined by the Administrative Office of the Courts’ pretrial services policies and procedures.

[Adopted by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

**Committee commentary.** — The Administrative Office of the Courts’ pretrial services policies and procedures may be located at the Administrative Office of the Courts’ website at https://pretrial.nmcourts.gov/.

[Adopted by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

## 5-404. Bail for witness.

If it appears by affidavit that the testimony of a person is material in any felony proceeding and that it may become impracticable to secure his presence by subpoena, the court may require such person to give bail for his appearance as a witness. If the witness is not in court, a warrant for his arrest may be issued and upon return thereof the court may require him to give bail as provided in Rule 5-401 for his appearance as a witness. If a witness fails to give bail, he may be committed to the custody of the sheriff for a period not to exceed five (5) days, within which time his deposition shall be taken as provided in Rule 5-503. The court upon good cause shown may extend the time for taking such depositions for an additional period not exceeding five (5) days. Only in a capital, first or second degree felony case shall any surety be required for the bail of a witness.

**Committee commentary.** — The deposition of a material witness may be taken and can be introduced at trial pursuant to Rule 5-503.

The release of a material witness is handled generally in the same manner as one accused of an offense. There are two important exceptions: (1) the witness may not be held in custody for more than five (5) days, unless the time is extended to ten (10) days;

and (2) unless the criminal offense charged is a capital, first or second degree felony, conditions may not be imposed which would require the witness to post a surety bond. *See* Section 31-3-7 NMSA 1978.

## 5-405. Appeal from orders regarding release or detention.

A. **Right of appeal.** A party may appeal an order regarding release or detention as provided by Article II, Section 13 of the New Mexico Constitution, Section 39-3-3(A)(2) NMSA 1978, or as otherwise provided by law. In accordance with the Rules of Appellate Procedure, an appeal may be filed in the Supreme Court or Court of Appeals, as jurisdiction may be vested by law, under the following circumstances.

(1) ***Order setting conditions of release.*** After a hearing by the district court under Rule 5-401(H) or (K) NMRA, the defendant may appeal if

(a) the defendant is detained or continues to be detained because of an inability to post a secured bond or meet a condition of release; or

(b) the defendant is subject to a condition of release that requires the defendant to return to custody for specified hours following release for employment, schooling, or other limited purposes.

(2) ***Order revoking release.*** After a hearing by the district court under Rule 5-403 NMRA, the defendant may appeal if the defendant is subject to an order revoking release.

(3) ***Order granting or denying motion for pretrial detention.*** After a hearing by the district court under Rule 5-409 NMRA,

(a) the defendant may appeal if the district court has granted the prosecutor's motion for pretrial detention; or

(b) the state may appeal if the district court has denied the prosecutor's motion for pretrial detention.

B. **Stay of proceedings.** An appeal under this rule does not stay proceedings in the district court.

[As amended, effective September 1, 1990; March 1, 1995; as amended by Supreme Court Order No. 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

**Committee commentary.** — This rule was amended in 2017 in response to the 2016 amendment to Article II, Section 13 of the New Mexico Constitution. As amended, Article II, Section 13 (1) permits a court of record to order the detention of a felony

defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community, and (2) requires the district court to release a defendant who is in custody solely due to financial inability to post a secured bond.

[As amended by Supreme Court Order No. 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

## 5-406. Bonds; exoneration; forfeiture.

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

(1) twelve (12) months after the posting of the bond if the crime is a felony and no charges are pending in the district court;

(2) six (6) months after the posting of the bond if the crime is a misdemeanor or petty misdemeanor and no charges are pending;

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

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

(5) upon dismissal of the case without prejudice, unless the case involves a paid surety; or

(6) upon acquittal, conviction, or dismissal of the case with prejudice.

B. **Surrender of the defendant by a paid surety.** If the paid surety arrests the defendant under Section 31-3-4 NMSA 1978 prior to the entry of a judgment of default on the bond, the court may absolve the paid surety of responsibility to pay all or part of the bond.

C. **Forfeiture.** If the defendant has been released upon the execution of an unsecured appearance bond, percentage bond, property bond, cash bond, or surety bond under Rule 5-401 NMRA, and the defendant fails to appear in court as required, the court may declare a forfeiture of the bond. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Hearing on the defendant, at the defendant's last known address, and on the surety, if any, in the manner provided by Rule 5-407 NMRA.

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

E. **Judgment of default; execution.** If, after a hearing, the forfeiture is not set aside, the court shall enter a judgment of default on the bond. If the judgment of default is not paid within ten (10) days after it is filed and served on the defendant, at the defendant's last known address, and on the surety, if any, in the manner provided by Rule 5-407 NMRA, execution may issue thereon.

F. **Appeal.** Any aggrieved person may appeal from a judgment or order entered under this rule as authorized by law for appeals in civil actions in accordance with the Rules of Appellate Procedure. An appeal of a judgment or order entered under this rule does not stay the underlying criminal proceedings.

[Adopted, effective October 1, 1987; as amended by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

**Committee commentary.** — Under Paragraph A, a bond is automatically exonerated upon a finding of guilty or not guilty. *See* NMSA 1978, § 31-3-10 ("All recognizances secured by the execution of a bail bond shall be null and void upon the finding that the accused person is guilty, and all bond liability shall thereupon terminate.").

Under Paragraph B and NMSA 1978, Section 31-3-4, if a paid surety wants to be discharged from the obligation of its bond, the surety may arrest the defendant and deliver the defendant to the county sheriff. Section 31-3-4 provides that a "paid surety may be released from the obligation of its bond only by an order of the court" and sets forth the circumstances under which the "court shall order the discharge of a paid surety."

Under Paragraph C, the court may declare a forfeiture of any secured or unsecured bond if the defendant fails to appear in court as required. *See* NMSA 1978, § 31-3-2 (failure to appear; forfeiture of bail bonds); *see also State v. Romero*, 2006-NMCA-126, ¶ 12, 140 N.M. 524, 143 P.3d 763 (holding that the court may not declare a forfeiture of bail for violations of conditions of release unrelated to appearance before the court), *aff'd*, 2007-NMSC-030, 141 N.M. 733, 160 P.3d 914.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

## 5-407. 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.

[Adopted, effective October 1, 1987.]

## 5-408. Pretrial release by designee.

A. **Scope.** This rule shall be implemented by any person designated in writing by the chief judge of the district court under Rule 5-401(N) NMRA. A designee shall execute Form 9-302 NMRA to release a person from detention prior to the person's first appearance before a judge if the person is eligible for pretrial release under Paragraph B, Paragraph C, or Paragraph D of this rule, provided that a designee may contact a judge for special consideration based on exceptional circumstances. A judge may issue a pretrial order imposing a type of release and conditions of release that differ from those set forth in this rule.

B. **Minor offenses; release on recognizance.**

(1) ***Persons eligible.*** A designee shall release a person from custody on personal recognizance, subject to the conditions of release set forth in Form 9-302 NMRA, if the person has been arrested and detained for a municipal code violation, game and fish offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the exceptions listed in Subparagraph (B)(2) of this rule; and is not known to be on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law.

(2) ***Exceptions.*** A person arrested for any of the following offenses is not eligible for release under this paragraph:

(a) battery under Section 30-3-4 NMSA 1978;

(b) aggravated battery under Section 30-3-5 NMSA 1978;

(c) assault against a household member under Section 30-3-12 NMSA 1978;

(d) battery against a household member under Section 30-3-15 NMSA 1978;

(e) aggravated battery against a household member under Section 30-3-16 NMSA 1978;

(f) criminal damage to property of a household member under Section 30-3-18 NMSA 1978;

(g) harassment under Section 30-3A-2 NMSA 1978, if the victim is known to be a household member;

(h) stalking under Section 30-3A-3 NMSA 1978;

(i) abandonment of a child under Section 30-6-1(B) NMSA 1978;

(j) negligent use of a deadly weapon under Section 30-7-4 NMSA 1978;

(k) enticement of a child under Section 30-9-1 NMSA 1978;

(l) criminal sexual contact under Section 30-9-12(D) NMSA 1978;

(m) criminal trespass under Section 30-14-1(E) NMSA 1978, if the victim is known to be a household member;

(n) telephone harassment under Section 30-20-12, if the victim is known to be a household member;

(o) violating an order of protection under Section 40-13-6 NMSA 1978; or

(p) driving under the influence of intoxicating liquor or drugs in violation of Section 66-8-102 NMSA 1978.

C. **Pretrial release based on risk assessment.** A designee shall release a person from custody prior to the person's first appearance before a judge if the person qualifies for pretrial release based on a risk assessment and a pretrial release schedule approved by the Supreme Court.

D. **Pretrial release under release on recognizance program.** A designee may release a person from custody prior to a person's first appearance before a judge if the person qualifies for pretrial release under a local release on recognizance program that relies on individualized assessments of arrestees and has been approved by order of the Supreme Court.

E. **Type of release and conditions of release set by judge.** A person who is not eligible for pretrial release by a designee under Paragraph B, Paragraph C, or Paragraph D of this rule shall have the type of release and conditions of release set by a judge under Rule 5-401 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

**Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Rule 5-401(N) NMRA, the chief judge of the district court may designate responsible persons in writing who are authorized to release certain arrested persons from detention prior to the arrested person's first appearance before a judge. In the past, some courts have used fixed secured bond schedules tied to the level of the charged offense, rather than any individual flight risk of the arrestee, a practice that has been specifically prohibited by new Subparagraph (E)(1)(d) of Rule 5-401 NMRA (as reflected in the 2017 amendment), and that has constitutional implications. *See, e.g*., Memorandum and Opinion Setting out Findings of Fact and Conclusions of Law, *ODonnell v. Harris Cty*., No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017); Opinion, *Jones v. City of Clanton*, No. 2:15-cv-00034-MHT-WC (M.D. Ala. Sept. 14, 2015).

The provisions in this new rule provide more detailed guidance for courts for authorizing release by designees, who are generally detention center or court employees, and contains several situations in which release by designees can be authorized, none of them including fixed secured bond schedules.

Paragraph B of this rule sets out a statewide standard method of automatic release by designees in cases involving minor offenses, where no exercise of discretion is required on the part of the designee. Subparagraph (B)(2) identifies certain offenses excepted from automatic release under Subparagraph (B)(1), including the misdemeanors and petty misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery, enticement of a child, violating an order of protection, and driving under the influence of intoxicating liquor or drugs.

Paragraph C of this rule will independently permit a designee to release an arrestee if specifically authorized to be released through use of a Supreme Court-authorized risk assessment instrument.

Paragraph D of this rule provides flexibility for individual courts to operate their own Supreme Court-authorized release on recognizance programs that may rely on individualized discretionary assessments of arrestee eligibility by designees, in addition to the release authority authorized in Paragraphs B and C of this rule, so long as they are exercised within the parameters of Court-approved programs.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

## 5-409. Pretrial detention.

A. **Scope.** Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a motion for an expedited pretrial detention

hearing and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. **Motion for pretrial detention.** The prosecutor may file a motion for an expedited pretrial detention hearing at any time in the court where the case is pending. The motion shall include the specific facts that warrant pretrial detention and shall specify whether the state is requesting a preliminary examination to establish probable cause. If the state requests a preliminary examination, the motion shall also specify whether the state is requesting that an expedited pretrial detention hearing be held concurrently.

(1) The prosecutor shall immediately deliver a copy of the motion to

(a) the detention center holding the defendant, if any;

(b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.

(2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

(3) Except when the court finds no probable cause, the court may not grant or deny the motion for pretrial detention without a hearing.

C. **Case initiated in magistrate or metropolitan court.** If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6-203 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court shall proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA and thereafter promptly send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan court shall then close the case and its jurisdiction shall be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph I of this rule.

D. **Case initiated in district court.** If a motion for pretrial detention is filed in the district court and an initial finding of probable cause has not been made under Rule 5-301 NMRA, Rule 6-203 NMRA, or Rule 7-203 NMRA, the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 5-301 NMRA and shall deny the motion for pretrial detention

without prejudice. If probable cause is found, the court shall proceed to conduct the defendant's first appearance under Rule 5-301(D) NMRA and Rule 5-401(A) NMRA.

E. **Detention pending hearing; warrant.**

(1) ***Defendant in custody when motion is filed.*** If a detention center receives a copy of a motion for pretrial detention, the detention center shall distribute the motion to any person designated by the district, magistrate, or metropolitan court to release defendants from custody under Rule 5-401(N) NMRA, Rule 5-408 NMRA, Rule 6-401(M) NMRA, Rule 6-408 NMRA, Rule 7-401(M) NMRA, or Rule 7-408 NMRA. All authority of any person to release a defendant under that designation is terminated on receipt of a detention motion until further court order.

(2) ***Defendant not in custody when motion is filed.*** If the defendant is not in custody when the motion for pretrial detention is filed, the district court may issue a warrant for the defendant's arrest if the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution. If the motion does not allege sufficient facts, the court shall issue a summons and notice of hearing.

F. **Expedited pretrial detention hearing.** The district court shall hold an expedited hearing on the motion for pretrial detention to determine whether any release condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably protect the safety of any other person or the community. On the request of the prosecutor or on the court's own motion, the court shall set the matter for a preliminary examination to be held concurrently with the motion for pretrial detention.

(1) ***Time.***

(a) *Time limit.* The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events:

(i) the filing of the motion for pretrial detention; or

(ii) the date the defendant is arrested as a result of the motion for pretrial detention.

(b) *Time limit for concurrent hearings.* Notwithstanding the time limit specified in Subparagraph (F)(1)(a) of this rule, if the prosecutor requests or the court on its own motion orders the expedited pretrial detention hearing and preliminary examination to be held concurrently, the consolidated hearing shall be held no less than eight (8) days and no more than ten (10) days after the applicable triggering event identified in Subparagraph (F)(1)(a)(i) and (ii) of this rule.

(c) *Extensions.* The time enlargement provisions in Rule 5-104 NMRA do not apply to a pretrial detention hearing. The court shall extend the time limit for holding the hearing as follows:

(i) for three (3) days to five (5) days, as provided in Subparagraph (F)(1)(b) of this rule, if in the motion for pretrial detention the prosecutor requests or the court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing;

(ii) for up to three (3) days on a showing that extraordinary circumstances exist and justice requires the extension;

(iii) on the defendant filing a waiver of the time limit; or

(iv) on stipulation of the parties.

(d) *Notice.* The court shall promptly schedule the hearing and notify the parties of the hearing setting within one (1) business day after the filing of the motion.

(2) ***Initial disclosures.***

(a) The prosecutor shall promptly disclose to the defendant before the hearing

(i) all evidence that the prosecutor intends to rely on at the hearing, and

(ii) all exculpatory evidence known to the prosecutor.

(b) Except in cases where the hearing is held within two (2) business days after the filing of the motion, the prosecutor shall disclose evidence under this subparagraph at least twenty-four (24) hours before the hearing. At the hearing, the prosecutor may offer evidence or information that was discovered after the disclosure deadline, but the prosecutor must promptly disclose the evidence to the defendant.

(3) ***Defendant's rights.*** The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

(4) ***Prosecutor's burden.*** The prosecutor must prove by clear and convincing evidence that the defendant is likely to pose a threat to the safety of others if

released pending trial and that no release conditions will reasonably protect the safety of any other person or the community.

(5) ***Evidence.*** The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the hearing. The court may make its decision about pretrial detention based on documentary evidence, court records, proffer, witness testimony, hearsay, argument of counsel, input from a victim, and any other reliable proof presented at the hearing.

(6) ***Factors to be considered.*** The court shall consider any fact relevant to the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release and any fact relevant to the issue of whether any conditions of release will reasonably protect the safety of any person or the community, including but not limited to the following:

(a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence;

(b) the weight of the evidence against the defendant;

(c) the history and characteristics of the defendant;

(d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(e) any facts tending to indicate that the defendant may or may not commit new crimes if released; and

(f) whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in another pending case or was ordered detained based on a finding of dangerousness in any prior case.

G. **Order for pretrial detention.** The district court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that the defendant is likely to pose a threat to the safety of others if released pending trial and that no release conditions will reasonably protect the safety of any other person or the community. An order containing findings of the individualized facts justifying the detention must be filed as soon as possible, but no later than three (3) days after the conclusion of the hearing.

H. **Order setting conditions of release.** The district court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule 5-401 NMRA. The court shall file

findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than three (3) days after the conclusion of the hearing.

I. **Further proceedings in cases initiated in magistrate or metropolitan court.** If, after a preliminary examination, the district court finds no probable cause to believe that the defendant has committed a felony offense, the court shall set conditions of release and may remand any remaining misdemeanor charges to the magistrate or metropolitan court for further proceedings.

J. **Expedited trial scheduling for defendant in custody.** The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

K. **Successive motions for pretrial detention and motions to reconsider.** On written motion of the prosecutor or the defendant, the district court may reopen the detention hearing at any time before trial if the court finds that

(1) information exists that was not known to the movant at the time of the hearing or circumstances have changed after the hearing, and

(2) the information or changed circumstance has a material bearing on whether the previous ruling should be reconsidered.

L. **Appeal.** Either party may appeal the district court order disposing of the motion for pretrial detention in accordance with Rule 5-405 NMRA and Rule 12-204 NMRA. The district court order shall remain in effect pending disposition of the appeal.

M. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from presiding over a detention hearing unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order Nos. 20-8300-013 and 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

**Committee commentary.** —

**Paragraph A** — In addition to the detention authority for dangerous defendants authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court conceivably could be faced with a request to detain under the preexisting exception to the right to pretrial release in "capital offenses when the proof is evident or the presumption great." *Id*. As a result of the repeal of capital punishment for offenses committed after July 1, 2009, this provision will be applicable only to offenses alleged to have been committed before that date for which capital punishment may be imposed. *See State v. Ameer*, 2018-NMSC-030, ¶¶ 5-6, 70, 458 P.3d 390.

Although this rule does not provide the district court with express sanction authority, the district court retains inherent authority to "impose a variety of sanctions on both litigants and attorneys in order to regulate docket, promote judicial efficiency, and deter frivolous filings." *State ex rel. N.M. State Highway & Transp. Dep't v. Baca*, 1995-NMSC-033, ¶ 11, 120 N.M. 1, 896 P.2d 1148 (internal quotation marks and citation omitted); *see also State v. Le Mier*, 2017-NMSC-017, ¶ 19, 394 P.3d 959 ("Where discovery violations inject needless delay into the proceedings, courts may impose meaningful sanctions to effectuate their inherent power and promote efficient judicial administration."). "Extreme sanctions such as dismissal are to be used only in exceptional cases." *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (internal quotation marks and citation omitted), *modified on other grounds by Le Mier*, 2017-NMSC-017. *Cf*. Rule 5-206 NMRA (providing that an attorney may be subject to appropriate disciplinary action for violating the rule); Rules 5-501(H), 5-502(G), 5-503.2(B), and 5-505(B) NMRA (sanctions for discovery violations); Rule 5-511 NMRA (sanctions for burdening a person subject to a subpoena).

**Paragraph B** — Paragraph B permits the prosecutor to file a motion for pretrial detention at any time. The prosecutor may file the motion at the same time that the prosecution requests a warrant for the defendant's arrest under Rule 5-208(D) NMRA.

Under this paragraph, the prosecutor retains discretion to "obtain a neutral determination of probable cause" by either presenting the case to a grand jury or proceeding with a preliminary examination. *See Herrera v. Sanchez*, 2014-NMSC-018, ¶ 14, 328 P.3d 1176. However, because the district court faces time constraints in setting a preliminary examination if requested, the prosecutor is required to advise the court of the need for the setting by stating in the motion for pretrial detention whether the prosecutor intends to proceed by grand jury indictment or instead by preliminary examination and the filing of a criminal information.

**Paragraph C** — Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction and confers exclusive jurisdiction on the district court, except as provided by Paragraph I. The district court's exclusive jurisdiction extends to cases that are refiled after dismissal.

**Paragraphs C and D** — Federal constitutional law requires a "prompt judicial determination of probable cause" to believe the defendant committed a chargeable offense, before or within forty-eight (48) hours after arrest, in order to continue detention or other significant restraint of liberty. *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause does not relieve the prosecutor from proving the grounds for pretrial detention by clear and convincing evidence.

**Paragraph F** — Paragraph F sets forth procedures for pretrial detention hearings. The court must "make three categories of determinations" at a pretrial detention hearing:

(1) which information in any form carries sufficient indicia of reliability to be worthy of consideration, (2) the extent to which that information would indicate that a defendant may be likely to pose a threat to the safety of others if released pending trial, and (3) whether any potential pretrial release conditions will reasonably protect the safety of others.

*State v. Groves*, 2018-NMSC-006, ¶ 29, 410 P.3d 193, 198 (internal quotation marks and citation omitted).

Subparagraph (F)(1)(c)(i) authorizes an extension of time if the prosecutor requests or the court orders a preliminary hearing to be held concurrently with the detention hearing.

Subparagraph (F)(3) describes the defendant's rights at the hearing. "[T]he Due Process Clause of the New Mexico Constitution requires that a defendant's protections at a pretrial detention hearing include 'the right to counsel, notice, and an opportunity to be heard.'" *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶ 88, 410 P.3d 201 (quoting *State v. Brown*, 2014-NMSC-038, ¶ 20, 338 P.3d 1276). "Due process requires a meaningful opportunity to cross-examine testifying witnesses or otherwise challenge the evidence presented by the state at a pretrial detention hearing." *Id*. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting the detention hearing, rather than by any means of remote electronic conferencing.

Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. In *Torrez*, the Supreme Court clarified that "neither the United States Constitution nor the New Mexico Constitution categorically requires live witness testimony at pretrial detention hearings." 2018-NMSC-005, ¶ 110. The court may rely on "credible proffers and other summaries of evidence, law enforcement and court records, or other nontestimonial information" in determining whether the prosecutor has met its burden under Article II, Section 13 of the New Mexico Constitution. *Id*. ¶ 3. In doing so, the court should exercise "sound judicial discretion in assessing the reliability and accuracy of information presented in support of detention, whether by proffer or direct proof." *Id*. ¶ 81. The "court necessarily retains the judicial discretion to find proffered or documentary information insufficient to meet the constitutional clear and convincing evidence requirement in the context of

particular cases." *Id*. ¶ 3. Both the prosecutor and the defendant may proceed by proffer at the pretrial detention hearing.

Subparagraph (F)(6) lists factors that the court may consider in assessing whether the prosecutor has met its burden of proving by clear and convincing evidence that the defendant is likely to pose a threat to the safety of others if released pending trial and whether any potential pretrial release conditions will reasonably protect the safety of others. This assessment "require[s] a detention court to engage in a delicate case-by-case balancing of all relevant factors, with the calculus limited only 'by what evidence the litigants present.'" *State v. Mascareno-Haidle*, 2022-NMSC-015, ¶ 39, 514 P.3d 454 (citing *State v. Ferry*, 2018-NMSC-004, ¶ 7, 409 P.3d 918). Among other factors, the court may consider the nature and circumstances of the charged offense and the defendant's history and characteristics. *See State v. Groves*, 2018-NMSC-006, ¶¶ 32-33, 410 P.3d 193 (explaining that the defendant's past conduct can help the court assess whether the defendant poses a future threat of danger). In *Ferry*, the Supreme Court explained that "the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the [prosecutor's] burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community." 2018-NMSC-004, ¶ 6. However, the detention court shall not "consider the nature and circumstances of the offense factor in isolation and to the exclusion of all other relevant factors, whether those factors are expressly identified in the rule or not." *Masacreno-Haidle*, 2022-NMSC-015, ¶ 39 (internal quotation marks omitted). Furthermore, the type of offense charged, by itself and without more, will not suffice to meet the prosecutor's burden. *See Groves*, 2018-NMSC-006, ¶ 33 (discounting the relevance at a detention hearing of "the category or punishability of the charged crime," and recognizing that "the court's focused concern is not to impose punishment for past conduct but instead to assess a defendant's likely future conduct" (citing *Torrez*, 2018-NMSC-005, ¶ 101)). If the prosecutor meets this initial burden, the prosecutor must also demonstrate by clear and convincing evidence that "no release conditions will reasonably protect the safety of any other person or the community." *Ferry*, 2018-NMSC-004, ¶ 6. "For example, the [prosecutor] may introduce evidence of a defendant's defiance of restraining orders; dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal to abide by conditions of release in other cases." *Id*.

The 2024 amendment removes a reference to a pretrial risk assessment instrument approved by the Supreme Court. The risk assessment instrument remains valid. However, this instrument only measures risk and should not be used as a stand-alone factor to make a recommendation for or against pretrial detention. The risk assessment score may be considered as part of a defendant's history and characteristics under Subparagraph (F)(6)(c).

**Paragraph I** — On the transfer of a case to the district court, the magistrate or metropolitan court generally loses jurisdiction under Paragraph C of this rule. A single narrow exception is set out in Paragraph I, whose provisions allow a case to be

remanded to the magistrate or metropolitan court only if, after a preliminary hearing, misdemeanor—not felony—charges alone remain, and then at the sole discretion of the district court. A case in which the prosecutor files and subsequently withdraws a motion for pretrial detention cannot be remanded to the magistrate or metropolitan court for further proceedings, unless the case otherwise meets the misdemeanor exception carved out under this paragraph.

**Paragraph J** — Paragraph J requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part because of "the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice."). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case. A meaningful review of the progress of the case includes assessment of the parties' compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

**Paragraph K** — The district court may rule on a motion under Paragraph K with or without a hearing. The district court has inherent discretion to reconsider its ruling on a motion for pretrial detention. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 ("District courts have plenary power over their interlocutory orders and may revise them . . . at any time prior to final judgment." (internal citation omitted)); *see also State v. Brown*, 2014-NMSC-038, ¶ 13, 338 P.3d 1276 (recognizing that a pretrial release decision is interlocutory).

**Paragraph L** — Either party may appeal the district court's ruling on the detention motion. Under Article II, Section 13 of the New Mexico Constitution, an "appeal from an order denying bail shall be given preference over all other matters." *See also State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652 P.2d 232 (holding that the state may appeal a ruling when it is an aggrieved party under Article VI, Section 2 of the New Mexico Constitution).

**Paragraph M** — Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is conducting a detention hearing. *See* NMSA 1978, § 38-3-9 (1985). Paragraph M does not prevent a judge from filing a recusal either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18-8300-024,

effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2024-00068, effective for all cases pending or filed on or after May 8, 2024.]

# ARTICLE 5
# Discovery

## 5-501. Disclosure by the state.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within ten (10) days after arraignment or the date of filing of a waiver of arraignment, subject to Paragraph E of this rule, the state shall disclose or make available to the defendant:

(1) any statement made by the defendant, or codefendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the district attorney;

(2) the defendant's prior criminal record, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the trial, or were obtained from or belong to the defendant;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the prosecutor;

(5) a written list of the names and addresses of all witnesses which the prosecutor intends to call at the trial, identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify, together with any statement made by the witness and any record of prior convictions of any such witness which is within the knowledge of the prosecutor; and

(6) any material evidence favorable to the defendant which the state is required to produce under the due process clause of the United States Constitution.

B. **Examination by defendant.** The defendant may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Depositions.** The state may move the court to perpetuate the testimony of any such witness by taking the witness' deposition pursuant to Rule 5-503 NMRA.

D. **Certificate of compliance.** The prosecutor shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the prosecutor to the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the defendant.

E. **Disclosures for enhanced sentences.** If the state intends to use a prior criminal conviction to enhance a sentence, the state shall provide or make available to the defendant certified copies or other proof of any prior conviction to be offered during the sentencing hearing.

F. **Information not subject to disclosure.** The prosecutor shall not be required to disclose any material required to be disclosed by this rule if:

(1) the disclosure will expose a confidential informer;

(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

G. **Statement defined.** As used in this rule, and Rules 5-502 and 5-503, "statement" means:

(1) a writing made by a person having percipient knowledge of relevant facts and which contains such facts, other than drafts or notes that have been incorporated into a subsequent draft or final report; or

(2) any written, stenographic, mechanical, electrical or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral declaration and which is recorded contemporaneously with the making of the oral declaration.

H. **Failure to comply.** If the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the prosecutor in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.

[As amended, effective December 1, 1998; as amended by Supreme Court Order No. 07-8300-02, effective March 15, 2007; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

**Committee commentary.** — Section 14 of Article 2 of the New Mexico Constitution gives the defendant a right to "demand the nature and cause of the accusation." This rule provides procedures for the exercise of the right to determine the "cause of the accusation" to obtain discovery of relevant evidence that may tend to prove or disprove the factual allegations of a criminal charge. A motion for discovery of evidence should not be confused with a motion for statement of facts pursuant to Rule 5-205 NMRA, which is intended to obtain more specificity regarding the factual manner in which the defendant is alleged to have committed his or her criminal acts.

This rule was derived from Rule 16(a) of the Federal Rules of Criminal Procedure. *See generally*, 62 F.R.D. 271, 304-313 (1974); 48 F.R.D. 553, 587-606 (1970).

This rule and Rule 5-502 require the prosecution and the defense to exchange certain information. Judicial involvement should be in the rare case.

Under Subparagraph (4) of Paragraph A of this rule, the state has a duty to disclose to the defense any reports prepared by experts in connection with the defendant's case.

Subparagraph (6) of Paragraph A of this rule was added in 1979 to make it clear that the state has a duty to provide the defense with exculpatory material evidence. *See Brady v. Maryland*, 373 U.S. 83 (1963) and *Giles v. Maryland*, 386 U.S. 66 (1967). Failure to produce such evidence may result in the entry of an order pursuant to Rule 5-505 or if discovered after trial in a new trial unless the nondisclosure constitutes harmless error. *See* Paragraph A of Rule 5-113 and *United States v. Agurs*, 427 U.S. 97 (1976).

There are a number of supreme court decisions recognizing the duty of the prosecutor to produce evidence which is material and exculpatory. *See* for example: *Trimble v. State*, 75 N.M. 183, 402 P.2d 162 (1965) (loss of certain letters and erasure of parts of tape held violation of due process of law); *State v. Gomez*, 75 N.M. 545, 408 P.2d 48 (1965) (failure, upon request, to disclose contents of supplemental police report held reversible error); *State v. Morris*, 69 N.M. 244, 365 P.2d 668 (1961) (failure to produce letter prior to trial held not suppression of material evidence requiring reversal); *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975) (negligent nondisclosure of supplemental police report and statement of a witness misfiled in the district attorney's office found to be material evidence and reversible error); *State v. Vigil*, 79 N.M. 80, 439 P.2d 729 (Ct. App. 1968) (nondisclosure of evidence held not reversible error when defendant knew the evidence was in possession of the state and made no demand for its production); and *State v. Turner*, 81 N.M. 571, 469 P.2d 720 (Ct. App. 1970) (there must be particularized need for materials not produced for there to be reversible error).

