Rules of Procedure for the Municipal Courts

ARTICLE 1
General Provisions

8-101. Scope and title.

A. **Scope and title.** These rules govern the procedure for the enforcement of municipal ordinances in the municipal courts.

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

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

D. **Citation form.** These rules shall be cited by set and rule number, as in NMRA, Rule 8-___.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 96.

Construction and application of constitutional provision against special or local laws regulating practice in courts of justice, 135 A.L.R. 365.

8-102. Conduct of court proceedings.

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

B. **Nonjudicial proceedings.** Proceedings, other than judicial proceedings, designed and carried out primarily as ceremonies, and conducted with dignity by judges

in open court, may properly be photographed in, or broadcast from, the courtroom with the permission and under the supervision of the court.

[As amended, effective September 2, 1997; May 5, 1998; as amended by Supreme Court Order No. 16-8300-021, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-021, effective December 31, 2016, in Paragraph A, after “introduce extraneous influences”, deleted “which” and added “that”, and after “no such action shall be done or permitted”, deleted “except as provided by Rule 8-601 NMRA of these rules”.

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

The 1997 amendment, effective September 2, 1997, inserted "as provided by Rule 8-601 of these rules or" near the end of Paragraph A.

8-103. Rules; forms; fees.

A. **Rules.**

(1) Each municipal court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law or these rules. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court.

(2) To be effective any rule promulgated by a municipal court and any amendments thereto shall be filed with the clerk of the court and made readily available to members of the public.

B. **Forms.** Supreme Court forms used or distributed by the municipal courts shall be in the form approved by the Supreme Court. If particular issues or concerns are not addressed by existing Supreme Court forms, a municipal court may create new forms to address those needs, provided that the new forms are not inconsistent with existing Supreme Court forms. A party may file a pleading or paper that is substantially in the form approved by the Supreme Court. Forms may be combined.

C. **Costs or fees prohibited.** No costs or fees of any kind shall be collected by any court for any filing or proceeding under Rule 8-105 or 8-106 NMRA.

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; as amended by Supreme Court Order No. 08-8300-047, effective December 31, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, in Paragraph B, changed the first sentence from "Forms used in the municipal court shall be substantially in the form approved by the supreme court" to "Supreme Court forms used or distributed by the municipal court shall be in the form approved by the Supreme Court." and added the last three sentences.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, in Paragraph B deleted "substantially" preceding "in the form"; added the second sentence to permit pleadings or papers to be filed when prepared substantially in the form approved by the Supreme Court; and added the last sentence relating to the combination of forms.

Cross references. — For criminal forms approved for use in the district and magistrate courts by the Supreme Court, *see* Rule 9-101 NMRA et seq.

For the approval of forms used in the district courts, *see* Rule 5-102 NMRA.

For the approval of forms used in the magistrate courts, *see* Rule 6-103 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 24 et seq.

8-104. Time.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) for electronic filing, at midnight; and

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

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

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

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

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

B. **Extending time.**

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

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

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

(2) ***Exceptions.*** The court shall not extend the time for a determination of probable cause, the commencement of trial, or for taking an appeal, except as otherwise provided in these rules.

C. **Additional time after certain kinds of service.** When a party may or must act within a specified time after service and service is made by mail, facsimile, electronic transmission, or by deposit at a location designated for an attorney at a court facility under Rule 8-208(C)(1)(e) NMRA, three (3) days are added after the period would otherwise expire under Paragraph A. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

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

[As amended, effective August 1, 2004; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

Committee commentary. — In 2014, the Joint Committee on Rules of Procedure amended the time computation rules, including Rules 1-006, 2-104, 3-104, 5,104, 6-104, 7-104, 8-104, 10-107, and 12-308 NMRA, and restyled the rules to more closely resemble the federal rules of procedure. *See* Fed. R. Civ. Pro. 6; Fed. R. Crim. Pro. 45. The method of computing time set forth in this rule may be expressly superseded by other rules. *See, e.g.*, Rule 8-202 NMRA (requiring the court to make a probable cause

determination within forty-eight (48) hours of a warrantless arrest, notwithstanding the time computation provisions in this rule).

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

[Adopted by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

The 2014 amendment, approved by Supreme Court Order No. 14-8300-016, effective December 31, 2014, completely rewrote the rule; deleted former Paragraph A which provided rules for computation of time by excluding the day of the event from which the period of time began to run, including the last day of the period of time, excluding Saturdays, Sundays, legal holidays and days of severe inclement weather, and defined legal holidays; deleted former Paragraph B which provided for the enlargement of the period of time by the court; deleted former Paragraph C which provided for the service of motions for the enlargement of the period of time and for ex parte applications; deleted former Paragraph D, which provided for a three day enlargement of the period of time when a party was served by mail; and added current Paragraphs A through D.

The 2004 amendment amended Paragraph A to delete "by local rules of any municipal court", to add after "legal holiday" in the second sentence "or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible" and to add the last sentence of the paragraph relating to how time is computed and defining "legal holiday"; amended Subparagraph (2) of Paragraph B to delee references to Rules 8-506 and 8-703 and amended Paragraph D to make gender neutral changes.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 71 C.J.S. Pleading § 416.

8-105. Designation of judge.

A. **Appointment of temporary municipal judge.** Upon recusal or disqualification of a municipal judge, or if by reason of absence, death, sickness or other cause, a municipal judge is unable or unavailable to perform the duties of the municipal judge, a temporary municipal judge shall be appointed in the manner prescribed by law. If no municipal ordinance shall govern the temporary appointment of a municipal court judge,

or if none shall be appointed in accordance with the ordinance, the district court, upon certification of that fact by letter from the municipal court judge or any party, shall designate a qualified elector of the municipality to sit as municipal court judge in the action.

B. **Transfer of records.** After designation of a temporary municipal court judge, whether by ordinance or order of the district court, the disqualified judge shall forthwith send to the designated judge a copy of all proceedings in the action, pay to the designated judge all money received in the action and mark the records filed in the action "transferred by disqualification to" followed by the designated judge's name. The designated judge shall include in the court file a complete copy of the papers transferred by the disqualified judge and shall keep a record of all subsequent proceedings in the same manner as if the action had originally been filed with the designated judge.

C. **Obtaining records.** After designation of a temporary municipal court judge because of the inability or unavailability of the municipal court judge to perform the judge's duties, the designated judge shall take such action as may be necessary to obtain the files in the case, and all proceedings shall thereafter be conducted as if the action had originally been filed with the designated judge.

[As amended, effective May 1, 2002.]

ANNOTATIONS

The 2002 amendment, effective May 1, 2002, in Paragraph A, substituted "with the ordinance" for "therewith" near the middle of the second sentence; in Paragraph B, substituted "filed in" for "of" near the end of the first sentence and substituted "in the court file a complete copy of the papers transferred by the disqualified judge" for "in his records the copy of proceedings in the action prior to its transfer, including a reference to the name of the disqualified judge".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 372, 379, 390, 396.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member, 64 A.L.R.2d 600, 37 A.L.R.4th 1004.

8-106. Disqualification; recusal.

A. **Disqualification.** No right to peremptory disqualification exists in the municipal court.

B. **Recusal.** No judge shall sit in any action in which the judge’s impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a certificate of recusal in any such action. Upon receipt of notification of recusal from a judge, the municipal court shall give

written notice to each party. Upon recusal, another judge shall be designated to conduct any further proceedings in the action in the manner provided by Rule 8-105 NMRA.

C. **Failure to recuse.** If a party believes that the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, the party may file a notice of facts requiring recusal. The notice shall specifically set forth the constitutional grounds alleged. Upon receipt of the notice, the judge may file a certificate of recusal in the action or enter an order finding that there are not reasonable grounds for recusal. If within ten (10) days after the filing of notice of facts requiring recusal, the judge fails to file a certificate of recusal in the action, any party may certify that fact by letter to the district court of the county in which the action is pending with a copy of the notice of recusal. No filing fee shall be required for the filing of a letter certifying grounds for recusal described in Paragraph B of this rule. The party's certification to the district court shall be filed in the district court not less than five (5) days after the expiration of time for the municipal court judge to file a certificate of recusal or not less than five (5) days after the filing of an order in the municipal court finding the grounds alleged in the notice of recusal do not constitute reasonable grounds for recusal, whichever date is earlier. A copy of the letter shall also be filed with the municipal court. The district court shall make such investigation as the court deems warranted and enter an order in the action, either prohibiting the municipal court judge from proceeding further or finding that there are insufficient grounds to reasonably question the municipal court judge's impartiality under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct.

[As amended, effective May 1, 2002; as amended by Supreme Court Order No. 15-8300-017, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-017, effective December 31, 2015, in Paragraph C, in the seventh sentence, after "filed with the", deleted "metropolitan" and added "municipal".

The 2002 amendment, effective May 1, 2002, rewrote Pargraph B relating to municipal judges and added Paragraph C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 372, 379, 390, 396.

Disqualification of judge in proceedings to punish contempt against or involving himself or court of which he is a member, 64 A.L.R.2d 600, 37 A.L.R.4th 1004.

8-107. Pro se and attorney appearance.

A. **Appearance by an individual, pro se or attorney.** A defendant to any criminal action may appear, defend, and appeal any proceeding without an attorney, pro se, or

may appear through an attorney as provided in Paragraph D below. Non-attorneys may not represent individuals, except as provided in Paragraphs B and C of this rule.

B. **Pro se appearance by an individual on behalf of corporation or limited liability company.** If the defendant is a corporation or limited liability company, whose voting shares or memberships are held by a single shareholder or member, or a closely knit group of shareholders or members all of whom are natural persons active in the conduct of the business, and the appearance is by an officer or general manager who has been authorized to appear on behalf of the corporation or limited liability company, then this individual may appear, defend, and appeal any proceeding on behalf of the defendant corporation or limited liability company.

C. **Pro se appearance by an individual on behalf of general partnership.** If the defendant is a general partnership that meets all of the following qualifications:

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

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

(3) the appearance is by a general partner who has been authorized to appear by the general partners, then this individual may appear, defend, and appeal any proceeding on behalf of the defendant general partnership.

D. **Attorney appearance.** Whenever counsel undertakes to represent a defendant in any criminal action, the attorney will file a written entry of appearance in the cause, unless the attorney has been appointed by written order of the court. Counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory, shall comply with Rule 24-106 NMRA. For the purpose of this rule, an attorney may enter an appearance by:

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

(2) communicating with the judge in open court on behalf of a defendant. An attorney who enters an appearance by an in-court communication with the judge shall file a written entry of appearance with the court within three (3) days after the communication with the judge.

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

F. **Substitution of counsel.** The court may condition consent to withdraw as an attorney upon substitution of other counsel or the filing by a party of proof of service on all parties of an address at which service may be made upon the party. Withdrawing

counsel or substitute counsel shall serve on all parties a copy of the motion requesting written consent to withdraw and shall file proof of service with the court.

[As amended, effective September 15, 2000; February 16, 2004; as amended by Supreme Court Order No. 13-8300-028, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — A friend or family member may not represent a defendant, nor a parent represent a minor child defendant, unless the friend, family member, or parent is a licensed attorney and enters an appearance in the case.

Corporations, limited liability corporations, and partnerships are required to submit an entry of appearance form approved by the Supreme Court, if available.

[Adopted by Supreme Court Order No. 13-8300-028, effective for all cases filed or pending on or after December 31, 2013.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-028, effective December 31, 2013, provided for the pro se appearance of an individual; deleted the former title “Entry of appearance” and added the current title; added Paragraphs A, B, and C; and in Paragraph D, deleted the former title “How entered” and added the current title, added the second sentence, and in Subparagraph (2), in the first sentence, deleted “any communication” and added “communicating”.

The 2003 amendment, effective February 16, 2004, in Paragraph A substituted “how entered” for “written entry of appearance” in the introductory language and substituted “an attorney may enter an appearance by” for “the” in the last sentence of the introductory paragraph, designated previously undesignated text as Subparagraph (1), substituted “a written entry of appearance or any pleading or paper signed by the attorney; or” for “any pleading signed by counsel constitutes an entry of appearance” in that subparagraph, and inserted Subparagraph (2), substituted present Paragraph B for former Paragraph B, which read "Oral entry of appearance. With permission of the court, an attorney may enter an appearance on behalf of a defendant by oral communication with the court, provided a written entry of appearance is filed within three (3) days”, and present Paragraph C for former Paragraph C, which read “Duration of representation. An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by the court”.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appearance § 1 et seq.

6 C.J.S. Appearances § 17.

8-108. Presence of the defendant.

A. **Presence defined.** The defendant's "presence," as used in this rule, may include either

(1) the defendant's physical appearance in open court; or

(2) the defendant's appearance through an audio or audio-visual communication under Rule 8-109A NMRA.

B. **Presence required.** Except as otherwise provided by this rule, the defendant shall be present at

(1) the first appearance, the arraignment, the plea, and any hearing to set bail or conditions of release;

(2) every stage of the trial; and

(3) the imposition of any sentence.

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

(1) is voluntarily absent after the proceeding has commenced, regardless of whether the court informed the defendant of an obligation to remain present; or

(2) engages in conduct that the court determines, by clear and convincing evidence, to be so disruptive as to justify the exclusion of the defendant from further proceedings. If a defendant is excluded from the proceedings under this subparagraph, the court shall provide the defendant with a timely opportunity to regain the right to be present so long as the defendant agrees to refrain from any further disruptive conduct.

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

(1) a defendant who is an organization may appear by counsel for all purposes;

(2) when the proceeding involves only a conference or hearing upon a question of law, if an attorney has entered on the defendant's behalf;

(3) in prosecutions for offenses that may disposed of without a hearing under Rule 8-503 NMRA; and

(4) the municipal court may accept a knowing, intelligent, and voluntary waiver of the defendant's right to be present for first appearance, arraignment, entry of a plea of not guilty, trial, or the imposition of any sentence. The defendant may not waive the right to be present for the entry of a guilty or no contest plea.