Some of the appellate court decisions announced since the adoption of Subparagraph (5) of Paragraph A of this rule have not always indicated that the rule was being construed. Relying on a prerule decision, *State v. Herrera*, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972) holds that the defendant is entitled to statements of the witness, in that case a police report. *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975) holds that, once the witness has testified at trial the defendant is entitled to a copy of a written statement submitted by the witness to the grand jury. Subparagraph (5) of Paragraph A of this rule may require the statement of the witness to be disclosed prior to his testifying. (*See* Rule 5-506.)

In *State v. Sparks*, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), the court noted that this rule did not give the defendant a right to testimony of a witness before the grand jury. However, the court then held that the constitutional right to confrontation gave the defendant the right to the transcribed testimony for use in cross examination of the witness once the witness had testified. In *State v. Felter*, 85 N.M. 619, 515 P.2d 138 (1973), the supreme court made it clear that, absent some showing of particularized need, the defendant is not entitled to a copy of the grand jury testimony before the witness has testified at trial.

In *State v. Quintana*, 86 N.M. 666, 526 P.2d 808 (Ct. App.), *cert. denied*, 86 N.M. 656, 526 P.2d 798 (1974), the court held that the failure of the state to "strictly comply" with Subparagraph (5) of Paragraph A of this rule was not reversible error without a showing that substantial rights of the defendant had been prejudiced. In *State v. Billington*, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974), the court held that failure of the state to comply with the rule was grounds for continuance of the trial as a matter of law. The cases might be reconciled on the basis of the importance of the witnesses whose names were not disclosed by the state in each case.

Paragraph D of this rule (prior to the 1980 amendment) was derived from Rule 34(b) of the Federal Rules of Civil Procedure, the procedure for production of documents and things and entry upon land for inspection. Paragraph E of this rule was derived from American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 2.5 (Approved Draft 1970).

On the privilege of the state to refuse to disclose the identity of an informer, *see* Rule 11-510. *See also*, *State v. Bauske*, 86 N.M. 484, 525 P.2d 411 (Ct. App. 1974).

[As amended by Supreme Court Order No. 13-8300-008, effective for all cases pending or filed on or after May 13, 2013; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

## 5-502. Disclosure by the defendant.

A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, within thirty (30) days after the date of arraignment or filing of a waiver of arraignment the defendant shall disclose or make available to the state the following:

(1) books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the defendant, and which the defendant intends to introduce in evidence at the trial;

(2) any results or reports of physical or mental examinations and of scientific tests or experiments, including all polygraph examinations of the defendant and witnesses, made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at trial if the results or reports relate to his testimony; and

(3) a list of the names and addresses of the witnesses the defendant intends to call at the trial, identifying any witnesses that will provide expert testimony and indicating the subject area in which they will testify, together with any statement made by the witness.

B. **Examination by state.** The state may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. **Information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of the following:

(1) reports, memoranda or other internal defense documents made by the defendant, his attorneys or agents, in connection with the investigation or defense of the case; or

(2) statements made by the defendant to his agents or attorneys.

D. **Obtaining expert evaluations, testing, or interviews without disclosure to the state.** When the defendant is being held, pending trial, in the custody of the state at any correctional or detention facility the defendant may present to the court an ex parte motion for transport, certifying that evaluation, testing, or interviewing is reasonably necessary for the preparation of the defense. The motion shall be delivered directly to the chambers of the judge assigned to the case without filing it in the clerk's office.

(1) *Ex parte motion and order requirements*. The motion, and any resulting order that grants the motion, shall specify the following:

(a) the detention facility or other appropriate law enforcement agency responsible for transporting the defendant;

(b) the date and time when the defendant is to be taken to a secure, but private, location for whatever evaluation, testing or interviewing is to be done; and

(c) the date and time that the defendant is to be returned to the detention facility.

(2) *Evaluation, testing or interviewing defined*. As used in this rule, "evaluation, testing or interviewing" refers to performing expert consultations including but not limited to the following:

(a) polygraph examinations;

(b) medical, psychological or psychiatric testing;

(c) evaluations and interviews; and

(d) other types of forensic examinations.

(3) *Security considerations*. The court shall give consideration to whether the location proposed by the defendant is appropriate, including whether the defendant can be appropriately secured by the transport officers without the officers being physically present while the defendant is being evaluated, tested or interviewed, and whether the defendant may have handcuffs or other restraints removed while the defendant completes the evaluation, testing or interviewing so long as the defendant is under the observation of one or more transport officers.

(4) *Ex parte hearing to address concerns*. At any time after being presented with an ex parte motion under this paragraph, the court may conduct an ex parte hearing to address proposed security arrangements, expense involved, or other reasonable concerns. The state's participation in ex parte proceedings under this paragraph is neither required nor allowed.

(5) *Motion resolved by written order; disclosure restricted*. An ex parte motion filed under this paragraph shall be resolved by written order. The motion, and resulting order, shall be filed in the clerk's office by the district judge assigned to the case subject to the nondisclosure requirements in this subparagraph. To effectuate the nondisclosure provisions required by this subparagraph, the court's order shall comply with Subparagraphs (3), (4), (5), and (6) of Paragraph G of Rule 5-123 NMRA. Any transport order granted under this rule shall direct that the transport officers are prohibited from disclosing anything about the contents or execution of the order not directly necessary to its execution. The motion and resulting order shall remain sealed and shall not be disclosed to anyone other than court personnel, the defendant, and defense counsel except that disclosure may be permitted under the following circumstances:

(a) disclosure of the evaluation, testing, or interviewing is required by this rule;

(b) the evaluation, testing or interviewing is used at trial;

(c) the motion, resulting order, evaluation, testing, or interviewing is relevant to a habeas corpus proceeding;

(d) the motion, resulting order, evaluation, testing, or interviewing is relevant to a legal malpractice or disciplinary proceeding filed against the defendant's attorney; or

(e) the motion, resulting order, evaluation, testing, or interviewing is ordered unsealed pursuant to Paragraph I of Rule 5-123 NMRA.

E. **Designation of potential expert witness.** At any time after the filing of an indictment or information the defendant may file a notice designating by name a potential expert witness. Unless and until such designated potential expert is listed by the defendant as a potential witness pursuant to Subparagraph (3) of Paragraph A of this rule, the state shall not be entitled to interview the designated potential expert regarding the case, nor obtain opinions or documents from the designated potential expert regarding the case.

F. **Certificate of compliance.** The defendant shall file with the clerk of the court at least ten (10) days prior to trial a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the defendant after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the state.

G. **Failure to comply.** If the defendant fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 5-505 NMRA or hold the defendant or the defense counsel in contempt or take other disciplinary action pursuant to Rule 5-112 NMRA.

[As amended by Supreme Court Order No. 11-8300-049, effective for cases filed or pending on or after February 6, 2012; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

**Committee commentary.** — This rule was derived from Rule 16(b) of the Federal Rules of Criminal Procedure. *See generally*, 62 F.R.D. 271, 306, 314-16 (1974); 48 F.R.D. 553, 607-09 (1970). Unlike its federal counterpart, this rule requires an exchange of information without a written request.

Under Subparagraph (2) of Paragraph A of this rule, the defense has a duty to disclose to the state any reports prepared by experts in connection with the defendant's case which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at trial if the results or reports relate to his testimony.

Although the defendant may not be compelled to produce evidence if it would result in a violation of his privilege against self-incrimination, this rule has been upheld as not

contravening the privilege against self-incrimination or the right to due process of law guaranteed by the Fifth Amendment to the United States Constitution. *Gray v. Sanchez*, 86 N.M. 146, 520 P.2d 1091 (1974). *See also, Jones v. Superior Court*, 58 Cal.2d 56, 22 Cal. Rptr. 879, 372 P.2d 919 (1962); *Prudhomme v. Superior Court*, 2 Cal.3d 320, 85 Cal. Rptr. 129, 466 P.2d 673 (1970); *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 466 (1970); *Wardius v. Oregon*, 412 U.S. 470 (1973); *United States v. Nobles*, 422 U.S. 232, 955 S. Ct. 2160, 45 L. Ed. 2d 141 (1975).

In 2011, a new Paragraph D was added to provide an explicit mechanism for a defendant to obtain information and evidence potentially necessary for the defense, while maintaining the confidentiality of the theory of the defense concerning the information and evidence. The needed information and evidence may include various forensic or other interviews, evaluations, or testing of the defendant. Requiring the defendant to make a request in open court may have the practical effect of disclosing the nature of the defense prior to the time it may otherwise have to be disclosed under Paragraph A of the rule. An ex parte proceeding conducted pursuant to this rule does not violate the prohibitions against ex parte communications set forth in the Code of Judicial Conduct.

A new Paragraph E also was added in 2011 to allow a defendant to designate a potential expert witness, and then to protect from disclosure information given to that potential expert as well as opinions and reports generated by that potential expert. If the defendant lists the designated potential expert in the witness list required by Subparagraph (A)(3) or calls the potential expert as a witness at trial, then the items described in Subparagraph (A)(2) must be disclosed; if the defendant does not include the designated potential expert in the witness list required under Subparagraph (A)(3), the matters concerning the designated potential expert remain confidential. The term "the case" in Paragraph E is used to make clear that the person designated as a potential expert is not off limits to any party with regard to any other case or matter.

*See* Paragraph F of Rule 5-501 NMRA for the definition of "statement" as used in this rule.

[As amended by Supreme Court Order No. 11-8300-049, effective for cases filed or pending on or after February 6, 2012; as amended by Supreme Court Order No. 15-8300-010, effective for all cases pending or filed on or after December 31, 2015.]

## 5-502.1. Discovery; redaction of witness or victim information.

A. **Scope of rule.** This rule applies to documents and other materials subject to disclosure under Rules 5-501 and 5-502 NMRA.

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

(1) "counsel team" means the attorneys representing the parties and their employees or contractors who are participating in the preparation of the prosecution or

the defense, provided that "counsel team" does not include the defendant or any members of the public;

(2) "personal contact information" means a person's home address, home phone number, personal cell phone number, or personal email address;

(3) "protected personal identifier information" means social security number, taxpayer identification number, financial account number, or driver's license number, and all but the year of a person's date of birth; and

(4) "public" means any person or entity except members of the counsel team or court personnel.

C. **Redaction of protected personal identifier information.**

(1) An attorney with an obligation to provide discovery to opposing counsel under Rule 5-501 NMRA or Rule 5-502 NMRA may redact protected personal identifier information or personal contact information if the attorney deems it appropriate under the circumstances of the case. To do so, the attorney must

(a) file a notice that redacted and unredacted discovery is being provided to the opposing party; and

(b) provide two versions of documents and materials subject to disclosure as follows:

(i) The first version may have redacted protected personal identifier information or personal contact information. For discovery provided by the state, the defense counsel team may provide the redacted version to the defendant, and the defendant may retain the redacted version in the defendant's possession.

(ii) The second version shall be an unredacted version of the same discovery and shall be provided to the counsel team for the opposing party to accommodate the need for any conflicts checks and background investigation of victims and witnesses.

(2) If the state has an obligation to provide discovery to a pro se defendant under Rule 5-501 NMRA, the prosecutor may redact protected personal identifier information or personal contact information if the prosecutor deems it appropriate under the circumstances of the case. To do so, the attorney must file a notice that redacted discovery is being provided to the defendant.

(3) If an attorney provides redacted discovery under this rule, unredacted discovery shall not be disclosed to the defendant or a member of the public unless the court issues a written order finding that the defendant or member of the public has a specific compelling need for the unredacted discovery. The court may issue an order

permitting the disclosure of unredacted discovery on motion of a party, including a defendant acting pro se, or on the court's own motion.

D. **Failure to comply.** An attorney receiving discovery that includes redacted protected personal identifier information or personal contact information shall take all reasonable precautions to ensure that the unredacted version of the discovery is not disclosed by the attorney or any member of the counsel team to the defendant or any member of the public. Failure to comply with the provisions of this paragraph may subject the attorney or other person to sanctions, including sanctions for contempt of court, or the initiation of disciplinary proceedings.

[Adopted by Supreme Court Order No. 22-8300-025, effective for all cases pending or filed on or after December 31, 2022.]

**Committee commentary.** — This rule creates a mechanism for an attorney to redact discovery as needed to protect victims and witnesses from violent crime and identity theft and to encourage their participation in criminal proceedings without compromising the needs of opposing counsel to conduct conflicts checks and background investigations and otherwise fulfill counsel's duty to provide ethical, competent representation. This rule does not alter the disclosure requirements of Rules 5-501 and 5-502 NMRA, nor does it alter any requirement to provide a witness list, *see, e.g.*, Rules 5-503, 5-508, and LR2-308 NMRA. Under Paragraph C, an attorney must provide an unredacted version of documents and materials subject to disclosure. As appropriate, witness lists may be drafted to avoid explicit disclosure of names and addresses by making reference to the unredacted discovery. The definition of "protected personal identifier information" in this rule is consistent with the definition set forth in Rule 5-123 NMRA (Public inspection and sealing of court records), and varies slightly from the definition of "protected personal identifier information" set forth in the Inspection of Public Records Act, NMSA 1978, § 14-2-6(E) (2018).

## 5-503. Depositions; statements.

A. **Statements.** Any person, other than the defendant, with information which is subject to discovery shall give a statement. A party may obtain the statement of the person by serving a written "notice of statement" upon the person to be examined and upon each party not less than five (5) days before the date scheduled for the statement. The notice shall state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. If a subpoena is served to secure a witness or materials, a copy of the subpoena shall be served upon each party.

B. **Depositions; when allowed.** A deposition may be taken pursuant to this rule upon:

(1) agreement of the parties; or

(2) order of the court at any time after the filing of the indictment or information or complaint in the district court, upon a showing that it is necessary to take the person's deposition to prevent injustice.

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

D. **Time and place of deposition.** Counsel must make reasonable efforts to confer in good faith regarding scheduling of a deposition or statement before serving a notice of deposition or a notice of statement. Unless agreed to by the parties, any deposition allowed under this rule shall be taken at such time and place as ordered by the court. The attendance of witnesses at depositions may be compelled by subpoena as provided in these rules.

E. **Notice of examination: general requirements; special notice; notice of non-appearance; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party taking the deposition of any person upon oral examination pursuant to court order shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription or copy of the deposition or statement to be made from the recording of a deposition or statement at the party's expense.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders. If the deposition is taken by an official court reporter, the official transcript shall be the transcript prepared by the official court reporter.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 5-503.1 NMRA and shall begin with a statement on the record by the officer that includes:

(a) the officer's name and business address;

(b) the date, time, and place of the deposition;

(c) the name of the deponent;

(d) the administration of the oath or affirmation to the deponent; and

(e) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(6) The parties may agree in writing or the court may, upon motion, order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rule 5-503.1(A) NMRA, 5-503.2(A)(1) NMRA and 5-503.2(B)(1) NMRA, a deposition taken by such means is taken in the county and at a place where the witness is to answer questions. The officer taking the deposition must be physically present with the witness.

F. **Depositions; examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses in depositions may proceed as permitted at trial under the New Mexico Rules of Evidence, except Rule 11-103 NMRA and Rule 11-615 NMRA. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other

method authorized by Paragraph D(2) of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

G. **Statements; depositions; motion to terminate or limit examination.** At any time during a deposition or statement, on motion of a party, the witness or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the witness or the deponent, the court in which the action is pending, or the court in the county where the deposition or statement is being taken, may order the examination to cease or may limit the scope and manner of the taking of the deposition or statement pursuant to Rule 5-507 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party, the witness or the deponent, the taking of the deposition or statement shall be suspended for the time necessary to make a motion for an order.

H. **Depositions; review by witness; changes; signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Paragraph I(1) of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

I. **Certification by officer; exhibits; copies; notice of transcription.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. If the deposition is transcribed, the officer shall provide the original of the deposition or statement to the party ordering the transcription and shall give notice thereof to all parties. The party receiving the original shall maintain it, without alteration, until final disposition of the case in which it was taken or other order of the court. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may:

(a) offer copies to be marked for identification and annexed to the deposition or statement and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

J. **Final disposition of depositions.** The original deposition may be destroyed as provided in the judicial retention of records schedule.

[As amended, effective July 1, 1973; July 1, 1980; September 1, 1981; October 1, 1983; February 1, 1991; August 1, 1992; May 15, 2000; as amended by Supreme Court Order No. 05-8300-013, effective September 15, 2005.]

**Committee commentary.** — This rule was derived from Rule 1.220(f) of the Florida Rules of Criminal Procedure. *See* Rule 15 of the Federal Rules of Criminal Procedure. Depositions are to be used in criminal cases only in exceptional circumstances. *McGuinness v. State*, 92 N.M. 441, 589 P.2d 1032 (1979); *State v. Barela*, 86 N.M. 104, 519 P.2d 1185 (Ct. App. 1974). *See also* R. Giron, McGuinness v. State, Limiting the Use of Depositions at Trial, 10 N.M.L. Rev. 207 (1979-1980).

"Statement" as used in Paragraph A of this rule includes any statement given by a witness, including a videotape or recorded statement. The committee considered whether the prosecution or defense could take the deposition of a codefendant who has been granted witness immunity, but left this matter to the supreme court. The committee is of the opinion that any statement made by a codefendant who will become a witness for the state is discoverable under Rule 5-501. See, for example, *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (Ct. App. 1975); *State v. Herrera*, 84 N.M. 365, 503 P.2d 648 (Ct. App. 1972). *See also* 5-501 for the definition of "statement". See also commentary to Rule 5-116 NMRA.

Paragraph A of this rule requires witnesses to cooperate in the giving of a statement. A witness may not refuse to give a statement because defense counsel or the prosecuting attorney may not be able to be present during the taking of the statement.

Paragraph B of this rule provides for the use of a deposition when the witness may be unable to attend the trial or a hearing.

The court of appeals has indicated that one of the purposes of a deposition is to enable the defense to impeach a witness on cross examination at trial. *State v. Billington*, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974). However, under Paragraph B of this rule, the right to take the deposition would appear to be limited to the situation where the person will be unable or unwilling to attend the trial or a hearing. *See State v. Billington*, supra, 86 N.M. at 48-49 (dissenting opinion) and *State v. Blakely*, 90 N.M. 744, 568 P.2d 270 (Ct. App. 1977).

The use of a deposition at trial by the state requires strict compliance with Paragraph N of this rule. *See State v. Barela*, supra; State v. Berry, 86 N.M. 138, 520 P.2d 558 (Ct. App. 1974); *State v. De Santos*, 91 N.M. 428, 575 P.2d 612 (Ct. App.), cert. denied, 91 N.M. 491, 596 P.2d 297 (1978). This is an exception to the hearsay rule. Paragraph N of this rule was revised in 1981 to make the New Mexico rules governing depositions consistent with Rule 15 of the Federal Rules of Criminal Procedure and to clarify the relationship between the Rules of Evidence and the Rules of Criminal Procedure governing the use of depositions. *See* Rule 11-802 NMRA and *McGuinness v. State*, supra. *See also*, Subparagraph (1) of Paragraph D of Rule 11-801 NMRA, *California v. Green*, 399 U.S. 149 (1970), and Paragraph A of Rule 11-804 NMRA. The Rules of Evidence relating to the admissibility of evidence are applicable to evidence admitted by deposition.

This rule was amended in 1982 to comply with Supreme Court Miscellaneous Order 8000, June 28, 1982, requiring that the record in all criminal cases be on audio recording devices. *See* Rule 22-303 NMRA. Because depositions may be taken in hospitals or out-of-state or by a video recorder, the committee did not require the use of audio recording devices approved by the administrative office of the courts. Since depositions are for use at trial, it is anticipated that in most cases the trial court will have the deposition taken by an official court reporter or tape monitor on an audio recording device approved by the administrative office of the courts.

## 5-503.1. Persons before whom depositions may be taken.

A. **Within the United States.** Depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

B. **In foreign countries.** In a foreign country, depositions may be taken:

(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States;

(2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony; or

(3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in *(here name the country)*". Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. **Disqualification for interest.** Except as agreed to by the parties pursuant to Rule 5-512 NMRA, no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

As used in this rule, an "employee" means a person who is employed in the office of the defendant, the prosecutor or an attorney representing a defendant in the proceedings.

[Approved, effective May 15, 2000; as amended, effective September 30, 2002.]

## 5-503.2. Depositions; failure to make discovery; sanctions.

A. **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery in depositions as follows:

(1) An application for an order to a deponent who is not a party but whose deposition is being taken within the state or for an order to a party may be made to the court where the action is pending. If a deposition is being taken outside the state this shall not preclude the seeking of appropriate relief in the jurisdiction where the deposition is being taken.

(2) If a deponent fails to answer a question propounded or submitted under Rule 5-503 NMRA, or a corporation or other entity fails to make a designation under Rule 5-503(E)(5) NMRA, or if a party, in response to a request for inspection fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When

taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 5-507 NMRA.

(3) For purposes of this paragraph an evasive or incomplete answer is to be treated as a failure to answer.

(4) If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Any motion filed pursuant to this paragraph shall state that counsel has made a good faith effort to resolve the issue with opposing counsel prior to filing a motion to compel discovery.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. **Failure to comply with order.**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by a court with jurisdiction, the failure may be considered a contempt of that court.

(2) If a party or an officer, director or managing agent of a party or a person designated under Rule 5-503 NMRA to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Paragraph A of this rule, or if a party fails to obey an order under Rule 5-507 NMRA, the court in which the action is pending may make such orders in regard to the failure as are just.

[Approved, effective May 15, 2000.]

## 5-504. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

A. **When allowed.** Upon motion, and after notice to opposing counsel, at any time after the filing of the indictment, information or complaint in district court charging a criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, the district court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The district judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

B. **Use at trial.** At the trial of a defendant charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to Paragraph A of this rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a district judge and the defendant was present and was represented by counsel or waived counsel; and

(3) the defendant was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. **Additional use at trial.** In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons set forth in Paragraph N of Rule 5-503.

[As amended, effective July 1, 1988.]

**Committee commentary.** — This rule was drafted by the rules committee in response to House Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and Section 30-9-17 NMSA 1978. The purpose of 30-9-17, *supra*, is to protect a child who has been allegedly sexually abused from further mental stress. The committee explored several alternatives prior to preparing this draft.

First of all, the committee explored the possibility of removing all spectators from the courtroom during the child's testimony. This was rejected as it may not be constitutionally permissible to bar wholly the public and the press from the courtroom without the concurrence of the defendant under either the New Mexico Constitution or the United States Constitution. *See Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979); *Estes v. Texas*, 381 U.S. 532, 587, 85 S. Ct. 1628, 1662, 14 L. Ed. 2d 543, 583 (1965). Prior to the *Gannett* decision, it was generally recognized that the right to a public trial

under the United States Constitution could not even be waived by the defendant. *See Constitution of the United States*, congressional research service, 1973. There is also a right to a public trial under the New Mexico Constitution; however, there are no decisions relating to the waiver of this right.

Next, the committee considered further protections which could be afforded to the child. It was noted that the present rules already provide for the court to protect the child during discovery. *See* Rule 5-507 NMRA.

Several members of the committee had grave concerns about the constitutionality of not requiring an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically what is required to make a showing of good cause for a deposition of an alleged rape victim. Under the rule, the child must be under the age of sixteen and unable to testify without suffering unreasonable and unnecessary mental or emotional harm.

In 1988, the committee was requested to consider proposing amendments to Rule 5-504 NMRA which would further protect the child from unnecessary psychological harm. The committee was advised that in order to show good cause, some children have been subjected to two or three psychological evaluations. These evaluations in themselves have, in some cases, created unnecessary psychological harm to the child defeating the purpose of the statute and court rule. Since the present rule does not require a psychological examination, the committee did not believe that further amendments were necessary. Further, the committee is of the opinion that in the rare case that a psychological examination is necessary to show good cause, the trial judge should appoint an independent psychiatrist or psychologist to examine the child and the report to the court. No other examination should be required. The court's determination that psychological harm may result should be made outside the adversarial process.

The committee is of the opinion that the court should consider the following factors in determining whether a videotaped deposition should be taken to avoid a victim child from suffering unreasonable and unnecessary mental or emotional harm:

(1) the child is unable to testify because of fear;

(2) there is a substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

(3) the child suffers a mental or other infirmity; or

(4) conduct by defendant or defense counsel causes the child to be unable to continue testifying.

[Revised, effective May 1, 2002.]

## 5-505. Continuing duty to disclose.

A. **Additional material or witnesses.** If, subsequent to compliance with Rule 5-501 or 5-502, and prior to or during trial, a party discovers additional material or witnesses which he would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, he shall promptly give written notice to the other party or the party's attorney of the existence of the additional material or witnesses.

B. **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney in contempt of court pursuant to Rule 5-112 of these rules.

**Committee commentary.** — This rule was derived from Rule 16, Part III of the Colorado Rules of Criminal Procedure and Rules 16(c) and (d)(2) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 306-07, 316-17 (1974).

In *State v. Billington*, 86 N.M. 44, 519 P.2d 140 (Ct. App. 1974), the court held that the violation of this rule by the state entitled the defendant to a continuance. The court believed that the defendant had a right to take the deposition of a witness whose name was not given under Subparagraph (5) of Paragraph A of Rule 5-501 NMRA or seek other discovery for trial preparation and, therefore, a continuance was required as a matter of law.

In *State v. Quintana*, 86 N.M. 666, 526 P.2d 808 (Ct. App.), cert. denied, 86 N.M. 656, 526 P.2d 798 (1974), the opinion of the court states that an alleged violation of this rule could not be raised on appeal where the defendant did not object to the introduction of evidence on the grounds that this rule was violated. The concurring opinion emphasized that on appeal the defendant had to show that some prejudice resulted from the state's failure to comply with the discovery rules.

## 5-506. Grand jury proceedings.

A. **Indictment.** Grand jury indictments shall be public when they are filed with the court. Upon request, the court may order an indictment sealed until arrest.

B. **Sound recording.** A sound recording shall be made of the testimony of all witnesses and any explanation or instructions of the prosecutor and any comments made by the prosecutor or other persons in the presence of the grand jury. No record shall be made of the deliberations of the grand jury.

C. **Copy of recording.** At any time after indictment, on request of a party, the district court clerk shall furnish a copy of the tape recording of:

(1) the defendant's testimony before the grand jury; and

(2) the entire proceedings, unless the state objects to some portions of the tape, in which case the court shall determine which portions of the proceedings are to be furnished to defendant.

D. **Disclosure.** The district court may prohibit disclosure of that portion of testimony or proceedings which creates substantial risk of harm to some person or which is irrelevant to the defendant.

[As amended, effective August 1, 1989.]

**Committee commentary.** — This rule provides that the district court shall order the preparation of a copy of the tape recording of testimony of a defendant or a witness on the state's witness list before the grand jury.

Prior to the adoption of this rule and the amendment of Rule 5-501, the prosecution was not required to produce the statement of the defendant before the grand jury. Section 31-6-8 NMSA 1978, enacted by the 1979 legislature, provides that a transcript of testimony before the grand jury is to be made only upon order of the district court.

The rule in New Mexico is that:

"(O)nce the witness has testified at the criminal trial about that which he testified before the grand jury, the accused is entitled to an order permitting examination of that portion of the witness' grand jury testimony relating to the crime for which the defendant is charged". *Valles v. State*, 90 N.M. 347, 563 P.2d 610 (Ct. App. 1977), cert. denied, 90 N.M. 637, 567 P.2d 486, quoting from *State v. Sparks*, 85 N.M. 429, 512 P.2d 1265 (Ct. App. 1973), cert. denied, 92 N.M. 353, 588 P.2d 554 (1978); *State v. Felter*, 85 N.M. 619, 515 P.2d 138 (1973); *State v. Tackett*, 78 N.M. 450, 432 P.2d 415 (1967), cert. denied, 390 U.S. 1026, 20 L. Ed. 2d 283, 88 S. Ct. 1414 (1968); and *State v. Morgan*, 67 N.M. 287, 354 P.2d 1002 (1960), holding that the defendant is entitled to a copy of the transcript of testimony of a witness before the grand jury prior to the time that the witness testifies at trial only on a showing of particularized need.

Paragraph D of this rule addresses the problem that can result from the release of certain information such as the addresses of witnesses and the names of confidential informants. The district court may prohibit such disclosures when consistent with the constitutional right to a fair trial.

## 5-507. Depositions; statements; protective orders.

A. **Motion.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition or statement, the court in the district where the deposition or statement is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense, the risk of physical harm, intimidation, bribery or economic reprisals. The order may include one or more of the following restrictions:

(1) that the deposition or statement requested not be taken;

(2) that the deposition or statement requested be deferred;

(3) that the deposition or statement may be had only on specified terms and conditions, including a designation of the time or place;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that the deposition or statement be conducted with no one present except persons designated by the court;

(6) that a deposition or statement after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

B. **Written showing of good cause.** Upon motion, the court may permit the showing of good cause required under Paragraph A of this rule to be in the form of a written statement for inspection by the court in camera, if the court concludes from the statement that there is a substantial need for the in camera showing. If the court does not permit the in camera showing, the written statement shall be returned to the movant upon request. If no such request is made, or if the court enters an order granting the relief sought, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to the appellate court having jurisdiction in the event of an appeal.

C. **Denial of order.** If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery.

[As amended, effective August 1, 1992; May 15, 2000.]

**Committee commentary.** — This rule provides a protective order procedure only for the taking of depositions. Some of the same criteria for denying a party the opportunity to take a deposition are also used for denying discovery of evidence held by the state under Paragraph E of Rule 5-501 NMRA.

The grounds for the protective order are taken from Paragraph C of Rule 1-026 and American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 2.5 (Approved Draft 1970). The American Bar Association Special Committee on Federal Rules of Procedure urged that the proposed amendments to Rule 16 of the Federal Rules of Criminal Procedure include the Standards. *See* 52 F.R.D. 87, 98 (1971). However, the Bar Association recommendations were not included in the federal amendments. *See* 62 F.R.D. 271, 307, 316-17 (1974).

## 5-508. Notice of alibi; entrapment defense.

A. **Notice.** In criminal cases not within magistrate court trial jurisdiction, upon the written demand of the district attorney, specifying as particularly as is known to the district attorney, the place, date and time of the commission of the crime charged, a defendant who intends to offer evidence of an alibi or entrapment as a defense shall, not less than ten (10) days before trial or such other time as the district court may direct, serve upon such district attorney a notice in writing of the defendant's intention to introduce evidence of an alibi or evidence of entrapment.

B. **Content of notice.** A notice of alibi or entrapment shall contain specific information as to the place at which the defendant claims to have been at the time of the alleged offense and, as particularly as known to defendant or the defendant's attorney, the names and addresses of the witnesses by whom the defendant proposes to establish an alibi or raise an issue of entrapment. Not more than five (5) days after receipt of defendant's witness list or at such other time as the district court may direct, the district attorney shall serve upon the defendant the names and addresses, as particularly as known to the district attorney, of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi or claim of entrapment at the trial of the cause.

C. **Continuing duty to give notice.** Both the defendant and the district attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

D. **Failure to give notice.** If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If such notice is given by a defendant, the district court may exclude the testimony of any witness offered by the defendant for the purpose of proving an alibi or entrapment if the name and address of such witness was known to defendant or the defendant's attorney but was not stated in such notice. If the district attorney fails to file a list of witnesses and

serve a copy on the defendant as provided in this rule, the court may exclude evidence offered by the state to contradict the defendant's alibi or entrapment evidence. If notice is given by the district attorney, the court may exclude the testimony of any witnesses offered by the district attorney for the purpose of contradicting the defense of alibi or entrapment if the name and address of the witness is known to the district attorney but was not stated in such notice. For good cause shown the court may waive the requirements of this rule.

E. **Admissibility as evidence.** The fact that a notice of alibi was given or anything contained in such notice shall not be admissible as evidence in the trial of the case.

[As amended, effective May 1, 1998; by Supreme Court Order No. 12-8300-027, effective for all cases filed or pending on or after January 7, 2013.]

**Committee commentary.** — This rule was derived from Rule 3.200 of the Florida Rules of Criminal Procedure. The constitutionality of the Florida rule was upheld in *Williams v. Florida*, 399 U.S. 78, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970). In a more recent case, the United States Supreme Court declared the Oregon notice of alibi rule unconstitutional because the Oregon rules fail to give the defendant reciprocal discovery rights. *Wardius v. Oregon*, 412 U.S. 470, 93 S. Ct. 2208, 37 L. Ed. 2d 470 (1973)

A similar rule has now been adopted in the federal rules as Rule 12.1. *See* 62 F.R.D. 271, 292-95 (1974). *See also*, American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 3.3 (Approved Draft 1970).

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## 5-509. Habitual criminal proceedings; notice of attack on prior sentence.

A. **Notice.** If the defense in an habitual criminal sentencing proceeding intends to attack the validity of any prior conviction, unless a shorter period of time is ordered by the court, no later than ten (10) days before the habitual criminal sentencing proceeding, the defendant shall provide the state with a written notice of such intention. The defendant's notice of intent to attack a prior conviction shall contain specific information as to each conviction the defendant intends to attack as invalid and the

names and addresses of the witnesses by whom the defendant proposes to establish such defense. Not less than five (5) days after receipt of defendant's witness list or at such other time as the district court may direct, the district attorney shall serve upon the defendant the names and addresses, as particularly as known to the district attorney, of the witnesses the state proposes to offer in rebuttal to discredit the defendant's claim that the prior conviction was invalid.

B. **Continuing duty to give notice.** Both the defendant and the district attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

C. **Failure to give notice.** If a defendant fails to serve a copy of such notice as herein required, the court may exclude evidence offered by such defendant for the purpose of proving a prior conviction was invalid, except the testimony of the defendant himself. If such notice is given by a defendant, the district court may exclude the testimony of any witness offered by the defendant for the purpose of proving the invalidity of a prior conviction if the name and address of such witness was known to defendant or his attorney but was not stated in such notice. If the district attorney fails to file a list of witnesses and serve a copy thereof on the defendant as provided in this rule, the court may exclude evidence offered by the state to contradict the defendant's evidence. If such notice is given by the district attorney, the court may exclude the testimony of any witnesses offered by the district attorney for the purpose of contradicting the defendant's claim that a prior conviction was invalid if the name and address of such witness is known to the district attorney but was not stated in such notice. For good cause shown the court may waive the requirements of this rule.

[As adopted, effective August 1, 1989.]

## 5-511. Subpoena.

A. **Form; issuance.**

(1) Every subpoena shall:

(a) state the name of the court from which it is issued;

(b) state the title of the action and its criminal action number;

(c) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(d) be substantially in the form approved by the Supreme Court.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing, deposition or statement, or may be issued separately.

(2) All subpoenas shall issue from the court for the district in which the matter is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. **Service; place of examination.**

(1) A subpoena may be served any place within the state.

(2) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person's attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (2)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, including the public defender department, fees and mileage need not be tendered.

(3) A person may be required to attend a deposition or statement within one hundred (100) miles of where that person resides, is employed or transacts business in person, or at such other place as is fixed by an order of the court.

(4) A person may be required to attend a hearing or trial at any place within the state.

(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

(6) A subpoena may be issued for taking of a deposition within this state in a criminal action pending outside the state pursuant to Section 38-8-1 NMSA 1978 upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

(7) A subpoena may be served in an action pending in this state on a person in another state or country in the manner provided by law or rule of the other state or country.

C. **Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction.

(2)

(a) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, statement, hearing or trial.

(b) Subject to Subparagraph (2) of Paragraph D of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Subparagraph (3)(b)(iii) of this paragraph, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(b) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena.

D. **Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided in Subparagraph (3)(a)(ii) of Paragraph C of this rule.

[Approved, effective May 15, 2000; as amended by Supreme Court Order No. 16-8300-034, effective for all cases pending or filed on or after December 31, 2016.]

**Committee commentary.** — *See* the committee commentary following Rule 1-045 NMRA for a discussion of the comparable civil rule governing subpoenas. Prior to the adoption of this rule, Rule 1-045 NMRA governed subpoenas in criminal cases. *See* Rule 5-603 NMRA prior to the May 15, 2000, amendment of that rule.

## 5-511.1. Service of subpoenas and notices of statement.

Prior to or at the same time as service of any notice of a witness statement or subpoena other than a grand jury subpoena, copies of the notice and subpoena shall be served on each party in the manner prescribed by Rule 5-103 NMRA.

[Adopted by Supreme Court Order No. 16-8300-034, effective for all cases pending or filed on or after December 31, 2016.]

## 5-512. Stipulations regarding discovery procedure.

Unless the court orders otherwise, or previous orders of the court conflict, the parties may by written stipulation:

A. provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

B. modify the procedures provided by these rules for other methods of discovery.

[Approved, effective September 30, 2002.]

# ARTICLE 6
# Trials

## 5-601. Motions.

A. **Change of venue.** Change of venue shall be accomplished according to law.

B. **Motions to reconsider.** A party may file a motion to reconsider any ruling made by the district court. The district court may rule on a motion to reconsider with or without a hearing.

C. **Defenses and objections which may be raised.** Any defense, objection or request which is capable of determination without a trial on the merits may be raised before trial by motion.

D. **Defenses and objections which must be raised.** The following defenses or objections must be raised prior to trial:

(1) defenses and objections based on defects in the initiation of the prosecution; or

(2) defenses and objections based on defects in the complaint, indictment or information other than a failure to show jurisdiction in the court or to charge an offense, which objections shall be noticed by the court at any time during the pendency of the proceeding. Failure to present any such defense or objection, other than the failure to show jurisdiction or charge an offense, constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. If any such objection or defense is sustained and is not otherwise remediable, the court shall order the complaint, indictment or information dismissed.

E. **Time for making motions.**

(1) Unless otherwise provided by these rules or ordered by the court, a pretrial motion shall be made at the arraignment or within ninety (90) days thereafter, unless upon good cause shown the court waives the time requirement.

(2) A motion to reconsider may be filed at any time before entry of the judgment and sentence. A motion to reconsider the judgment and sentence or an appealable order entered before or after the judgment and sentence will toll the time to appeal only if the motion is filed within the permissible time for initiating the appeal.

F. **Evidentiary hearing.** If an evidentiary hearing is required, the motion shall be accompanied by a separate written request for an evidentiary hearing, including a statement of the ultimate facts intended to be proven at such an evidentiary hearing. Unless a shorter period of time is ordered by the court, at least five (5) days before the hearing on the motion, each party shall submit to the other party's attorney the names and addresses of the witnesses the party intends to call at the evidentiary hearing, together with any statement subject to discovery made by the witness which has not been previously disclosed pursuant to Rule 5-501 or 5-502.

G. **Ruling of court.** All motions shall be disposed of within a reasonable time after filing.

H. **Defenses and objections not waived.** No defense or objection shall be waived by not being raised or made at arraignment.

I. **Notice of withdrawal of motion.** If a motion is scheduled for hearing, a party shall give at least five (5) days notice of withdrawal of the motion.

[As amended, effective May 1, 1999; as amended by Supreme Court Order No. 19-8300-018, effective for all cases filed or pending on or after December 31, 2019.]

**Committee commentary.** — *See* NMSA 1978, §§ 38-3-3 to 38-3-7 (1880, as amended through 2003), for the statutes pertaining to change of venue. The original venue for a

criminal case is the county in which the crime was committed. NMSA 1978, § 30-1-14 (1963).

Paragraphs C and D of this rule were derived from Rules 12(b)(1) and (2) and 12(f) of the Federal Rules of Criminal Procedure. *See generally* 48 F.R.D. 553, 579 (1970); 62 F.R.D. 571, 287-92 (1974). Unlike the federal rule, Paragraph D of this rule does not include motions to suppress evidence as a matter which must be raised prior to trial. If a motion to suppress is made prior to trial, it is governed by Rule 5-212. Subparagraph (2) of Paragraph D, and Paragraph H of this rule superseded decisions holding that motions to quash an indictment must be raised prior to the arraignment and plea. *See* NMSA 1978, § 31-6-3; *State v. Elam*, 1974-NMCA-075, 86 N.M. 595, 526 P.2d 189.

Paragraph I was added in 1999 to provide an affirmative duty of an attorney to give five days notice of withdrawal of a motion. Failure to provide adequate notice can result in unnecessary costs. *See State v. Rivera*, 1998-NMSC-024, 125 N.M. 532, 964 P.2d 93. A willful violation of this paragraph can result in contempt of court and the imposition of disciplinary action. *See* Rule 5-112 NMRA. Paragraph I is intended to preclude local rules which may result in imposition of costs incurred by the court because of an alleged negligent failure of the attorney to provide adequate notice of the withdrawal of a motion. The committee is of the opinion that such a rule would have a chilling effect upon the zealous representation of a defendant in a criminal case.

This rule was amended in 2019 to affirmatively provide for motions to reconsider, which have long been recognized in common law though not in our Rules of Criminal Procedure. *See State v. Suskiewich*, 2014-NMSC-040, ¶ 12, 339 P.3d 614 (“Although our procedural rules do not grant the State an express right to file a motion to reconsider a suppression order, the common law has long recognized the validity and utility of motions to reconsider in criminal cases.”). Consistent with Rule 12-201 NMRA, a motion to reconsider filed within the permissible time period for initiating an appeal will toll the time to file an appeal until the motion has been expressly disposed of or withdrawn.

[As amended by Supreme Court Order No. 19-8300-018, effective for all cases filed or pending on or after December 31, 2019.]

## 5-602. Insanity; lack of capacity.

A. **Defense of insanity.**

(1) Notice of the defense of “not guilty by reason of insanity at the time of commission of an offense” must be given at the arraignment or within twenty (20) days thereafter, unless upon good cause shown the court waives the time requirement of this rule.

(2) When the defense of “not guilty by reason of insanity at the time of commission of an offense” is raised, the issue shall be determined in nonjury trials by

the court and in jury trials by a special verdict of the jury. If the defendant is acquitted on the ground of insanity, a judgment of acquittal shall be entered, and any proceedings for commitment of the defendant because of any mental disorder or developmental disability shall be pursuant to law as provided in the Mental Health and Developmental Disabilities Code, Sections 43-1-1 to -19 NMSA 1978.

B. **Notice of incapacity to form specific intent.** If the defense intends to call an expert witness on the issue of whether the defendant was incapable of forming the specific intent required as an element of the crime charged, notice of such intention shall be given at the time of arraignment or within twenty (20) days thereafter, unless upon good cause shown, the court waives the time requirement of this rule.

[As amended, effective August 1, 1989; November 1, 1991; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

**Committee commentary.** — The requirement of a notice of the defense of "not guilty by reason of insanity" under Subparagraph (1) of Paragraph A of this rule replaces the plea of not guilty by reason of insanity, eliminated by the 1982 enactment of Sections 31-9-3 and 31-9-4 NMSA 1978. *See State v. Page*, 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984). *See also*, Rule 5-303 NMRA for the types of permissible pleas. A similar notice is required by Rule 12.2 of the Federal Rules of Criminal Procedure.

Notice of incapacity to form specific intent pursuant to Paragraph B of this rule does not constitute notice of insanity as a defense under Subparagraph (1) of Paragraph A of this rule. *See State v. Padilla*, 88 N.M. 160, 161, 538 P.2d 802 (Ct. App.), cert. denied, 88 N.M. 318, 540 P.2d 248 (1975). Also, a motion for psychiatric examination which states that counsel does not know whether defendant was sane when he committed the acts resulting in criminal charges and that the examination is sought for the purpose of making such a determination, does not constitute notice under Subparagraph (1) of Paragraph A of this rule. *State v. Silva*, 88 N.M. 631, 545 P.2d 490 (Ct. App.), cert. denied, 89 N.M. 6, 546 P.2d 71 (1976).

Subparagraph (2) of Paragraph A of this rule replaced former Section 41-13-3, 1953 Comp., which was repealed at the time of the adoption of the rule. In the event that the defendant is found not guilty by reason of insanity, he is acquitted of the crime and may be confined as mentally ill only through the civil commitment procedures.

**Notice of incapacity to form specific intent**

Paragraph B of this rule requires the defendant to give notice to the state if he intends to call an expert witness on the issue of his ability to form the specific intent element of the crime charged. *Compare* Rule 12.2(b) of the Federal Rules of Criminal Procedure. For a discussion of what crimes include an element of specific intent, *see generally*, Thompson & Gagne, "The Confusing Law of Criminal Intent in New Mexico," 5 N.M.L. Rev. 63 (1974).

[As revised, September 12, 1991; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

## 5-602.1. Competency.

A. **Purpose; scope.** This rule is intended to provide a timely, efficient, and accurate procedure for resolving whether a defendant is competent to stand trial. Competency to stand trial is distinct from other questions about a defendant's mental health that may be relevant in a criminal proceeding, such as the substantive defenses of not guilty by reason of insanity at the time of commission of an offense and incapacity to form specific intent.

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

(1) ***Competency*.** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant has,

(a) sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding,

(b) a rational as well as factual understanding of the proceedings against the defendant, and

(c) the capacity to assist in the defendant's own defense and to comprehend the reasons for punishment.

(2) ***Competency evaluation*.** A competency evaluation is an examination of the defendant by a qualified mental health professional, appointed by and acting on behalf of the court, limited to determining whether the defendant is competent to stand trial. A competency evaluation shall be limited to a determination of the defendant's competency and shall not state opinions about other matters including the defendant's sanity at the time of the offense or ability to form a specific intent.

C. **Raising a question of competency; who may raise.** A question of the defendant's competency to stand trial shall be raised whenever it appears that the defendant may not be competent to stand trial. The question shall be raised by a motion for a competency evaluation and may be raised by a party or upon the court's own motion at any stage of the proceedings.

D. **Motion for competency evaluation; contents.**

(1) ***By motion of a party*.** When a question of competence is raised by a party, a motion for a competency evaluation shall be in writing and shall contain the following:

(a) a statement that the motion is based on a good faith belief that the defendant may not be competent to stand trial;

(b) a description of the facts and observations about the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without violating the attorney–client privilege;

(c) a statement that the motion is not filed for purposes of delay;

(d) a statement of whether the motion is opposed as provided in Rule 5-120 NMRA;

(e) a completed defendant information sheet, substantially in the form approved by the Supreme Court; and

(f) a request for a competency evaluation.

(2) ***Upon the court's own motion*.** When raised by the court, the court shall make a record of the specific facts or observations about the defendant that form the basis for the motion.

E. **Suspension of proceedings.** Upon the filing of a motion for a competency evaluation, further proceedings in the case shall be suspended until the motion is denied or, if the motion is granted, until the issue of the defendant's competency is determined. Suspension of proceedings under this paragraph shall not affect a court's authority to set or review conditions of release under Rule 5-401 NMRA or to rule on a motion for pretrial detention under Rule 5-409 NMRA and shall not preclude further judicial action, defense motions, or discovery proceedings which may fairly be conducted without the personal participation of the defendant.

F. **Resolution of motion; reasonable belief.** In considering a motion for a competency evaluation, the court shall comply with the following procedures.

(1) ***Unopposed*.** Within two (2) days of the filing of a motion that is unopposed under Subparagraph (D)(1)(d) of this rule, the court shall file an order substantially in the form approved by the Supreme Court finding whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial. The determination shall be based upon the allegations in the motion or upon the court's own observations of the defendant.

(2) ***Opposed*.** A response in opposition to a motion for a competency evaluation shall be in writing, shall cite specific facts in opposition to the motion, and shall be filed within five (5) days of the filing of the motion or be deemed waived. Upon the filing of a response in opposition, the court shall do one of the following:

(a) file an order substantially in the form approved by the Supreme Court within two (2) days finding whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial; or

(b) hold a hearing on the motion and file an order substantially in the form approved by the Supreme Court within five (5) days of the filing of a response under this Subparagraph finding whether there is a reasonable belief that the defendant may not be competent to stand trial.

G. **Evaluation order.** An order finding a reasonable belief under Paragraph F of this rule shall order the defendant to undergo a competency evaluation. Within two (2) days of filing the order, the court shall deliver a copy of the evaluation order, motion for a competency evaluation, and response, if any, to the evaluator designated to perform the evaluation. The order shall be in a form substantially approved by the Supreme Court and shall include the following:

(1) the name of the evaluator;

(2) a provision requiring the evaluator to file a written report with the court in accordance with Paragraph H of this rule within thirty (30) days of the entry of the order, unless the court orders the report to be filed at another time; and

(3) if the motion for a competency evaluation was filed before the start of a trial by jury, a provision requiring the parties to return to court for a hearing on the question of the defendant's competency within forty-five (45) days of the entry of the order.

H. **Report; contents; disclosure.** The report ordered under Subparagraph (G)(2) of this rule shall be filed with the court.

(1) ***Contents of report*.** The report shall include the following:

(a) a description of the procedures, tests, and methods used by the evaluator;

(b) a clear statement of the evaluator's clinical findings and opinions about the defendant's competency;

(c) a description of the sources of information and the factual basis for the evaluator's clinical findings and opinions, provided that the report shall not include information or opinions concerning the defendant's mental condition at the time of the alleged crime or any statements made by the defendant regarding the alleged crime or any other crime; and

(d) the reasoning by which the evaluator used the information to reach the clinical findings and opinions.

(2) ***Disclosure*.** Within two (2) days of the filing of the report, the court shall provide a copy to the defendant and to the state. Prior to disclosure, the court shall excise any statements made by the defendant regarding the alleged crime or any other crime. The court shall notify the parties when information has been withheld under this subparagraph and that any excised information shall be sealed, preserved in the records of the court, and made available to the appellate court in the event of an appeal.

I. **Effect of report; final resolution of competency.**

(1) ***Motion filed before the start of a trial by jury*.** If the motion for a competency evaluation was filed before the start of a trial by jury, the court and the parties shall proceed as follows after receiving the report filed under Paragraph H of this rule.

(a) *Stipulations; objections*. Within seven (7) days of the filing of the report, the parties shall confer and file with the court one of the following:

(i) a joint motion to adopt the conclusion set forth in the report; or

(ii) the specific, written objections of either party.

(b) *Hearing*. The court shall hold a hearing on the question of the defendant's competency as ordered under Subparagraph (G)(3) of this rule, subject to the following procedures.

(i) If the parties agree with and the court concurs in the conclusion set forth in the report, the court may vacate the hearing and proceed under Subparagraph (1)(c) of this paragraph.

(ii) If a hearing is necessary, the purpose of the hearing shall be to determine based upon a preponderance of the evidence whether the defendant is not competent to stand trial.

(iii) The conclusion set forth in the report shall be prima facie evidence about the defendant's competency, subject to rebuttal by the party challenging the report.

(c) *Final order on competency*. Within three (3) days of the conclusion of the hearing held under Subparagraph (1)(b) of this paragraph, the court shall file an order resolving the question of the defendant's competency. Upon request of the parties, the order shall include findings of fact and conclusions of law and may incorporate by reference the report filed under Paragraph H of this rule. If the court concludes that the defendant is not competent, the court shall proceed under Paragraph J of this rule.

(2) ***Motion filed after the start of a trial by jury*.** If the motion for a competency evaluation was filed after the start of a trial by jury, the court shall submit

the question to the jury at the close of evidence. The jury shall decide by a preponderance of the evidence if the defendant is not competent to stand trial before considering the defendant's guilt or innocence beyond a reasonable doubt.

J. **Defendant found not competent to stand trial.**

(1) If the defendant's competency is raised before the start of a trial by jury and the court finds that the defendant is not competent to stand trial, the court shall proceed under Rule 5-602.2 NMRA.

(2) If the defendant's competency is raised after the start of a trial by jury and the jury finds that the defendant is not competent to stand trial, the court shall declare a mistrial and proceed under Rule 5-602.2 NMRA.

K. **Extensions of time.** The time limits provided in this rule may be extended by the court for good cause shown, provided that the aggregate of all extensions granted by the court shall not exceed ninety (90) days from the day that the motion for a competency evaluation is filed, except upon a showing of exceptional circumstances. An order extending time shall be in writing and shall state the reasons supporting the extension. An order extending time beyond the ninety (90)-day limit set forth in this paragraph shall not rely on circumstances that were used to support a previous extension.

L. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely motion for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the question of the defendant's competence is not resolved within the time limits provided in this rule, including any court-ordered extensions, the case shall be subject to review and dismissal without prejudice at the discretion of the court.

M. **Cases transferred to the district court; remand.** In a case transferred to the district court under Rules 6-507.1 or 8-507.1 NMRA, the court shall do the following:

(1) open a case and order a competency evaluation under Paragraph G of this rule within (5) days of receiving the order transferring the case;

(2) proceed under this rule to determine whether the defendant is competent to stand trial, and

(a) if the defendant is found competent, remand the case within two (2) days to the court in which the case is pending; or

(b) if the defendant is found not competent, remand the case to the court in which the case is pending within two (2) days after a determination that further proceedings under Rule 5-602.2 NMRA are inapplicable.

N. **Statements and other information inadmissible.** Any statements or other information elicited from a defendant or any other person for the purpose of determining the defendant's competency shall not be admissible or used against the defendant in any criminal proceeding on any issue other than the defendant's competency to stand trial.

O. **Automatic sealing of court records.** Any motion, response, report, or other paper filed under this rule shall be automatically sealed without motion or order of the court as provided in Rule 5-123(C)(2) NMRA. An order for a competency evaluation under Paragraph G of this rule and a final order on competency under Paragraph I of this rule shall not be sealed except upon motion and order under Rule 5-123 NMRA.

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

**Committee commentary.** — "It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171 (1975); *see also State v. Rotherham*, 1996-NMSC-048, ¶ 13, 122 N.M. 246, 923 P.2d 1131. ("The law has long recognized that it is a violation of due process to prosecute a defendant who is incompetent to stand trial."). Unlike affirmative defenses that implicate questions of culpability, deterrence, and punishment for an individual defendant, *see e.g.*, Rule 5-602(A) NMRA (setting forth procedures for raising the defense of not guilty by reason of insanity at the time of the commission of the offense), the prohibition against trying an incompetent defendant is integral to the legitimacy of the criminal justice system itself. *See Drope*, 420 U.S. at 172 ("[T]he prohibition is fundamental to an adversary system of justice."); *see also Rotherham*, 1996-NMSC-048, ¶ 13 ("Suspension of the criminal process where the defendant is incompetent is fundamental to assuring the fairness, accuracy, and dignity of the trial."). As such, all participants in a criminal proceeding—including the court acting sua sponte—have a shared duty to inquire into the defendant's competency whenever circumstances suggest that the defendant, "though physically present in the courtroom, is in reality afforded no opportunity to defend himself." *Drope*, 420 U.S. at 171 (internal quotation marks and citation omitted). This rule should be interpreted to effectuate that common purpose.

The procedures set forth in this rule for determining whether a defendant is incompetent to stand trial were substantially amended and recompiled from Rule 5-602 NMRA. The amended rule is intended to address concerns about the delays and costs associated with raising a question of the defendant's competency in a criminal proceeding. The rule addresses these concerns in several ways. First, the rule limits the scope of the evaluation that may be ordered when competency is raised to a determination of

whether the defendant is competent to stand trial; other questions about the defendant's mental health that may be relevant to the defense should be raised and evaluated separately. *See, e.g.*, Rule 5-502(D) NMRA (setting forth ex parte procedures for a motion to transport the defendant for evaluation, testing, or interviewing when "reasonably necessary for the preparation of the defense"). Second, the rule formalizes and streamlines the process for raising a question about the defendant's competency and determining whether an evaluation is necessary. Third, the rule requires the appointment of a neutral evaluator and establishes a rebuttable presumption in favor of the evaluator's conclusion about the defendant's competency. And fourth, the rule imposes aggressive time limits on the court, the parties, and the evaluator to ensure that the question of the defendant's competency is resolved as efficiently as possible.

**Paragraph A**

The procedures set forth in this rule are intended to be used only to determine whether the defendant is competent to stand trial. This rule therefore may not be used to obtain an evaluation of other aspects of the defendant's mental health, such as the availability of defenses under Rule 5-602 NMRA (setting forth procedures for raising the defenses of not guilty by reason of insanity at the time of the commission of the offense and incapacity to form specific intent). Similarly, the procedures set forth in this rule may not be used for purposes unrelated to assessing the defendant's competency, including the following:

Neither party should move for an evaluation of competence in the absence of a good faith doubt that the defendant is competent to proceed. Nor should either party use the incompetence process for purposes unrelated to assessing and adjudicating the defendant's competence to proceed, such as to obtain information for mitigation of sentence, obtain a favorable plea negotiation, or delay the proceedings against the defendant. Nor should the process be used to obtain treatment unrelated to the defendant's competence to proceed . . . .

*Criminal Justice Standards on Mental Health*, § 7-4.3(e) (Am. Bar Ass'n 2016).

**Paragraph B**

**Definition of competency.**

The definition of competency set forth in Subparagraph (B)(1) is taken from *State v. Linares*, 2017-NMSC-014, ¶ 34, 393 P.3d 691 (quoting *Rotherham*, 1996-NMSC-048, ¶ 13). As the Supreme Court has noted, UJI 14-5104 NMRA sets forth a "different formulation of the conditions necessary to be deemed competent." *Linares*, 2017-NMSC-014, ¶ 34 n.8. *Compare id*. ¶ 34 ("A person is competent to stand trial when he or she has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, a rational as well as factual understanding of the proceedings against him, and the capacity to assist in his own defense and to comprehend the reasons for punishment." (internal quotation marks and alterations omitted)), *with* UJI

14-5104 NMRA (setting forth the elements of competency as (1) understanding the nature and significance of the criminal proceedings, (2) having a factual understanding of the criminal charges, and (3) being able to assist the attorney with the defense). The committee considers the standard set forth in *Linares* to be controlling.

**Definition of competency evaluation.**

The evaluation that may be ordered under this rule is limited to a determination of the defendant's competency. Such an evaluation shall be performed by a neutral, court-appointed evaluator, selected from a list of evaluators provided by the Administrative Office of the Courts under NMSA 1978, Section 31-9-2, or by the Human Services Department on behalf of the Department of Health under NMSA 1978, Section 43-1-1. As a court-appointed expert, the evaluator acts on behalf of the court and not on behalf of any party. *Cf. State v. Garcia*, 2000-NMCA-014, ¶ 32, 128 N.M. 721, 998 P.2d 186 ("[T]hat the State would not have chosen [the court-appointed evaluator] to perform the evaluation is of no moment to this Court. . . . The record indicates that [the court-appointed evaluator] was selected by the New Mexico Department of Health, *not* Defendant, and that she was further selected as the court's expert, *not* Defendant's.").

A competency evaluation should not address whether a defendant is "dangerous" and therefore may be subject to commitment to attain treatment to competency. *Cf. State v. Gallegos*, 1990-NMCA-104, ¶ 24, 111 N.M. 110, 802 P.2d 15 (explaining that the competency evaluations "made prior to a Section 31-9-1.5 hearing" are not "for the purpose of assessing [the] defendant's dangerousness"). The term "dangerous" is defined by statute and is not a clinical diagnosis. *See* NMSA 1978, § 31-9-1.2 (D) ("'[D]angerous' means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 [criminal sexual penetration] or 30-9-13 [criminal sexual contact of a minor] NMSA 1978."). Further, the need to consider a defendant's dangerousness arises only after a court has held that a defendant is not competent to stand trial and only if the defendant is charged with a felony. *See* § 31-9-1.2(B); *see also Garcia*, 2000-NMCA-014, ¶ 31 ("'Dangerousness' is a consideration secondary to the initial determination of competency." (citing Rule 5-602(B)(3)(b) NMRA (1991))).

**Paragraph C**

"The law has long recognized that it is a violation of due process to prosecute a defendant who is incompetent to stand trial." *Rotherham*, 1996-NMSC-048, ¶ 13. The rule therefore permits the issue of the defendant's competency to be raised by a motion for a competency evaluation at any point in the proceedings by the parties or the court. *Cf. Pate v. Robinson*, 383 U.S. 375, 385 (1966) (holding that the court's failure to hold a hearing sua sponte on the question of the defendant's competence violated his constitutional right to a fair trial). Once a question of the defendant's competency is raised, the court "does not possess the discretion to ignore the issue" and must make "a determination on the record" about whether the defendant is competent to stand trial. *See State v. Montoya*, 2010-NMCA-067, ¶¶ 14, 18, 148 N.M. 495, 238 P.3d 369

(decided under Rule 5-602 NMRA (1991)). Similarly, the question, once raised, cannot be waived by the defendant. *See Pate*, 383 U.S. at 384 ("[I]t is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial.").

**Paragraph D**

This paragraph sets forth specific requirements for requesting a competency evaluation. A motion under this paragraph must be in writing and must include certain information and statements to satisfy the court that the motion is well-taken and should be granted. *Cf., e.g., State v. Flores*, 2005-NMCA-135, ¶ 29, 138 N.M. 636, 124 P.3d 1175 ("[A] court may consider defense counsel's observations and opinions, but . . . those observations and opinions alone cannot trigger reasonable doubt about the defendant's competency."); *State v. Hovey*, 1969-NMCA-049, ¶¶ 21-22, 80 N.M. 373, 456 P.2d 206 (holding that the district court did not abuse its discretion in denying a motion for a mental examination when defense counsel only "wondered about" the defendant's competency and never asserted that the defendant was incompetent). Together with the reasonable belief standard set forth under Paragraph F for ordering a competency evaluation, these provisions are intended to speed the court's determination of whether an evaluation should be ordered. In most cases, the court should have sufficient information from the motion and any response in opposition to rule on the motion without an evidentiary hearing.