[As amended by Supreme Court Order No. 15-8300-009, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 16-8300-024, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — This rule permits a defendant to expressly waive appearance in municipal court for the proceedings listed in Subparagraph (D)(4) of this rule if the waiver is knowing, voluntary, and intelligent. *See State v. Padilla*, 2002-NMSC-016, ¶ 14, 132 N.M. 247, 46 P.3d 1247 (concluding that a trial court may "accept a knowing, intelligent, and voluntary waiver of a defendant's presence, either as an express waiver or as an implied waiver when a defendant has forfeited his or her right to presence by conduct"). However, unless the case is one that may be disposed of without a hearing under Rule 8-503 NMRA, a defendant in municipal court may not waive appearance for the entry of a guilty or no contest plea. A defendant who pleads guilty or no contest waives multiple trial rights, including (1) the right to a speedy and public trial; (2) the privilege against self-incrimination, (3) the requirement that the prosecution must prove guilt beyond a reasonable doubt; (4) the right to appear and defend against the charges; and (5) the right to confront one's accusers. To ensure that the defendant's waiver of these constitutional trial rights and entry of a guilty or no contest plea is knowing, intelligent, and voluntary, the municipal court shall not accept a plea of guilty or no contest without first advising the defendant as required by Rule 8-502 NMRA in open court, which may include an audio or audio-video appearance under Rule 8-109A NMRA.

[Adopted by Supreme Court Order No. 15-8300-009, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-024, effective December 31, 2016, provided that if an attorney has entered on the defendant's behalf, a defendant's appearance is not required at proceedings in municipal court involving a question of law; and in Subparagraph (D)(2), after "question of law", added "if an attorney has entered on the defendant's behalf".

The 2015 amendment, approved by Supreme Court Order No. 15-8300-009, effective December 31, 2015, defined a defendant's presence in court proceedings to include physical presence as well as appearing through audio or audio-visual communication, specified additional court proceedings when a defendant's presence is required and

when a defendant's presence is not required, provided a standard which a judge must apply to justify the exclusion of a defendant from court proceedings when the defendant is disruptive, provided for a defendant to regain the right to be present in court proceedings after being excluded for disruptive conduct, provided for a defendant to expressly waive his appearance in court proceedings, and added the committee commentary; in the heading of the rule, after "defendant", deleted "appearance of counsel"; in Paragraph A, in the heading, deleted "required" and added "defined", after the heading, added "The defendant's 'presence,' as used in this rule, may include either", and added Subparagraphs A(1) and (2); designated language formerly in Paragraph A as Paragraph B, added the heading "Presence required.", and added "Except as otherwise provided by this rule"; added Subparagraph B(1); added the Subparagraph B(2) designation, and after "trial", deleted "including" and added "; and"; added the Subparagraph B(3) designation and after "sentence", deleted "except as otherwise provided by these rules"; redesignated former Paragraphs B and C as Paragraphs C and D, respectively; in Subparagraph C(1), after "commenced", added "regardless of whether the court informed the defendant of an obligation to remain present"; in Subparagraph C(2), after "engages in conduct", deleted "which justifies excluding" and added "that the court determines, by clear and convincing evidence, to be so disruptive as to justify the exclusion of", after "defendant from", deleted "the proceeding" and added "further proceedings.", and added the last sentence; in Subparagraph D(1), deleted "A corporation" and added "a defendant who is an organization"; added Subparagraphs D(2) and (3); added the Subparagraph D(4) designation, after "municipal court", deleted "with the written consent of the defendant", after "may", deleted "permit" and added "accept a knowing, intelligent, and voluntary waiver of the defendant's right to be present for first appearance", after "arraignment", added "entry of a", after "plea", added "of not guilty", after "trial", deleted "and" and added "or the", after "imposition of", added "any", after "sentence", deleted "in the absence of the defendant", and added the last sentence.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 692 to 700, 901 to 935.

Presence of accused during view by jury, 30 A.L.R. 1357, 90 A.L.R. 597.

Personal presence of defendant and his counsel as necessary to the validity of discharge of jury in criminal case before reaching verdict, 150 A.L.R. 764.

Right of accused to be present at polling of jury, 49 A.L.R.2d 619.

Power to try one charged with misdemeanor in his absence, 68 A.L.R.2d 638.

Absence of convicted defendant during hearing or argument of motion for new trial or in arrest of judgment, 69 A.L.R.2d 835.

Propriety of criminal trial of one under influence of drugs or intoxicants at time of trial, 83 A.L.R.2d 1067.

Exclusion or absence of defendant, pending trial of criminal case, from courtroom, or from conference between court and attorneys, during argument on question of law, 85 A.L.R.2d 1111, 23 A.L.R.4th 955.

Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.

23A C.J.S. Criminal Law §§ 1161 to 1167.

8-109. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated June 16, 1997, this rule, defining "record", was withdrawn effective on and after September 2, 1997.

8-109A. Audio and audio-visual appearances of defendant.

A. **When permitted.** The court may permit a defendant or attorneys to appear through the use of a simultaneous audio or audio-visual communication when it will legitimately serve justice considering, among other issues, the economic needs of the parties. When an appearance through the use of an audio or audio-visual communication is conducted, the court may require the party requesting to appear by audio or audio-visual communication to pay the expense of the communication. Prior to an audio or audio-visual appearance, the defendant shall file with the court a written request to appear by audio or audio-visual communication substantially in the form approved by the Supreme Court. The judge shall conduct any audio or audio-visual proceeding in a place open to the public.

B. **Required audio-visual appearances.** For purposes of these rules, an appearance through a simultaneous audio-visual communication, as defined in Paragraph A above, constitutes an appearance in open court for:

(1) an arraignment, initial appearance, bail hearing, or entry of any plea; or

(2) a sentencing proceeding, after conviction at trial or a plea of guilty or no contest, unless the court is to take testimony or a statement from someone other than the defendant.

C. **Conduct of required audio-visual proceedings.** The following conditions must be met for any required audio-visual proceeding conducted pursuant to Paragraph B of this rule:

(1) the defendant and the defendant's attorney, if any, shall have the ability of private, unrecorded communication;

(2) the judge, legal counsel, if any, and defendant shall be able to communicate and see each other through a two-way audio-visual communication between the court and the place of custody or confinement; and

(3) the proceedings shall be conducted in a place open to the public through the use of audio-visual equipment which will permit members of the public to simultaneously see and hear the proceedings contemporaneously with the judge.

D. **Construction of rule.** This rule shall not prohibit other audio or audio-visual appearances upon waiver of any right such person held in custody or confinement might have to be physically present. Nothing contained in this rule shall be construed as establishing a right for any person held in custody to appear by a two-way audio-visual communication system.

[Approved, effective November 1, 2000; as amended, effective July 1, 2002; as amended by Supreme Court Order No. 08-8300-047, effective December 31, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, in Paragraph B, changed the phrase "The court may require the defendant to appear through the use of a simultaneous audio-visual communication for" to the phrase "For purposes of these rules, an appearance through a simultaneous audio-visual communication, as defined in Paragraph A above, constitutes an appearance in open court for" and in Subparagraph (1) of Paragraph B, added the phrase "entry of any plea, or".

The 2002 amendment, effective July 1, 2002, in the third sentence of Paragraph A, substituted "request to appear by audio or audio-visual communication" for "waiver of appearance" and rewrote Paragraph C(1) which formerly read "the defendant and the defendant's legal counsel, if any, shall be together in one room at the time".

Cross references. — For service and filing by fax, *see* Rule 8-209 NMRA.

For service and filing electronically, *see* Rule 8-210 NMRA.

For written waiver of appearance, *see* Criminal Form 9-104 NMRA.

For a written request to appear before the court by audio or audio-visual communications, *see* Criminal Form 9-104A NMRA.

8-110. Suspended.

[As amended, effective January 1, 1996; 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.]

ANNOTATIONS

Compiler's notes. — Pursuant to Supreme Court Order No. 21-8300-032, 8-110 NMRA, relating to criminal contempt, was suspended effective November 22, 2021, until further order of the court. For provisions of the former rule, *see* the 2020 NMRA on *NMOneSource.com*.

8-111. Non-attorney prosecutions.

A. **Law enforcement officers.** Law enforcement officers may file criminal complaints against persons in the municipal court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the jurisdiction of the court. Law enforcement officers may prosecute misdemeanor criminal complaints they have filed in municipal court, except that no law enforcement officer may prosecute any case that involves a charge of driving under the influence of intoxicating liquor or drugs.

B. **Other authorized prosecutions.** A municipal officer or employee may appear and prosecute any petty misdemeanor proceeding on behalf of the municipality if the municipality has authorized the officer or employee to institute or cause to be instituted an action on behalf of the governmental entity, except that no municipal officer or employee may prosecute through a non-attorney any case that involves a charge of driving under the influence of intoxicating liquor or drugs.

C. **Trial procedures.** In cases where law enforcement officers and non-attorney municipal employees are authorized under Paragraphs A and B of this rule to prosecute complaints they have filed, those officers and employees shall be permitted to testify and present evidence to the court. In the court's discretion, such parties may also ask questions of witnesses, either directly or through the court, and may make statements bringing pertinent facts and legal authorities to the court's attention.

[Adopted, effective July 1, 1988; as amended by Supreme Court Order No. 08-8300-047, effective December 31, 2008; as amended by Supreme Court Order No. 13-8300-033, effective for all cases filed on or after December 31, 2013.]

Committee commentary. — Prior to December 31, 2008, this rule authorized private citizens to pursue criminal prosecutions in municipal court, either on their own or through a special prosecutor. In 2013, the Court withdrew former Paragraphs D and E in recognition of the 2008 amendment, which removed the authority for such private prosecutions. Former Paragraph D was entitled "Special prosecutor" and provided that "[n]othing in this rule shall be construed to allow a private attorney to prosecute a case for any party without first having been duly appointed as a special prosecutor by the city

attorney for the municipality in which the court is located." Former Paragraph E was entitled "City attorney" and provided that "[n]othing in this rule shall be construed to prevent the city attorney of the municipality in which the complaint is filed from dismissing the case or entering an appearance and assuming prosecutorial control over the case." Paragraphs D and E are no longer necessary because they addressed the situation in which a private citizen could pursue a criminal complaint through a special prosecutor. The withdrawal of Paragraphs D and E does not preclude a municipality from appointing a special prosecutor to prosecute.

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

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-033, effective December 31, 2013, permitted law enforcement officers to prosecute misdemeanor criminal complaints; prohibited law enforcement officers and municipal employees who are not attorneys from prosecuting charges of driving under the influence of alcohol and drugs; deleted the provision that private attorneys cannot prosecute criminal complaints without being designated by the city attorney as a special prosecutor; deleted the provision that the rule does not prevent the city attorney from dismissing cases or assuming the prosecution of cases filed by municipal police and municipal employees; in Paragraph A, in the title, deleted "Peace" and added "Law enforcement", in the first sentence, deleted "Municipal police" and added "Law enforcement", in the second sentence, after "charges within the", deleted "trial", and added the third sentence; in Paragraph B, in the title, after "authorized", deleted "appearances" and added "prosecutions"; and after "on behalf of the governmental entity", added the remainder of the sentence; in Paragraph C, in the first sentence, deleted "Municipal police" and added "In cases where law enforcement", after "law enforcement officers and", added "non-attorney", after "non-attorney municipal employees", added "are authorized under Paragraphs A and B of this rule to prosecute", after "they have filed", added "those officers and employees", and after "employees shall be", deleted "authorized" and added "permitted"; deleted former Paragraph D, which provided that private attorneys could not prosecute criminal complaints without being designate by the city attorney as a special prosecutor; and deleted former Paragraph E, which provided that the rule did not prevent the city attorney from dismissing cases or assuming the prosecution of cases filed by municipal police or municipal employees.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, in Paragraph A, deleted the phrase "and private citizens" from the title and deleted the phrase "and individual private citizens in their own behalf" in the first sentence and in Paragraph C, deleted the phrase "and individual private citizens in their own behalf" following the phrase "Paragraph B".

Violation of municipal ordinance. — In municipal court, it is contemplated that the city attorney, a municipal officer, a police officer, or a private citizen will prosecute the

violation of a municipal ordinance. *State v. Rodriguez*, 2005-NMSC-019, 138 N.M. 21, 116 P.3d 92.

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

8-112. Public inspection and sealing of court records.

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

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

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

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

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

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

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

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

C. **Protection of personal identifier information.**

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision.

Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse. 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.

D. **Motion to seal court records required.** Except as provided in Paragraph C of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. The motion is subject to the provisions of Rule 8-304 NMRA, and a copy of the motion shall be served on all parties who have appeared in the case in which the court record has been filed or is to be filed. Any party or member of the public may file a response to the motion to seal within fifteen (15) days after the motion is filed. The movant shall lodge the court record with the court pursuant to Paragraph E when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph E. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

E. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph D of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rule 8-301 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an

order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating “SEALED BY ORDER OF THE COURT ON (DATE)” and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

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

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

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

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

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

(d) the proposed sealing is narrowly tailored; and

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

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

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

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

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

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

G. **Sealed court records as part of record on appeal.** Court records sealed under the provisions of this rule that are filed as part of an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access

to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the municipal court shall be filed in the district court pursuant to Rule 5-123 NMRA if the case is pending on appeal.

H. **Motion to unseal court records.**

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal is subject to the provisions of Rule 8-304 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph F for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

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

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

[Adopted by Supreme Court Order No. 10-8300-005, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023 temporarily suspending Paragraph C for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph C for an additional 90 days, effective November 10, 2010; by Supreme Court Order No. 11-8300-007, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017.]

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

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

Numerous statutes identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, NMSA 1978, § 7-1-4.2(H) (providing for confidentiality of taxpayer information); NMSA 1978, § 14-6-1(A) (providing for confidentiality of patient health information); NMSA 1978, § 24-1-9.5 (limiting disclosure of test results for sexually transmitted diseases); NMSA 1978, § 29-10-4 (providing for confidentiality of certain arrest record information); NMSA 1978, § 29-12A-4 (limiting disclosure of local crime stoppers program information); NMSA 1978, § 29-16-8 (providing for confidentiality of DNA information); NMSA 1978, § 31-25-3 (providing for confidentiality of certain communications between victim and victim counselor); NMSA 1978, § 40-8-2 (providing for sealing of certain name change records); NMSA 1978, § 40-6A-312 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); NMSA 1978, § 40-10A-209 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); NMSA 1978, § 40-13-7.1 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); NMSA 1978, § 40-13-12 (providing for limits on internet disclosure of certain information in domestic violence cases); NMSA 1978, § 44-7A-18 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, this rule does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph D of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph F of this rule before deciding whether to seal any particular court record.