A motion for a competency evaluation must include "a description of the facts and observations about the defendant that have formed the basis for the motion." This requirement may be satisfied by the first-hand knowledge of the movant or, for example, by attaching "an affidavit from someone who has observed the defendant and formulated an opinion about his or her competency, such as a corrections officer or defense counsel's paralegal." *Flores*, 2005-NMCA-135, ¶ 31. When a motion is filed by defense counsel, this requirement must be met without disclosing the substance of confidential communications with the defendant or violating the attorney–client privilege. *Accord Criminal Justice Standards on Mental Health*, § 7-4.3(f).

**Paragraph E**

The automatic suspension of proceedings under Paragraph E is consistent with NMSA 1978, Section 31-9-1, and applies to any proceeding for which the defendant's personal participation is fairly required. As such, the suspension required by the rule does not stay all proceedings, and matters that do not require the defendant's personal participation may proceed, including setting or reviewing conditions of release and considering motions that raise purely legal issues. Nothing in this rule is intended to limit a court's inherent authority to stay proceedings upon motion. *See, e.g., Belser v. O'Cleireachain*, 2005-NMCA-073, ¶ 3, 137 N.M. 623, 114 P.3d 303 ("The authority to stay proceedings is incidental to the court's inherent management authority.").

Granting a motion for a competency evaluation necessarily delays the proceedings against the defendant. *See, e.g., State v. Serros*, 2016-NMSC-008, ¶ 62, 366 P.3d 1121 (finding support for the district court's finding that defense counsel delayed the defendant's case "by raising the question of . . . competency and then failing to pursue an evaluation once the case had been stayed"). In extreme cases, the delay following an order for a competency evaluation can be substantial. *See, e.g., State v. Stock*, 2006-NMCA-140, ¶ 20, 140 N.M. 676, 147 P.3d 885 (noting that the defendant's case was delayed "for nearly two and one-half years" following an order for a competency evaluation). When ordering a competency evaluation, the court should be mindful of the defendant's conditions of release, including whether the defendant is in custody, and schedule a hearing to set or review conditions of release if appropriate.

**Paragraph F**

This paragraph sets forth procedures and time limits for ruling on a motion for a competency evaluation. When a motion is unopposed, the court shall review the motion and any supporting documentation within two days of its filing to determine if the motion is supported by a reasonable belief that the defendant may not be competent to stand trial.

When a motion for a competency evaluation is opposed, the rule sets forth an expedited process for considering the motion. The court must allow five days for a response in opposition. If a timely response is not submitted, the court shall review the motion to determine whether it is supported by a reasonable belief that the defendant may not be competent and shall rule on the motion within two days. If a response is submitted, the court may rule on the pleadings or may hold an expedited hearing to determine whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial.

The reasonable belief standard is not the standard previously set forth in Rule 5-602 NMRA for ordering a competency evaluation. *See* Rule 5-602(B)(2)(a) NMRA (1991) (requiring an evaluation when the court finds a "reasonable doubt as to the defendant's competency"); Rule 5-602(C) NMRA (1991) (requiring an evaluation "upon motion and good cause shown"). The former "reasonable doubt" and "good cause" standards invited decades of litigation about the quantum of evidence necessary to support an order for an evaluation. *See, e.g., Flores*, 2005-NMCA-135, ¶¶ 26-29 (reviewing cases considering whether enough evidence had been offered "to pass the reasonable doubt and good cause tests"). This litigation is often misplaced and delays the ultimate determination of the substantive issue at hand: whether the defendant is not competent to stand trial. Whether to order an evaluation is a threshold issue and therefore should not require proof that the defendant is actually incompetent. *See Mitchell v. United States*, 316 F.2d 354, 360 (D.C. Cir. 1963) ("It cannot reasonably be supposed that Congress intended to require the accused to produce, in order to get a mental examination, enough evidence to prove that he is incompetent or irresponsible. That is what the examination itself may, or may not, produce. If the accused already had such evidence, there would be little need for the examination."); *see also Flores*, 2005-

NMCA-135, ¶ 31 (“We do not read the case law as requiring expert testimony in order to obtain an evaluation of his or her competency . . . .”).

The reasonable belief standard therefore requires the court to consider only whether the movant’s subjective, good faith belief that the defendant may not be competent to stand trial is objectively reasonable. *Cf. Kestenbaum v. Pennzoil Co*., 1988-NMSC-092, ¶ 27, 108 N.M. 20, 766 P.2d 280 (discussing the difference between a “subjective good faith belief as opposed to an objective standard of reasonable belief”). In making this determination, the court should evaluate whether the motion demonstrates that the movant’s good faith belief is supported by specific, articulable facts that would lead a reasonable person to believe that the defendant may not be competent to stand trial. *Cf. State v. Martinez*, 2018-NMSC-007, ¶ 10, 410 P.3d 186 (“An officer obtains reasonable suspicion when the officer becomes aware of specific articulable facts that, judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring.” (internal citation and quotation marks omitted)). This is not a heavy burden, and in most circumstances a motion that meets the requirements of Paragraph D of this rule will satisfy the reasonable belief standard without the need for an evidentiary hearing. Without such a showing, however, a motion for a competency evaluation—whether opposed or unopposed—should be denied. *Cf. Hovey*, 1969-NMCA-049, ¶ 18 (“[T]here must be a showing of reasonable cause for the belief that an accused is not competent to stand trial.”).

**Paragraph G**

An evaluation ordered under Paragraph G of this rule shall be provided at no cost to an indigent defendant as provided by Sections 31-9-2 and 43-1-1.

**Paragraph H**

**Contents of report.**

Subparagraph (H)(1) identifies the information that must be included in the report filed with the court after the defendant’s competency evaluation. *Accord Criminal Justice Standards on Mental Health*, § 7-3.6(b). Paragraph (H)(1)(b), in particular, requires the report to include “a clear statement of the evaluator’s clinical findings and opinions about the defendant’s competency.” This requirement is intended to discourage the use of qualifiers such as “marginally” or “minimally” competent, which are not helpful and invite further litigation and delay. If the expert is not confident about the conclusion, the expert should perform further testing until a clear conclusion can be reached.

**Disclosure after review.**

Within two days of the filing of the report, the court shall review the report and provide a copy to the defendant and the state. Prior to disclosure, the court must review the report and excise any information or opinions unrelated to the defendant’s present competency before delivering copies of the report to the parties. *Criminal Justice*

*Standards on Mental Health*, § 7-3.7(a) ("The report should not contain information or opinions concerning either the defendant's mental condition at the time of the alleged offense or any statements made by the defendant regarding the alleged offense or any other offense."). If information is excised, the court must notify the parties and ensure that the information is sealed in the record and preserved for appellate review. *Accord Standards for Criminal Justice: Discovery and Trial by Jury*, § 11-6.6 (Am. Bar Ass'n 3d ed. 1996) (setting forth procedures for withholding information that is not discoverable and preserving the record for appellate review).

**Paragraph I**

Paragraph I sets forth the procedures for resolving the question of the defendant's competency after the report is filed by the evaluator and distributed to the parties. Within seven days of the filing of the report, the parties are required to confer and file either a stipulated motion to adopt the conclusion set forth in the report or the specific objections of either party.

The final question of the defendant's competency should be decided at the hearing ordered under Subparagraph (G)(3), unless the parties stipulate to, and the court agrees with, the conclusion set forth in the report. If a hearing is necessary, the court shall determine by a preponderance of the evidence whether the defendant is not competent to stand trial. Subparagraph (I)(1)(b)(iii) provides that the conclusion set forth in the report shall be prima facie evidence about the defendant's competency, subject to rebuttal by the party challenging the report. Favoring the conclusion set forth in the report reflects the evaluator's role as the court's neutral expert.

The presumption in favor of the report does not change the burden of persuasion, which is on the party asserting that the defendant is not competent. *See, e.g., State v. Chavez*, 2008-NMSC-001, ¶ 11, 143 N.M. 205, 174 P.3d 988 ("With respect to the initial determination of competency, it is well established that the defendant in a criminal case bears the initial burden of proving his or her incompetence by a preponderance of the evidence standard."). Rather, the presumption imposes a burden of production on the party challenging the conclusion set forth in the report. *See Mortg. Inv. Co. v. Griego*, 1989-NMSC-014, ¶ 13, 108 N.M. 240, 771 P.2d 173 ("[Rule 11-301 NMRA] imposes only a burden of production on the party against whom the presumption is directed."); Rule 11-301 NMRA ("In a civil case, unless a state statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally."); *see also* UJI 14-5104 NMRA committee commentary ("[P]roceedings to ascertain the competency to stand trial are civil proceedings."). Either party may challenge the report by producing evidence, for example, that the evaluation was flawed or incomplete. Without evidence tending to undermine the reliability of the report, however, the evaluator's conclusion about the defendant's competency ordinarily should be dispositive. *Cf. Bell v. Skillicorn*, 1892-NMSC-007, ¶ 4, 6 N.M. 399, 28 P. 768 ("Where the party having the burden of

proof establishes a prima facie case, and no proof to the contrary is offered, he would prevail.").

When a motion for a competency evaluation is filed after the start of a trial by jury, the court shall submit the issue to the jury, unless the court finds that "there is no reasonable doubt as to the defendant's competency to stand trial, in which case there is no question for a jury to decide." *See State v. Noble*, 1977-NMSC-031, ¶ 7, 90 N.M. 360, 563 P.2d 1153; *see also* UJI 14-5104 NMRA. This requirement is rooted in the constitutional right to a trial by jury. *See* N.M. Const. art. II, § 12 ("The right of trial by jury as it has heretofore existed shall be secured to all and remain inviolate."); *see also generally State v. Chavez*, 1975-NMCA-119, 88 N.M. 451, 541 P.2d 631 (tracing the development of the constitutional right to a trial by jury on the question of a defendant's competency). When decided by a jury, a verdict on the issue of the defendant's competency need not be unanimous. *See* UJI 14-5104 NMRA.

**Paragraph J**

Rule 5-602.2 NMRA sets forth procedures that must be followed after a finding of incompetency.

**Paragraph K**

The court may extend any of the time limits in this rule for good cause shown, provided that the ultimate issue of the defendant's competency shall be resolved within ninety days of the filing of the motion for a competency evaluation. The court shall not grant an extension that exceeds the ninety-day limit except upon a showing of exceptional circumstances. In addition to granting an extension of time, the court should consider whether the use of the court's coercive powers may be appropriate.

**Paragraph L**

A dismissal for failure to comply with the time limits set forth in this rule is distinct from a dismissal for violation of the defendant's right to a speedy trial under the Sixth Amendment to the United States Constitution. Like the speedy trial analysis, however, the reasons for the delay may be relevant when deciding whether to dismiss a case under Subparagraph (L)(2) of this rule. *See, e.g., State v. Ochoa*, 2017-NMSC-031, ¶ 18, 406 P.3d 505 (discussing four types of delay and how they weigh against the defendant and the state). The court also may consider whether the use of the court's coercive powers, rather than dismissal, would be appropriate.

An order of dismissal under this rule is a final, appealable order. *See, e.g., State v. Lucero*, 2017-NMCA-079, ¶ 11, 406 P.3d 530 (holding that the state has the right to appeal a district court order dismissing a criminal complaint, indictment, or information "even if the dismissal is without prejudice").

**Paragraph N**

This paragraph is derived from Standard 7-4.7(a) of the ABA Mental Health Standards. *See also* Rule 11-504 NMRA (providing that communications between a patient and the patient's physician, psychotherapist, or state or nationally licensed mental-health therapist for the purpose of diagnosis or treatment are privileged). Information elicited from the defendant or any other person for the purpose of determining the defendant's competency is immaterial to the defendant's guilt or innocence and therefore is inadmissible against the defendant in a criminal proceeding unless the defendant waives the privilege. *See Criminal Justice Standards on Mental Health*, § 7-4.7(b) ("The defendant waives the privilege . . . by using or indicating an intent to use the report or parts thereof for any other purpose."). The privilege may not be used to shield evidence that would be otherwise admissible in a criminal proceeding.

**Courtroom closure**

Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 5-124(A) NMRA ("All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule."); *see also* Rule 5-124 committee commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

## 5-602.2. Proceedings after a finding of incompetency.

A. **Scope.** This rule governs proceedings after a defendant has been found incompetent to stand trial under Rule 5-602.1 NMRA. This rule does not apply to a defendant charged with a felony whose incompetency is believed to be due to developmental or intellectual disability. Those proceedings are governed by Rule 5-602.3 NMRA.

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

(1) ***Competency.*** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant has,

(a) sufficient present ability to consult with the defendant's lawyer with a reasonable degree of rational understanding,

(b) a rational as well as factual understanding of the proceedings against the defendant, and

(c) the capacity to assist in the defendant's own defense and to comprehend the reasons for punishment.

(2) ***Dangerous.*** The terms dangerous or dangerousness mean that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or Section 30-9-13 NMSA 1978. Dangerousness is not a clinical diagnosis; therefore, a finding of dangerousness need not be based on a psychological evaluation or on expert testimony.

(3) ***Department.*** The term Department means the New Mexico Department of Health.

C. **Defendant not charged with a felony.** If the incompetent defendant has not been charged with a felony, the following provisions shall apply.

(1) ***Case transferred to district court.*** If the case was transferred to the district court under Rule 6-507.1 NMRA or Rule 8-507.1 NMRA, the court shall remand the case within two (2) days to the court in which the case is pending as provided in Rule 5-602.1(M)(2)(b) NMRA.

(2) ***Case originally filed in district court.*** If the case was originally filed in the district court, the court may dismiss the case without prejudice in the interests of justice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

D. **Defendant charged with a felony; dangerousness determination.** If the incompetent defendant is charged with a felony, the court shall consider whether there is clear and convincing evidence that the defendant is dangerous as that term is defined by Section 31-9-1.2(D) NMSA 1978 and this rule. A determination of the defendant's dangerousness shall take into account only evidence relevant to whether the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or Section 30-9-13 NMSA 1978.

E. **No finding of dangerousness.** If the court does not find that the incompetent defendant is dangerous under Paragraph D of this rule, the court may dismiss the case without prejudice in the interests of justice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code and order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

F. **Finding of dangerousness.**

(1) ***Commitment for treatment to attain competency.*** If the court finds that an incompetent defendant charged with a felony is dangerous, the court shall commit the defendant for treatment to attain competency to stand trial. The order of commitment shall order the defendant transported to a secure, locked facility where the defendant shall remain under the supervision of the Department. The order also shall provide for return of the defendant to the local facilities of the court on completion of the treatment.

(2) ***Inability to treat defendant.*** If after an investigation the Department determines that it does not have the ability to meet the medical needs of the defendant, the Department may refuse admission and certify to the court and parties the Department's inability to meet the medical needs of the defendant. The certification shall be made within fourteen (14) days of receipt of the court's order of commitment and receipt of necessary and available documents reasonably required for admission. Within ten (10) days of receipt of the certification, the court shall set a hearing to determine disposition of the criminal case.

(3) ***Initial assessment and report.*** Unless the Department certifies that it is unable to meet the medical needs of the defendant, within thirty (30) days of the defendant's admission to undergo treatment to attain competency, the person supervising the defendant's treatment shall file with the court and serve on the state and the defendant the following:

(a) an initial assessment and treatment plan;

(b) a report on the defendant's amenability to treatment to competency;

(c) an assessment of the facility's capacity to provide treatment for the defendant; and

(d) an opinion about the probability of the defendant's attaining competency within nine (9) months from the date of the finding of incompetency.

(4) **Status-review hearing.** Within ninety (90) days of the finding of incompetency, the court shall hold a hearing, unless waived by the defense, to review whether the defendant has attained competency, and if not, whether the defendant is making progress under treatment towards attaining competency within nine (9) months of the finding of incompetency and whether the defendant remains dangerous.

(a) If the court finds the defendant competent, the court shall set the matter for trial.

(b) If the court finds the defendant is not competent but is making progress toward attaining competency, the court may continue or modify its original order entered under Subparagraph (F)(1) of this rule, but the court shall review the defendant's

competency again no later than nine (9) months after the original finding of incompetency.

(c) If the court finds that the defendant remains incompetent and is not making progress towards attaining competency, and that there is not a substantial probability that the defendant will attain competency within nine (9) months of the original finding of incompetency, the court shall proceed under Paragraph G of this rule.

G. **Treatment ineffective for defendant.** If at any time the court determines that a defendant ordered to undergo treatment to attain competency is not likely to attain competency within nine (9) months from the original finding of incompetency, the court shall do either of the following:

(1) proceed under Paragraph H of this rule if the defendant is charged with any of the following:

(a) a felony that involves the infliction of great bodily harm on another person;

(b) a felony that involves the use of a firearm;

(c) aggravated arson as provided in Section 30-17-6 NMSA 1978;

(d) criminal sexual penetration as provided in Section 30-9-11 NMSA 1978; or

(e) criminal sexual contact of a minor as provided in Section 30-9-13 NMSA 1978; or

(2) if the defendant is not charged with an offense set forth in Subparagraph (1) of this paragraph,

(a) dismiss the case with prejudice; or

(b) dismiss the case without prejudice in the interest of justice. On dismissal, if the treatment supervisor has issued a report finding that the defendant satisfies the criteria for involuntary commitment under the Mental Health and Developmental Disabilities Code, the Department shall commence proceedings under Section 43-1-10 or 43-1-11 NMSA 1978, and the court may order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. The court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

H. **Commitment; hearing.** If the court determines that a defendant charged with an offense set forth in Subparagraph (G)(1) of this rule is not likely to attain competency within nine (9) months of the original finding of incompetency, the court shall hold a

hearing to determine whether there is clear and convincing evidence that the defendant committed the criminal act charged. The court shall decide the issue without a jury, and may admit hearsay or affidavit evidence on secondary matters as permitted by law.

(1) If the court does not find clear and convincing evidence that the defendant committed the criminal act, the court shall dismiss the case with prejudice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code and order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

(2) If the court finds clear and convincing evidence that the defendant committed the criminal act but does not find that the defendant is dangerous, the court shall dismiss the case without prejudice. On dismissal, the court may advise the district attorney to consider initiation of proceedings under Section 43-1-10 or 43-1-11 NMSA 1978 of the Mental Health and Developmental Disabilities Code and order the defendant confined for a maximum of seven (7) days to facilitate preparation and initiation of a petition under that code. In the alternative, the court may advise the attorneys in the matter to consider referral to an appropriate person authorized under Section 43-1B-4 NMSA 1978 to file a petition for assisted outpatient treatment.

(3) If the court finds clear and convincing evidence that the defendant committed the criminal act and enters a finding that the defendant remains incompetent and dangerous, the court shall,

(a) order that the defendant shall be detained by the Department in a secure, locked facility until further order of the court or until the expiration of the period of time equal to the maximum sentence to which the defendant would have been subjected had the defendant been convicted in a criminal proceeding;

(b) order the Department to report to the district court and the parties any significant changes in the defendant's condition, including but not limited to competency and dangerousness; and

(c) on notice to the parties and to the Department, conduct a hearing at least every two (2) years to review whether the defendant remains incompetent and dangerous.

(i) If the court finds that the defendant is competent, the court shall continue with the criminal proceeding.

(ii) If the court finds that the defendant continues to be incompetent and dangerous, the court shall review the defendant's competency every two (2) years

until expiration of the period of commitment equal to the maximum sentence to which the defendant would have been subject had the defendant been convicted in a criminal proceeding.

(iii) If the defendant is not committed under this rule or if the court finds on its two (2)-year review that the defendant is no longer dangerous, the defendant shall be released.

I. **Automatic sealing of court records.** Any motion, response, assessment, treatment plan, report, or other paper filed under this rule shall be automatically sealed without motion or order of the court as provided in Rule 5-123(C)(2) NMRA. An order issued under this rule shall not be sealed except on motion and order under Rule 5-123 NMRA.

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. S-1-RCR-2023-00053, effective for all cases pending or filed on or after February 23, 2024.]

**Committee commentary.** —

**Dangerous(ness)**

Dangerousness is not a clinical diagnosis or condition. The definition of "dangerous" is taken from NMSA 1978, Section 39-1-1.2(D) and applies to a person who, if released, presents a serious threat of inflicting great bodily harm on another or of violating NMSA 1978, Section 30-9-11 or 30-9-13. A determination of dangerousness is analogous to the inquiry to determine which conditions of release will "reasonably ensure . . . the safety of any other person or the community." Rule 5-401(C) NMRA; *see State v. Rotherham*, 1996-NMSC-048, ¶ 53, 122 N.M. 246, 923 P.2d 1131 (*citing United States v. Salerno*, 481 U.S. 739, 747 (1987)) ("[B]ecause the state seeks to treat an incompetent [defendant] and to protect the community from danger, detention serves a regulatory rather than a punitive function."). As such, a finding of dangerousness need not be supported by a psychological evaluation or expert testimony. *Cf. State v. Gallegos*, 1990-NMCA-104, ¶ 24, 111 N.M. 110, 802 P.2d 15 (explaining that the competency evaluations "made prior to a Section 31-9-1.5 hearing" are not "for the purpose of assessing [the] defendant's dangerousness"); *cf. also State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, ¶¶ 97-103, 410 P.3d 201 (providing guidance about "evaluating evidentiary presentations" in pretrial detention proceedings, including evidence of "one's character traits based on patterns of past conduct").

Dangerousness is a term of art defined under NMSA 1978, Chapter 31, Article 9 and is not equivalent to "likelihood of harm to self or others" as used in the Mental Health and Developmental Disabilities Code. *Compare* NMSA 1978, § 31-9-1.2(D) ("As used in Sections 31-9-1 through 31-9-1.5 NMSA 1978, 'dangerous' means that, if released, the defendant presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978.") *with* NMSA 1978, § 43-1-3(M)

("'likelihood of serious harm to oneself' means that it is more likely than not that in the near future the person will attempt to commit suicide or will cause serious bodily harm to the person's self by violent or other self-destructive means, including grave passive neglect"), *and* NMSA 1978, § 43-1-3(N) ("'likelihood of serious harm to others' means that it is more likely than not that in the near future a person will inflict serious, unjustified bodily harm on another person or commit a criminal sexual offense, as evidenced by behavior causing, attempting or threatening such harm, which behavior gives rise to a reasonable fear of such harm from the person"). *See also, e.g*., NMSA 1978, § 43-1-11(E)(1) (providing that an adult may be involuntarily committed for evaluation and treatment not to exceed thirty days based upon a finding, *inter alia*, that "as a result of a mental disorder, the [adult] presents a likelihood of serious harm to the [adult's] self or others").

The question of whether a defendant is "dangerous" arises only after a court has held that a defendant is not competent to stand trial and only if the defendant is charged with a felony. *See* NMSA 1978, § 31-9-1.2(B); *see also State v. Garcia*, 2000-NMCA-014, ¶ 31, 128 N.M. 721, 998 P.2d 186 ("'Dangerousness' is a consideration secondary to the initial determination of competency." (citing Rule 5-602(B)(3)(b) NMRA (1991))).

**Clear and convincing evidence of dangerousness**

Paragraph D of this rule requires clear and convincing evidence of a defendant's dangerousness to support a commitment for treatment to attain competency. Application of the clear and convincing standard is consistent with other proceedings, including mental health proceedings, that may result in a deprivation of a person's liberty. *See, e.g*.,§ 43-1-11(E) (requiring clear and convincing evidence to support the involuntary commitment of an adult for evaluation and treatment); NMSA 1978, § 43-1-12(E) (requiring clear and convincing evidence to support an extended commitment of an adult for treatment); NMSA 1978, § 43-1-15(E) (requiring clear and convincing evidence to support the appointment of a treatment guardian for an adult); NMSA 1978, § 31-9-1.5(D) (requiring clear and convincing evidence to support detaining an incompetent defendant who is not likely to attain competency); Rule 5-409(G) NMRA (requiring clear and convincing evidence to support pretrial detention of a criminal defendant).

**Commitment hearing**

The purpose of a hearing under Paragraph H of this rule is to determine whether an incompetent defendant committed the criminal act charged. *See Rotherham*, 1996-NMSC-048, ¶ 58 ("[T]he hearing [under Section 31-9-1.5(A) is not a trial to establish criminal culpability, for which evidence relating to both *actus reus* and *mens rea* clearly would be relevant. Rather, to justify further commitment for treatment, the hearing is to determine whether the defendant committed the criminal *act*. Hence, any evidence relating to the defendant's state of mind at the time the criminal act was committed is irrelevant."); *but see State v. Taylor*, 2000-NMCA-072, ¶ 15, 129 N.M. 376, 8 P.3d 863 ("[T]aken in context, when the Supreme Court characterized 'state of mind' as irrelevant,

it was using the term as it pertained to the issue before it: the irrelevancy of the defendant's ability to form a specific intent." (citing *Rotherham*, 1996-NMSC-048, ¶ 58)). The defendant therefore may not assert the defenses of insanity or inability to form specific intent. *See Rotherham*, 1996-NMSC-048, ¶ 58.

In addition, Paragraph H provides that the court may admit hearsay or affidavit evidence at the commitment hearing on secondary matters as permitted by law. *Accord* § 31-9-1.5(A) ("The district court may admit hearsay or affidavit evidence on secondary matters such as testimony to establish the chain of possession of physical evidence, laboratory reports, authentication of transcripts taken by official reporters, district court and business records and public documents."). In determining whether to admit such evidence, the court should be mindful that a person who is the subject of a commitment proceeding ordinarily is entitled to certain minimum procedural safeguards as a matter of due process. *See Vitek v. Jones*, 445 U.S. 480, 494-95 (1980). Among those safeguards is the right to confront and cross-examine government witnesses except upon a showing of good cause. *See id*. (holding that an inmate had the right, *inter alia*, to confront the state's witnesses against him in a proceeding to transfer him to a mental hospital, "except upon a finding, not arbitrarily made, of good cause for not permitting such presentation, confrontation, or cross-examination"). To that end, the New Mexico Supreme Court has identified "certain principles" that are useful in determining "what it means to establish good cause for not allowing confrontation" in the related context of a probation revocation proceeding. *See State v. Guthrie*, 2011-NMSC-014, ¶ 33, 150 N.M. 84, 257 P.3d 904 (internal quotation marks and citation omitted); *see also Vitek*, 445 U.S. at 495-96 (holding that a prisoner "facing involuntary transfer to a mental hospital" is entitled to due process protections similar to those required in a probation revocation proceeding). Those principles include (1) whether the evidence is offered to prove an assertion that is "central" or "collateral" to the proceeding; (2) whether the assertion is contested, or whether the state "is being asked to produce a witness to establish something that is essentially uncontroverted"; (3) whether the evidence is inherently reliable due to its source and the circumstances surrounding its introduction; and (4) whether live testimony and confrontation would be useful to test the truthfulness and credibility of the evidence. *Guthrie*, 2011-NMSC-014, ¶¶ 33-39.

**Treatment**

Treatment ordered under this rule must include competency restoration treatment and may include general healthcare and mental healthcare treatment. *See Rotherham*, 1996-NMSC-048, ¶ 79 (Minzner, J., specially concurring) ("During such a commitment, as a matter of substantive due process, those involuntarily committed under Section 31-9-1.5 have a right to be treated not only for competency, but to alleviate their dangerousness and accompanying mental illness or disability.").

**Courtroom closure**

Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 5-124(A) NMRA ("All courtroom proceedings shall be open to the public unless the

courtroom is closed by an order of the court entered under this rule."); *see also* Rule 5-124 committee commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

## 5-602.3. Incompetency due to developmental or intellectual disability.

A. **Definitions.** The following definitions shall apply for purposes of this rule.

(1) ***Department.*** "Department" means the New Mexico Department of Health.

(2) ***Developmental or intellectual disability.*** Developmental or intellectual disability means significant subaverage intellectual functioning existing concurrently with deficits in adaptive behavior. An intelligence quotient of seventy (70) or below on a reliably administered intelligence quotient test shall be presumptive evidence of developmental or intellectual disability.

B. **Hearing to determine developmental or intellectual disability.** If a defendant is charged with a felony and found incompetent to stand trial, on motion of the defense, the court shall hold a hearing to determine if the defendant's incompetency is due to developmental or intellectual disability. The purpose of the hearing shall be to determine whether there is a preponderance of the evidence of the following:

(1) the defendant has developmental or intellectual disability; and

(2) there is not a substantial probability that the defendant will become competent to proceed in a criminal case within a reasonable time, not to exceed nine (9) months from the original finding of incompetency.

C. **Department evaluation; notice of Department's findings.** If the court makes the findings set forth in Paragraph B of this rule, the court shall order the Department to perform an evaluation within sixty (60) days of service of the order to determine whether the defendant presents a likelihood of serious harm to self or others. At the completion of the evaluation, the Department shall promptly notify the court and the parties of its findings.

D. **Proceedings under Chapter 43, Article 1 NMSA 1978.** If the evaluation ordered under Paragraph C of this rule results in a finding by the Department that the defendant presents a likelihood of serious harm to self or others,

(1) the Department shall commence proceedings under Chapter 43, Article 1 NMSA 1978 within sixty (60) days of the evaluation if the defendant has been charged in the initial proceedings with one or more of the following offenses:

(a) murder in the first degree;

(b) first degree criminal sexual penetration;

(c) criminal sexual contact of a minor; or

(d) arson; or

(2) the Department may commence proceedings under Chapter 43, Article 1 NMSA 1978 within sixty (60) days of the evaluation if the defendant has not been charged with an offense enumerated in Subparagraph (1) of this paragraph.

E. **Notice.**

(1) The Department shall notify the court if it commences proceedings under Chapter 43, Article 1 NMSA 1978 and Paragraph D of this rule.

(2) The Department shall notify the court as soon as practicable if the Department does not intend to commence proceedings under Paragraph (D)(2) of this rule.

F. **Disposition of criminal charges.** Unless the court dismisses the charges at an earlier time, the criminal charges against the defendant shall be dismissed without prejudice on the first of the following to occur:

(1) the hearing under Chapter 43, Article 1 NMSA 1978; or

(2) the expiration of fourteen (14) months from the court's initial determination that the defendant is incompetent to proceed in a criminal case.

G. **Automatic sealing of court records.** Any motion, response, assessment, treatment plan, report, or other paper filed under this rule shall be automatically sealed without motion or order of the court as provided in Rule 5-123(C)(2) NMRA. An order issued under this rule shall not be sealed except on motion and order under Rule 5-123 NMRA.

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. S-1-RCR-2023-00053, effective for all cases pending or filed on or after February 23, 2024.]

**Committee commentary.** — Until June 16, 2023, NMSA 1978, Section 31-9-1.6 (1999, amended 2023) used a disfavored term. Old cases used that term in deference to the

statute, despite the term not being otherwise acceptable. With the amendment of the statute, this rule has been updated to use the appropriate term of developmental or intellectual disability.