Paragraph C of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph C discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from

publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

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

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

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

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

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

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

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

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

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

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

[Adopted by Supreme Court Order No. 10-8300-005, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-007, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-002, effective March 31, 2017, provided that any attorney or other person granted access to electronic records in municipal court cases that contain protected personal identifier information must take reasonable precautions to protect that personal identifier information, and provided that any attorney or other person who unlawfully discloses such personal identifier information may be subject to sanctions or the initiation of disciplinary proceedings; and in Subparagraph C(1), added the last two sentences.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-007, effective February 7, 2011, in Paragraph C, eliminated the former prohibition against including personal identifier information in court records without a court order, the prohibition against disclosing personal identifier information that the court orders to be included in a court record, the requirement that citations be automatically sealed, and the exceptions to the prohibitions against the inclusion and disclosure of personal identifier information; and required the court and the parties to avoid including personal identifier information in court records unless they deem the inclusion of personal identifier information to be necessary to the court's function, prohibited the publication of personal identifier information on court web sites and by posting in the courthouse, and required persons requesting access to court records to provide personal information and identification.

8-113. Court interpreters.

A. **Scope and definitions.** This rule applies to all proceedings filed in the municipal 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) 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.

(3) 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.

(4) Notwithstanding any failure of a party 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 municipal ordinances for which there are no comparable state statutes and 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 noncertified 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 Subsubparagraph (d) of this subparagraph. If the court has made diligent, good faith efforts to obtain a justice system interpreter and one is not reasonably available, after consulting with the Administrative Office of the Courts, the court may appoint a language access specialist or less qualified non-certified court interpreter only after the following requirements are met:

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

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

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

(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.

D. **Waiver of the right to a court interpreter.** Any case participant identified as needing a court interpreter under Paragraph B of this rule may at any point in the case waive the services of a court interpreter with approval of the court only if the court explains in open court through a court interpreter the nature and effect of the waiver and makes a written finding that the waiver is knowingly, voluntarily, and intelligently made. If the case participant is the defendant in the criminal proceeding, the waiver shall be in

writing and the court shall further determine that the defendant has consulted with counsel regarding the decision to waive the right to a court interpreter. The waiver may be limited to particular proceedings in the case or for the entire case. With the approval of the court, the case participant may retract the waiver and request a court interpreter at any point in the proceedings.

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

(1) **Qualifying the court interpreter.** Before appointing a court interpreter to provide interpretation services to a case participant, the court shall qualify the court interpreter in accordance with Rule 11-604 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 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.

(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 NMSA1978. All oaths required under this subparagraph shall be given in open court.

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

(5) **Record of the court interpretation.** Upon the request of a party, the court may make and maintain an audio recording of all spoken language court interpretations or a video recording of all signed language interpretations. Unless the parties agree otherwise, the party requesting the recording shall pay for it. Any

recordings permitted by this subparagraph shall be made and maintained in the same manner as other audio or video recordings of court proceedings.

(6) **Court interpretation for multiple case participants.** When more than one case participant needs a court interpreter for the same spoken language, the court may appoint the same court interpreter to provide interpretation services for those case participants. When more than one case participant needs court interpretation for a signed language, separate court interpreters shall be appointed for each case participant. If a party needs a separate court interpreter for attorney-client communications during a court proceeding, prior to the commencement of the court proceeding, the party shall obtain a court interpreter of the party's own choosing and at the party's own expense. If the party is a criminal defendant represented by court-appointed counsel, a court interpreter for attorney-client communications may be paid as allowed under the Indigent Defense Act and Public Defender Act.

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

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

(b) the court makes a written finding that it contacted the Administrative Office of the Courts for assistance in locating two (2) qualified court interpreters but two (2) could not be found; and

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

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

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

(10) **Remote spoken language interpretation.** Court interpreters may be appointed to serve remotely by audio or audio-video means approved by the Administrative Office of the Courts for any proceeding when a court interpreter is otherwise not reasonably available for in-person attendance in the courtroom. Electronic equipment used during the hearing shall ensure that all case participants hear all statements made by all case participants in the proceeding. If electronic equipment is not available for simultaneous interpreting, the hearing shall be conducted to allow for consecutive interpreting of each sentence. The electronic equipment that is used must permit attorney-client communications to be interpreted confidentially.

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

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

(a) inability to adequately interpret the proceedings;

(b) knowingly making a false interpretation;

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

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

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

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

(g) acting as an advocate; or

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

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

F. **Payment of costs for the court interpreter.** Unless otherwise provided in this rule, and except for court interpretation services provided by an employee of the court as part of the employee's normal work duties, all costs for providing court interpretation services by a court interpreter shall be paid by the court in amounts consistent with guidelines issued by the Administrative Office of the Courts. If the court determines that it does not have adequate funds to pay for the court interpretation services required by this rule, the court may dismiss the proceeding without prejudice so that it may be refiled in the appropriate magistrate court or district court.

[Adopted by Supreme Court Order No. 12-8300-022, effective for all cases filed or pending on or after January 1, 2013; amended by Supreme Court Order No. 13-8300-031, effective for all cases pending or filed on or after December 31, 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 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.]

ANNOTATIONS

The 2013 amendment, approved by Supreme Court Order No. 13-8300-031, effective December 31, 2013, permitted the court to appoint an interpreter in cases involving municipal ordinances that are not comparable to state statutes; and in Subparagraph (2) of Paragraph C, after "For cases exclusively involving" added "municipal ordinances for which there are no comparable state statutes and cases exclusively involving".

8-114. 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, and court employees and security personnel. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom.

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 motion for courtroom closure shall be filed and served at least twenty (20) days prior to the commencement of the courtroom proceeding, 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. A reply is not permitted without leave of the court, which may be granted upon a showing of good cause.

(4) ***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.

(5) ***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.

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 tendered to the court for an in camera review that is not ordered to be disclosed shall be returned to the party.

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. 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.").

Numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., committee commentary to Rule 8-112

NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential. 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 [municipal] 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 (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

8-201. Commencement of action.

A. **How commenced.** An action is commenced by filing one of the following with the court:

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

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

(3) a citation issued and signed by an official authorized by law that contains the name and address of the cited person, the specific offense charged, a citation to the specific section of law violated, and the time and place to appear. Unless the person requests an earlier date, the time specified in the citation shall be at least three (3) days after issuance of the citation; or

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

A copy of every citation issued shall be delivered to the person cited, and the original shall be filed with the municipal court within seven (7) days of the issuance of the citation or, in any event, no later than one (1) day prior to the date cited for the defendant to appear. Any citation that sets an appearance date and is untimely filed may be dismissed with or without prejudice by the court on its own motion. All complaints and citations shall be signed, as defined in Rule 8-209(J) NMRA, and the municipal court shall not accept for filing any unsigned complaint or citation. In the event that an unsigned complaint or citation commences an action, the case shall be dismissed without prejudice.

B. **Jurisdiction.** Municipal courts have jurisdiction in all cases as may be provided by law.

C. **Where commenced.** The action shall be commenced in the municipality where the offense is alleged to have been committed.

D. **When commenced.** All prosecutions for the commission of any offense made punishable by ordinance shall be commenced within the time provided by law.

E. **Arrest without a warrant; criminal complaint.** In all municipal court cases, 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 the defendant may be released from custody. If the defendant is in custody and the court is open, the complaint shall be filed immediately with the municipal 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.

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

[As amended, effective September 1, 1990; November 1, 1991; May 1, 1997; September 15, 1997; as amended by Supreme Court Order No. 08-8300-047, effective December 31, 2008; as amended by Supreme Court Order No. 16-8300-007, effective for all cases pending or filed on or after December 31, 2016; 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. 21-8300-022, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-022, effective December 31, 2021, provided the time within which an original citation must be filed with the municipal court, and provided a sanction for the untimely filing of certain citations; in Paragraph A, in the last undesignated subparagraph, after “shall be filed”, deleted “as soon as practicable”, and added “within seven (7) days of the issuance of the citation or, in any event, no later than one (1) day prior to the date cited for the defendant to appear. Any citation that sets an appearance date and is untimely filed may be dismissed with or without prejudice by the court on its own motion.”

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective December 31, 2020, required, in criminal cases where the defendant is arrested without a warrant and is in custody, that the complaint be filed immediately with the municipal court if the court is open, and provided the municipal court with discretion, in cases where the defendant was arrested without a warrant and where the defendant is not

provided a copy of the criminal complaint upon transfer to a detention facility without just cause or sufficient reason, to dismiss a complaint without prejudice or to order the release of the defendant from custody; in Paragraph E, added “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 the defendant may be released from custody.”, after “If the defendant is in custody”, added “and the court is open”, after “the complaint shall be filed”, added “immediately”, after “with the municipal court”, deleted “at the time it is given to the defendant”, after “If the court is not open”, deleted “at the time the copy of the complaint is given to the defendant”, and after “If the defendant is not in custody”, deleted “the next business day of the court”.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-007, effective December 31, 2016, provided that all complaints and citations commencing an action in the municipal courts must be signed, that the municipal court shall not accept for filing any unsigned complaint or citation and that any case commenced by an unsigned complaint or citation shall be dismissed without prejudice; in Paragraph (A), in the introductory sentence, after “commenced by filing”, added “one of the following”; in Subparagraph (A)(1), after “consisting of a signed”, added “sworn written”, after “the facts”, added “the”, after “section number of”, added “either”, after “municipal ordinance or”, added “the”, and after “Compilation”, deleted “which” and added “that”; in Subparagraph (A)(2), after “citation issued”, added “and signed”, and after “officer”, deleted “pursuant to” and added “under”; in Subparagraph (A)(3), after “citation issued”, added “and signed”, and after “issuance of the citation”, added “or”; deleted Subparagraph (A)(4) and redesignated former Subparagraph (A)(5) as Subparagraph (A)(4); in Subparagraph (A)(4), after “in direct”, added “criminal”, and after Subparagraph (A)(4), added the last two sentences of the undesignated paragraph.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, in Paragraph A, added Subparagraphs (4) and (5).

The second 1997 amendment, effective September 15, 1997, added "A separate complaint shall be filed for each defendant" at the end of Subparagraph A(1) and added the last undesignated paragraph of Paragraph A.

The first 1997 amendment, effective May 1, 1997, rewrote Subparagraph (3) of Paragraph A.

The 1991 amendment, effective for cases filed in the municipal courts on or after November 1, 1991, in Paragraph E, rewrote the second sentence, which formerly read "The complaint shall at that time be filed with the municipal court", inserted "and the defendant remains in custody," in the third sentence, and added the last sentence.

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

Cross references. — For criminal complaint, *see* Rule 9-202 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions §§ 10, 11 et seq.

1A C.J.S. Actions § 237 et seq.

8-202. Probable cause determination.

A. **General rule.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release. The probable cause determination shall be made by a municipal 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 8-104(A) NMRA.

B. **Conduct of determination.** The determination of whether there is probable cause shall be nonadversarial and may be held in the absence of the defendant and of counsel. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. No witnesses shall be required to appear unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause. If the complaint and any attached statements fail to make a written showing of probable cause, an amended complaint or a statement of probable cause may be filed at the time of the probable cause determination with sufficient facts to show probable cause for detaining the defendant.

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

(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 further proceedings. The defendant's release shall be subject only to the conditions that the defendant shall appear before the court as directed and shall not violate any federal, state, or local criminal law. The court shall not impose any additional conditions of release under Rule 8-401 NMRA.

(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 8-401 NMRA.

[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. 17-8300-023, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019.]

Committee commentary. — When a defendant has been arrested without a warrant and remains in custody, the Fourth Amendment to the United States Constitution requires a judicial determination of probable cause within forty-eight hours after arrest. *See Gerstein v. Pugh*, 420 U.S. 103 (1975) (holding that any significant pretrial restraint on liberty requires a prompt judicial determination of probable cause); *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (holding that a judicial determination "of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*").

A probable cause determination proceeding is not to be confused with a first appearance hearing. *See* Rule 8-501 NMRA. The determination of probable cause can be made in a nonadversarial proceeding and may be held in the absence of the defendant and of counsel. *See Gerstein*, 420 U.S. at 119-22 (concluding that a probable cause determination does not need to be "accompanied by the full panoply of adversary safeguards — counsel, confrontation, cross-examination, and compulsory process for witnesses"). The probable cause determination is required only to assure in warrantless arrest cases that there is probable cause to detain the defendant.

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

Failure to make a probable cause determination does not void a subsequent conviction. *See Gerstein*, 420 U.S. at 119.

[Adopted by Supreme Court Order No.13-8300-042, effective for cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, authorized the court to set conditions of release immediately upon

finding probable cause that the defendant committed an offense; in Subparagraph C(2), added the first sentence, deleted “that the defendant committed an offense”, after “bailable offense, the court”, deleted “shall” and added “may”, and after “may set conditions of release”, deleted “in accordance with” and added “immediately or within the time required under”, and deleted “If the court finds that there is probable cause the court shall make such finding in writing.”.

The 2017 amendment, approved by Supreme Court Order No. 17-8300-023, effective December 31, 2017, provided that when a defendant is released following a court finding that the complaint failed to establish probable cause to believe that the defendant committed a criminal offense, the defendant’s release shall be subject only to the conditions that the defendant shall appear before the court as directed and shall not violate any federal, state, or local criminal law; in Subparagraph C(1), after “release of the defendant from custody pending”, deleted “trial” and added the remainder of the subparagraph.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-041, effective December 31, 2013, limited the extension of time for making a probable cause determination; required the personal recognizance release of the defendant from custody pending trial if no probable cause is found; in Paragraph A, added the third and fourth sentences; in Paragraph C, Subparagraph (1), added the title, after “the court shall”, deleted “dismiss the complaint without prejudice and”, after “order the immediate”, added “personal recognizance”, and after “release of the defendant”, added the remainder of the sentence; and in Subparagraph (2), added the title.

The 1991 amendment, effective for cases filed in the municipal courts on or after November 1, 1991, in Paragraph A, substituted "promptly, but in any event within forty-eight (48) hours" for "within a reasonable time, but in any event within twenty-four (24) hours" in the second sentence and deleted the former last sentence, relating to expiration of the prescribed period on a Saturday, Sunday or legal holiday.

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, rewrote Paragraph A; deleted former Paragraph B, relating to time of determination, and redesignated former Paragraphs C and D as Paragraphs B and C; in Paragraph B, inserted "of whether there is probable cause" and substituted "nonadversarial" for "nonadversary" in the first sentence and added the last sentence; and rewrote Paragraph C.

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

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

For form on affidavit for bench warrant, *see* Rule 9-211 NMRA.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Arrest §§ 47, 54.

Civil liability for improper issuance of search warrant or proceedings thereunder, 45 A.L.R. 605.

Search of automobile without a warrant by officers relying on description of persons suspected of a crime, 60 A.L.R. 299.

Sufficiency of showing probable cause for search warrant for intoxicating liquor, 74 A.L.R. 1418.

Arrest, or search and seizure, without warrant on suspicion or information as to unlawful possession of weapons, 92 A.L.R. 490.

Peace officer's delay in making arrest without a warrant for misdemeanor or breach of peace, 58 A.L.R.2d 1056.

Issuance of second search warrant after lapse of time for executing first, without additional showing of probable cause, 100 A.L.R.2d 525.

Propriety of considering hearsay evidence or other incompetent evidence in establishing probable cause for issuance of search warrant, 10 A.L.R.3d 359.

Propriety of consideration of credibility of witness in determining probable cause at state preliminary hearing, 84 A.L.R.3d 811.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse - state cases, 4 A.L.R.4th 196.

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

Disputation of truth of matters stated in affidavit in support of search warrant - modern cases, 24 A.L.R.4th 1266.

Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse-state cases, 55 A.L.R. 5th 125.

6A C.J.S. Arrest § 6; 22 C.J.S. Criminal Law §§ 339, 349.

8-203. Issuance of warrant for arrest and summons.

A. **Issuance.** Upon the docketing of any action, the court may issue either an arrest warrant or a summons.

B. **Basis for warrant.** No warrant shall issue except upon a sworn statement of the facts showing probable cause that an offense has been committed. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. Before ruling on a request for a warrant, the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses produced by the affiant, provided that such additional evidence shall be reduced to writing and supported by oath or affirmation. The court also may permit a request for an arrest warrant by any method authorized by Paragraph G of Rule 8-207 NMRA for search warrants and may issue an arrest warrant remotely provided the requirements of Paragraph H of Rule 8-207 NMRA and this rule are met.

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

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

[As amended by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013; as amended by Supreme Court Order No. 15-8300-008, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Paragraph A was amended in 2013 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 8-207 NMRA and the related committee commentary for more information.

Paragraph C was amended in 2019 to be consistent with Rule 5-208 NMRA, which was amended at the same time.

[Adopted by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013; as amended by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019, removed the showing of good cause requirement for a municipal court to issue a warrant for arrest, and revised the committee commentary; and in Paragraph C, after “in its discretion”, deleted “and for good cause shown”.

The 2015 amendment, approved by Supreme Court Order No. 15-8300-008, effective December 31, 2015, designated the first sentence of former Paragraph A as present Paragraph A, and designated the remainder of former Paragraph A as present Paragraph B; in Paragraph A, after “court may issue”, added “either”, and after “arrest warrant or”, added “a”; in Paragraph B, added the heading “Basis for warrant”, and in the first sentence, after “No warrant”, deleted “or summons”; designated former Paragraph B as present Paragraph C, and after “the issuance of”, deleted “a warrant for” and added “an”, and after “arrest”, added “warrant”; and added Paragraph D.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013, provided for alternate methods for requesting and issuing arrest warrants; and in Paragraph A, added the last sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Private citizen's right to institute mandamus to compel a magistrate or other appropriate official to issue a warrant, or the like, for an arrest, 49 A.L.R.2d 1285.

22 C.J.S. Criminal Law §§ 334 to 336; 72 C.J.S Process § 2 et seq.

8-204. Service of summons.

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

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

C. **Execution; form.** The summons shall be substantially in the form approved by the Supreme Court. The summons shall be signed by the judge or the clerk and be directed to the defendant, and must contain

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

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

(3) the name and address of the prosecuting attorney, if any; otherwise the address of the law enforcement entity filing the complaint.

D. **Summons; time to appear.** Service shall be made at least ten (10) days before the defendant is required to appear. If service is made by mail an additional three (3) days shall be added under Rule 8-104 NMRA. Service by mail is complete on mailing.

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

F. **Summons; by whom served.** In criminal actions any process may be served by the chief of police or any authorized full-time law enforcement officer, or any other person who is over the age of eighteen (18) years and not a party to the action. Service may be made outside the municipal boundaries when provided by law. Service outside the municipal limits shall be made in the manner provided by law.

G. **Summons; service by mail.** A summons and complaint may be served on any defendant by the clerk of the court, the judge, or the prosecutor mailing a copy of the summons and a copy of the complaint, by first-class mail, postage prepaid, to the person to be served. If a defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court, after review of the file to determine whether the summons was returned as not delivered, may

(1) issue a warrant for the defendant's arrest, and thereafter the action shall be treated as if the warrant had been the first process in the action; or

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

H. **Summons for initial appearance; returned mail.**

(1) 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

(a) direct service to be made by a person authorized by Paragraph F of this rule in the manner prescribed by Paragraph I of this rule; or

(b) 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.

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

I. **Summons; how served.** Service may be made as provided by law

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

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

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

J. **Return.** If service is made by mail under Paragraph G of this rule, return shall be made by the defendant appearing as required by the summons. If service is by personal service under Paragraph I of this rule, the person serving the process shall make proof of service to the court promptly and in any event within the time during which the person served must respond to the process. When service is made by a full-time law enforcement officer, proof of service shall be by certificate; and when made by a person

other than a full-time law enforcement officer, proof of service shall be made by affidavit. Where service within the state includes mailing, the return shall state the date and place of mailing.

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

[As amended, effective January 1, 1990; 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 H 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. Paragraph H 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 Paragraphs (G)(1) and (H)(1)(b) 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 8-203 and 8-205 NMRA.

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

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-026, effective December 31, 2022, required the municipal court judge, prior to taking any action when a defendant fails to appear, to review the file to determine whether the summons was returned as not delivered, provided additional options for the court to address the situation in which a mailed summons for a defendant's initial appearance has been returned as not delivered and the defendant has failed to appear at the time and place specified in the summons, made certain technical amendments, and added the Committee commentary; in Paragraph C, in the introductory clause, after "The summons shall be", added "substantially in the form approved by the Supreme Court. The summons shall be", and deleted Subparagraph C(4); in Paragraph D, after "Rule 8-104", added "NMRA"; in Paragraph G, after the second occurrence of "court", added "after review of the file to determine whether the summons was returned as not

delivered”; added a new Paragraph H and redesignated former Paragraphs H through J as Paragraphs I through K, respectively; and in Paragraph J, after the second occurrence of “Paragraph”, deleted “H” and added “I”.

The 1989 amendment, effective for cases filed in the municipal courts on or after January 1, 1990, redesignated the first two sentences of the introductory paragraph of former Paragraph B as present Paragraph E and rewrote the remaining language of former Paragraph B and redesignated it as present Paragraph H; deleted former Paragraph C, relating to proof of service; and added present Paragraphs B to G, I and J.

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62B Am. Jur. 2d Process §§ 105 to 138.

Service of process upon actual agent of foreign corporation in action based on transactions outside of state, 30 A.L.R. 255, 96 A.L.R. 366.

Foreign railway corporation as subject to service of process in state in which it merely solicits interstate business, 46 A.L.R. 570, 95 A.L.R. 1478.

Constitutionality, construction, and applicability of statutes relating to service of process on unincorporated association, 79 A.L.R. 305.

Constitutionality, construction and effect of statute providing for service of process upon statutory agent in action against foreign corporation as regards communication to corporation of facts of service, 89 A.L.R. 658.

Power of state to provide for service, other than personal, of process upon nonresident individual doing business within the state so as to subject him to judgment in personam, 91 A.L.R. 1327.

Who, other than public official, may be served with process in action against foreign corporation doing business in state, 113 A.L.R. 9

Substituted service, service by publication, or service out of the state, in action in personam against resident or domestic corporation, as contrary to due process of law, 126 A.L.R. 1474, 132 A.L.R. 1361.

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

Leaving process or notice at residence as compliance with requirement that party be served "personally" or "in person," "personally served," etc., 172 A.L.R. 521.

Cessation by foreign corporation of business within state as affecting designation of agent for service of process, 77 A.L.R.2d 676.

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

Who is "general" or "managing" agent of foreign corporation under statute authorizing service of process on such agent, 17 A.L.R.3d 625.

Construction of phrase "usual place of abode," or similar terms referring to abode, residence, or domicil, as used in statutes relating to service of process, 32 A.L.R.3d 112.

Stipulation extending time to answer or otherwise proceed as waiver of objection to jurisdiction for lack of personal service: state cases, 77 A.L.R.3d 841.

72 C.J.S. Process § 26 et seq.

8-205. Arrest warrants.

A. **To whom directed.** Whenever a warrant is issued in an action, including by any method authorized by Rule 8-207(G) NMRA, it shall be directed to a municipal police officer, a full-time salaried state or county law enforcement officer, a campus police officer, or an Indian tribal or pueblo law enforcement officer. The person obtaining the warrant shall cause it to be entered into a law enforcement information system. A copy of the warrant shall be docketed in the case file. Upon arrest, the defendant shall be brought before the court without unnecessary delay.

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

C. **Return.** The arresting officer shall make a return of the warrant, or any duplicate original, to the court 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 case file.

D. **Duty to remove warrant.** If the warrant has been entered into a law enforcement information system, upon arrest of the defendant, the person executing the warrant shall

cause it to be removed from the system. If the court withdraws the warrant, the court shall cause the warrant to be removed from the warrant information system.

[As amended, effective July 1, 1999; March 1, 2000; as amended by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013; 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. — Paragraph A was amended in 2013 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 8-207 NMRA and the related committee commentary for more information.

[Adopted by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013.]

ANNOTATIONS

The 2020 amendment, approved by Supreme Court Order No. 20-8300-008, effective December 31, 2020, in Paragraph A, after “authorized by”, deleted “Paragraph G of”, after “Rule 8-207”, added “(G)”, and after “a campus”, deleted “security” and added “police”; and in Paragraph C, after “to the court”, deleted “which issued” and added “as captioned on”.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013, provided for alternate methods for requesting and issuing arrest warrants; in Paragraph A, in the first sentence, after "issued in an action", added "including by any method authorized by Paragraph G of Rule 8-207 NMRA"; and in Paragraph C, after "shall make a return", added "of the warrant, or any duplicate original".

The 2000 amendment, effective March 1, 2000, made gender neutral changes in Paragraph B.

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

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

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

For the requirement that municipal peace officers obtain fingerprints of those arrested for DWI offenses, *see* Section 29-3-8 NMSA 1978.

For criminal process in driving while under the influence of intoxicating liquor or drugs, *see* Section 35-14-2 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 408 to 410, 421, 422.

Necessity of showing warrant upon making arrest under warrant, 40 A.L.R. 62.

Liability for false imprisonment, of officer executing warrant for arrest as affected by its being returnable to wrong court, 40 A.L.R. 290.

Power of private person to whom warrant of arrest is directed to deputize another to make the arrest or to delegate his power in that respect, 47 A.L.R. 1089.

Territorial extent of power to arrest under a warrant, 61 A.L.R. 377.

Civil liability of officer making arrest under warrant as affected by his failure to exhibit warrant, or to state fact of, or substance of, warrant, 100 A.L.R. 188.

22 C.J.S. Criminal Law §§ 334 to 339.

8-206. Bench warrants.

A. **Failure to appear or act.** If any person who has been ordered by the municipal judge to appear at a certain time and place or to do a particular thing fails to appear at such specified time and place in person or by counsel when permitted by these rules or to do the thing so ordered, the court may issue a warrant for the person's arrest. Unless the municipal judge has personal knowledge of such failure, no bench warrant shall issue except upon a sworn written statement of probable cause. The court shall not issue a bench warrant for failure to pay fines, fees, or costs unless the defendant has failed to timely respond to a summons issued in accordance with Rule 8-206.1 NMRA.

B. **Law enforcement information system.** If a bench warrant is issued in a driving while under the influence of intoxicating liquor or drugs proceeding, upon execution of the bench warrant, the court shall cause the warrant to be entered into a warrant information system maintained by a law enforcement agency. A copy of the warrant shall be docketed in the case file.

C. **Execution and return.** A bench warrant shall be executed and returned in the same manner as an arrest warrant. The return shall be docketed in the case file.

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

[As amended, effective July 1, 1999; as amended by Supreme Court Order No. 17-8300-001, effective for all cases pending or filed on or after April 17, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-001, effective April 17, 2017, prohibited the municipal court from issuing a bench warrant for failure to pay fines, fees, or costs unless the defendant has failed to timely respond to a summons; and in Paragraph A, added the last sentence of the paragraph.

The 1999 amendment, effective July 1, 1999, added Paragraphs B and D, redesignating former Paragraph B as Paragraph C, and in Paragraph C, in the first sentence, deleted "issued pursuant to Rule 8-205 of these rules" and made a minor stylistic change, and added the last sentence.

Compiler's notes. — The 2015 amendment to Rule 8-206 NMRA, approved by Supreme Court Order No. 15-8300-015, effective December 31, 2015, was withdrawn by Supreme Court Order No. 15-8300-025, effective December 1, 2015.

Cross references. — For form on affidavit for bench warrant, *see* Rule 9-211 NMRA.

For forms on bench warrant and return, *see* Rule 9-212 NMRA.

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

"Personal knowledge" exception. — The "personal knowledge" exception to the affidavit requirement appears to recognize that there is no point in the municipal judge executing an affidavit when the judge has personal knowledge of facts constituting probable cause. *State v. Pinela*, 1992-NMCA-025, 113 N.M. 627, 830 P.2d 179.

Municipal judge had sufficient "personal knowledge" to support the bench warrant from his review of the information on the unsworn affidavit from the clerk's office. *State v. Pinela*, 1992-NMCA-025, 113 N.M. 627, 830 P.2d 179.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 22 C.J.S. Criminal Law § 355.

8-206.1. Payment of fines, fees, and costs.

A. **Payment arrangements.** The court shall assess the defendant's ability to pay any fines, fees, or costs at the time of sentencing and shall consider the following types of payment arrangements in the order of priority set forth below.

(1) ***Full payment at time of sentencing*.** If the defendant is able to pay the full amount at the time of sentencing, the court shall require the defendant to do so.

(2) ***Full payment within thirty (30) days of sentencing*.** If the defendant cannot pay the full amount at the time of sentencing but will be able to pay within thirty (30) days, the court shall require the defendant to do so.