The legal definition of developmental or intellectual disability under this rule and Section 31-9-1.6(E) is not equivalent to a clinical finding of developmental or intellectual disability. *See State v. Trujillo*, 2009-NMSC-012, ¶ 13, 146 N.M. 14, 206 P.3d 125. A clinical determination of intellectual or developmental disability requires a finding that the issue arose before a person's eighteenth birthday. *See id.* ¶ 10 (citing Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders-IV-TR* 41 (2000)). Age of onset, however, is not a factor in a legal determination of developmental or intellectual disability for purposes of incompetency. *See Trujillo*, 2009-NMSC-012, ¶ 12 ("[T]he Legislature's decision to exclude the age of onset factor is logical given that what is legally relevant are the symptoms probative of culpability at the time of the alleged crime and coherence at the time of trial, not the age at which those symptoms started to affect the individual.").

The discretion given to the Department under Subparagraph (D)(2) of this rule is consistent with Section 31-9-1.6(C) as it was originally enacted. Before it was amended in 1999, Subsection 31-9-1.6(C) provided as follows:

C. If the department evaluation results in a finding that the defendant presents a likelihood of serious harm to himself or a likelihood of serious harm to others, within sixty days of the department's evaluation the department:

(1) shall commence proceedings under Chapter 43, Article 1 NMSA 1978 if the defendant was charged with first degree homicide, first degree sexual penetration, criminal sexual contact of a minor or arson in the initial proceedings, and the court presiding over the initial proceedings shall enter a finding that the respondent presents a likelihood of harm to others; or

(2) may commence proceedings under Chapter 43, Article 1 NMSA 1978 if the defendant was charged with any crime other than first degree homicide, first degree sexual penetration, criminal sexual contact of a minor or arson in the initial proceedings from which he was referred under this section to the department.

1997 N.M. Laws, ch. 153. Although the 1999 amendments to Section 31-9-1.6 deleted Subsection (C)(2), see 1999 N.M. Laws, ch. 149, the Supreme Court has observed that the deletion "is not dispositive of legislative intent and may only represent a housekeeping deletion of a provision the Legislature deemed superfluous." *Trujillo*, 2009-NMSC-012, ¶ 27.

Subparagraph (D)(2) of the rule therefore clarifies that the Department has discretion to initiate proceedings under NMSA 1978, Chapter 43, Article 1 for a defendant who has not been charged with an enumerated offense when the Department's evaluation results in a finding that the defendant presents a likelihood of serious harm to self or

others. See Trujillo, 2009-NMSC-012, ¶ 28 (holding the 1999 amendments to Section 31-9-1.6 were not "intended to restrict the State from civilly committing defendants . . . accused of a crime other than the four enumerated in Section 31-9-1.6(C)").

**Courtroom closure**

Hearings under this rule may be closed only on motion and order of the court. See Rule 5-124(A) NMRA ("All courtroom proceedings shall be open to the public unless the courtroom is closed by an order of the court entered under this rule."); *see also* Rule 5-124 committee commentary ("[I]f a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (B)(2) of this rule.").

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. S-1-RCR-2023-00053, effective for all cases pending or filed on or after February 23, 2024.]

## 5-603. Pretrial hearing.

At any time after the filing of the information or indictment, the court may order the attorneys to appear before it for a hearing, at which the defendant shall have the right to be present, to consider:

A. the simplification of the issues;

B. the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof;

C. the number of expert witnesses, character witnesses or other witnesses who are to give testimony of a cumulative nature; and

D. such other matters as may aid in the disposition of the trial.

Upon request of any party, a record shall be made of a hearing, or any part thereof, held pursuant to this rule.

The court shall make an order reciting the agreements made and matters determined which shall be signed by the court and the attorneys for the parties, and when entered shall control the subsequent course of the proceedings, unless thereafter modified.

This rule shall not be invoked in the case of any defendant who is not represented by counsel.

**Committee commentary.** — This rule gives the court the authority to order a pretrial hearing to simplify the issues. The American Bar Association Standards Relating to

Discovery and Procedure Before Trial recommend pretrial conferences be held in the following cases:

(1) when the anticipated trial is likely to be protracted;

(2) when the anticipated trial is otherwise likely to be complicated; and

(3) when counsel concur in requesting the conference. American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 5.4, Commentary (Approved Draft, 1970).

Some of the matters recommended to be considered at a pretrial conference include:

(1) making stipulations as to facts about which there can be no dispute;

(2) marking for identification various documents and other exhibits of the parties;

(3) waivers of foundation as to such documents;

(4) severance of defendants or offenses;

(5) seating arrangements for defendants and counsel;

(6) use of jurors and questionnaires;

(7) conduct of voir dire;

(8) number and use of peremptory challenges;

(9) procedure on objections where there are multiple counsel;

(10) order of presentation of evidence and arguments where there are multiple defendants;

(11) order of cross-examination where there are multiple defendants; and

(12) temporary absence of defense counsel during trial. American Bar Association Standards Relating to Discovery and Procedure Before Trial, Section 5.4(a) (Approved Draft, 1970).

With the adoption of UJI 14-5101 was amended to provide that the district court may order the parties to tender requested jury instructions prior to the close of the defendant's case. It is suggested that in complex cases, the pretrial hearing may be the appropriate time for a discussion of the applicable jury instructions.

## 5-604. Time of commencement of trial for cases of concurrent trial jurisdiction originally filed in the magistrate, metropolitan, or municipal court.

A. **Refiling of cases previously dismissed in a lower court.** For cases of concurrent trial jurisdiction originally filed in the magistrate, metropolitan, or municipal court that are subsequently dismissed and refiled in the district court, the initiatory pleading in the district court shall state in the caption that it is a refiled case and shall state the following in the first paragraph:

(1) the date of the initial filing in the lower court;

(2) the date of the dismissal;

(3) the deadline for trial in the lower court under Rule 6-506 NMRA, Rule 7-506 NMRA, or Rule 8-506 NMRA; and

(4) the reason for the dismissal and refiling.

B. **Initial trial setting and continuances; motions to assert speedy trial rights.** If the district court does not initially schedule a refiled case within the trial deadline that would have been applicable had the case remained in the lower court, or if the court grants a continuance beyond that deadline, the defendant may move that the court consider whether the case should be dismissed for violation of the defendant's right to speedy trial, taking into consideration the following factors:

(1) the complexity of the case;

(2) the length of the delay in bringing the defendant to trial;

(3) the reason for the delay in bringing the defendant to trial;

(4) whether the defendant has asserted the right to a speedy trial or has acquiesced in some or all of the delay; and

(5) the extent of prejudice, if any, from the delay. This paragraph does not prohibit a defendant from filing a motion to dismiss for violation of the right to a speedy trial even if a trial is scheduled within the trial deadline that would have been applicable had the case remained in the lower court.

C. **Applicability.** This rule shall not apply to the following:

(1) cases on appeal from the metropolitan, magistrate or municipal court;

(2) cases originally filed in the district court; and

(3) cases within the exclusive trial jurisdiction of the district court.

[As amended, effective September 1, 1998; May 1, 2000; as amended by Supreme Court Order No. 07-8300-018, effective August 13, 2007; by Supreme Court Order No. 08-8300-052, effective November 24, 2008; as amended, provisionally for one year, by Supreme Court Order No. 09-8300-032, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court; by Supreme Court Order No. 11-8300-019, Paragraph A is effective for all cases refiled in the district court on or after May 1, 2011; Paragraphs B and C are effective immediately for all cases pending in the municipal, magistrate, metropolitan, district and appellate courts on or after March 23, 2011.]

**Committee commentary.** — The 2011 amendments to this rule are intended to codify the Supreme Court's ruling in *State v. Savedra*, 2010-NMSC-025, 148 N.M. 301, 236 P.3d 20. Accordingly, the six-month rule provisions previously applicable to cases originally filed in the district court have been withdrawn. While there is no longer a "six-month rule" for cases that originate in the district court, the district court should remain mindful of the defendant's right to a speedy trial. The arraignment provision in Paragraph A of the prior version of this rule has been moved to Paragraph A of Rule 5-303 NMRA.

This rule now deals exclusively with cases falling within the concurrent trial jurisdiction of the magistrate, metropolitan, or municipal court and the district court that are originally filed in a limited jurisdiction court and later dismissed and refiled in the district court. Under Paragraph A of the rule, when such cases are refiled in district court, the prosecution must indicate that the case is refiled in the caption of the initiatory pleading filed in the district. Paragraph A also sets forth information the prosecution must set forth in the first paragraph of the initiatory pleading.

Paragraph B recognizes that if the district court does not set the case for trial within the trial deadline that would have applied had the case remained in the lower court, or grants a continuance beyond that deadline, the defendant may file a motion asking the district court to consider whether the case should be dismissed based on a consideration of the speedy trial factors. But even if the case is set for trial within the trial deadline that would have applied in the lower court, Paragraph B also recognizes that dismissal on speedy trial grounds is not necessarily precluded if the defendant moves for such relief and consideration of the speedy trial factors warrants dismissal.

[Commentary as amended, provisionally for one year, by Supreme Court Order No. 09-8300-032, effective September 1, 2009, for all petitions for extension of time pending in the district court or Supreme Court; as amended by Supreme Court Order No. 11-8300-019, effective March 23, 2011.]

## 5-605. Jury trial.

A. **Trial by jury; waiver.** Criminal cases required to be tried by jury shall be so tried unless the defendant waives a jury trial with the approval of the court and the consent of the state.

B. **Alternate jurors.** In any criminal case, the district court may direct that not more than six jurors, in addition to the regular jury, be called and impanelled to sit as alternate jurors. Alternate jurors, in the order in which they are called, shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to a like examination and challenges for cause, take the same oath, and have the same functions, powers, facilities and privileges as the regular jurors.

C. **Discharge; general rule.** Except in felony cases in which the death penalty may be imposed and a single jury is used for trial and sentencing, an alternate juror who does not replace a regular juror shall be discharged before the jury retires to consider its verdict.

D. **Findings and conclusions; when required.** In a case tried without a jury, the court shall make a general finding and shall, in addition, make specific findings of fact and conclusions of law on all ultimate facts and conclusions of law upon which written requested findings and conclusions have been filed within ten (10) days after the making of the general finding by the court, or within such time as the court may designate.

[As amended by Supreme Court Order No. 09-8300-042, effective November 30, 2009, for all new and pending cases.]

**Committee commentary.** — Although titled "Jury trial", this rule does not deal exclusively with the right to a jury trial but with procedure for both jury and nonjury cases. For comments on the right to a jury trial, *see* the commentary to Rule 5-301 NMRA. For the procedure governing the selection of jurors, *see* Rule 5-606 NMRA and Sections 38-5-13 and 38-5-14 NMSA 1978.

Under prior law, the defendant could waive a jury trial for a "high court" misdemeanor by proceeding to trial before the court without a jury and without making any objections. *State v. Marrujo*, 79 N.M. 363, 443 P.2d 856 (1968). Under Paragraph A of this rule, all trials in the district court, except for petty misdemeanors, are by jury unless the defendant waives the jury. The state may refuse to consent to a waiver by the defendant and thereby require the matter to be tried by a jury. *See State ex rel. Gutierrez v. First Judicial Dist. Ct.*, 52 N.M. 28, 191 P.2d 334 (1948).

Paragraph B of this rule was added in 1979. The contents of this paragraph were formerly found in Paragraph E of Rule 5-606. This paragraph is derived from Paragraph B of Rule 1-047 and is consistent with American Bar Association Standards Relating to Trial by Jury, Section 2.7 (Approved Draft 1968).

Paragraph C of this rule was added in 1979 to clarify when alternate jurors are to be discharged.

Paragraph D of this rule covers the procedure for judgment in a nonjury case. The court must make a finding of guilty or not guilty. If the finding is guilty, requested findings of fact and conclusions of law may be submitted by the parties within ten (10) days or such time as the court designates. The court is then required to file a decision containing findings of fact and conclusions of law, presumably before announcing the judgment and sentence. *Cf.* Paragraph C of Rule 5-614 and Paragraph A of Rule 5-701. *Compare*, Rule 1-052.

## 5-606. Jurors.

A. **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper, or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

B. **Challenges; procedure.** Challenges for good cause and peremptory challenges shall be made outside the hearing of the jury panel. The party making a challenge will not be disclosed to the jury panel, but each challenge will be recorded by the clerk. The state shall accept or make any peremptory challenge as to each prospective juror before the defense is called upon to accept or make a peremptory challenge as to the prospective juror.

C. **Challenges for cause.** The court shall permit the parties to a case to express in the record of the trial any challenge to a prospective juror for good cause. The court shall rule upon the challenge and may excuse any prospective juror for good cause.

D. **Peremptory challenges.**

(1) The state and the defense in each criminal case tried to a jury in the district court shall be entitled to peremptory challenges of prospective jurors as follows:

(a) if the offense charged is punishable by death, the defense shall be allowed twenty-four (24) challenges and the state shall be allowed sixteen (16) challenges;

(b) if the offense charged is punishable by life imprisonment, the defense shall be allowed twelve (12) challenges and the state shall be allowed eight (8) challenges; and

(c) in all other cases, the defense shall be allowed five (5) challenges and the state shall be allowed three (3) challenges.

(2) When two (2) or more persons are jointly tried, two (2) additional challenges shall be allowed to the defense and to the state for each additional defendant. When two (2) or more defendants are jointly tried and cannot agree by whom the peremptory challenges shall be exercised, they shall be exercised in the manner prescribed by the court.

(3) The state and the defense are each entitled to one (1) peremptory challenge in addition to those otherwise allowed by this rule if one (1) or two (2) alternate jurors are to be empaneled, two (2) peremptory challenges if three (3) or four (4) alternate jurors are to be empaneled, and three (3) peremptory challenges if five (5) or six (6) alternate jurors are to be empaneled. The additional peremptory challenges provided by this paragraph may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror. The procedure for the exercise of peremptory challenges for alternate jurors shall be the same as that for regular jurors.

E. **Juror qualification and questionnaire forms; retention schedule; certification of compliance with privacy requirements.** Prior to the examination of prospective jurors under this rule, the court shall require each prospective juror to complete a juror qualification and questionnaire forms as approved by the Supreme Court, which shall be subject to the following protections:

(1) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be kept confidential unless ordered unsealed under the provisions in Rule 5-123 NMRA;

(2) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be destroyed according to the following deadlines:

(a) All copies in the possession of the court shall be destroyed ninety (90) days after expiration of the term of service of the juror or prospective juror unless an order has been entered directing their retention for a longer period of time; and

(b) All copies in the possession of the attorneys, parties, and any other individual or entity shall be destroyed within one hundred twenty (120) days after final disposition of the proceeding for which the juror or prospective juror was called unless permitted by written order of the court to retain the copies for a longer period of time, in which case the court’s order shall set the deadline for destruction of those copies; and

(3) On or before the destruction deadline required under this rule, all attorneys and parties shall file a certification under oath in a form approved by the Supreme Court that they have complied with the confidentiality and destruction requirements set forth in this paragraph.

F. **Supplemental questionnaires.** The court may order prospective jurors to complete supplemental questionnaires. Unless otherwise ordered by the court, the party requesting supplemental questionnaires shall be required to pay the actual costs of producing and mailing the supplemental questionnaires. The confidentiality and destruction protections in Subparagraphs (E)(1), (2), and (3) of this rule shall apply to any supplemental questionnaires ordered under this paragraph.

[As amended, effective April 19, 2004; as amended by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

**Committee commentary.** — Paragraph A of this rule was derived from Paragraph A of Rule 1-047 NMRA and is consistent with American Bar Association Standards Relating to Trial by Jury, Section 2.7 (Approved Draft 1968).

Paragraphs B and C of this rule encompass that portion of Section 38-5-14 NMSA 1978 which relates to challenges of jurors in criminal cases.

There are a number of different procedures followed by state and federal courts in allowing the exercise of peremptory challenges. The commentary to the American Bar Association Standards Relating to Trial by Jury, Section 2.6 (Approved Draft 1968) states,"The details as to how peremptories are to be exercised in a given case must be left to the discretion of the trial judge, as different cases, particularly those with multiple defendants, pose unique problems . . . ."

The New Mexico Supreme Court Committee, after considering a number of alternatives, concluded that the exercise of peremptory challenges in cases where there are multiple defendants probably should be left to the trial judge. One of the following methods should be chosen by the trial judge if, prior to the selection of any jurors, the defendants cannot agree who will exercise challenges for the defense:

(1) the judge may allow the challenges to be exercised alternately, beginning with the defendant whose name first appeared in the information or indictment. The problem with this method is that it is possible that one defendant will exercise all of the challenges allowed;

(2) the judge may divide the total number of defense challenges as equally as possible between all of the defendants beginning with the defendant whose name first appears on the information or indictment. The challenges would then be exercised alternately by the defendants; or

(3) the judge may require all defendants to agree on the exercise of a challenge before it is exercised on a juror.

*See* the commentary to the American Bar Association Standards Relating to Trial by Jury, Section 2.6 (Approved Draft 1968). *See also State v. Boeglin*, 90 N.M. 93, 559

P.2d 1220 (Ct. App. 1977), for an alternate method of exercising peremptory challenges.

Paragraph E of this rule was added to clarify the procedure for using and retaining juror qualification and questionnaire forms. In cases where an issue may be raised on appeal concerning jury selection or a particular juror, the appellant may consider filing a motion in the district court within ninety (90) days of the jury verdict to request an order requiring the retention of the juror qualification and questionnaire forms for inclusion in the record proper filed in the appellate court. Paragraph E of this rule supersedes administrative regulations concerning the retention of juror qualification and questionnaire forms.

[As amended by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

## 5-607. Order of trial.

The order of trial shall be as follows:

A. a qualified jury shall be selected and sworn to try the case;

B. initial instructions as provided in Rule Set 14 NMRA, Uniform Jury Instructions - Criminal shall be given by the court;

C. the state may make an opening statement. The defense may then make an opening statement or may reserve its opening statement until after the conclusion of the state's case;

D. the state shall submit its evidence;

E. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

F. the defense may then make an opening statement, if reserved;

G. the defense may submit its evidence;

H. the state may submit evidence in rebuttal;

I. the defense may submit evidence in surrebuttal;

J. at any time before submission of the case to the jury, the court may, for good cause shown, permit the state or defense to submit additional evidence;

K. out of the presence of the jury, the court shall determine the sufficiency of the evidence, whether or not a motion for directed verdict is made;

L. the instructions to be given shall be determined in accordance with Rule 5-608 NMRA. The court shall then instruct the jury;

M. the state may make a closing argument;

N. the defense may make a closing argument;

O. the state may make a rebuttal argument; and

P. the court may determine the sufficiency of the evidence, whether or not a motion for directed verdict is made, after the return of the jury's verdict.

[As amended by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed on or after December 31, 2021; as amended by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

**Committee commentary**. — Nothing in the provisions of Paragraph E of this rule alters long-settled law that a defendant, by presenting evidence, "waive[s a] claim that the evidence at the close of the State's case [is] insufficient for submission to the jury." *State v. Lard*, 1974-NMCA-004, ¶ 4, 86 N.M. 71, 519 P.2d 307. However, under Paragraph K of this rule the defendant need no longer move for a directed verdict at the close of all of the evidence to preserve a claim that the evidence was insufficient to allow the case to go to the jury. *Lard*, 1974-NMCA-004, at ¶ 6; *see State v. Hernandez*, 1993-NMSC-007, ¶ 66, 115 N.M. 6, 946 P.2d 312 (pointing to Rule 5-607(K) in holding that a trial court's "procedural lapse" in failing to rule on the sufficiency of the evidence at the close of all evidence itself "preserves the issue of sufficiency of the evidence for appellate review").

The 1975 amendments to this rule inserted a new Paragraph B to allow for instructions at the outset of the trial as provided in Rule Set 14 NMRA, Uniform Jury Instructions - Criminal. In addition, a new Paragraph L of this rule alerts the court and counsel that the procedure for settling instructions at the close of the evidence is provided for in Rule 5-608 NMRA.

[As amended by Supreme Court Order No. 21-8300-020, effective for all cases pending or filed on or after December 31, 2021.]

## 5-608. Instructions to juries.

A. **Required instructions.** The court must instruct the jury upon all questions of law essential for a conviction of any crime submitted to the jury.

B. **Requested instructions.** At the close of the defendant's case, or earlier if ordered by the court, the parties shall tender requested instructions in writing. The original and such copies as may be required by the court shall be given the court, and a copy shall be served on opposing counsel. The original shall have a place for the court to insert a number (No. . . . . .) but shall contain no title or other notations. The copies shall indicate the following information:

(1) [Plaintiff's] [Defendant's] Requested Instruction No. . . . . .;

(2) UJI Criminal No. . . . . .;

(3) If not in UJI Criminal, authority for tendered instruction should be indicated.

C. **Advisement of parties; filing.** The court shall advise the parties of the instructions to be given and:

(1) number the originals of the instructions to be given;

(2) mark one (1) copy of each instruction tendered as either given or refused and initial the copies;

(3) file such marked copies with the district court clerk.

D. **Objections.** Except as provided in Paragraph A of this rule, for the preservation of error in the charge, objection to any instruction given must be sufficient to alert the mind of the court to the claimed vice therein, or, in case of failure to instruct on any issue, a correct written instruction must be tendered before the jury is instructed. Before the jury is instructed, reasonable opportunity shall be afforded counsel so to object or tender instructions, on the record and in the presence of the court.

E. **Use in jury room.** Written instructions of the court shall go to the jury room, but no instruction which goes to the jury room shall contain any notation.

**Committee commentary.** — This rule was amended in 1975 in conjunction with the Uniform Jury Instructions project. The main purpose of the revision of the rule was to provide a procedure for instructions similar to that used after the adoption of UJI Civil. *See* Rule 1-051 NMRA. As stated by the New Mexico Supreme Court in *State v. Sherwood*, 39 N.M. 518, 50 P.2d 968 (1935), "Prudence and justice would suggest that it would be safest and best, before submitting instructions to a jury, to call upon counsel for both sides to point out specifically what objections, if any, they may have to such instructions, and to request them to suggest such additional instructions as they may think are necessary".

Paragraph A of this rule, codifying prior court decisions, requires the district court to instruct the jury on the law essential for a conviction of the crimes submitted to the jury

even if no requested instructions are presented by the parties. *See Territory v. Baca*, 11 N.M. 559, 71 P. 460 (1903). In *State v. Gunzelman*, 85 N.M. 295, 512 P.2d 55 (1973), the supreme court held that the failure of the district court to properly instruct on all of the essential elements of the crime charged was jurisdictional and could be raised for first time on appeal. *See also*, *State v. Walsh*, 81 N.M. 65, 463 P.2d 41 (Ct. App. 1969). Although this rule only requires the court to include instructions essential for conviction "on his own motion", the rule would not prevent the court from including other instructions supported by the evidence when no instruction is tendered.

Paragraph D of this rule retains the language of former Subdivision (g) of this rule. It requires a proper objection or tendering of a proper instruction for matters not covered by Paragraph A of this rule. *See State v. Romero*, 86 N.M. 99, 519 P.2d 1180 (Ct. App. 1974); *State v. Urban*, 86 N.M. 351, 524 P.2d 523 (Ct. App. 1974); *State v. Romero*, 87 N.M. 279, 532 P.2d 208 (Ct. App. 1975). The final sentence of the rule was added in 1975 to make it clear that the parties are entitled to have the district judge hear the objections. *See Webb v. Webb*, 87 N.M. 353, 533 P.2d 586 (1975).

## 5-609. Submission to jury.

A. **Foreman.** The court shall direct the jury to select one of its members as foreman to preside over its deliberations.

B. **Forms of verdict.** Before the jury retires the court shall submit to it written forms of verdict for its use in returning a verdict.

C. **Exhibits.** Upon its request to review any exhibit during its deliberations, the jury shall be furnished all exhibits received in evidence.

**Committee commentary.** — Paragraph C of this rule, allowing the exhibits to go to the jury room upon the request of the jury, modifies the holding in *State v. Valles*, 83 N.M. 541, 494 P.2d 619 (Ct. App. 1972). In that case, the court of appeals held that there was no abuse of discretion by the trial court in refusing to allow exhibits to go to the jury room. Under Paragraph C of this rule, if the jury requests any one exhibit, all exhibits should go in as a way of preventing undue emphasis being placed on one of the exhibits. Because the submission to the jury is automatic upon request under this rule, it is not error for such submission to take place when the defendant and his attorney are not present. *State v. Riordan*, 86 N.M. 92, 519 P.2d 1029 (Ct. App. 1974). *See also*, *State v. Chavez*, 86 N.M. 199, 521 P.2d 1040 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

## 5-610. Additional instructions to jury following retirement; communications between court and jury.

A. **Upon jurors' request.** After the jurors have retired to consider their verdict, if they desire additional instructions or to have any testimony read to them, they may in the discretion of the court be returned to the courtroom and the court may give them

such additional instructions if authorized by UJI Criminal or may order such testimony read to them. Such instruction shall be given and such testimony read only after notice to, and in the presence of, the attorneys and the defendants.

B. **Recall of jurors by court.** The court may recall the jurors after they have retired to consider their verdict to give them additional instructions if authorized by UJI Criminal, or to correct any erroneous instructions it has given them. Such additional or corrective instructions may be given only after notice to and in the presence of the attorneys and the defendants.

C. **Additional evidence prohibited.** After the jurors have retired to consider their verdict, the court shall not recall the jurors to hear additional evidence.

D. **Communications; judge and jury.** The defendant shall be present during all communications between the court and the jury unless the defendant has signed a written waiver of the right to be personally present. All communications between the court and the jury must be in open court in the presence of the defendant and counsel for the parties unless the defendant waives on the record the right to be present or unless the communication involves only a ministerial matter. Unless requested by counsel for the defendant, communications between the court and the jury on a ministerial matter may be made in writing after notice to all counsel without recalling the defendant.

[As amended, effective September 1, 2005.]

**Committee commentary.** — This rule incorporated the holding in *State v. Lindwood*, 79 N.M. 439, 444 P.2d 766 (Ct. App. 1968), that it was not prejudicial error for the court to recall the jury and give it an instruction previously overlooked after the charge had been given and arguments of counsel made.

In addition to authorizing additional instructions, Paragraph A of this rule specifically allows the reading of testimony to the jury. *State v. Montoya*, 86 N.M. 316, 523 P.2d 814 (Ct. App. 1974).

Paragraph D of this rule has been added to clarify the procedure for communications between the judge and the jury, after the jury has retired to consider the verdict, without recalling the jury. *See State v. McClure*, 94 N.M. 440, 612 P.2d 232 (Ct. App. 1980); *State v. Hinojos*, 95 N.M. 659, 625 P.2d 588 (Ct. App. 1980); *State v. Saavedra*, 93 N.M. 242, 599 P.2d 395 (Ct. App. 1979); *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979); *State v. Brugger*, 84 N.M. 135, 500 P.2d 420 (Ct. App. 1972); *State v. Beal*, 48 N.M. 84, 146 P.2d 175 (1944). In addition, provision has been made for those communications which do not relate to issues in the case at trial to be made without having the defendant present, provided the defendant's presence has not been requested by his attorney. Rule 43 of the Federal Rules of Criminal Procedure, regarding the presence of the defendant, has been interpreted to allow such communications without the presence of the defendant. *United States v. Mesteth*, 528

F.2d 333 (8th Cir. 1976); *United States v. Reynolds*, 489 F.2d 4 (6th Cir. 1973), *cert. denied*, 416 U.S. 988, 40 L. Ed. 2d 766, 94 S. Ct. 2395 (1974); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970, 35 L. Ed. 2d 706, 93 S. Ct. 1443 (1973); *United States v. Alper*, 449 F.2d 1223 (3d Cir. 1971), *cert. denied*, 405 U.S. 988, 31 L. Ed. 2d 453, 92 S. Ct. 1248, *reh. denied*, 406 U.S. 911, 31 L. Ed. 2d 822, 92 S. Ct. 1605 (1972); and *United States v. Stone*, 452 F.2d 42 (8th Cir. 1971).

All communications between the judge and jury should be made a part of the record, whether made in the presence of defense counsel and defendant or not.

While a case is pending, a judge may not entertain any ex parte communications from any party, from counsel for any party, from any advocacy group on behalf of any party, or with any member of the probation department except as allowed by law. Any authorized ex parte communication between the court and the probation department must be in writing.

## 5-611. Return of verdict; mistrial; 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 with respect to any defendant as to whom it has agreed.

C. **Several counts.** If there are two or more counts, the jury may at any time during its deliberations return a verdict with respect to any count upon which it has agreed.

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. If the jury has been instructed on one or more lesser included offenses, and the jury cannot unanimously agree upon any of the offenses submitted, the court shall poll the jury by inquiring as to each degree of the offense upon which the jury has been instructed beginning with the highest degree and, in descending order, inquiring as to each lesser degree until the court has determined at what level of the offense the jury has disagreed. If upon a poll of the jury it is determined that the jury has unanimously voted not guilty as to any degree of an offense, a verdict of not guilty shall be entered for that degree and for each greater degree of the offense.

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.

F. **Irregularity of verdict.** No irregularity in the rendition or reception of 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.

H. **Mistrial; jury disagreement.** An order declaring a mistrial for jury disagreement shall be in writing and shall expressly reserve the right to retry the defendant. Orders declaring mistrial for jury disagreement shall be substantially in the form approved by the supreme court.

**Committee commentary.** — Paragraphs A, B, D and E of this rule were derived from Rule 31 of the Federal Rules of Criminal Procedure and Rule 32 of the Colorado Rules of Criminal Procedure.

Paragraph D of this rule provides that, when instructed, the jury may find the defendant guilty of a necessarily included offense. For a lesser offense to be necessarily included, the greater offense cannot be committed without also committing the lesser. *State v. Medina*, 87 N.M. 394, 534 P.2d 486 (Ct. App. 1975). *See also*, *State v. Everitt*, 80 N.M. 41, 450 P.2d 927 (Ct. App. 1969).

Paragraph C of this rule allows the jury at any time during its deliberation to return a verdict on counts upon which it has agreed. In *United States v. Conti*, 361 F.2d 153 (2d Cir. 1966), the court held that a similar procedure does not result in prejudice to the defendant.

Paragraph D and H of this rule set out the procedure that should be followed in the declaration of a mistrial due to jury disagreement, in cases involving lesser included offenses.

In *State v. Spillmon*, 89 N.M. 406, 553 P.2d 686 (1976), it was held that retrial of the defendant on murder charges would constitute double jeopardy. The trial was to a jury, which returned verdicts of guilty as to attempted robbery and not guilty as to burglary, but which declared that they were dead-locked on the charges of first degree murder and second degree murder. The judge did not formally declare a mistrial, did not expressly state that he was reserving the power to retry the murder charge, did not

inquire as to whether the jury had unanimously voted to acquit of either degree of murder, and merely set the murder charges for another trial. The supreme court held that the judge was wrong in concluding the proceedings without formally declaring a mistrial, in concluding the proceedings without expressly reserving the power to retry the charges on which the jury was hung, and in failing to ascertain whether the jury had acquitted of any degree of the murder charge.