(3) ***Agreement to pay*.** If the defendant cannot pay the full amount within thirty (30) days after the date of sentencing, the court may permit the defendant to enter into an agreement to pay in installments. The court shall retain the authority to enforce an agreement to pay regardless of whether the defendant remains on probation or whether the defendant was placed on probation at all. An agreement to pay shall

(a) be based on the defendant's individual circumstances;

(b) require the largest possible payment amounts that the judge determines the defendant can make successfully;

(c) require the first installment to be due no later than thirty (30) days after the date of sentencing;

(d) schedule subsequent installments in intervals of thirty (30) days or less; and

(e) schedule all payments to be made within the shortest practicable period of time.

(4) ***Modification of the agreement to pay*.** The court may, for good cause shown, modify the agreement to pay up to three (3) times, either by allowing the defendant additional time for payment or by reducing the amount of one or more installments. The court shall document the good cause shown with written findings in the case file.

B. **Community service in lieu of payment.** If the court finds at any time that the defendant is unable to pay all or part of the assessed fines, fees, or costs, the court shall permit the defendant to perform community service in lieu of payment of all or part of the assessed fines, fees, or costs owed to the court. The defendant shall receive credit toward the fines, fees, or costs at the rate of the prevailing federal hourly minimum wage or as otherwise required by law. If the defendant performs community service in lieu of payment, all hours must be completed by the deadline set by the court. If the defendant fails to perform community service as ordered by the court, the failure to perform community service shall be treated the same as a failure to pay, and the court shall follow the procedures set forth in Paragraphs C and D of this rule.

C. **Failure to comply; issuance of summons or bench warrant.**

(1) ***Issuance and content of summons*.** If the defendant fails to make a payment as ordered by the court, request a modification of an agreement to pay before

the payment due date, or perform community service by the deadline set by the court, the court shall issue a summons within five (5) days of the deadline. The summons shall

(a) instruct the defendant to either pay or appear at the court within fifteen (15) days after the date that the summons is issued;

(b) if the summons does not set a specific hearing date and time, state that the defendant may request a hearing before the judge and that ability to pay will be addressed at any hearing; and

(c) notify the defendant that a bench warrant shall be issued if the defendant fails to timely respond to the summons.

(2) ***Service of summons*.** The court may serve a summons under this paragraph using any method of service permitted by the Rules of Procedure for the Municipal Courts.

(3) ***Issuance of bench warrant*.** If a defendant fails to comply with a summons issued under Subparagraph (C)(1) of this rule, the court shall issue a bench warrant for failure to pay or perform community service no later than five (5) days after the appearance date on the summons. Once the defendant has been arrested or has surrendered on the warrant, the court shall hold a hearing under Paragraph D of this rule, unless the defendant has satisfied all outstanding obligations to the court by making payment in full or by performing community service in lieu of payment.

(4) ***Subsequent failure to comply*.** The first time the defendant misses a payment under an agreement to pay or fails to perform community service by the deadline set by the court, the court shall follow the procedure set forth in Subparagraphs (C)(1) through (C)(3) of this rule. If the defendant subsequently fails to comply with an order to pay or to perform community service, the court may issue a bench warrant and is not required to issue a summons prior to issuing a bench warrant. Prior to issuing a bench warrant, the court may attempt to contact the defendant and make satisfactory arrangements to address the defendant's noncompliance. Once the court has issued a second bench warrant for failure to comply, the court shall not grant the defendant an extension or a renewed agreement to pay, except upon a written finding of exceptional circumstances.

D. **Failure to comply hearing.** The court shall hold a failure to comply hearing as set forth in a summons, at the defendant's request, or following the defendant's arrest or surrender on a bench warrant, unless the defendant has satisfied all outstanding obligations to the court by making payment in full or performing community service in lieu of payment. If the defendant has been arrested and remains in custody, the court shall hold the hearing within three (3) days of the defendant's arrest. The defendant may appear at the hearing through an audio or audio-visual communication under Rule 8-109A NMRA. At the hearing the court shall determine the basis for the defendant's failure to pay or to perform community service as ordered by the court. If the court finds

that the defendant is financially unable to pay, the court may modify the agreement to pay under Subparagraph (A)(4) of this rule; convert the unpaid fines, fees, or costs to community service; revoke any unpaid portion of a fine; or grant other appropriate relief. If the court finds that the defendant has willfully refused to pay or to perform community service, the court may order the defendant committed to jail under Section 33-3-11 NMSA 1978.

[Adopted by Supreme Court Order No. 17-8300-001, effective for all cases pending or filed on or after April 17, 2017.]

Committee commentary. — If the defendant has failed to pay fines, fees, or costs owed to the court or to perform community service as ordered by the court, the court should issue a summons. The summons may set a specific hearing date and time. Alternatively, the summons may set a deadline by which the defendant must pay, request a modification to the agreement to pay, or request a hearing. In addition to issuing summonses for failure to pay, the court should develop and implement alternative methods for providing supplementary notice to the defendant through automated means, such as automated telephone calls, email messages, or text messages.

If the defendant requests a hearing prior to the issuance of bench warrant under Subparagraph (C)(3) of this rule, the court shall not issue a bench warrant prior to the hearing date.

Prior to assessing jail in lieu of payment, the court must afford the defendant adequate procedural due process protections and determine the defendant's ability to pay. The court must notify the defendant that ability to pay will be addressed at any hearing, provide the defendant with an opportunity to present and dispute information relevant to the defendant's ability to pay, and document any willful failure to pay with written findings in the court file. *See Turner v. Rogers*, 564 U.S. 431, 131 S. Ct. 2507, 2520 (2011). "It shall be a defense that the defendant did not willfully refuse to obey the order of the court or that [the defendant] made a good faith effort to obtain the funds required for the payment." NMSA 1978, § 31-12-3(C) (1993); *see Bearden v. Georgia*, 461 U.S. 660 (1983) (holding that imprisoning a person for failure to pay fines, without considering the reasons for the inability to pay, violates the constitutional guarantee of equal protection).

[Adopted by Supreme Court Order No. 17-8300-001, effective for all cases pending or filed on or after April 17, 2017.]

8-207. 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 violation of a municipal ordinance;

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

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

C. **Form.** A search warrant shall be substantially in the form approved by the Supreme Court.

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

E. **Return.** The return of the warrant, or any duplicate original, shall be made promptly after execution of the warrant to the municipal court issuing the warrant. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if 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. The inventory shall be signed by the officer and the person or persons in whose presence the inventory was taken. The court shall upon request deliver a copy of the inventory to the person from whose possession or premises the property was taken and to the applicant for the warrant.

F. **Probable cause.** As used in this rule, “probable cause” shall be based 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.

G. **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.

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

(1) Before ruling on a request for a warrant the judge may require the affiant to appear personally, telephonically, or by audio-video transmission and may examine under oath the affiant and any witnesses produced by the affiant, 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 8-112 NMRA.

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

[As amended by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013; 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. — In 2013, Paragraphs G and H were added to permit multiple methods for requesting and issuing warrants. *See* Rule 5-211(F) NMRA and the related committee commentary for more information.

It is the obligation of each court to track the warrants it has issued and the warrants returned to it. The requirement in Paragraph H(3) of this rule that the judge file a duplicate original of a warrant issued remotely reaffirms this existing duty. Warrants issued via traditional means should already be tracked. Warrants issued remotely are no different. If a judge is concerned that filing a warrant prematurely may create a public and law enforcement safety issue, the warrants may be filed under seal, provided an appropriate order is entered in accordance with Paragraph F of Rule 8-112 NMRA.

[Adopted by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-016, effective December 31, 2017, provided that a request for a search warrant should be made in writing whenever possible, and made certain technical revisions to the rule; in Paragraph D, after “affidavit for search warrant”, deleted “and” and added “a copy of”; in Paragraph E, after “property was taken, if”, deleted “they are” and added “the person is”; in Paragraph F, after “shall be based”, deleted “upon” and added “on”; in Paragraph G, in the introductory clause, after “following methods”, added “provided that the request should be made in writing whenever possible”; and in Subparagraph H(1), after “provided that”, deleted “such” and added “any”.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013, provided for multiple methods for requesting and issuing warrants; in Paragraph B, in the second sentence, after "The warrant", added "shall state the date and time it was issued by the judge and"; in Paragraph E, in the first sentence, after "The return", added "of the warrant, or any duplicate original"; added Paragraph G; in Paragraph H, added the title of the paragraph; in Subparagraph (1) of Paragraph H, after "for a warrant the", deleted "court" and added "judge" and after "affiant to appear personally", added "telephonically, or by audio-video transmission"; and added Subparagraphs (2) through (4) of Paragraph H.

Cross references. — For form on affidavit for search warrant, *see* Rule 9-213 NMRA.

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

For application for inspectorial search order, *see* Rule 9-801 NMRA.

For forms on inspection order and return, *see* Rule 9-802 NMRA.

Showing of probable cause is not limited to written statements. — A "showing" of probable cause required under Article II, Section 10 of the New Mexico Constitution is not limited to a writing that the issuing judge sees rather than hears or ascertains by other means. Rather, the plain meaning of "showing" as used in Article II, Section 10 is a presentation or statement of facts or evidence that may be accomplished through visual, audible, or other sensory means. *State v. Boyse*, 2013-NMSC-024, *rev'g* 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

A search warrant may be obtained by telephone. — Where a police officer, who was investigating cruelty to animals, prepared a detailed, type-written affidavit as part of an application for a search warrant of defendant's property; the officer contacted the on-call magistrate judge by telephone; over the telephone, the judge administered an oath to the officer who then read the written affidavit to the judge; the judge approved the search warrant over the telephone; and the officer noted the judge's approval on the search warrant form and executed the search warrant, the search warrant was valid because Article II, Section 10 of the New Mexico Constitution allows for requesting and approving search warrants by telephone. *State v. Boyse*, 2013-NMSC-024, *rev'g* 2011-NMCA-113, 150 N.M. 712, 265 P.3d 1285.

Citizen-informer rule. — In order to apply the citizen-informer rule, the affidavit must affirmatively set forth circumstances which would allow a neutral magistrate to determine the informant's status as a citizen-informer. *State v. Hernandez*, 1990-NMCA-127, 111 N.M. 226, 804 P.2d 417.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Searches and Seizures § 108 et seq.

Preventing, obstructing, or delaying service or execution of search warrant as contempt, 39 A.L.R. 1354.

Illustrations of distinction, as regards search and seizure, between papers or other articles which merely furnish evidence of crime, and the actual instrumentalities of crime, 129 A.L.R. 1296.

Previous illegal search for or seizure of property as affecting validity of subsequent search warrant or seizure thereunder, 143 A.L.R. 135.

Authority to consent for another to search and seizure, 31 A.L.R.2d 1078.

Issuance of second search warrant after lapse of time for executing first, without additional showing of probable cause, 100 A.L.R.2d 525.

Search and seizure: necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

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

What constitutes compliance with knock-and-announce rule in search of private premises - state cases, 85 A.L.R.5th 1.

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

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

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

79 C.J.S. Searches and Seizures § 128 et seq.

8-208. Service and filing of pleadings and other papers.

A. **Service; when required.** Unless the court otherwise orders, every pleading subsequent to the citation or complaint, every written order, every paper relating to conditions of release or bond, every paper relating to discovery, every written motion other than one which may be heard ex parte, and every written notice, demand, and similar paper shall be served upon each of the parties.

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

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

(1) "Delivering a copy" means:

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

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 8-209 NMRA or Rule 8-210 NMRA;

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

(d) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion 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 citation or complaint required to be served upon a party, together with a certificate or affidavit of service indicating the date and method of service, shall be filed with the court within a reasonable time after service.

E. **Filing with the court defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note on the papers 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 8-209 NMRA or Rule 8-210 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, except as provided in Paragraph A of Rule 8-201 NMRA, which prohibits the filing of an unsigned citation or complaint.

F. **Proof of service.** Except as otherwise provided in these rules or by order of court, proof of service shall be made by the certificate of an attorney of record, or if made by any other person, by the affidavit of such person. Such certificate or affidavit shall be filed with the clerk or endorsed on the pleading, motion, or other paper required to be served.

G. **Filing of motions.** Whenever, by these rules, a party is required to "move" within a specified time or a motion is required to be "made" within a specified time, the motion shall be deemed to be made at the time it is filed or at the time it is served, whichever is earlier.

H. **Filing and service by the court.** Unless otherwise ordered by the court, the court shall serve all written court orders and notices of hearing on the parties. The court may file papers before serving them on the parties. For papers served by the court, the

certificate of service need not indicate the method of service. For purposes of Rule 8-104(C) NMRA, papers served by the court shall be deemed served by mail, regardless of the actual manner of service, unless the court's certificate of service unambiguously states otherwise. The court may, in its discretion, serve papers in accordance with the method described in Subparagraph (C)(1)(e) of this rule.

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

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

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

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

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

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

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

[As amended, effective March 1, 2000; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-007, effective for all cases pending or filed on or after December 31, 2016.]

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

[Adopted by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-007, effective December 31, 2016, provided an exception to the rule that the clerk of the municipal court shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in the proper form; and in Paragraph (E), in the fourth sentence, after "practices", added "except as provided in Paragraph A of Rule 8-201 NMRA, which prohibits the filing of an unsigned citation or complaint."

The 2014 amendment, approved by Supreme Court Order No. 14-8300-016, effective December 31, 2014, authorized the court to designate a place of service on attorneys; provided for the filing and service of orders and notices by the court; provided for the filing and service of documents by an inmate; in Paragraph A, after "complaint, every", added "written" and after "written order", deleted "not entered in open court"; in Paragraph B, in the second sentence, after "last known address", deleted "or, if no address is known, by leaving it with the clerk of the court"; in Paragraph C, added "Definitions. As used in this rule:", in Paragraph C (1), changed "Delivery of" to "Delivering", after "a copy", deleted "within this rule", and after "or to the party", deleted "in the office", added Paragraph C (1)(e) and deleted former Paragraph C (5) which provided that delivery included placing a copy in a box maintained by the attorney for purposes of serving the attorney; in Paragraph D, in the title added "by a party" and after "affidavit of service", added "indicating the date and method of service"; in Paragraph E, in the first sentence, after "The filing of", deleted "pleadings and other" and after "shall note on the", deleted "form" and added "papers", deleted the former third sentence which provided that a paper filed by electronic means constituted a written paper, and added the current third sentence; and added Paragraphs H and I.

The 2000 amendment, effective March 1, 2000, amended this rule to conform it with Rules 6-209 and 7-209 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61B Am. Jur. 2d Pleading §§ 899, 901.

71 C.J.S. Pleading §§ 407 to 415.

8-209. 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.

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

C. **Paper size and quality.** No facsimile copy shall be filed with the court unless it is: on plain paper eight and one-half by eleven (8 1/2 x 11) inches in size; legible; and typewritten or printed using a pica (10 pitch) type style or a twelve (12) point typeface. The right, left, top and bottom margins shall be at least one (1) inch. The pages shall be consecutively numbered at the bottom.

D. **Documents faxed directly to the court.** A pleading or paper may be faxed directly to the court if:

(1) the court has a plain paper fax machine;

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

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

(4) the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and

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

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

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

G. **Transmission by facsimile.** A notice, order, writ, pleading or paper may be faxed to a party or attorney who has:

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

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

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

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

H. **Proof of service by facsimile.** Proof of facsimile service must include:

(1) a statement that the pleading or paper was transmitted by facsimile transmission and that the transmission was reported as complete and without error;

(2) the time, date and sending and receiving facsimile machine telephone numbers; and

(3) the name of the person who made the facsimile transmission.

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

J. **"Signed" defined.** As used in these rules, "signed" includes an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[Adopted, effective January 1, 1997.]

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

8-210. Electronic service and filing of pleadings and other papers.

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

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

(2) "document" includes the electronic representation of pleadings and other papers.

B. **Registration for electronic service.** The clerk of the Supreme Court shall maintain a register of attorneys who agree to accept documents by electronic transmission. The register shall include the attorney's name and preferred electronic mail address.

C. **Electronic transmission by the court.** The court may send any document by electronic transmission to an attorney registered pursuant to Paragraph B of this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Filing by electronic transmission.** Documents may be filed by electronic transmission in accordance with this rule and any technical specifications for electronic transmission:

(1) in any court that has adopted technical specifications for electronic transmission;

(2) if a fee is not required or if payment is made at the time of filing.

E. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single transmission is necessary.

F. **Service by electronic transmission.** Service pursuant to Rule 8-208 of these rules may be made by electronic transmission on any attorney who has registered pursuant to Paragraph B of this rule and on any other person who has agreed to service in this manner.

G. **Time of filing.** If electronic transmission of a document is received before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If electronic transmission is received after the close of business, the document will be considered filed on the next business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative.

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

I. **Proof of service by electronic transmission.** Proof of service by electronic transmission shall be made to the court by a certificate of an attorney or affidavit of a non-attorney and shall include:

(1) the name of the person who sent the document;

(2) the time, date and electronic address of the sender;

(3) the electronic address of the recipient;

(4) a statement that the document was served by electronic transmission and that the transmission was successful.

[Approved, effective July 1, 1997.]

ARTICLE 3
Pleadings and Motions

8-301. General rules of pleading; captions.

A. **Caption.** Pleadings and papers filed in the municipal court shall have a caption or heading which shall briefly include:

(1) the name of the court as follows:

"State of New Mexico

City of _____

Municipal Court";

(2) the names of the parties; and

(3) a title that describes the cause of action or relief requested. The title of a pleading or paper shall have no legal effect in the action.

B. **Plaintiff.** All actions shall be brought in the name of the municipality as plaintiff.

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

[As amended, effective December 17, 2001.]

ANNOTATIONS

The 2001 amendment, effective December 17, 2001, inserted "captions" in the rule heading; added Paragraph A; redesignated former Paragraphs A and B as present Paragraphs B and C; and deleted former Paragraph C, requiring that the name of the defendant be stated in the caption of every pleading.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 1, 2, 74 to 76.

71 C.J.S. Pleading §§ 5, 9.

8-302. Pleas allowed.

A. **Pleas and defenses.** The plea shall be one of the following: guilty, not guilty, or no contest. No other pleas shall be permitted. A plea of not guilty shall not operate as a waiver of any defense or objection. Defenses and objections not raised by the plea shall be asserted in the form of motions to dismiss or for appropriate relief.

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

C. **Rejection of pleas.** The court shall reject a plea of guilty or no contest if justice would not be served by acceptance of such plea.

[As amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, removed the plea of not guilty by reason of insanity from the list of pleas permitted within municipal court jurisdiction; in Paragraph A, in the heading, deleted “allowed” and added “and defenses”; added “or no contest”, deleted “not guilty by reason of insanity or nolo contendere”, and “or not guilty by reason of insanity”, deleted “If the defendant pleads not guilty by reason of insanity, the municipal court shall transfer the action to the district court pursuant to Rule 8-507 of these rules.” and added the last sentence of the paragraph; deleted former Paragraph B and redesignated former Paragraph C as new Paragraph B; in Paragraph B, in the heading, added “Failure or”, and added “or stands mute”; and added a new Paragraph C.

8-303. Amendment of complaints and citations.

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

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

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

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

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

[As amended, effective May 15, 2001.]

ANNOTATIONS

The 2001 amendment, effective May 15, 2001, inserted "or citation" following "complaint" in the first and last sentences and substituted "if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced" for "or to charge a different offense" in the last sentence in Subsection A; redesignated former Subsection B as present Subsection E; and added present Subsections B, C, and D, conforming this rule to Rule 5-204.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading § 745 et seq.

71 C.J.S. Pleading §§ 275 to 322.

8-304. Motions.

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

B. **Motion requirements.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions shall be served on each party as provided by Rule 8-208 NMRA.

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 the opposing party shall accompany the motion. The motion is not granted until the order is approved by the court.

D. **Opposed motions.** The motion shall recite that concurrence of the opposing party was requested or shall specify why no such request was made. The moving party shall request concurrence from the opposing party unless the motion is a

(1) motion to dismiss;

(2) motion regarding bonds and conditions of release;

(3) motion for new trial;

(4) motion to suppress evidence; or

(5) motion to modify a sentence under Rule 8-801 NMRA.

Notwithstanding the provisions of any other rule, a party 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 or by order of the court, if a party wants to file a written response to a motion, the written response shall be filed and served 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.

F. **Suppression of evidence.**

(1) A person aggrieved by a search and seizure may move for the return of the property and to suppress its use as evidence; and a person aggrieved by a confession, admission, or other evidence obtained through allegedly unconstitutional means may move to suppress such evidence.

(2) Unless otherwise ordered by the court, a motion to suppress shall be filed at least twenty (20) days before trial or the time specified for a motion hearing, whichever is earlier. Except for good cause shown, a motion to suppress shall be filed and decided prior to trial.

(3) Unless otherwise ordered by the court, the prosecution shall file a written response to a motion to suppress within fifteen (15) days after service of the motion. If the prosecution fails to file a response within the prescribed time period, the court may rule on the motion with or without a suppression hearing.

G. **Motions to reconsider.** A party may file a motion to reconsider any ruling made by the court 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. The court may rule on a motion to reconsider with or without a hearing.

[As amended, effective January 1, 1987; September 1, 1990; as amended by Supreme Court Order No. 06-8300-037, effective March 1, 2007; as amended by Supreme Court Order No. 13-8300-044, effective for all cases filed or pending on or after December 31, 2013; 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. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — Although Paragraph E does not require a written response to every motion, a court may order a party to file a written response to a motion. Alternatively, to facilitate docket and case management, courts are encouraged to issue scheduling orders with specific deadlines for written motions and responses. To the extent of any conflict, the deadlines in a court order supersede the deadlines in this rule.

A motion to suppress evidence under Paragraph F of this rule may be used to suppress or exclude evidence obtained through an unlawful search and seizure or obtained in violation of any constitutional right. *See, e.g., State v. Harrison*, 1970-NMCA-025, 81 N.M. 324, 466 P.2d 890 (motion to exclude lineup identification).

In 2017, the committee moved the suppression provisions from Paragraph B to Paragraph F of this rule and added new time deadlines for motions to suppress and for responses. If a party cannot meet the time deadline for filing either a motion to suppress or a response, the party may ask the court, in its discretion, to grant a time extension under Rule 8-104(B) NMRA, a continuance under Rule 8-601(A) NMRA, or an extension of the time for commencement of trial under Rule 8-506(C) NMRA.

The paragraph addressing suppression motions previously was amended in 2013 in response to *City of Santa Fe v. Marquez*, 2012-NMSC-031, 285 P.3d 637. *Marquez* held that, absent good cause shown, motions to suppress must be filed prior to trial and suppression issues must be adjudicated prior to trial in order to preserve the state's right to appeal any order suppressing evidence. *Id*. ¶ 28; *see* Rule 5-212(C) NMRA and committee commentary. Prior to the entry of a final judgment in municipal court, the prosecution may obtain judicial review of an order suppressing evidence by dismissing the charges and reinstating the charges in district court. *See State v. Heinsen*, 2005-NMSC-035, ¶¶ 1, 23, 25, 28, 138 N.M. 441, 121 P.3d 1040; *see also* Rule 8-506.1 NMRA. But if the municipal court enters an order at trial suppressing evidence and concludes that any remaining evidence is insufficient to proceed against the defendant, the defendant is acquitted, and the defendant's double jeopardy rights preclude the municipality from appealing. *See Marquez*, 2012-NMSC-031, ¶ 16; *State v. Lizzol*,

2007-NMSC-024, ¶ 15, 41 N.M. 705, 160 P.3d 886. Adjudicating suppression issues prior to trial ensures that the municipality will be able to exercise its right to appeal any order suppressing evidence.

If a defendant raises a suppression issue at trial, the trial judge may order a continuance under Rule 8-601(A) in order to ascertain whether there is good cause for the defendant's failure to raise the issue prior to trial. *See Marquez*, 2012-NMSC-031, ¶ 16. 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 motion and hold a suppression hearing. Absent good cause shown, the judge may deny the motion for failure to comply with the rule.

Paragraph G was added in 2019 to affirmatively provide for motions to reconsider, which have long been recognized in common law though not in our rules. *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.

[Adopted by Supreme Court Order No. 13-8300-044, effective for all cases filed or pending on or after December 31, 2013; 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. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019.]

ANNOTATIONS

The 2019 amendment, approved by Supreme Court Order No. 19-8300-018, effective for all cases pending or filed on or after December 31, 2019, provided for motions to reconsider, provided that motions to reconsider may be filed at any time before entry of the judgment and sentence, provided that the filing of a motion to reconsider a judgment and sentence within the permissible time period for initiating an appeal will toll the time to file the appeal, and revised the committee commentary; and added Paragraph G.

The 2017 amendment, approved by Supreme Court Order No. 17-8300-016, effective December 31, 2017, rewrote the section related to suppression of evidence, made technical revisions, and revised the committee commentary; deleted former Paragraph B, which related to suppression of evidence, and redesignated former Paragraphs C through F as Paragraphs B through E, respectively; in Paragraph B, changed the heading from "Motions and other papers" to "Motion requirements"; in Paragraph C, after "opposing", deleted "counsel" and added "party"; in Paragraph D, after each occurrence of "opposing", deleted "counsel" and added "party"; in Paragraph E, after "in

these rules", deleted "any" and added "or by order of the court, if a party wants to file a written response to a motion, the", and after "shall be filed", added "and served"; and added a new Paragraph F.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-044, effective December 31, 2013, required that motions to suppress be filed and determined prior to trial; and added Subparagraph (2) of Paragraph B.

The 2006 amendment, approved by Supreme Court Order No. 06-8300-037, effective March 1, 2007, deleted former Paragraph B providing motions may be written or oral; deleted former Paragraph D relating to notice of hearings; relettered former Paragraph C as Paragraph B and added Paragraphs C through E to conform this rule with Rule 5-120 NMRA.

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, inserted "before trial" near the end of Paragraph A; deleted the second and third sentences of Paragraph B, relating to supporting or opposing briefs or affidavits; and deleted former Paragraphs C through F and redesignated former Paragraphs G and H as present Paragraphs C and D, respectively.

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

8-305. Unnecessary allegations.

A. **Examples.** It shall be unnecessary for a complaint or citation to contain the following allegations unless such allegations are necessary to give the defendant notice of the offense 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) exceptions to the offense charged; or

(11) any other similar allegation.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading §§ 31 to 33, 35, 36, 57, 58, 623.

71 C.J.S. Pleading §§ 6, 26, 36.

8-306. Joinder; consolidation; severance.

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

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

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

B. **Consolidation for preliminary examination or trial.** The court may order two or more complaints against a single defendant to be tried or heard on preliminary examination together if the offenses could have been joined in a single complaint. The court may consolidate for preliminary examination or trial of two or more defendants if the offenses charged are based on the same or related acts.

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

[As amended, effective September 1, 1990; September 15, 1997.]

ANNOTATIONS

The 1997 amendment, effective September 15, 1997, deleted "defendants" from the Paragraph A, heading, deleted former Subparagraphs A(2) and A(3) relating to joinder of defendants, rewrote Paragraph B, and inserted "motion for" in the paragraph heading, substituted "defendant or the prosecutor" for "party" and inserted "consolidation" and "in any complaint or by joinder for trial" in Paragraph C.

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, substituted "may, with leave of the court," for "shall" near the beginning of Subparagraph (2) of Paragraph A.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 103 et seq.

Right to severance where two or more persons are jointly accused, 70 A.L.R. 1171, 104 A.L.R. 1519, 131 A.L.R. 917, 54 A.L.R.2d 830.

Right to severance where codefendant has incriminated himself, 54 A.L.R.2d 830.

Appealability of order sustaining demurrer, or its equivalent, to complaint on ground of misjoinder or nonjoinder of parties or misjoinder of causes of action, 56 A.L.R.2d 1238.

Consolidated trial upon several indictments or information against same accused, over his objection, 59 A.L.R.2d 841.

Time for making application for consolidation of actions, 73 A.L.R.2d 739.

Appealability of state court order granting or denying consolidation, severance or separate trials, 77 A.L.R.3d 1082.

1A C.J.S. Actions §§ 105 et seq., 204 et seq.

ARTICLE 4
Release Provisions

8-401. Pretrial release.

A. **Hearing.**

(1) ***Time.*** The court shall conduct a hearing under this rule and issue an order setting 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; or

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

(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.

B. **Right to pretrial release; recognizance or unsecured appearance bond.** Pending trial, the defendant 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, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. 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.

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, if any, 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) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(12) submit to a drug test or an alcohol test on request of a person designated by the court;

(13) return to custody for specified hours after release for employment, schooling, or other limited purposes; and

(14) 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 K 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 8-401.1 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 K of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 8-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. **Order setting conditions of release; contents.**

(1) ***Contents of order setting conditions of release.*** The order setting conditions of release shall

(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;

(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 the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. **Motion for review of conditions of release by the municipal court.**

(1) ***Motion for review.*** If the municipal 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, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) ***Review hearing.*** The municipal court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. 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 file a written order setting forth 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 file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the municipal 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.