In *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977), the trial on the charge of murder and manslaughter ended in a hung jury, and the declaration of a mistrial. The court held that the trial judge should have ascertained whether the jury had acquitted of any degree of unlawful homicide. The failure to do so resulted in the bar of the prosecution of all degrees other than the lowest (voluntary manslaughter). In the court of appeals decision, *State v. Castrillo*, N.M. Ct. App. No. 2499, decided December 12, 1976, the court ruled that an oral pronouncement by the judge, that he is declaring a mistrial, is not a proper declaration of a mistrial, and that a formal order is essential. The court also stated that the trial judge must reserve the power to retry any portion of the case.

The *Spillmon* case and the two *Castrillo* cases lay down several rules: (a) a formal written order is required in the declaration of a mistrial because of jury disagreement; (b) an express reservation of the power to retry the charges is essential; and (c) in case lesser included offenses are submitted, no mistrial for jury disagreement should be declared until the judge ascertains whether the jury has acquitted on any of the degrees of the offense. This rule and the court-approved form implement these rules.

The trial judge should not accept an announcement as to the jury vote on any included offense until the jury has carried its deliberations as far as possible. The inquiry concerning a unanimous vote on any degree of the offense does not come until the jury is about to be discharged as deadlocked. The inquiry of the jury is not as to what the jury can do, but what the jury has done. The jury is not sent back for further deliberations, but in a proper case may be sent back to sign a verdict which the judge finds that the jury has already reached. *State v. Castrillo*, 90 N.M. 608, 566 P.2d 1146 (1977). *See* UJI 14-250 and 14-6012 NMRA and their commentaries.

In polling the jury pursuant to Paragraph E of this rule, the judge begins by inquiring as to the highest degree of the offense charged. If the jury is unable to agree as to the highest degree of the offense submitted to the jury, the court may enter an order declaring a mistrial thereby automatically reserving the power to retry the offense and all lesser degrees of the offense. If the judge finds that the jury agreed that the defendant was not guilty as to the highest degree of the offense, the judge then inquires as to the next highest degree submitted and continues until he reaches the degree of the offense upon which the jury could not agree.

## 5-612. Presence of the defendant; appearance of counsel.

A. **Presence required.** Except as otherwise provided by these rules, the defendant shall be present at all proceedings, including the arraignment, all hearings and conferences, argument, the jury trial and during all communications between the court and the trial jury.

B. **Waiver of personal presence.** The defendant may waive the right to be personally present:

(1) for a specific hearing or proceeding, by an oral waiver on the record; or

(2) by executing a written waiver substantially in the form approved by the Supreme Court. The waiver must be approved by the defendant's counsel and the court prior to the hearing.

C. **Continued presence not required.** The further progress of the trial, including the return of the verdict, and the imposition of sentence shall not be prevented if the defendant waives the right to be personally present or whenever a defendant who was initially present:

(1) is voluntarily absent after the trial has commenced (whether or not he has been informed by the court of his obligation to remain during the trial); or

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

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

(1) a defendant other than a person may appear by counsel for all purposes;

(2) when the offense is punishable by fine or by imprisonment for a term of less than one (1) year, or both, the court, with the written consent of the defendant, permits arraignment, plea, trial and imposition of sentence in the defendant's absence;

(3) when the proceeding involves only a conference or hearing upon a question of law.

[As amended by Supreme Court Order No. 06-8300-010, effective April 15, 2006.]

**Committee commentary.** — This rule is similar to Rule 43 of the Federal Rules of Criminal Procedure. *See* Fed. R. Crim. P. 43.

Prior to the 1974 amendment, Paragraph B of this rule excluded capital cases from the scope of this rule. The 1974 amendment, expanding the scope of the rule to include capital cases, follows the decision in *State v. Corriz*, 86 N.M. 246, 522 P.2d 793 (1974).

## 5-613. Conduct of trial.

A. **Oath of witnesses.** The judge shall administer the following oath to each witness: "Do you swear or affirm that the testimony you will give in this case will be the truth, the whole truth and nothing but the truth, under penalty of law?"

B. **Evidence.** The Rules of Evidence, so far as they are applicable and not in conflict with these rules, shall apply to and govern the trial of criminal cases.

[As amended, effective May 15, 2000.]

**Committee commentary.** — This rule was amended effective July 1, 1973 upon the adoption of the Rules of Evidence.

Prior to May 15, 2000 Paragraph A of this rule adopted by reference Rule 1-045 NMRA. A new subpoena rule for criminal cases was approved by the Supreme Court effective May 15, 2000 and Paragraph A of this rule was deleted. *See* Rule 5-511 NMRA for subpoenas in criminal proceedings.

## 5-614. Motion for new trial.

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

B. **Evidence on motion.** When a motion for new trial calls for a decision on any question of fact, the court may consider evidence on such motion by affidavit or otherwise.

C. **Time for making motion for new trial.** A motion for new trial based on the ground of newly discovered evidence may be made only before final judgment, or within two (2) years thereafter, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for new trial based on any other grounds shall be made within ten (10) days after verdict or finding of guilty or within such further time as the court may fix during the ten (10) day period.

D. **Procedure; hearing.** When the defendant has been found guilty by a jury or by the court, a motion for new trial may be dictated into the record, if a court reporter is present, and may be argued immediately after the return of the verdict or the finding of the court. Such motion may be in writing and filed with the clerk. Such motion, written or oral, shall fully set forth the grounds upon which it is based.

E. **Waiver.** Failure to make a motion for a new trial shall not constitute a waiver of any error which has been properly brought to the attention of the court.

[As amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009.]

**Committee commentary.** — Paragraphs A and D of this rule were derived from Rules 3.580 and 3.590 of the Florida Rules of Criminal Procedure. Paragraph C of this rule was derived from Rule 33 of the Federal Rules of Criminal Procedure.

A motion for a new trial on grounds other than newly discovered evidence must be made within ten (10) days after the verdict and before the judgment is entered. *State v. Wilson*, 1974-NMCA-059, ¶ 11, 86 N.M. 348, 524 P.2d 520.

For the test used for granting a new trial on newly discovered evidence, *see State v. Chavez*, 1974-NMCA-138, ¶ 12, 87 N.M. 38, 528 P.2d 897.

A motion under this rule that is filed not later than thirty (30) days after the filing of the judgment tolls the time for appeal under the Rules of Appellate Procedure. *See* Rule 12-201(D)(1)(b) NMRA (2016).

[As amended by Supreme Court Order No. 16-8300-014, effective for all cases pending or filed on or after December 31, 2016.]

## 5-614.1. Judicial acquittal notwithstanding guilty verdict.

A. **Motion.** When the defendant has been found guilty, the court on motion of the defendant, or on its own motion, may enter judgment of acquittal if the court finds the evidence insufficient to sustain a guilty verdict.

B. **Time for making motion for acquittal.** A defendant may move for a judgment of acquittal, or renew such a motion, within fourteen (14) days after the jury returns a guilty verdict or after the court discharges the jury, whichever is later.

C. **Procedure; hearing.** When the defendant has been found guilty by a jury or by the court, a motion for acquittal may be dictated into the record and may be argued immediately after the return of the verdict. That motion may be in writing and filed with the clerk. That motion, written or oral, shall fully set forth the grounds on which it is based.

D. **Waiver.** Failure to make a motion for acquittal shall not constitute a waiver of any error which has been properly brought to the attention of the court.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

**Committee commentary.** — The district court has "inherent authority to determine whether the evidence presented at trial was legally insufficient to support a conviction." *State v. Martinez*, 2022-NMSC-004, ¶¶ 1, 4, 26, 503 P.3d 313. When reviewing the sufficiency of the evidence after the return of a guilty verdict, the district court shall use the same standard employed by appellate courts in assessing whether sufficient evidence supports a conviction. *Id*. ¶ 12. That standard is as follows: "In reviewing the sufficiency of the evidence, [the district court] must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict. Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts. The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Galindo*, 2018-NMSC-021, ¶ 12, 415 P.3d 494 (internal quotation marks and citations omitted).

In cases when a defendant is charged with multiple offenses and the jury returns a guilty verdict on more than one charge, the district court may acquit the defendant on one of the charges while also entering judgment and sentencing the defendant on the remaining charge or charges that are supported by the jury's guilty verdict. In a case like that, for purposes of creating a clear record on appeal, the district court shall issue one final order containing both the judgment and sentence for the convictions that were supported by sufficient evidence, as well as the judicial acquittal on the unsupported guilty verdicts.

[Adopted by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

## 5-615. Notice of federal restriction on right to receive or possess a firearm or ammunition.

A. **Notice required.** A person who is the subject of an order set forth in Paragraph B of this rule shall be given written notice of the following:

(1) The person is prohibited under federal law from receiving or possessing a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4);

(2) The Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about the person's identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System; and

(3) The person may petition the court as provided in Section 34-9-19 NMSA 1978 to restore the person's right to possess or receive a firearm or ammunition and to remove the person's name from the National Instant Criminal Background Check System.

B. **Orders requiring notice.** The notice required under Paragraph A of this rule shall be included in or made a part of an order,

(1) that was issued after a hearing

(a) of which the defendant received actual notice; and

(b) at which the defendant had an opportunity to participate with the assistance of counsel; and

(2) that finds the defendant,

(a) incompetent to stand trial; or

(b) not guilty by reason of insanity at the time of the offense.

[Provisionally approved by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

**Committee commentary.** — Enacted in 2016, NMSA 1978, Section 34-9-19(C) requires the Administrative Office of the Courts to notify a person who has been "adjudicated as a mental defective" or "committed to a mental institution" that the person "is disabled pursuant to federal law from receiving or possessing a firearm or ammunition." Federal law declares it a crime for a person who has been "adjudicated as a mental defective" or "committed to a mental institution" to, among other things, receive or possess a firearm or ammunition. *See* 18 U.S.C. § 922(g)(4) ("It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

The terms "adjudicated as a mental defective" and "committed to a mental institution" are defined under federal regulation and New Mexico law as follows:

*Adjudicated as a mental defective.*

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

*Committed to a mental institution.* A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11; NMSA 1978, § 34-9-19(M) ("[T]he terms 'adjudicated as a mental defective' and 'committed to a mental institution' have the same meaning as those terms are defined in federal regulations at 27 C.F.R. Section 478.11 . . . .").

Paragraph A of this rule prescribes the notice that must be given under Section 34-9-19(C) to a person who has been "adjudicated as a mental defective" or "committed to a mental institution." *See also* Form 4-940 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition). Paragraph B identifies the orders that require notice in a criminal proceeding because they presumptively meet the federal definition of "adjudicated as a mental defective" or "committed to a mental institution."

The requirements in Paragraph (B)(1) are intended to ensure that adequate due process protections are present before notice is provided and the person's identifying information is reported to the National Instant Criminal Background Check System (NICS). *Accord, e.g., United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012) ("[T]he right to possess arms (among those not properly disqualified) is no longer something that can be withdrawn by government on a permanent and irrevocable basis without due process. Ordinarily, to work a permanent or prolonged loss of a constitutional liberty or property interest, an adjudicatory hearing, including a right to offer and test evidence if facts are in dispute, is required."); Open Letter to the States' Attorneys General from the Bureau of Alcohol, Tobacco, Firearms, and Explosives, U.S. Department of Justice (May 9, 2007), https://www.atf.gov/file/83751/download (explaining that the ATF historically has required "traditional protections of due process be present, including adequate notice, an opportunity to respond, and a right to counsel"); *cf*. 18 U.S.C. § 921(a)(33) (providing that "[a] person shall not be considered to have been convicted of [a misdemeanor crime of domestic violence under § 922(g)(9)], unless . . . the person was represented by counsel in the case . . . .").

The inclusion in Paragraph (B)(2)(a) of a finding of incompetency to stand trial is not free from doubt. The federal definition of "adjudicated as a mental defective" arguably is limited in Subsection (b)(2) to a finding of incompetent to stand trial in proceedings

under the Uniform Code of Military Justice (UCMJ) and therefore may not apply to such a finding in a state criminal proceeding. However, the federal agency that promulgated the definition interprets Subsection (b)(2) as applying to findings of incompetency both in criminal cases and in proceedings under the UCMJ. *See* 79 Fed. Reg. 774, 777 (2014) (statement in proposed rule by the Bureau of Alcohol, Tobacco, Firearms, and Explosives). That interpretation is consistent with federal law that governs the reporting of information to the NICS. *See* NICS Improvement Amendments Act of 2007, Pub. L. 110-180, § 101(c)(1)(C), 121 Stat. 2559, 2562-63 (2008) (providing that no law shall prevent a federal department or agency from providing to the Attorney General any record that includes a finding of incompetent to stand trial "*in any criminal case* or under the Uniform Code of Military Justice" (emphasis added)).

Further, the standards for determining competency in a proceeding under the UCMJ and under New Mexico law in a criminal case are substantially the same. *Compare* 10 U.S.C. § 876b(a)(1) (requiring commitment to the Attorney General's custody of a person "presently suffering from a mental disease or defect rendering the person mentally incompetent to the extent that the person is unable to understand the nature of the proceedings against that person or to conduct or cooperate intelligently in the defense of the case"); *with, e.g., State v. Rotherham*, 1996-NMSC-048, ¶ 12, 122 N.M. 246, 923 P.2d 1131 ("A person is competent to stand trial when he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and he has a rational as well as factual understanding of the proceedings against him. An accused must have the capacity to assist in his own defense and to comprehend the reasons for punishment." (internal quotation marks, alterations, and citations omitted)). Requiring notice for a finding of incompetency in a criminal proceeding, therefore, is consistent with the intent and scope of the federal definition, which is controlling under New Mexico law. *See* NMSA 1978, § 34-9-19(M).

[Provisionally approved by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

# ARTICLE 7
# Judgment and Appeal

## 5-701. Judgment; costs.

A. **Judgment.** If the defendant is found guilty, a judgment of guilty shall be rendered if the court makes the legal determination that sufficient evidence supports the verdict. If the defendant has been acquitted, a judgment of not guilty shall be rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The clerk shall give notice of entry of judgment and sentence.

B. **Sentencing hearing.** Except for good cause shown, the sentencing hearing shall begin within ninety (90) days from the date the trial was concluded or the date a plea was entered.

C. **Judgment and sentence.** Within thirty (30) days after the conclusion of the sentencing hearing, the court shall enter a judgment and sentence.

D. **Costs and fees.** In a case in which there is a conviction, costs and fees may be imposed as provided by law.

[As amended, effective December 1, 1998; as amended by Supreme Court Order No. S-1-RCR-2023-00020, effective for all cases pending or filed on or after December 31, 2023.]

## 5-702. Advising defendant of a right to appeal.

A. **Advice by court.** At the time of imposing or deferring sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to proceed at state expense.

B. **Duties of defense counsel.** In addition to the advice given by the court, defense counsel shall, within the time provided in the Rules of Appellate Procedure, file with the court one of the following documents:

(1) a notice of appeal in compliance with Rule 12-201 of the Rules of Appellate Procedure; or

(2) an affidavit, substantially in the form approved by the supreme court, signed and sworn to by defendant and witnessed by counsel stating defendant's decision not to appeal.

[As amended, effective October 1, 1987.]

**Committee commentary.** — The original version of this rule was abrogated as a part of the adoption of the Rules of Appellate Procedure in 1975. Paragraph A of Rule 12-201 incorporates the appeal procedure formerly contained in this rule.

The new rule is derived from Rule 32(a)(2) of the Federal Rules of Criminal Procedure. This rule does not require the court to advise a defendant pleading guilty or no contest under Rule 5-503 of his right to appeal. *See State v. Chavez*, 80 N.M. 560, 458 P.2d 812 (Ct. App. 1969). *See* Federal Rules 32(a)(2) and commentary. 62 F.R.D. 271, 320, 322 (1974). Nevertheless, an appeal from a plea of guilty is permissible. *See e.g.*, *State v. Vigil*, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973).

This rule was revised in 1983 to correct the growing number of petitions for postconviction relief arising from defendants who claim they were never advised of their right to appeal. Requiring both the defendant to certify that the defendant was, in fact, advised of the right to appeal, and counsel to witness the advice given, will preclude this problem.

## 5-703. Predisposition report procedure.

A. **Ordering the report.** The court may order a predisposition report at any stage of the proceedings.

B. **Inspection.** The report shall be available for inspection by only the parties and attorneys by the date specified by the district court, and in any event, no later than ten (10) days prior to any hearing at which a sentence may be imposed by the court unless the parties agree to proceed with shorter notice.

C. **Hearing.** Before a sentence is imposed, the parties shall have an opportunity to be heard on any matter concerning the report. The court, in its discretion, may allow the parties to present evidence regarding the contents of the report.

[As amended by Supreme Court Order No. 06-8300-005, effective March 31, 2006.]

**Committee commentary.** — This rule is designed to regularize the sentencing process so that the basis of the judge's decision is made known and challenged at the time of sentencing if necessary. The principle expressed in this rule is consistent with the *American Bar Association Standards Relating to Sentencing Alternatives and Procedures, Part IV* (Approved Draft 1968), the *Model Sentencing Act,* Article II (Nat. Council on Crime and Delinquency, 2d Ed. 1972) and Rule 32(c) of the *Federal Rules of Criminal Procedure. See* 62 F.R.D. 271, 324-25 (1974).

This rule provides that counsel may advise the court of any plea negotiations and that the report may be requested at that time so as to be available for use during negotiations and at the plea hearing under Rule 5-303 NMRA.

## 5-704. Death penalty; sentencing.

A. **Notice of intent.** In any case in which the state seeks the death penalty, the state shall file a notice of intent to seek the death penalty within ninety (90) days after arraignment. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of death. Before the time for filing a notice of intent has expired, upon motion by the state with good cause shown, the district court may extend the time for filing a notice of intent.

B. **Pre-trial review of state penalty proceeding evidence.** No later than ninety (90) days prior to trial, the court shall hold a hearing to determine whether or not there is probable cause to believe that one or more aggravating circumstances exist. If the court

finds that there is not probable cause on one or more aggravating circumstances, the court shall dismiss that aggravating circumstance.

C. **Capital defense counsel.** The defendant in a death penalty case must be represented by at least two (2) attorneys, one of whom meets the minimum standards set forth in this paragraph for first-chair capital defense attorneys and another who meets the minimum standards set forth in this paragraph for first-chair or second-chair capital defense attorneys.

(1) The minimum standards for first-chair capital defense attorneys are:

(a) member in good standing of the New Mexico Bar;

(b) a minimum of five (5) years active criminal litigation experience as a licensed attorney immediately preceding appointment;

(c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion, at least two of which were murder prosecutions; and

(d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit.

(2) The minimum standards for second-chair capital defense attorneys are:

(a) member in good standing of the New Mexico Bar;

(b) a minimum of three (3) years active criminal litigation experience as a licensed attorney immediately preceding appointment;

(c) prior experience as lead counsel or co-counsel in at least eight (8) felony jury trials that were tried to completion; and

(d) completion within two (2) years prior to entry of appearance in a death penalty case of at least twelve (12) hours of training in the defense of capital cases in a program approved by the New Mexico Department of the Public Defender and qualified for New Mexico MCLE credit. This requirement may be met within one (1) year after appointment as second-chair counsel in a death penalty case.

The district court shall require any attorney who enters an appearance as trial counsel in a death penalty case to show that the attorney is a qualified capital defense attorney in accordance with the requirements of this paragraph. If the district court determines that the defendant is not represented by two (2) qualified capital defense attorneys, at least one of whom is qualified to act as first chair, the district court, in the

case of indigent defendants, shall order the New Mexico Department of the Public Defender to appoint one or more qualified attorneys to ensure that the defendant is represented as required by this paragraph. In the case of a defendant who has retained private counsel, the district court shall order the New Mexico Department of the Public Defender to appoint an attorney who is qualified as a first-chair capital defense attorney to assist the privately retained defense attorney.

D. **Separate trial and sentencing juries optional.**

(1) If the defendant is charged with an offense which may be punished upon conviction by the penalty of death, the procedure set forth in Section 31-20A-1 NMSA 1978 shall govern unless the defendant at least sixty (60) days before the scheduled trial date elects, by written notice filed with the court, to have two separate juries for trial and sentencing as provided in Subparagraph (2) of this paragraph.

(2) If the defendant elects to have separate trial and sentencing juries under Subparagraph (1) of this paragraph, a trial jury shall be impaneled to determine whether the defendant is innocent or guilty of the capital felony offense and any other charged non-capital offenses. The jury shall be selected and instructed in the same manner as any other jury selected and instructed to determine the innocence or guilt of a defendant charged with non-capital felony offenses. If the trial jury finds the defendant guilty of a capital felony offense that may result in a sentence of death, a second jury shall be selected in accordance with Paragraph E of this rule to determine whether the defendant shall be sentenced to death or life imprisonment.

(3) At the sentencing hearing, the state may present evidence relevant to any aggravating factor permitted to be considered under Section 31-20A-5 NMSA 1978. The defendant may present evidence relevant to any mitigating factor, including but not limited to those factors enumerated in Section 31-20A-6 NMSA 1978. If the defendant elects the two-jury procedure set forth in Subparagraph (2) of this paragraph, information presented to the sentencing jury may include portions of the trial transcript and exhibits as designated by the parties and admitted by the court. The state and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the evidence to establish the existence of any aggravating or mitigating factor, and as to the appropriateness in the case of imposing a sentence of death. The parties may make opening statements and closing arguments, including a rebuttal closing argument by the state.

E. **Individual sequestered voir dire.** For the selection of jurors for the single jury permitted under the procedure set forth in Section 31-20A-1 NMSA 1978 or for the separate sentencing jury permitted under Subparagraph (2) of Paragraph D of this rule, voir dire shall be conducted by questioning individual prospective jurors on death penalty issues out of the presence of any other prospective juror. The court may also permit individual sequestered voir dire of prospective jurors on other issues.

F. **Alternate jurors.** If the defendant is charged with an offense which may be punished upon conviction by the penalty of death and a single jury is used for trial and sentencing, alternate jurors shall not be discharged until the regular jurors are discharged. Such jurors may not attend or participate in the consideration of a verdict, but shall be treated in the same manner as other jurors and shall be called after a verdict is returned to act as alternate jurors to replace jurors who become or are found to be unable or disqualified to consider the sentence to be imposed. If the defendant elects the two-jury procedure set forth in Subparagraph (2) of Paragraph D of this rule, alternate jurors for the trial jury and the sentencing jury shall be impaneled and discharged in accordance with Rule 5-605 NMRA.

G. **Jury deliberations.** In any case in which the state seeks the death penalty and a single jury is used for trial and sentencing, if the jury convicts the defendant of first-degree murder, the court will proceed with the sentencing proceeding. The jury shall consider the aggravating and mitigating circumstances at the same time or separately. If the defendant has elected the two-jury procedure under Paragraph D of this rule, and if the trial jury convicts the defendant of first-degree murder, the trial jury shall then be discharged and a sentencing jury shall be selected as permitted by this rule. The court will then proceed with the sentencing proceeding and the sentencing jury shall consider the aggravating and mitigating circumstances at the same time or separately.

H. **Bifurcated proceedings.** Upon request of a party, the court shall bifurcate the issues of aggravating circumstances and mitigating circumstances in the following order:

(1) aggravating circumstances determination. The sentencing jury will first determine if one or more of the statutory aggravating circumstances charged in the indictment or information exist. The aggravating circumstance evidence shall be presented to the jury as follows:

(a) the state shall submit evidence of aggravating circumstances;

(b) the defense may submit its evidence;

(c) the state may submit any evidence in rebuttal;

(d) the defense may submit evidence in surrebuttal.

(2) sentencing stage. If the sentencing jury returns a finding that the state has proven the existence of at least one aggravating circumstance beyond a reasonable doubt:

(a) the defense may submit evidence of mitigating circumstances;

(b) the state may submit its evidence;

(c) the defense may submit any evidence in rebuttal;

(d) the state may submit evidence in surrebuttal.

I. **Polling of sentencing jury.** If the sentencing jury returns a verdict that the defendant should be sentenced to death, the court shall poll each juror to assure that the juror agrees with sentence of death.

J. **Record of proceedings.** All proceedings under this rule, whether conducted in open court, at bench conferences or in chambers, shall be recorded verbatim.

K. **Disability of judge.** In any felony case in which the defendant may be punished by the penalty of death, if the judge, who has presided over the trial or accepted a guilty plea, is unable to preside over a sentencing proceeding to determine the sentence to be imposed by reason of absence, death, sickness or other disability, any other judge regularly sitting in or assigned to the court may conduct a sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. Prior to conducting a sentencing proceeding, a substitute judge shall file a certificate that he read or heard the evidence and examined the exhibits.

[As amended, effective April 19, 2004; as amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; by Supreme Court Order No. 09-8300-042, effective November 30, 2009, for all new and pending cases.]

**Committee commentary.** — This rule was drafted to comply with the legislative directive that the Supreme Court promulgate rules to regulate the practice and procedure in capital felony cases for the selection and utilization of alternate jurors and substitute trial judges caused by the disability of any juror or trial judge before whom a capital felony sentencing proceeding has commenced. *See* note to Section 31-20A-6 NMSA 1978. *See* Laws 1979, Chapter 150, Section 11.

Paragraph F of this rule is the same as Rule 5-605 NMRA, except alternate jurors in certain felony cases will not be discharged at the time the regular jurors retire to deliberate, but rather will be kept under the same conditions as the regular jurors. Alternate jurors in capital felony cases may not participate in the deliberation of the verdict even if a regular juror is no longer able to participate. It is believed that alternate juror participation in the deliberation of the verdict may be unconstitutional in that the deliberation of the other eleven jurors may have progressed to a stage that the alternate juror would have little voice in the verdict. *See* commentary to American Bar Association Standard 2.7, Standard Relating to Trial by Jury.

Subsection B of Section 31-20A-1 NMSA 1978 requires that the sentencing proceeding be commenced as soon as practicable after the verdict. Paragraph B of this rule, requiring the court to commence the death penalty sentencing proceeding immediately after the guilt phase of the trial, was deleted as part of the 2004 amendments.

[As amended by Supreme Court Order No. 09-8300-009, effective May 6, 2009; by Supreme Court Order No. 09-8300-042, effective November 30, 2009, for all new and pending cases.]

## 5-705. Life imprisonment without possibility of release or parole.

A. **Notice of intent.** In any case in which the state seeks life imprisonment without the possibility of release or parole, the state shall file a notice of intent to seek life imprisonment without the possibility of release or parole within ninety (90) days after arraignment in district court. The notice of intent shall specify the elements of the statutory aggravating circumstances upon which the state will rely in seeking a sentence of life imprisonment without the possibility of release or parole. Before the time for filing a notice of intent has expired, with good cause shown, the district court may modify the time for filing a notice of intent.

B. **Pretrial review of state penalty proceeding evidence.** Upon the defendant's motion, no later than ninety (90) days prior to trial, the court shall hold a hearing to determine whether or not there is probable cause to believe that one or more aggravating circumstances exist. If the court finds that there is not probable cause on one or more aggravating circumstances, the court shall dismiss that aggravating circumstance.

C. **Bifurcated proceeding upon motion.** Upon motion and a showing of prejudice, the court may bifurcate the issues of guilt of the defendant and whether one or more aggravating circumstances exist under Section 31-20A-5 NMSA 1978. If the court bifurcates the proceeding, it must also determine whether the same jury that decides guilt will also decide whether one or more aggravating circumstances exist. A motion for bifurcated proceeding must be filed at least ninety (90) days prior to trial. The court's decision on the motion shall be issued no later than ten (10) days prior to trial.

D. **Procedures for proceeding that has not been bifurcated.** If the proceeding is not bifurcated, the trial jury shall determine by a special verdict whether one or more aggravating circumstances exist beyond a reasonable doubt.

E. **Procedures for bifurcated proceedings.** If the court bifurcates the issues of guilt of the defendant and whether one or more aggravating circumstances exist, the court shall proceed as follows:

(1) A trial jury shall be impaneled to determine whether the defendant is guilty of an offense for which the sentence imposed may be life without the possibility of release or parole.

(2) If the trial jury finds the defendant guilty of an offense that may result in a sentence of life without the possibility of release or parole, the same jury or a second jury, as determined by the court under Paragraph C of this rule, shall determine whether one or more aggravating circumstances exist beyond a reasonable doubt. The court

shall permit the state and the defendant to present evidence and argument relating to the presence or absence of one or more aggravating circumstances.

[Adopted by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

**Committee commentary.** — This rule follows the repeal of the death penalty in 2009, *see* 2009 N.M. Laws, ch. 11, §§ 5-7, and sets forth procedures for cases in which a defendant faces a possible sentence of life imprisonment without the possibility of release or parole. *See* NMSA 1978, § 31-20A-2 (2009).

Under Paragraph A, the time for filing the notice of intent may be modified upon motion of a party or by the district court, sua sponte.

In *State v. Chadwick-McNally*, the Supreme Court held that defendants facing a possible sentence of life imprisonment without the possibility of release or parole were not entitled to the heightened procedural protections that are afforded to defendants facing a possible death sentence, including a hearing comparable to that provided for under Rule 5-704 (B) NMRA and bifurcated proceedings on issues of guilt and aggravated circumstances as provided for under Rule 5-704 (H). 2018-NMSC-018, ¶¶ 16-19, 20-22, 414 P.3d 326. Given the significant liberty interest implicated for a defendant facing a sentence of life imprisonment without parole—now the most serious penalty a criminal defendant in New Mexico can face—this rule provides for some of the heightened procedural protections contemplated by Rule 5-704.

Under Paragraph B, a defendant who moves for a pretrial determination on whether there is probable cause to believe that one or more aggravated circumstances exist is entitled to a hearing on that issue. A defendant is not entitled, as a matter of course, to bifurcated proceedings on the issues of guilt and whether one or more aggravating circumstances exist; “[w]hether bifurcated proceedings are appropriate must be determined by the court on a case-by-case basis.” *Chadwick-McNally*, 2018-NMSC-018, ¶¶ 21-22.

Under Paragraphs (D) and (E)(2), if a jury finds beyond a reasonable doubt that one or more aggravating circumstances exist, the defendant shall be sentenced to life imprisonment without the possibility of release or parole. *Id*. ¶ 25. Mitigation is not permitted. *Id*. “If the jury does not find that one or more aggravating circumstances exist, then the defendant shall be sentenced to life imprisonment.” *Id*. (quoting § 31-20A-2).