H. **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 8-403 NMRA.

I. **Petition to district court.**

(1) ***Defendant must seek review by municipal court before filing petition in district court.*** The defendant may file a petition in the district court for review of the municipal court's order setting conditions of release only after the municipal court has ruled on a motion to review the conditions of release under Paragraph G of this rule. The defendant shall attach to the district court petition a copy of the municipal court order disposing of the defendant's motion for review.

(2) ***Petition; requirements.*** A petition to the district court 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 municipal court;

(b) serve a copy on the prosecutor; and

(c) provide a copy to the assigned district court judge.

(3) ***Municipal court's jurisdiction pending determination of the petition.*** On the filing of a petition under this paragraph, the municipal court's jurisdiction to amend the conditions of release shall be suspended pending determination of the petition by the district court. The municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the municipal court while the district court petition is pending. The 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.

(4) ***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 municipal court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

(5) ***District court order; transmission to municipal court.*** The district court shall promptly send to the municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the municipal court.

J. **Expedited trial scheduling for defendant in custody.** The municipal 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 forty-five (45) days. 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. **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.

L. **Release from custody by designee.** The presiding judge of the municipal court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 8-408 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 8-408 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.

M. **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.

N. **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.

O. **Judicial discretion; disqualification.** Action by any court on any matter relating to pretrial release shall not preclude the subsequent disqualification of a judge under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; by Supreme Court Order No. 08-8300-047, effective December 31, 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

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 District Courts, *see* Rule 5-401 NMRA, the Rules of Criminal Procedure for the Magistrate Courts, *see* Rule 6-401 NMRA, and the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 8-104 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), (G)(2), and (G)(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, if any, 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 about 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").

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 8-401.2 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). Although pretrial release hearings are not required to be a matter of record in the municipal court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. 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 sets forth the procedure for the defendant to file a motion in the municipal court for review of the conditions of release. Paragraph I sets forth the procedure for the defendant to petition the district court for review of the conditions of release set by the

municipal court. Article II, Section 13 of the New Mexico Constitution requires the court to rule on a motion or 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 a 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 J requires the municipal 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 L, a designee must be designated by the presiding municipal court judge in a written court order. A person may not be appointed as a designee if that 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 L and Rule 8-408 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 M of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the municipal 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).

As set forth in Rule 8-106 NMRA, no right to peremptory disqualification exists in the municipal court, but a judge may file 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 No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court No. 22-8300-015, effective December 31, 2022, added the condition that the defendant refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner to an existing list of conditions that the municipal court may impose when setting conditions of release that 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, provided that in cases in which the defendant has been detained for more than forty-five days as a result of inability to post a secured bond or meet the conditions of release, the municipal court shall hold a status hearing in order to review the progress of the case and required the municipal court to issue an appropriate scheduling order if the court determines that insufficient progress has been made in the case, made certain technical, nonsubstantive changes, and revised the committee commentary; in Paragraph D, added a new Subparagraph D(10) and redesignated the succeeding subparagraphs accordingly; and in Paragraph J, added "The court shall hold a status review hearing in any case in which the defendant has been held for more than forty-five (45) days. 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.".

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, provided the mechanism through which a defendant may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution, rewrote the rule to such an extent that a detailed comparison is impracticable, and added the committee commentary.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, in Paragraph A, in the second sentence, changed the phrase "unless the court determines that such release" to the phrase "unless the court makes a written finding that such release" and in the fourth sentence, changed the phrase "If the court determines that release" to the phrase "If the court makes a written finding that release".

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, amended Paragraph A prohibiting the denial of bail prior to conviction of a person charged except when the bond is to be posted by a complaining witness or alleged victim and the court finds the defendant poses a danger to the complaining witness or alleged victim; amended Paragraph A to add the explanatory note relating to the posting of a community bond; and amended Paragraph H to delete the provision permitting the refund of a cash bond to a personal representative or assignor and providing for the return to the payor.

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

The first 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, rewrote Paragraphs A through E; in Paragraph F, inserted "increase or reduce the amount of bail set or" in the first sentence and substituted "If such amendment of the release order" for "If the imposition of such additional or different conditions" at the beginning of the second sentence; in Paragraph G, substituted "Subparagraph (1) or (3)" for "Subparagraph (3)"; and rewrote Paragraph H.

Cross references. — For form on order setting conditions of release and appearance bond, *see* Rule 9-302 NMRA.

For forms on bail bond and justification of sureties, *see* Rule 9-304 NMRA.

For cash receipt, *see* Rule 9-312A NMRA.

For order setting conditions of release, *see* Rule 9-303 NMRA.

For release order and bond, *see* Rule 9-303A NMRA.

For bench warrant, *see* Rule 9-212A NMRA.

For duty of personal representative to take possession of assets of an estate, *see* Section 45-3-709 NMSA 1978.

Constitutional right to bail. — Article II, Section 13 of the New Mexico Constitution affords criminal defendants the right to bail, and although there is a presumption that all persons are bailable pending trial, the right to bail is not absolute under all circumstances; the trial court must give proper consideration to all of the factors in determining conditions of release, and shall set the least restrictive of the bail options and release conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community. *State v. Brown*, 2014-NMSC-038.

Least restrictive bail option is required. — Where trial court determined that defendant was bailable, and made findings that defendant would not likely commit new crimes, that defendant did not pose a danger to anyone, and that defendant was likely to appear if released, and where trial court failed to give proper consideration to all of the factors in determining conditions of release set forth in analogous rule for the district courts, and trial court failed to set the least restrictive of the bail options and release conditions, it was an abuse of discretion to continue the imposition of bond. *State v. Brown*, 2014-NMSC-038.

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

Necessity of acknowledgment of bail bond in open court, 38 A.L.R. 1108.

Bail pending appeal from conviction, 45 A.L.R. 458.

Amount of bail required in criminal action, 53 A.L.R. 399.

Arresting one who has been discharged on habeas corpus or released on bail, 62 A.L.R. 462.

Factors in fixing amount of bail in criminal cases, 72 A.L.R. 801.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 79 A.L.R. 13.

Fault or omission of justice of peace regarding bond, undertaking, or recognizance, as affecting party seeking appeal, 117 A.L.R. 1386.

Dismissal or vacation of indictment as terminating liability or obligation of surety on bail bond, 18 A.L.R.3d 1354.

When is a person in custody of governmental authorities for purpose of exercise of state remedy of habeas corpus - modern cases, 26 A.L.R.4th 455.

Bail: duration of surety's liability on pretrial bond, 32 A.L.R.4th 504.

Bail: duration of surety's liability on posttrial bail bond, 32 A.L.R.4th 575.

Bail: effect on liability of bail bond surety of state's delay in obtaining indictment or bringing defendant to trial, 32 A.L.R.4th 600.

Propriety of applying cash bail to payment of fine, 42 A.L.R.5th 547.

8 C.J.S. Bail § 2 et seq.

8-401A. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 8-401A NMRA, was recompiled and amended as 8-401.1 NMRA, effective for all cases pending or filed on or after July 1, 2017.

8-401B. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 8-401B NMRA, was recompiled and amended as 8-401.2 NMRA, effective for all cases pending or filed on or after July 1, 2017.

8-401.1. Property bond; unpaid surety.

Any bond authorized by Rule 8-401(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.

[Approved effective October 1, 1987; as amended, effective September 1, 1990; 8-401A recompiled and amended as 8-401.1 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, specified in the rule heading that the rule applies to “property bonds”, and revised the citation to the property bond provision in Rule 8-401 NMRA; in the heading, deleted “Bail” and added “Property bond”, in the first sentence, after “authorized by”, deleted “Subparagraph (2) of Paragraph A of”, and after “Rule 8-401”, added “(E)(2)(b) NMRA”.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 8-401A NMRA was recompiled and amended as 8-401.1 NMRA, effective for all cases pending on or after July 1, 2017.

8-401.2. Surety bonds; justification of compensated sureties.

A. **Justification of sureties.** Any bond submitted to the court by a paid surety under Rule 8-401(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 8-401 NMRA in any municipality in which the chief judge of the district court upon concurrence of a majority of the district judges of the district has entered an order finding that the provisions of Paragraph B of this rule will result in the detention of persons otherwise eligible for pretrial release under Rule 8-401 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.

[Approved effective October 1, 1987; as amended, effective September 1, 1990; 8-401B recompiled and amended as 8-401.2 NMRA by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, specified in the rule heading that the rule applies to “surety bonds”, and revised the citation to the surety bond provision in Rule 8-401 NMRA; in the heading, deleted “Bail” and added “Surety”; in Paragraph A, after “by a paid surety”, deleted “pursuant to Paragraph A of” and added “under”, and after “Rule 8-401”, added “(E)(2)(c) NMRA”; in Paragraph B, changed “he” and “his” to “the bondsman” and “the bondsman’s”; in Paragraph C, in the introductory paragraph, deleted each occurrence of “pursuant to” and added “under”, after each occurrence of “Rule 8-401”, added “NMRA”, and changed “he” to “the bondsman”; and in Paragraph D, after “submitted”, deleted “pursuant” and added “under”, and after “exceed ten”, added “(10)”.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-005, former 8-401B NMRA was recompiled and amended as 8-401.2 NMRA, effective for all cases pending on or after July 1, 2017.

8-402. Release.

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

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

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

(2) that the defendant's conduct will not obstruct the orderly administration of justice.

C. **Defendant in custody.** Nothing in this rule shall be construed to prevent the court from releasing pursuant to Rule 8-401 a defendant not released prior to or during trial.

[As amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "defendant" for "person" throughout the rule, deleted "under Rule 8-401" following the first "trial" and made stylistic changes in Paragraph A, inserted "or new trial" in the Paragraph B heading and inserted "or pending any new trial" near the middle of Paragraph B, deleted former Paragraph C relating to release after sentencing, and redesignated former Paragraph D as Paragraph C.

Cross references. — For release pending appeal, *see* Rule 8-703 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 513, 516.

23A C.J.S. Criminal Law §§ 1168, 1169.

8-403. 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. **Motion for revocation or modification of conditions of release.**

(1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor 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.** If the court does not deny the motion on the pleadings, 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.

D. **Initial hearing.**

(1) The court shall hold an initial hearing as soon as practicable, but 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.

(2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.

(3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

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.

(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. The court may

(1) continue the existing conditions of release;

(2) set new or additional conditions of release in accordance with Rule 8-401 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.

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 municipal court enters an order setting new or additional conditions of release and 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 petition the district court for review in accordance with Rule 8-401(I) NMRA. The defendant may petition the district court immediately on the issuance of the municipal court order and shall not be required to first seek review or reconsideration by the municipal court. If, on disposition of the petition by the district court, 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 municipal 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 forty-five (45) days. 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. **Petition to district court for review of revocation order.** If the municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5-403(K) NMRA.

(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 municipal court;

(b) serve a copy on the prosecutor; and

(c) provide a copy to the assigned district court judge.

(2) ***Municipal court's jurisdiction pending determination of the petition.*** On the filing of the petition, the municipal court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the 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 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 under Rule 5-401 NMRA.

(4) ***District court order; transmission to municipal court.*** The district court shall promptly send the order to the municipal court, and jurisdiction over the conditions of release shall revert to the 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.

[Approved, effective July 1, 1988; as amended, effective September 1, 1990; as amended by Supreme Court Order No. 08-8300-047, effective December 31, 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. 18-8300-024, effective for all cases pending or filed on or after February 1, 2019; 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. — 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, 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. These 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.

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 municipal 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 due to "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.

[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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

ANNOTATIONS

The 2022 amendment, approved by Supreme Court Order No. 22-8300-015, effective December 31, 2022, required the municipal court, in cases in which the defendant has been detained for more than forty-five days pending trial, to conduct a status review hearing in order to review the progress of the case, and required the municipal court to issue an appropriate scheduling order if the court determines that insufficient progress has been made in the case, made certain technical, nonsubstantive changes, and revised the committee commentary; and in Paragraph I, added "The court shall hold a status review hearing in any case in which the defendant has been held for more than forty-five (45) days. 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.".

The 2018 amendment, approved by Supreme Court Order No. 18-8300-024, effective February 1, 2019, extended the period of time within which the court must hold an initial hearing when the defendant is not being held in the local detention center and authorized the court to revoke the defendant's release if the court finds that there is probable cause to believe that the defendant committed a crime; in Subparagraph D(1), added "if the defendant is in custody, the hearing shall be held", and added "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"; in Subparagraph F(3)(a), added "that there is either"; added Subparagraph F(3)(a)(i), in Subparagraph F(3)(a)(ii), after "willfully violated" added "any other"; and Subparagraph F(3)(b), added "finds that there is clear and convincing evidence".

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, clarified the procedures 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, and added the committee commentary; in the heading, after "Revocation" added "or modification", and after "release", added "orders"; and deleted former Paragraphs A through C and added new Paragraphs A through J.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, added a new Paragraph B and designated former Paragraph B as Paragraph C.

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, in Paragraph A deleted "Paragraph A of" preceding "Rule 8-401" in Subparagraph (1), deleted former Subparagraph (2), imposing conditions authorized under Paragraph C of Rule 8-401, and redesignated former Subparagraph (3) as present Subparagraph (2); rewrote Paragraph B; and deleted Paragraph C, relating to record on review.

8-406. 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) six (6) months after the posting of the bond if no charges are pending;

(2) at any time prior to entry of a judgment of default on the bond if the municipal attorney approves;

(3) upon surrender of the defendant to the court by an unpaid surety;

(4) upon dismissal of the case without prejudice, unless the case involves a paid surety; or

(5) 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 execution of an unsecured appearance bond, percentage bond, property bond, cash bond, or surety bond under Rule 8-401 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 8-407 NMRA. A paid surety may appear in municipal court without the assistance of an attorney as provided in Rule 8-107 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 8-407 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 civil appeals in accordance with Section 35-15-7 NMSA 1978. An appeal of a judgment or order entered under this rule does not stay the underlying criminal proceedings.