[Adopted by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

# ARTICLE 8
# Special Proceedings

## 5-801. Reduction of sentence.

A. **Reduction of sentence.** A motion to reduce a sentence may be filed within ninety (90) days after the sentence is imposed, or within ninety (90) days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within ninety (90) days after entry of any order or judgment of the appellate court on direct appeal denying review of, or having the effect of upholding, a judgment of conviction. A motion to reduce a sentence may also be filed upon revocation of probation as provided by law. Changing a sentence from a sentence of incarceration to a sentence of probation shall constitute a permissible reduction of sentence under this paragraph.

B. **Mandatory sentence.** This rule does not apply to the death penalty or a mandatory sentence.

[As amended, effective March 1, 1986; August 1, 1989; August 1, 1992; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

**Committee commentary.** — Motions to correct clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission should be brought under Rule 5-113(B) NMRA. Motions challenging the legal validity of a conviction or a sentence should be brought under Rule 5-802 or Rule 5-803 NMRA. This rule authorizes motions seeking discretionary reduction of a sentence.

This rule was originally drafted to be substantially the same as Rule 35 of the Federal Rules of Criminal Procedure. Prior to the adoption of Rule 5-801 NMRA there was confusion as to when the district court could modify a sentence. The New Mexico rule was that the district court could modify a sentence of a prisoner during the same term of the conviction, even if the defendant had already commenced to serve his sentence. *See State v. White*, 1962-NMSC-139, ¶ 12, 71 N.M. 342, 378 P.2d 379. The district court, however, lost all power to modify a judgment after the filing of the notice of appeal. *See id*. ¶ 14. The Rules of Criminal Procedure for the District Courts abolished the concept of terms of court and therefore it was desirable to have a specific rule setting forth the limits of power of the district court.

The rule, as originally drafted, limited the period of time that district court could modify a sentence to a period of thirty (30) days after imposition of sentence. Rule 5-801 was revised in 1988 to comply with the Supreme Court's decision in *Hayes v. State*, 1988-NMSC-021, 106 N.M. 806, 751 P.2d 186. In *Hayes*, the Supreme Court held that if the motion to reduce a sentence is filed within thirty (30) days after the mandate on appeal, the trial court could reduce the sentence within a reasonable time after the filing of the motion. *Id*. ¶ 8. The Supreme Court suggested that ninety (90) days from a timely filed motion was a reasonable time. *See also* Rule 35, Federal Rules of Criminal Procedure for the United States District Courts.

Under this rule, no modification of sentence can be considered by the trial court after the filing of notice of appeal. However, the trial court may modify the sentence within thirty (30) days after receipt of the mandate.

This rule is not to be construed as allowing the reduction, deferral or suspension of a sentence unless such modification of sentence is consistent with applicable New Mexico law.

A motion under this rule that is filed not later than thirty (30) days after the filing of the judgment tolls the time for appeal under the Rules of Appellate Procedure. *See* Rule 12-201(D)(1)(b) NMRA (2016); *see also State v. Romero*, 2014-NMCA-063, ¶¶ 5-13, 327 P.3d 525 (concluding that timely filing of post-judgment motion under Rule 5-801 suspends finality of judgment until a written ruling on the motion is entered).

[As amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-014, effective for all cases pending or filed on or after December 31, 2016.]

## 5-802. Habeas corpus.

A. **Scope of rule.** This rule governs the procedure for filing a writ of habeas corpus by persons in custody or under restraint for a determination that such custody or restraint is, or will be, in violation of the constitution or laws of the State of New Mexico or of the United States; that the district court was without jurisdiction to impose such sentence; or that the sentence was illegal or in excess of the maximum authorized by law or is otherwise subject to collateral attack.

B. **Petition.** The petition may be submitted using Form 9-701 NMRA and shall contain the following required information:

(1) the petition shall clearly state whether either

(a) the petition seeks to vacate, set aside, or correct the sentence or order of confinement, correct the Department of Corrections' interpretation or application of the sentence or order of confinement, or challenge the conviction; or

(b) the petition challenges conditions of confinement or matters other than those set forth in Subparagraph (B)(1)(a) of this rule;

(2) the respondent's name and title. The respondent shall be the petitioner's immediate custodian, who shall have the power to produce the body of the petitioner before the court and shall have the power to discharge the petitioner from custody if the petition is granted;

(3) a brief statement naming the place where the person is confined or restrained;

(4) a brief statement of the steps taken to exhaust all other available remedies, including a statement of the name of the case, the docket number of the case, the court, administrative agency, or institutional grievance committee from which relief was sought, and the result of each judicial or administrative proceeding;

(5) a brief statement of whether an appeal or prior petitions for habeas corpus or other relief have been filed, including a statement of the case name, the docket number of the case, the grounds upon which relief was sought, the court from which relief was sought, the result of each proceeding and, if appropriate, a statement of why the claim now being raised was not raised in such prior proceedings or how the claim now being raised differs from a claim raised in those proceedings;

(6) if the petitioner has previously filed a petition seeking relief under this rule, a brief statement explaining why the petition should not be dismissed under Paragraph H of this rule;

(7) a concise statement of the facts and law upon which the application is based; and

(8) a concise statement of the relief sought.

C. **Time and other limitations pertaining to petitions challenging the conditions of confinement within the New Mexico Corrections Department.**

(1) A New Mexico Corrections Department (NMCD) inmate may file a petition challenging any misconduct or disciplinary report or decision received while incarcerated in a NMCD correctional facility, provided that

(a) no court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance, or civil action filed by any inmate of the NMCD with regard to any cause of action under state law that is substantially related to the inmate's incarceration by the NMCD until the inmate exhausts the NMCD's internal grievance procedure;

(b) the inmate files the petition challenging the disciplinary decision within one (1) year of the inmate's receipt of the NMCD's final disciplinary decision; and

(c) the NMCD shall inform the inmate of the provisions of Paragraph C of this rule in writing at the time of its decision. Should the NMCD fail to inform the inmate of the provision of Paragraph C of this rule in writing at the time of its decision, the time limitations of Subparagraph (C)(1)(b) of this rule shall be waived.

(2) A NMCD inmate may file a petition challenging any other condition of the inmate's confinement while incarcerated in a NMCD correctional facility, provided that no court of this state shall acquire subject-matter jurisdiction over any complaint, petition, grievance, or civil action filed by any inmate of the NMCD with regard to any

cause of action under state law that is substantially related to the inmate's incarceration by the NMCD until the inmate exhausts the NMCD's internal grievance procedure.

D. **Papers attached to petition.** The following shall be attached to the petition:

(1) any opinion, order, transcript, or other written material indicating any court's, agency's, or institutional grievance committee's position or ruling on the petitioner's custody or restraint; and

(2) if the petitioner is indigent, an affidavit attesting to the petitioner's indigency and containing a statement of the petitioner's available assets and a motion for permission to proceed in forma pauperis, provided that a petitioner who is incarcerated at the time of filing the petition may file the petition without payment of the applicable filing fee or a motion for permission to proceed in forma pauperis.

E. **Venue.** If the petition

(1) seeks to vacate, set aside, or correct the sentence or order of confinement, correct the NMCD's interpretation or application of the sentence or order of confinement, or challenge the conviction, it shall be filed in the county of the court in which the matter was adjudicated, or, if the matter has not been adjudicated, in the county of the court that ordered the contested confinement; or

(2) challenges conditions of confinement or matters other than those set forth in Subparagraph (E)(1) of this rule, it shall be filed in the county where the petitioner is confined or restrained.

F. **Filing of the petition.** A writ of habeas corpus will be issued only upon filing with the clerk of the court a petition on behalf of the party seeking the writ. Upon the filing of the petition, the clerk of the district court shall file-stamp the petition with the date of receipt ("file-stamp" date). If the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution, the petition is deemed to be filed with the clerk of the court on the day the petition is deposited in the institution's internal mail system for forwarding to the court provided that the petitioner states within the petition, under penalty of perjury, the date on which the petition was deposited in the institution's internal mail system. A notation with a "deemed filed" date shall also be made on the petition and in the court's database.

G. **Court's classification and case assignment.**

(1) If the petitioner indicates that the petition challenges matters contained in Subparagraph (E)(1) of this rule, the clerk shall file the petition in the original criminal case, thereby reopening the original criminal case, and shall assign the petition to the judge that originally heard the criminal case, or if that judge is no longer serving on the bench, to a judge presiding in the criminal division. Upon receipt of the petition or revised petition, the clerk of the court shall immediately forward a file-stamped copy of

the petition and any attachments to the district attorney and to the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel. Mailing copies of the petition in accordance with this subparagraph and with a completed certificate of mailing shall constitute service on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1, or 5-103.2 NMRA.

(2) If the petitioner indicates that the petition challenges matters contained in Subparagraph (E)(2) of this rule, a new habeas corpus case shall be opened and the matter shall be assigned to a judge who addresses criminal matters in accordance with the court's assignment practices. Upon receipt of the petition or revised petition, the clerk of the court shall immediately forward a file-stamped and dated copy of the petition and any attachments to the attorney general and to the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel. Mailing copies of the petition in accordance with this subparagraph and with a completed certificate of mailing shall constitute service on the respondent by the clerk of the court in accordance with Rule 5-103, 5-103.1, or 5-103.2 NMRA.

H. **Procedure in non-death penalty cases.** If a sentence of death has not been imposed, upon presentation of the petition the court shall proceed in the following manner:

(1) **Pre-appointment review.** For petitions not filed by an attorney, within forty-five (45) days of the file-stamp date on the petition, the public defender department may file a statement recommending that the court order a revised petition under Subparagraph (I)(2)(a) of this rule or indicating whether the petition is a proceeding that a reasonable person of adequate means would be willing to bring at a person's own expense and provide sufficient detail for further judicial review of the public defender's assessment. The court ordinarily should not appoint the public defender during the pre-appointment review period.

(2) **Initial court review.** Within one-hundred twenty (120) days of the file-stamp date on the petition, the court shall examine the petition together with all attachments and statement of the public defender department, if any. Within this initial one-hundred twenty (120) day court review

(a) **Petitioner's opportunity to revise.** If the court is unable to determine from the face of the petition whether the petition should be allowed to go forward on the merits or dismissed under this rule, the court may return a copy of the petition to the petitioner for additional factual information or a restatement of the legal claims. If the petition is returned to the petitioner, the court shall set a date certain within the one-hundred twenty (120)-day initial review period, but no less than forty-five (45) days from the date of returning the copy to the petitioner, for the petitioner to resubmit a revised petition. If no revised petition is filed under this subparagraph by the date specified by the court, the judge may dismiss the petition.

(b) **Summary dismissal.** If it plainly appears from the face of the petition, any attachments, and the prior proceedings in the case that the petitioner is not entitled to relief as a matter of law, the court shall order a summary dismissal of the petition, state the reasons for the dismissal, and promptly serve a copy of the order on petitioner, district attorney if the petition challenges matters contained in Subparagraph (E)(1) of this rule, attorney general if the petition challenges matters contained in Subparagraph (E)(2) of this rule, and the public defender department post-conviction unit or, if the petition is filed on behalf of the petitioner by private legal counsel, to that legal counsel.

(c) **Appointment of counsel.** If, after reviewing the petition, any statement filed by the public defender department, and revised petition, if any, the court does not order a summary dismissal, the court shall appoint counsel to represent the petitioner, subject to the standards of the Indigent Defense Act, Section 31-16-3 NMSA 1978, unless the petitioner has filed a waiver of counsel or has retained counsel. A copy of the order of appointment shall be provided to the petitioner, respondent, and the public defender department post-conviction unit;

(3) **Procedure; time limits.** Within ninety (90) days after the date of appointment, counsel for the petitioner shall file either an amended petition or a notice that counsel does not intend to amend the petition and provide a copy of the amended petition or notice directly to the assigned judge. Within thirty (30) days after the filing of an amended petition or a notice of non-intent to amend the petition, the court may dismiss some or all of the claims in the petition under Subparagraph (H)(2) of this rule. Within one-hundred twenty (120) days after filing of the amended petition or notice not to amend, the respondent shall file a response to any claims not dismissed and provide a copy of the response directly to the assigned judge, without further order of the court;

(4) **Preliminary disposition hearing.** After the response is filed, at the request of a party or upon its own motion, the court may conduct a preliminary disposition hearing for the purpose of clarifying the issues and petitioner's evidence in support of the claims in the petition. At the preliminary disposition hearing, the court will attempt to resolve any of the issues presented by the petition based on the filings by counsel for the parties. The court shall then determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the court shall dispose of the petition without an evidentiary hearing, but may ask for briefs and oral arguments on legal issues;

(5) **Evidentiary hearing.** If an evidentiary hearing is required, the court shall conduct a hearing as promptly as practicable.

I. **Second and successive petitions.** If the petitioner has previously filed a petition seeking relief under this rule, the court shall have the discretion to

(1) dismiss any claim not raised in a prior petition unless fundamental error has occurred, or unless an adequate record to address the claim properly was not available at the time of the prior petition; and

(2) dismiss any claim raised and rejected in a prior petition unless there has been an intervening change of law or fact or the ends of justice would otherwise be served by rehearing the claim.

J. **Discovery procedures.**

(1) **Discovery procedures for parties represented by counsel.** At any time, counsel for a party may make a formal written request to opposing counsel for production of documents and other discovery materials that are available under Rules 5-501 and 5-502 NMRA. The written request shall describe the good faith efforts by counsel to obtain the discovery materials from previous counsel or any other sources and shall show that these efforts were unsuccessful. Counsel for the opposing party shall comply with the request within thirty (30) days after service or notify the court in writing of any objection to the request. Any objection based on privilege should clearly identify the material withheld and the basis of the privilege claim. The court shall then hold a hearing to rule on any objection to the discovery request. The court shall grant a challenged request for discovery when the requesting party demonstrates that the materials are relevant either to advance the claims that are alleged in the petition or to defend against the claims that are alleged in the petition.

(2) For purposes of this rule, “discovery materials” are

(a) materials in the possession of a party;

(b) materials in the possession of law enforcement authorities to which the petitioner would have been entitled to at the time of trial; or

(c) materials in the possession of the NMCD.

(3) Counsel for a party may make use of any other discovery procedure under the Rules of Criminal Procedure only after notice to opposing counsel and prior written authorization from the court. In determining whether to authorize such proceedings, the court may consider any of the factors contained in Rule 5-507(A) NMRA.

(4) **Discovery procedures for pro-se petitioners.** Petitioners not represented by counsel shall petition the court before requesting discovery under this rule and the Rules of Criminal Procedure for the District Courts. In determining whether to authorize a discovery request, the court may consider any of the factors contained in Rule 5-507(A) NMRA.

(5) **Motions to compel.** If the state or the petitioner fails to comply with any of the provisions of this rule, the court may enter an order under Rule 5-505 or Rule 5-112 NMRA.

K. **Transportation of incarcerated petitioners.** If the presence of the petitioner is required at a hearing it shall be the responsibility of counsel for the petitioner to submit a

transportation order for petitioners who are incarcerated. It shall be the responsibility of the respondent to facilitate the transportation of the petitioner if needed.

L. **Death penalty cases.** If a sentence of death has been imposed

(1) upon issuance of the mandate of the Supreme Court affirming the sentence of death, the district court shall promptly appoint counsel to represent the defendant;

(2) following the issuance of the mandate the execution shall be stayed pending further proceedings under this paragraph;

(3) unless an extension of time is granted for good cause shown, within one-hundred eighty (180) days after appointment, the defendant shall file a petition for writ of habeas corpus;

(4) unless an extension of time is granted for good cause shown, within one-hundred eighty (180) days after service of a petition for writ of habeas corpus, the respondent shall file a response to the petition;

(5) within thirty (30) days after service of the response, the court shall schedule a hearing on the petition. In considering the petition, the court may hear evidence, require briefs, or schedule arguments;

(6) within thirty (30) days after the filing of the district court's order on the petition

(a) if the writ is granted, the state may appeal; or

(b) if the writ is denied, the petitioner may appeal;

(7) the Rules of Appellate Procedure shall govern the appeal to the Supreme Court.

M. **Procedure on petition remanded by the Supreme Court.** A petition originally filed in the Supreme Court may be remanded by the Supreme Court to the district court. If the petition is remanded by the Supreme Court, the district court shall proceed as if the petition had been filed in the district court in the first instance.

N. **Appeal; non-death penalty proceedings.** Within thirty (30) days after the district court’s decision

(1) if the writ is granted, the state may appeal as of right under the Rules of Appellate Procedure;

(2) if the writ is denied, a petition for certiorari may be filed with the Supreme Court.

[As amended, effective March 1, 1986; March 16, 1998; June 1, 2002; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]

**Committee commentary for 2017 amendments.** — Rule 5-802 NMRA was amended in 2017 to streamline the administrative processing of petitions for a writ of habeas corpus in the district courts.

The amendments eliminate the thirty (30)-day review and acceptance period under Paragraph F and instead require that all petitions for a writ of habeas corpus be filed immediately upon receipt by the district court. Paragraph F establishes two important dates, the "file-stamp" date and the "deemed filed" date. The "deemed filed" date incorporates the prison mailbox rule allowing a petition for a writ of habeas corpus to be deemed filed the date it is deposited in the institution's internal mail system. *See* Rule 5-103(I) NMRA (Filing and service by an inmate). The deemed filed date will mainly affect the one (1)-year time limitation to file a petition for a writ of habeas corpus in federal court following a state court conviction. *See* Committee commentary for 2009 amendments. However, the deemed filed date may also affect the one (1)-year time limitation for filing a petition challenging a disciplinary decision of the New Mexico Corrections Department under Paragraph C. The "file-stamp" date is the date the district court actually receives the petition. All the deadlines in Rule 5-802 run from the "file-stamp" date.

Paragraph G provides guidance to the district court as to how classify and assign petitions challenging the underlying conviction versus petitions challenging the conditions of confinement. Petitioners who wish to raise both types of claims must file two separate petitions and submit each petition in the venue required by Paragraph E. *See* Form 9-701 NMRA.

While the district court may deny a petition for a writ of habeas corpus on appropriate grounds during the pre-appointment review period under Subparagraph (H)(1), the committee recommends that district courts consider the information provided in the pre-appointment review before denying a petition for a writ of habeas corpus.

Under Subparagraph (H)(2), within one-hundred twenty (120) days of the "file stamp date," the district court must either return the petition to petitioner for further information, summarily dismiss the petition, or appoint counsel. If the district court fails to take one of the foregoing actions within that designated time period, the petitioner may request a hearing.

**Committee commentary for 2014 amendments.** — Rule 5-802 NMRA was amended in 2014 following an extensive review by the Court and its Ad-hoc Habeas Corpus Review Committee. Rule 5-802 is designed to address petitions filed after the entry of a final judgment and all direct appeals, however styled, in a criminal case. For example, motions to vacate a sentence and motions to withdraw a plea after the entry of a final judgment and all direct appeals should be treated as habeas petitions to be adjudicated under Rule 5-802 as opposed to motions to modify or reduce a sentence filed under Rule 5-801.

Paragraph B(5) is amended to clarify that it applies to successive petitions for habeas relief. District courts should ordinarily dismiss petitions that do not comply with the provisions of Paragraph B(5).

Paragraph E(1) is amended to ensure that a habeas petition is assigned to the judge that originally heard the matter. This is the current practice in most district courts and reflects a policy that the judge that originally heard the matter is in a better position to rule on a petition for habeas corpus because that judge is familiar with the petitioner's case. Therefore, even if the judge that originally heard the case has transferred to a different division within the same court, the case should still be assigned to that judge. Should that judge no longer be serving on the bench, the criminal, as opposed to civil division of the court, should handle the matter. The criminal division is more familiar with the types of claims likely to be raised in a petition for a writ of habeas corpus.

The Committee added a new Paragraph F and substantially amended former Paragraph E (now Paragraph G). Paragraphs F and G are designed to help the district court screen out frivolous petitions while making sure meritorious petitions are properly addressed. First, Paragraph F gives the district courts more flexibility in processing petitions for habeas corpus. Oftentimes, habeas petitions are difficult to recognize when received by the district court. Paragraph F gives the district court time to determine what the petition is, whether it should be accepted as a habeas petition, and how it should be filed without prejudicing the rights of the petitioner. Paragraph F also ensures that the proper parties i.e. the district attorney, attorney general and the public defender are given notice of a filing of a petition for a writ of habeas corpus. By receiving notice, these parties will be able to keep track of the petitions and will be ready to respond if called upon by the district court.

Second, Paragraph G(1) gives the Public Defender Department the opportunity to file a statement regarding the filed petition for habeas corpus before counsel is appointed and/or a final order is rendered by the district court. Under the Indigent Defense Act, a person has the limited right to appointed counsel representation in post-conviction matters "unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense." NMSA 1978, § 31-16-3(B)(3) (1968). Therefore, the Public Defender may not be able to represent a petitioner in all cases. In addition, allowing the Public Defender an opportunity to file a statement regarding the petition may also help the district court screen out potentially frivolous claims.

Third, Paragraph G(1) imposes a deadline on the district court to either summarily dismiss the petition, return the petition to petitioner for further information, or appoint counsel. By allowing the court to return a petition to petitioner for further development, the court may be able to clarify issues that are vague or ambiguous. Once the district court returns a petition to a petitioner for further development, the burden is on petitioner to file a revised petition. When a petitioner fails to file an amended petition when directed by the court under Paragraph G(1), the judge shall ordinarily dismiss the petition except in rare cases.

Paragraph G(2) makes clear that a district court may dismiss some of all of the claims in a petition much like a court in a civil matter could enter summary judgment on some claims while allowing other claims to proceed to trial. Under Paragraph F(2), a response must be filed by the state to any claims that are not dismissed.

Paragraph G(3) adds in one final opportunity for the district court to clarify issues. The court may hold a "preliminary disposition hearing" or status conference at which it will clarify the issues and attempt to resolve the issues based upon the written filings of the parties. If the court is unable to resolve the issues based upon the written filings an evidentiary hearing under Paragraph G(4) may be necessary.

Paragraph H gives the district court guidance as to the handling of successive petitions for habeas relief. The standard is higher for a petitioner raising a claim rejected in a previous habeas petition than a claim rejected on direct appeal. Standard notions of claim and issue preclusion generally do not apply in habeas cases. *Campos v. Bravo*, 2007-NMSC-021, ¶ 5, 141 N.M. 801, 161 P.3d 846. Courts have some discretionary capacity to dismiss habeas claims when a prior petition has been filed. According to *Duncan v. Kerby*, 1993-NMSC-011, 115 N.M. 344, 851 P.2d 466:

The successive-writ petitioner has already enjoyed the opportunity to fully explore his constitutional claims in the postconviction setting, whereas the petitioner who makes his initial claim on direct appeal has not, and consequently, the successive writ petitioner is in a weaker position to argue that equity confers yet another postconviction opportunity to make his claim.

*Id*. ¶ 5. In exercising its discretion, the court should consider whether the prior petition was pro se or the petitioner was represented by counsel. Petitioners proceeding pro se will often not have developed their claims as fully as petitioners represented by counsel.

In *Allen v. LeMaster*, 2012-NMSC-001, 267 P.3d 806, the New Mexico Supreme Court ruled that the state could not depose a habeas petitioner due to Rule 5-503's prohibition on the compelled statements of defendants. Although the opinion did not address the totality of discovery in the habeas context, it marked the starting point for the Committee's addition of Paragraph I on discovery. As habeas cases become more complex it is important to have rules in place for when discovery is needed or requested.

Paragraph I operates from the perspective that discovery in the habeas context should only occur when necessary and with supervisory control from the district court. Consistent with *Allen*, petitioners represented by counsel and the state may request discovery pursuant to Rules 5-501 and 5-502 NMRA. *See id*. ¶ 15 ("The placement of habeas corpus regulation within our Rules of Criminal Procedure demonstrated this Court's recognition that postconviction motions challenging a conviction or sentence in a criminal case are in reality part of a criminal proceeding."). However, other discovery devices under the Rules of Criminal Procedure must be approved by the court. Discovery is limited to the items listed in Paragraph I(2). Among the reasons for requiring pro-se petitioners to get court approval before requesting discovery are to discourage abuse and protect victims of crime. Therefore, the court should proceed cautiously on any discovery request of a victim.

**Committee commentary for 2009 amendments.** — The 2009 amendments to this rule make five changes to the procedures governing petitions for writs of habeas corpus. First, Paragraph B is amended to provide that a petition filed by an unrepresented inmate is deemed to be filed on the date that the petition is deposited in the institution's internal mail system. The amendment further provides that the inmate must state in the petition, under penalty of perjury, the date on which the petition was deposited for mailing. A corresponding amendment to Form 9-701 NMRA includes this statement.

The purpose of the amendment to Paragraph B is to eliminate uncertainty regarding the date when the petition is filed in the district court. Although there is no time limit for filing a state petition for a writ of habeas corpus, the date of filing can have an impact on the deadline for filing a petition for a writ of habeas corpus in federal court. Currently, defendants convicted in state court have one (1) year to file a petition for a writ of habeas corpus in federal court, and the one (1) year period begins to run from the date of the final judgment on a guilty plea, or one (1) year from a final decision of the highest state court ruling on a direct appeal after trial. However, under federal law, the filing of a state habeas petition tolls the one (1) year limitations period for filing a habeas petition in federal court.

While a state petition can toll the federal limitations period, disputes often arise concerning when the state petition was actually filed in state court. In some instances, unforeseen mailing delays beyond the control of the inmate prevent the receipt of a state habeas petition to toll the one (1) year federal limitations period before it expires. Moreover, the practices among the various state judicial districts for processing state habeas petitions can vary greatly and, as a result, impact the application of the federal tolling provision. For example, some districts apparently refer habeas petitions to a district court judge for fairly swift review before actually filing, with filing by the clerk soon thereafter. In other districts, however, clerks sometimes hold petitions for sixty (60) days or more before they are reviewed by a judge and officially filed with the court. But in virtually none of these districts are the petitions actually file-stamped on the date of receipt by the clerk.

The uncertainties inherent in mailing documents from prison, and the existing inconsistent filing procedures in the district courts, have the potential to drastically affect an inmate's right to toll the federal limitations period while state post-conviction remedies are exhausted. *See Adams v. LeMaster*, 223 F.3d 1177 (10th Cir. 2000) (holding that New Mexico inmate's federal habeas petition was not timely filed because the one (1) year limitation period expired before state petition was file-stamped by state district court clerk). The amendments to Paragraph B are intended to eliminate confusion and avoid the unfair application of federal tolling provisions that may result from inconsistent filing practices in state district courts or unforeseen mailing delays beyond the control of an incarcerated petitioner.

Because there are no filing deadlines for filing state habeas petitions by unrepresented inmates in New Mexico, the changes to Paragraph B will not affect the substantive or procedural rights of the parties to a state post-conviction proceeding. State district courts, however, may want to revise their procedures so that the date file-stamped on a petition filed under this rule reflects the date of mailing set forth in the petition. If the State has reason to believe that the mailing date set forth in the petition is not accurate, the State may file a motion with the district court asking for a correction to the filing date.

The amendments to Paragraph C are intended to eliminate the inordinate amount of paperwork necessary to prepare and process requests for free process in post-conviction proceedings, which seems particularly unnecessary given the undeniable right of access to the courts by persons, indigent or not, who seek to correct an unlawful confinement. Moreover, the processing of this paperwork appears to lead to many of the delays in the actual filing of habeas petitions discussed above. The amendment to Paragraph C therefore seeks to eliminate these problems by allowing an incarcerated petitioner to file a petition without payment of a filing fee.

The amendments to Paragraph D are intended to clarify the place of filing for habeas petitions. The first change to Subparagraph (1) of Paragraph D provides that petitions challenging the Department of Correction's interpretation of a sentence should be filed with the court that imposed the sentence. As Rule 5-802.D(1) is currently written, the Department's interpretation and application of a sentence fall within "matters other than [those set forth in] Subparagraph (1)," thereby requiring the petition to be filed in the judicial district where the petitioner is confined or restrained. The rationale for the proposed amendment is that, much like petitions that seek to correct a sentence, the court that sentenced the inmate is better qualified to interpret its own sentence than a court of the judicial district in which the institution is located. The second change to Subparagraph (1) of Paragraph D also clarifies that the petition should be filed with the court that adjudicated the petitioner's confinement rather than focusing on the county where the offense was committed.

The amendments to Subparagraph (2) of Paragraph E expands the filing deadlines for amended petitions and responses ordered by the district court. Currently, if counsel is appointed to represent a petitioner, the attorney has thirty (30) days to file an amended petition. In situations where counsel is appointed, the issues involved and the need for

further investigation by counsel often make the 30-day filing deadline for an amended petition unrealistic. As a result, motions to extend the filing deadline are routinely made and granted. The amendment to the filing deadline seeks to recognize this reality and eliminate unnecessary motion practice by expanding the filing deadline to ninety (90) days. As a matter of fairness and consistency, the amendments also increase the filing deadline to ninety (90) days in those instances when the State is ordered to file a response to the amended petition.

Finally, the amendment to Paragraph H eliminates the deemed denied provision that previously governed the Supreme Court's review of the denial of habeas corpus petitions under Rule 12-501 NMRA. With this amendment, an express order by the Supreme Court is required to deny a petition for review filed under Rule 12-501 regardless of the length of time the petition for review is pending in the Supreme Court. The amendment is intended to conform to similar amendments to Rules 5-614, 5-801, and 5-121 NMRA eliminating the application of other deemed denied provisions during other stages of a criminal proceeding.

[Adopted, effective December 1, 1998; as amended by Supreme Court Order No. 09-8300-006, effective May 6, 2009; as amended by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014; as amended by Supreme Court Order No. 17-8300-025, effective for all cases pending or filed on or after December 31, 2017.]

## 5-803. Petitions for post-sentence relief.

A. **Application.** A petition to set aside a judgment and sentence may be filed in the district court of the jurisdiction which rendered the judgment by one who has been convicted of a criminal offense, and who is not in custody or under restraint as a result of such sentence. The petition shall be assigned to the judge that originally heard the matter, or if that judge is no longer serving on the bench, the successor criminal division.

B. **Grounds.** Relief under this rule is available to correct convictions obtained in violation of the constitution or laws of the United States or the State of New Mexico.

C. **Time for filing.** A petition for post-sentence relief shall be filed within a reasonable time after the completion of the petitioner's sentence, unless the court finds good cause, excusable neglect, or extraordinary circumstances beyond the control of the petitioner that justify filing the petition beyond that time.

D. **Procedure.** A petition for post-sentence relief under this rule may be granted only upon filing with the clerk of the court a petition on behalf of the party seeking relief. If the petition is filed by a petitioner who is not represented by an attorney and who is confined to an institution or other detention facility, the petition is deemed to be filed with the clerk of the court on the date the petition is deposited in the institution's internal mail system for forwarding to the court provided that the petitioner states within the petition,

under penalty of perjury, the date on which the petition was deposited in the institution's internal mail system. The petition shall contain the following:

(1) The respondent in proceedings under this rule, which shall be the State of New Mexico;

(2) The petitioner's full name and address, if petitioner is not represented by counsel;

(3) A statement of the steps taken to exhaust all other available remedies, including a statement of the name of the case, the docket number of the case, the court, administrative agency or institutional grievance committee from which relief was sought, and the result of each previous judicial proceeding. If a claim has been raised in prior proceedings, a statement explaining why the ends of justice require additional consideration of the petition;

(4) if the petitioner has previously filed a petition seeking relief under this rule or Rule 5-802 NMRA, a statement explaining why the petition should not be dismissed under Paragraph G;

(5) a statement as to whether:

(a) the petition seeks to vacate, set aside or correct the sentence or order of confinement; or

(b) the petition challenges matters other than Subparagraph (a) of this subparagraph;

(6) A concise statement of the facts and law upon which the application is based; and

(7) a concise statement of the relief sought.

E. **Papers attached to the petition.** The following shall be attached to the petition:

(1) any opinion, order, transcript, or other written material reasonably available to petitioner indicating any court's ruling on the petitioner's prior custody or restraint or on the issued raised in the petition, or a statement explaining why the materials are not attached;

(2) a certificate of service showing service on the district attorney in the district in which the application is filed.

F. **Procedure for adjudicating petition.**

(1) **Summary dismissal; return of petition.** Upon receipt of a petition for post-sentence relief, the court shall promptly examine the petition together with all attachments. If it plainly appears from the face of the petition, any exhibits, and the prior court proceedings in the case, that the petitioner is not entitled to relief as a matter of law, the court shall summarily dismiss the petition.

If the court is unable to determine from the face of the petition whether petitioner is entitled to relief as a matter of law, the court may return a copy of the petition to the petitioner for additional factual information or a restatement of the legal claims. If the petition is returned to the petitioner, the petitioner has forty-five (45) days to resubmit a revised petition. Upon receipt of the revised petition, the court has forty-five (45) days to examine the petition together with all attachments. If no revised petition is filed, the court may dismiss the petition.

(2) **Response.** If the court determines that summary dismissal is not appropriate, the court shall order the state to submit a response within one-hundred twenty (120) days.

(3) **Preliminary disposition hearing.** After the response is filed, at the request of a party or upon its own motion, the court may conduct a preliminary disposition hearing for the purpose of clarifying the issues and petitioner's evidence in support of the claims in the petition. At the preliminary disposition hearing, the court will attempt to resolve any of the issues presented by the petition based on the filings by counsel for the parties. The court shall then determine whether an evidentiary hearing is required. If it appears that an evidentiary hearing is not required, the court may dispose of the petition without a further hearing, but may ask for briefs and/or oral arguments on legal issues;

(4) **Evidentiary hearing.** If an evidentiary hearing is ordered, the hearing shall be conducted as promptly as practicable.

G. **Second and successive petitions.** If the petitioner has previously filed a petition seeking relief under this rule or Rule 5-802, the court shall have the discretion to:

(1) dismiss any claim not raised in a prior petition unless fundamental error has occurred, or unless an adequate record to address the claim properly was not available at the time of the prior petition; and

(2) dismiss any claim raised and rejected in a prior petition unless there has been an intervening change of law or fact or the ends of justice would otherwise be served by rehearing the claim.

H. **Discovery procedures.**

(1) **Discovery procedures for parties represented by counsel.** At any time, counsel for a party may make a formal written request to opposing counsel for production of documents and other discovery materials that are available under Rules 5-501 or 5-502 NMRA. The written request shall describe the good faith efforts by counsel to obtain the discovery materials from previous counsel or any other sources and shall show that these efforts were unsuccessful. Counsel for the opposing party shall comply with the request within thirty (30) days after service or notify the court in writing of any objection to the request. Any objection based on privilege should clearly identify the material withheld and the basis of the privilege claim. The court shall then hold a hearing to rule on any objection to the discovery request. The court shall grant a challenged request for discovery when the requesting party demonstrates that the materials are relevant to advance the claims that are alleged in the petition or the materials are relevant to defend against the claims that are alleged in the petition.

(2) For purposes of this rule, "discovery materials" are:

(a) materials in the possession of a party;

(b) materials in the possession of law enforcement authorities to which the petitioner would have been entitled to at the time of trial; or

(c) materials in the possession of the New Mexico Corrections Department.

(3) Counsel for a party may make use of any other discovery procedure under the Rules of Criminal Procedure for the District Courts only after notice to opposing counsel and prior written authorization from the court. In determining whether to authorize such proceedings, the court may consider any of the factors contained in Paragraph A of Rule 5-507 NMRA.

(4) **Discovery procedures for pro-se petitioners.** Petitioners not represented by counsel shall petition the court before requesting discovery under this rule and the Rules of Criminal Procedure for the District Courts. In determining whether to authorize a discovery request, the court may consider any of the factors contained in Paragraph A of Rule 5-507.

(5) **Motions to compel.** If the state or the petitioner fails to comply with any of the provisions of this rule, the court may enter an order under Rule 5-505 or Rule 5-112 NMRA.

I. **Appeal.** Within thirty (30) days after the district court's decision:

(1) if the petition is granted, the state may appeal as of right to the Court of Appeals under the Rules of Appellate Procedure.

(2) if the petition is denied, the petitioner may appeal to the Court of Appeals under the Rules of Appellate Procedure.

[Adopted by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

**Committee commentary.** — Rule 5-803 NMRA was adopted in 2014 and is designed to be used when relief under Rule 5-802 NMRA is unavailable. This rule is deemed to have superseded former Rule 1-060(B) NMRA for post-sentence matters involving criminal convictions, including the writ of coram nobis. *See State v. Lucero*, 1977-NMCA-021, ¶ 2, 90 N.M. 342, 563 P.2d 605. "The writ is available to one who, though convicted, is no longer in custody, to provide relief from collateral consequences of an unconstitutional conviction due to error of fact or egregious legal errors which are of such a fundamental character that the proceeding itself is rendered invalid, permitting the court to vacate the judgment." *State v. Tran*, 2009-NMCA-010, ¶ 15, 145, N.M. 487, 200 P.3d 537.

The Public Defender Department cannot be appointed to represent a petitioner under this rule. *See* NMSA 1978, §§ 31-15-10(F) (1973) (requiring a person to be "detained" in order to provide representation); 31-16-3(A) (defining the "right to representation" as applying to indigent persons detained by law enforcement or under formal charge or conviction for having committed a serious crime). Unlike petitioners under Rule 5-802 NMRA (habeas corpus), petitioners under this rule are not "in custody or under restraint" as they have completed their sentence. *See* Rule 5-802(A); *Tran*, 2009-NMCA-010, ¶ 15. The term "in custody" includes probation and parole. *See State v. Barraza*, 2011-NMCA-111, ¶ 10, 267 P.3d 815. The district court, however, retains its inherent authority to appoint counsel from either the private bar or pro bono immigration service agencies who have licensed counsel on staff.

Petitions may often be filed late under this rule because of the development of serious unforeseen collateral consequences which are beyond the control of the petitioner, such as deportation.

For example, the time limitations contained in Paragraph C may be tolled in instances when a decision from a court applies retroactively. *Cf. Kersey v. Hatch*, 2010-NMSC-020, 148 N.M. 381, 237 P.3d 683 (declining to retroactively apply holding in *State v. Frazier*, 2007-NMSC-032, 142 N.M. 120, 164 P.3d 1, which held that a defendant cannot be convicted of both felony murder and the predicate felony).

The provisions of this rule are similar to those of Rule 5-802. Please see the commentary to Rule 5-802 for further information.

[Adopted by Supreme Court Order No. 14-8300-014, effective for all cases filed on or after December 31, 2014.]

## 5-805. Probation; violations.

A. **Violation of probation.** At any time during probation if it appears that the probationer may have violated the conditions of probation:

(1) the court may issue a warrant for the arrest of the probationer. If conditions of release are provided in the warrant, the probationer may be released on bond pending an adjudicatory hearing on the charges; or

(2) the court or the probation office may issue a notice to appear before the court to answer a charge of violation of the conditions of probation.

B. **Notice of arrest without warrant.** If the probationer is arrested by the probation office without a warrant the probation office shall provide the district attorney with a written notice within one (1) day of the arrest. The notice shall contain a brief description of each alleged probation violation. A copy of the notice shall be given to the probationer and filed with the court.

C. **Technical violation program.** A judicial district may by local rule approved by the Supreme Court in the manner provided by Rule 5-102 NMRA, establish a program for sanctions for probationers who agree to automatic sanctions for a technical violation of the conditions of probation. Under the program a probationer may agree:

(1) not to contest the alleged violation of probation;

(2) to submit to sanctions in accordance with the local rule; and

(3) to waive the provisions of Paragraphs D through L of this rule. For purposes of this rule, a “technical violation” means any violation that does not involve new criminal charges.

D. **Conditions of release.** If a probationer is arrested and not released on conditions of release, within five (5) days of the arrest of the probationer the sentencing judge or a judge designated by the sentencing judge shall review the notice of arrest or warrant and consider conditions of release pending adjudication of the probation violation. If no conditions for release are set, the probationer may file a motion to appear before the judge to consider conditions of release.

E. **Filing of report.** If there is a recommendation that probation be revoked, within five (5) days of the arrest of probationer the probation office shall submit a written violation or a summary report to the district attorney and the court describing the essential facts of each violation. A copy of the report shall be served on the probationer and the probationer’s attorney of record.

F. **District attorney duty.** Within five (5) days of receiving the probation violation or a summary report, the district attorney shall either file a motion to revoke probation setting forth each of the alleged violations or file a notice of intent not to prosecute the alleged violations.

G. **Initial hearing.** If the probationer is in custody and an initial hearing is not timely commenced as required by this paragraph, upon its own motion or upon presentation of

a release order without a hearing required, the court shall order the probationer immediately released back to probation supervision pending final adjudication. An initial hearing on a motion to revoke probation shall be commenced within thirty (30) days after the latest of the following events:

(1) the date of the filing of a motion to revoke probation;

(2) if the proceedings have been stayed to determine the competency of the probationer, the date an order is filed finding the probationer competent to participate in the revocation proceedings;

(3) if an interlocutory or other appeal is filed, the date the mandate or order is filed in the district court disposing of the appeal;

(4) if the probationer is arrested or surrenders in another state, the date the probationer is returned to this state; or

(5) the date of arrest or surrender of a probationer in this state based on a bench warrant issued for failing to report.

H. **Adjudicatory hearing.** If the probationer is in custody and an adjudicatory hearing is not timely commenced as required by this paragraph, upon its own motion or upon presentation of a release order without a hearing required, the court shall order the probationer immediately released back to probation supervision pending final adjudication. The adjudicatory hearing shall commence no later than sixty (60) days after the initial hearing is conducted.

I. **Discovery.** The parties shall exchange witness lists and disclose proposed exhibits no later than ten (10) days after the initial hearing.

J. **Waiver of time limits.** The probationer may waive the time limits for commencement of the adjudicatory hearing.

K. **Extensions of time.** Extensions of time for commencement of a hearing on a motion to revoke probation may be granted in the court’s discretion upon the request of any party.

L. **Sanctions for noncompliance with time limits.** In addition to any release of the probationer that may be required by Paragraphs G or H of this rule, the court may dismiss the motion to revoke probation for violating any of the time limits in this rule.

M. **Applicability.** Paragraphs E and F of this rule are not applicable to revocation of probation proceedings that are initiated by the district attorney without a prior recommendation of the probation office to revoke probation.

[Approved by Supreme Court Order No. 07-8300-008, effective June 1, 2007; as amended by Supreme Court Order No. 10-8300-040, effective January 31, 2011; by Supreme Court Order No. 10-8300-040, suspending Paragraph L until further order of the Court for all cases pending in the district court on or after January 7, 2011; by Supreme Court Order No. 11-8300-043, effective for all hearings held in the district court on or after November 1, 2011.]

## 5-820. Fugitive complaint.

A. **Complaint.** A fugitive action may be commenced in the district court by filing a sworn fugitive complaint:

(1) identifying the defendant;

(2) identifying the demanding state for which the defendant's arrest is being made;

(3) stating the grounds for extradition; and

(4) stating either that a governor's warrant for the arrest of the defendant is sought or the date and time of arrest for extradition.

The complaint may be amended by the state without leave of court prior to arraignment. The complaint shall be substantially in the form approved by the Supreme Court.

B. **Where commenced.** A fugitive action shall be commenced in the county in which the defendant has been arrested or where the defendant is expected to be found.

C. **Service of complaint.** If the fugitive is arrested without a warrant, a fugitive complaint shall be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. The complaint shall be filed with the district court at the time it is given to the defendant. If the court is not open at the time the copy of the complaint is given to the defendant, the complaint shall be filed the next business day of the court.

[Approved, effective January 1, 2002.]

## 5-821. Arraignment and commitment hearing prior to issuance of the governor's rendition warrant.

A. **Time.** If the defendant has not been arraigned in the magistrate or metropolitan court, the defendant shall be brought before the district court for an arraignment and commitment hearing, as soon as practicable, but in no event later than forty-eight (48) hours after arrest as a fugitive.

B. **Procedure.** At the arraignment, the court shall:

(1) inform the defendant of the defendant's right to retain counsel;

(2) provide the defendant with copies of any documents on which the prosecution has relied;

(3) inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to petition for a writ of habeas corpus pursuant to law; and

(4) ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. **Waiver of extradition.** The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. **Identity question.** If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. **Conditions of release.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release pending the issuance of the rendition warrant by the governor.

F. **Time limits for governor's rendition.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending arrest on a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending arrest on a governor's rendition warrant for a period of not more than sixty (60) additional days.

G. **Dismissal of fugitive complaint.** If a governor's rendition warrant is not filed pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as provided by Paragraph F of this rule, the fugitive complaint shall be dismissed without prejudice and the defendant released. The time limits set forth in Paragraph F in this rule do not constitute the deadline for the completion of extradition proceedings under Rule 5-822 NMRA.

[Approved, effective January 1, 2002; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

## 5-822. Commencement and continuation of fugitive actions after issuance of a governor's rendition warrant.

A. **Filing of warrant and return.** If a person accused to be a fugitive is arrested on a rendition warrant for extradition issued by the governor, and a fugitive action based on the same demand is not pending in the district court, a fugitive action shall be commenced by filing in accordance with Paragraph F of Rule 5-103 NMRA the following:

(1) a copy of the demand for extradition on which the rendition warrant is based together with the documents required by statute to accompany the demand;

(2) the name and address of the agent of the demanding state authorized to receive the alleged fugitive; and

(3) the rendition warrant together with supporting documents.

B. **Where commenced.** If a fugitive action based on the same demand is pending in the district court, the warrant shall be filed in that action. If no fugitive action based on the same demand is pending in the district court when the fugitive is arrested on the governor's rendition warrant, the action shall be commenced in a district court of the district where the fugitive was arrested. If a fugitive action based on the same demand is pending in a magistrate or metropolitan court of this state, the action shall be transferred to the district court for further proceedings pursuant to these rules.

[Approved, effective January 1, 2002; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

## 5-823. Rights hearing; filing of demand for extradition.

A. **Rights explained.** As soon as practicable after the governor's rendition warrant is filed, but in any event within seven (7) days, the alleged fugitive shall be brought before the court. At that time, the court shall:

(1) inform the accused of the right to counsel and determine whether the accused is entitled to appointed counsel;

(2) inform the accused of the demand for extradition and of the crime which is charged or other basis for extradition which is alleged; and

(3) determine whether the accused wishes to test the legality of the governor's rendition warrant.

B. **Time for filing petition for writ of habeas corpus.** If the alleged fugitive wishes to contest the legality of the arrest pursuant to the governor's rendition warrant, the court shall fix a reasonable time for the alleged fugitive to file a petition for writ of habeas corpus in the fugitive action.

[Approved, effective January 1, 2002.]

## 5-824. Petition for writ of habeas corpus.

A. **Grounds.** If a person accused as a fugitive files a petition for writ of habeas corpus, the court may consider only if:

(1) the extradition documents on their face do not authorize the arrest or the issuance of the governor's rendition warrant;

(2) the person accused to be a fugitive has not been charged with a crime in the demanding state;

(3) the person alleged to be a fugitive is not the person demanded; or

(4) the person alleged to be a fugitive is not a fugitive or otherwise subject to extradition pursuant to statute.

The petition for writ of habeas corpus shall state the factual basis for the grounds alleged.

B. **Notice of hearing.** If a petition is filed, the court shall set a date for hearing and give notice of the hearing to the defendant, the state and the agent of the demanding state.

C. **Determination.** The governor's warrant of extradition is prima facie evidence that the constitutional and statutory requirements for extradition have been met. Unless the court finds beyond a reasonable doubt that the rendition warrant is invalid for one or more of the grounds set forth in Paragraph A of this rule, the court shall order the accused to be delivered to the agent of the demanding state.

[Approved, effective January 1, 2002.]

**Committee commentary.** — If a petition for writ of habeas corpus is filed, the grounds on which relief can be granted are very narrow. *See Michigan v. Doran*, 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1978) and *New Mexico ex rel. Ortiz v. Reed*, 524 U.S. 151, 118 S. Ct. 1860, 141 L. Ed. 2d 131 (1998). Questions relating to guilt or innocence, alibi, speedy trial, res judicata, and double jeopardy are not for the asylum state, but for the demanding state to determine after the defendant is returned. *State v. Sandoval*, 95 N.M. 254, 620 P.2d 1279 (1980). Even if arrest on a previous governor's rendition warrant was held to be illegal, that is not res judicata on whether a subsequent rendition warrant is proper. *Id.*; *see generally* Annot., "Discharge on Habeas Corpus of One Held in Extradition Proceedings as Precluding Subsequent Extradition Proceedings," 33 A.L.R.3d 1443.

The grounds stated here are generally those listed in *Sandoval*, which based them on *Michigan v. Doran*, 439 U.S. 282, 99 S. Ct. 530, 58 L. Ed. 2d 521 (1980). The issue of whether the extradition documents are "in order" has been restated for clarity. *Sandoval*

and *Doran* are true fugitive cases. Since there are statutory grounds for extradition in addition to fugitive status, provision also is made for them in this rule. *See also Colfax County Bd. of Commr's v. State of N.H.*, 16 F.3d 1107 (10th Cir. 1994) (a habeas proceeding cannot be transformed into an inquiry into the appropriateness of the demanding state's actions. "'Surrender is not to be interfered with by the summary process of habeas corpus upon speculations as to what ought to be the result of a trial in the place where the Constitution provides for its taking place.'" *Id.* (*quoting Drew v. Thaw*, 235 U.S. 432, 440, 59 L. Ed. 302, 35 S. Ct. 137 (1914)); *Hopper v. State ex. rel. Schiff*, 101 N.M. 71, 678 P.2d 699 (1984) (court may not look behind the charging documents to determine the applicability of the demanding state's criminal statute); *State v. Sandoval*, 95 N.M. 254, 620 P.2d 1279 (1980) (district court may not consider questions of res judicata or delays in the extradition hearing); and *Bazaldua v. Hanrahan*, 92 N.M. 596, 592 P.2d 512 (1979) (governor's warrant is prima facie evidence that the constitutional and statutory requirements have been met and fugitive must prove alibi beyond a reasonable doubt).

That the defendant's name is the same as the name of the person sought is prima facie evidence that the defendant is the person sought, even if the name is common. *Wright v. Florida*, 497 So.2d 1313 (Fla. App. 1986).

The petition is required to state the factual basis for the grounds alleged so that the prosecutor and demanding state will have a fair opportunity to prepare for the hearing on the petition. More specificity is required than for other motions in order to avoid needing extra time for discovery, so that the defendant can be delivered to the demanding state quickly if extradition is proper.

Notice to the agent of the demanding state is required by Section 31-4-10 NMSA 1978.

In general, conflicting evidence concerning a crime must be resolved in the state where the crime is charged, and extradition is proper. *Bazaldua v. Hanrahan*, 92 N.M. 596, 592 P.2d 512 (1979); accord, *South Carolina v. Bailey*, 289 U.S. 412, 53 S. Ct. 667, 77 L.Ed 1292 (1933) (alibi in another state).

## 5-825. Bail after arrest on a governor's rendition warrant; dismissal for failure to deliver defendant.

After arrest on a governor's rendition warrant, the accused person shall be ordered held without bail pending delivery to agents of the demanding state for at least thirty (30) days after the arrest. The accused person shall be ordered held without bail pending delivery to agents of the demanding state for at least thirty (30) days after final action on a petition for writ of habeas corpus if the accused files a timely petition for writ of habeas corpus. After arrest on a governor’s rendition warrant, if the accused person has pending criminal charges in New Mexico, and the governor exercises the governor’s discretion under New Mexico law to hold the accused person until the accused person has been tried and discharged, or convicted and punished, the accused person shall be ordered held in detention or upon conditions of release pending delivery

to agents of the demanding state while those charges are pending and for at least thirty (30) days after final action on those charges. If agents of the demanding state do not appear within those time periods, the court may dismiss the action and discharge the accused, or, upon good cause shown, may extend the time period for not more than thirty (30) days, during which time the accused person shall be eligible for release on bail.

[Approved, effective January 1, 2002; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010.]

## 5-826. Appeals from magistrate or municipal court.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a criminal action in magistrate or municipal court may appeal, as permitted by law, to the district court of the county within which the magistrate or municipal court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate or municipal court clerk's office. The three (3) day mailing period set forth in Rule 6-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the magistrate or municipal court clerk's office, shall be treated as timely filed and shall become effective when the judgment or order appealed from is filed in the magistrate or municipal court clerk’s office. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state or its political subdivisions or against a defendant who is represented by a public defender or court appointed counsel.

B. **Notice of appeal.** An appeal from the magistrate or municipal court is taken by doing the following:

(1) filing with the clerk of the district court a notice of appeal with a copy of the written judgment or final order appealed from (if available) and with proof of service; and

(2) promptly filing with the magistrate or municipal court, as applicable:

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

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

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

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

(1) serve each party or each party's attorney in the proceedings in the magistrate or municipal court, as applicable, with a copy of the notice of appeal in accordance with Rule 5-103 NMRA; and

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

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

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

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

(2) a copy of all papers and pleadings filed in the magistrate or municipal court;

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

(4) any exhibits.

The magistrate or municipal court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court. Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

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

H. **Conditions of release.** If the magistrate or municipal court has set an appeal bond pursuant to Rule 6-703 NMRA, upon filing of the notice of appeal, the bond shall be transferred to the district court pending disposition of the appeal. The district court

shall dispose of all matters relating to the appeal bond until remand to the magistrate or municipal court.

I. **Review of terms of release.** If the magistrate or municipal court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the magistrate or municipal court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the magistrate or municipal court.

J. **Trial de novo appeals.** Trials upon appeals from the magistrate or municipal court to the district court shall be de novo.

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

(1) fifteen (15) days after entry of the order disposing of the case;

(2) fifteen (15) days after disposition of a motion for rehearing; or

(3) if a notice of appeal is filed, upon final disposition of the appeal.

L. **Remand.** Upon expiration of the time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the magistrate court, the district court shall remand the case to the magistrate or municipal court for enforcement of the district court's judgment.

M. **Appeal.** Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure [12-101 NMRA]. The conditions of release and bond approved or continued in effect by the district court during the pendency of the appeal to the district court shall continue in effect pending appeal to the Court of Appeals, unless modified pursuant to Rule 12-205 NMRA of the Rules of Appellate Procedure.

N. **Transmittal of the judgment and sentence or final order.** After final determination of the appeal, the clerk of the district court shall transmit a copy of the judgment and sentence or final order to the magistrate or municipal court clerk.

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

## 5-827. Appeals from metropolitan court.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a criminal action may appeal, as permitted by law, to the district court of the county within which the metropolitan court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the metropolitan court clerk's office. The three (3) day mailing period set forth in Rule 7-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the metropolitan court clerk's office, shall be treated as timely filed and shall become effective when the judgment or order appealed from is filed in the metropolitan court clerk’s office. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state or its political subdivisions or against a defendant who is represented by a public defender or court appointed counsel.

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

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

(2) promptly filing with the metropolitan court:

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

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

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

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

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

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

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

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

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

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

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

(4) any exhibits; and

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

The metropolitan court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court. Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

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

H. **Conditions of release.** If the metropolitan court sets an appeal bond pursuant to Rule 7-703 NMRA upon filing of the notice of appeal, the appeal bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the appeal bond until remand to the metropolitan court.

I. **Review of terms of release.** If the metropolitan court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the metropolitan court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the metropolitan court.

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

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

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

(1) fifteen (15) days after entry of the order disposing of the case;

(2) fifteen (15) days after disposition of a motion for rehearing; or

(3) if a notice of appeal is filed, upon final disposition of the appeal.

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

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

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

O. **Transmittal of the judgment and sentence or final order.** After final determination of the appeal, the clerk of the district court shall transmit a copy of the judgment and sentence or final order to the metropolitan court clerk.

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

**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.

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

## 5-828. Appeals from magistrate, metropolitan or municipal court; dismissals for failure to comply with rules or failure to appear.

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

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

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

[Adopted by Supreme Court Order No. 12-8300-018, effective for all cases pending or filed on or after August 3, 2012.]

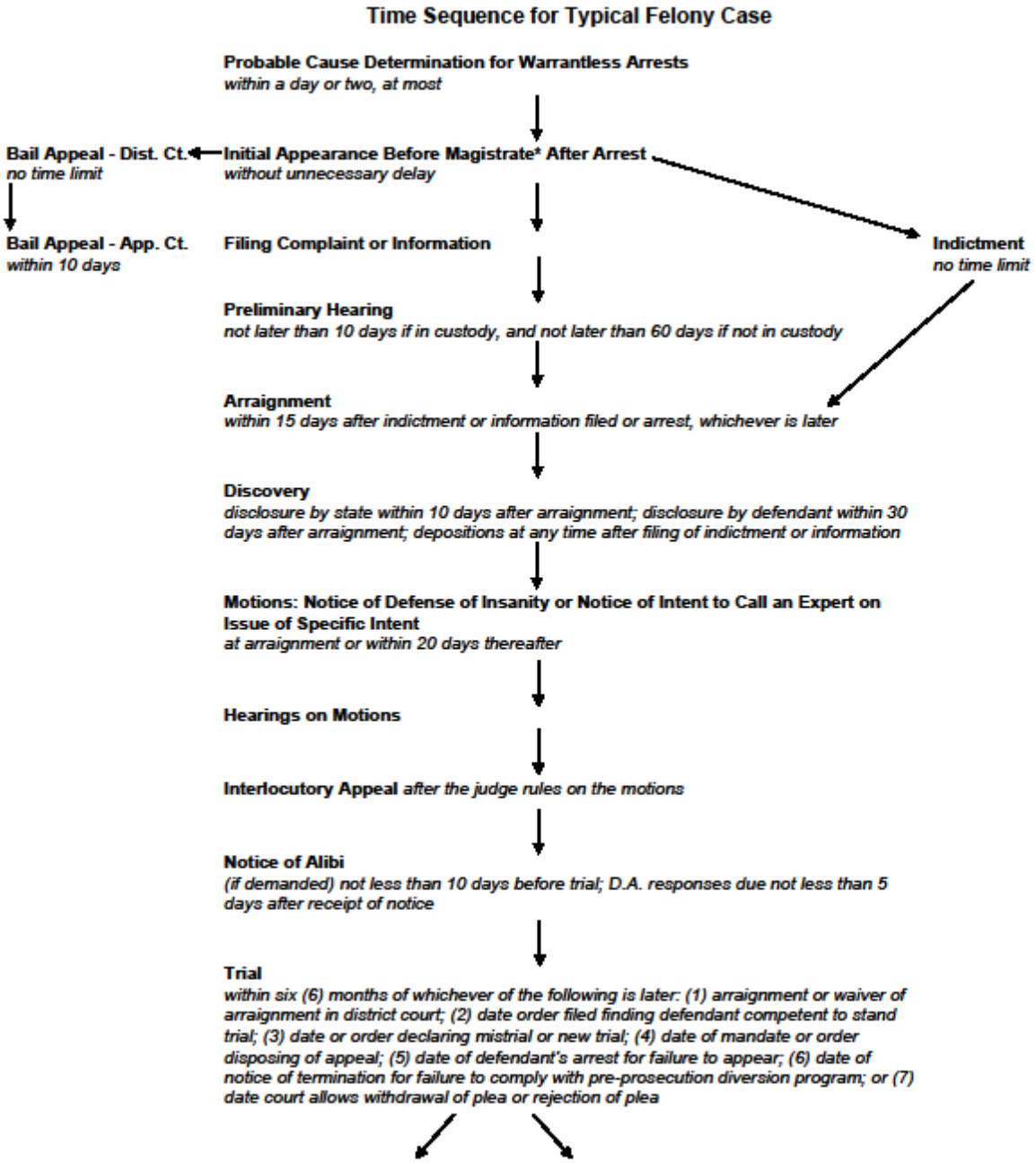
## 5-829. Withdrawn.

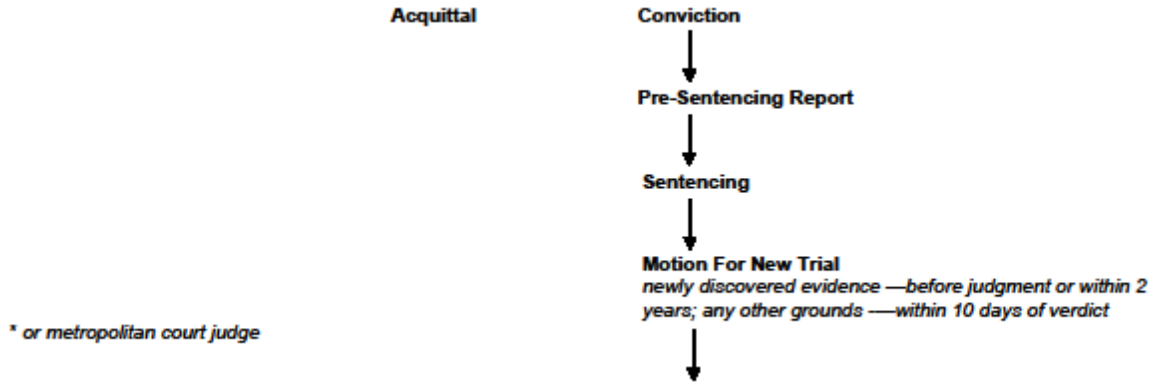
## 5-830. Withdrawn.

## 5-831. Withdrawn.

# ARTICLE 9
# Appendices

## 5-901. Time sequence for typical felony case.






## 5-902. Withdrawn.

## 5-903. Juror handbook (Transferred).