[Effective, October 1, 1987; as amended by Supreme Court Order No. 10-8300-036, 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.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, revised the circumstances under which a bond is automatically exonerated, clarified the provision relating to the discharge of a paid surety's obligation to pay all or part of the bond, clarified the circumstances under which the court may declare a forfeiture of the bond, and added the committee commentary; in the heading, deleted "Bail"; in Paragraph A, in the introductory clause, after "shall be", deleted "only", and after "exonerated", deleted "if the municipal attorney approves" and added "only

under the following circumstances", and added Subparagraphs A(1) through A(5); in Paragraph B, in the heading, after "Surrender of", deleted "an offender" and added "the defendant", deleted "A person who is released upon execution of a bail bond by a paid surety may be arrested by the paid surety if the court has revoked the defendant's conditions of release pursuant to Rule 8-403 NMRA or if the court has declared a forfeiture of the bond pursuant to the provisions of this rule.", after the next occurrence of "paid surety", deleted "delivers" and added "arrests", and after the next occurrence of "defendant", deleted "to the court" and added "under Section 31-3-4 NMSA 1978"; in Paragraph C, deleted "If there is a breach of condition of a bond," and added "If the defendant has been released upon execution of an unsecured appearance bond, percentage bond, property bond, cash bond, or surety bond under Rule 8-401 NMRA, and the defendant fails to appear in court as required", after "Notice of Forfeiture and", deleted "Order to Show Cause" and added "Hearing", after "on the", deleted "clerk of the court" and added "defendant, at the defendant's last known address, and on the surety, if any", and added the last sentence; in Paragraph D, after "surrendered by", deleted "the" and added "a", and after "surety", added "if any"; and in Paragraph E, changed "default judgment" to "judgment of default" throughout, after "not set aside", added "the court shall enter", after "bond", deleted "shall be entered by the court", after "served on the", added "defendant, at the defendant's last known address, and on the", after "surety", added "if any", and deleted the last sentence, which provided "Notwithstanding any provision of law, no other refund of the bail bond shall be allowed".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-036, effective December 10, 2010, in Paragraph B, after "the court may absolve the", deleted "bondsman" and added "the paid surety" and added Paragraph F.

Proper forfeiture of bond. — Where defendant was charged with the felony offense of driving while under the influence of intoxicating liquor, released on bail by the magistrate court in the amount of $5,000 subject to certain conditions, fled to Arkansas after his initial bond hearing, and where appellant bond company, over a year later, took defendant into custody in Arkansas and returned him to New Mexico, the district court did not err in affirming the forfeiture of the bond by the magistrate court where the evidence established that appellant did not take any action in Arkansas prior to the forfeiture hearing in the magistrate court and did not appear at the forfeiture hearing to show "good cause" why the defendant failed to appear at his preliminary hearing, that defendant was not in custody in Arkansas, and that Arkansas did not thwart the efforts of appellant to apprehend defendant; appellant failed to sustain its burden of showing an impediment to defendant's appearance or that defendant was taken into custody prior to the entry of the magistrate court judgment. *State v. Naegle*, 2017-NMCA-017.

8-407. Bail bonds; notice.

By entering into a bond in accordance with the provisions of these rules, the obligors submit to the jurisdiction of the court and irrevocably appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served. Their liability may be enforced on motion of the district attorney or upon the court's own motion

without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court who shall forthwith mail copies to the obligors at their last known addresses.

[Effective, October 1, 1987.]

8-408. Pretrial release by designee.

A. **Scope.** This rule shall be implemented by any person designated in writing by the presiding judge of the municipal court under Rule 8-401(L) 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;

(b) any offense involving domestic violence or a crime against a household member;

(c) negligent use of a deadly weapon;

(d) stalking; or

(e) driving under the influence of intoxicating liquor or drugs.

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 8-401 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 8-401(L) NMRA, the presiding judge of the municipal 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 8-401 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).

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.]

ARTICLE 5
Arraignment and Preparation for Trial

8-501. Arraignment; first appearance.

A. **Explanation of rights.** Upon the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:

(1) the offense charged;

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

(3) the right to bail;

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

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

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

(7) 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.

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. **Entry of plea.** The court shall require the defendant to plead to the complaint under Rule 8-302 NMRA, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty," the defendant remains in custody, the action shall be set for trial as soon as possible.

C. **Insanity or incompetency.** If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense,", after setting conditions of release, the action shall be transferred to the district court. If a question is raised about the defendant's competency to stand trial, the court shall proceed under Rule 8-507.1 NMRA.

D. **Waiver of arraignment.** With prior approval of the court, an arraignment may be waived by the defendant filing a written waiver of arraignment. A waiver of arraignment and entry of a plea shall be substantially in the form approved by the Supreme Court.

E. **Bail.** If the defendant has not been released by the court or the court's designee, the court shall enter an order prescribing conditions of release in accordance with Rule 8-401 NMRA.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07-8300-030, effective December 15, 2007; by Supreme Court Order No. 08-8300-047, effective December 31, 2008; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, provided that the court shall proceed under Rule 8-507.1 NMRA if a question is raised about the defendant's competency to stand trial; added new paragraph designation "C" and redesignated former Paragraphs C and D as Paragraphs D and E, respectively; in Paragraph C, added the heading, deleted "pleads", and added "raises the defense of", and "at the time of commission of an offense", deleted "or if an issue is raised as to the mental competency of the defendant to stand trial", and added the last sentence.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, deleted former Subparagraph (8) of Paragraph A which provided that if the defendant is charged with a crime of domestic violence or a felony, the court shall determine that the defendant has been informed that 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 deleted former Subparagraph (9) of Paragraph A which provided 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.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-030, effective December 15, 2007, added Subparagraphs 7, 8 and 9 of Paragraph A, providing for a determination by the court as to whether the defendant has been counseled on immigration, domestic violence and sex offender registration laws.

The 2000 amendment, effective November 1, 2000, rewrote the rule with little substantive change, except for the deletion of Paragraph E, relating to audio-visual appearances and arraignments.

Cross references. — For a discussion of the consequences of a conviction under the Family Violence Protection Act, 40-13-1 NMSA 1978, and the so-called "Brady Bill", 18 U.S.C. Section 922, *see* Civil Form 4-970 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 433 to 442.

Delay in taking before magistrate or denial of opportunity to give bail as supporting action for false imprisonment, 98 A.L.R.2d 966, 3 A.L.R.4th 1057.

Accused's right to assistance of counsel at or prior to arraignment, 5 A.L.R.3d 1269.

Admissibility of confession or other statement made by defendant as affected by delay in arraignment - modern state cases, 28 A.L.R.4th 1121.

22 C.J.S. Criminal Law §§ 357 to 364.

8-502. Pleas.

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

(1) a plea of guilty; or

(2) a plea of no contest, subject to the approval of the court.

B. **Advice to defendant.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, which shall include an appearance through an audio-visual proceeding under Rule 8-109A NMRA, informing the defendant of and determining that the defendant understands the following:

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

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

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

(4) that if the defendant pleads guilty or no contest there will not be a trial in this case, so that by pleading guilty or no contest the defendant waives the right to a trial;

(5) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if the defendant is

represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea.

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

D. **Plea agreement procedure.**

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

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

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

(4) If the court finds the provisions of the agreement unacceptable after reviewing it and any presentence report, the court will allow the withdrawal of the plea, and the agreement will be void. This subparagraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

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

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

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

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07-8300-030, effective December 15, 2007; by Supreme Court Order No. 08-8300-047, effective December 31, 2008; by Supreme Court Order No. 10-8300-031, effective December 3, 2010.]

Committee commentary. — In 2010, Subparagraph (2) of Paragraph B was amended to make clear that, when advising the defendant of the mandatory minimum and maximum possible penalties, the court must also advise the defendant of any possible sentence enhancements that may result based on any prior convictions the defendant may have. *See Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, 146 N.M. 556, 212 P.3d 1110 (providing that "if the district court is aware of the defendant's prior convictions that would require a sentence enhancement if subsequently requested by the State, the court should inform the defendant of the maximum potential sentence, including enhancements. If the defendant enters a guilty or no contest plea without being advised of possible sentence enhancements and then the possible existence of prior convictions comes to light when the State files a subsequent supplemental information seeking to enhance the defendant's sentence based on those prior convictions, the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information").

Subparagraphs (2), (3) and (4) of Paragraph D were also amended in 2010 to clarify the potential consequences of rejected plea recommendations in light of *State v. Pieri*, 2009-NMSC-019, ¶ 29, 146 N.M. 155, 207 P.3d 1132, which held that "if the court rejects a sentence recommendation or a defendant's unopposed sentencing request, and the defendant was aware that the court was not bound by those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea."

[Adopted by Supreme Court Order No. 10-8300-031, effective December 3, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-031, effective December 3, 2010, in Subparagraph (2) of Paragraph B, after "the plea is offered" added "including any possible sentence enhancements"; in Subparagraph (2) of Paragraph D, in the first sentence, after "entry of a plea of guilty or no contest", deleted "in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed", and added the second sentence; in Subparagraph (3) of Paragraph D, after "the court accepts a plea agreement", added "that was made in exchange for a guaranteed, specific sentence", and added the second sentence; and in Subparagraph (4) of Paragraph D, added the last sentence.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-047, effective December 31, 2008, in Paragraph B, added the phrase "which shall include an appearance through an audio-visual proceeding under Rule 8-109A NMRA" after the phrase "open court"; deleted former Subparagraph (6) of Paragraph B which provided that if the defendant is charged with a crime of domestic violence or a felony, the court shall determine that the defendant understands that 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 deleted former Subparagraph (7) of Paragraph B which provided 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.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-030, effective December 15, 2007, added Subparagraphs 5, 6 and 7 of Paragraph B, providing for a determination by the court as to whether the defendant understands the effect of a plea under immigration, domestic violence and sex offender registration laws.

The 1997 amendment, effective May 1, 1997, rewrote this rule.

Cross references. — For a discussion of the consequences of a conviction under the Family Violence Protection Act, 40-13-1 NMSA 1978, and the so-called "Brady Bill", 18 U.S.C. Section 922, *see* Civil Form 4-970 NMRA.

8-503. Disposition without hearing.

A. **General.** This rule establishes procedures governing disposition of cases within municipal trial court jurisdiction without a hearing. These procedures do not apply to charges of driving while under the influence of intoxicating liquor or drugs, reckless driving, driving while license suspended or revoked, domestic violence, any offense for which a period of incarceration is mandatory, or any offense for which the court imposes a sentence of incarceration. This procedure applies only to penalty assessment

misdemeanors for which the monetary penalty is specified by ordinance, unless the court, by written order, sets forth a schedule of additional offenses for which this procedure may be used together with the monetary penalty ordered by the court for each offense.

B. **Procedure.** An offense shall not be disposed of without a hearing unless the person charged signs an appearance, enters a plea of no contest or guilty and waives trial. Prior to signing the document, the person charged shall be informed of the right to trial, the right to appear personally before the judge, the right to remain silent, the right to present witnesses, and the right to hire a lawyer.

Provision may be made for the person charged to enter an appearance by mail, fax, or e-mail, and, if pleading guilty or no contest, to remit to the court the penalty specified by ordinance or by the court. A remittance to the court of the specified penalty without a signed appearance, plea and waiver form, shall constitute a guilty plea.

[As amended by Supreme Court Order No. 11-8300-051, effective for cases filed on or after January 31, 2012.]

Committee commentary. — Judges should use sound discretion in setting forth additional offenses to which this procedure may be applied. The court may specify which methods of payment will be accepted.

[Adopted by Supreme Court Order No. 11-8300-051, effective for cases filed on or after January 31, 2012.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-051, effective for cases filed on or after January 31, 2012, provided that the rule apply only to penalty assessment misdemeanors for which the monetary penalty is specified by statute and additional offenses specified by the court for which the court has specified the monetary penalty, required that defendants be advised of their constitutional rights before they enter a plea or waive trial, and authorized the court to permit defendants to appear by mail, fax or e-mail and to remit penalties to the court; in Paragraph A, deleted the former language, which authorized the court to establish procedures governing the disposition of cases specified by the court without a hearing, and added the current language; in Paragraph B, in the first paragraph, in the first sentence, after "appearance" changed "plea of no contest and waiver of trial" to "enters a plea of no contest or guilty and waives trial", and in the second sentence, after "right to trial", deleted "and that signing will constitute a plea of no contest and will have the effect of a judgment of guilty by the court" and added the remainder of the sentence; and in Paragraph B, in the second paragraph, after "enter an appearance", deleted "plead no contest and remit the appropriate scheduled penalty to the court by mail" and added the remainder of the sentence, deleted the former second sentence, which required the charging law enforcement officer to inform the defendant of the defendant’s right to trial and that a

plea of no contest is a plea of guilty, to provide a form for an entry of appearance and plea of no contest, and to inform the defendant of the scheduled penalty, and added the current second sentence.

Cross references. — For form on plea of no contest, *see* Rule 9-407 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 22 et seq.

8-504. Discovery.

A. **Disclosure by state.** Not less than ten (10) days before trial, the prosecution shall disclose and make available for inspection, copying, and photographing any records, papers, documents, or recorded statements made by witnesses or other tangible evidence in its possession, custody, and control that are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant.

B. **Disclosure by defendant.** Not less than ten (10) days before trial, the defendant shall disclose and make available to the prosecution for inspection, copying, and photographing any records, papers, documents, or other tangible evidence in the defendant's possession, custody, or control that the defendant intends to introduce in evidence at the trial.

C. **Witness disclosure.** Not less than ten (10) days before trial, the prosecution and defendant shall exchange a list of the names and addresses of the witnesses each intends to call at the trial.

D. **Witness interviews.** Upon request of a party, any witness named on the witness list of the opposing party, other than the defendant, shall be made available for interview prior to trial. Either party may request a subpoena under Rule 8-602 NMRA if good faith efforts to secure the interview have been unsuccessful.

E. **Continuing duty to disclose.** If a party discovers additional material or witnesses that the party previously would have been under a duty to disclose and make available at the time of such previous compliance if it were then known to the party, the party shall promptly give notice to the other party of the existence of the additional material or witnesses.

F. **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued under this rule, the court may:

(1) order the party to provide the discovery or inspection of materials not previously disclosed;

(2) grant a continuance to allow for completion of discovery;

(3) order the party to complete the interview or inspect the materials at the trial setting; or

(4) prohibit the party from calling a witness not disclosed or from introducing in evidence the material not disclosed; or

(5) enter such other order as it deems appropriate under the circumstances, including holding an attorney or party in contempt of court.

G. **"Statement" defined.** As used in this rule, "statement" means:

(1) a written statement made by a person and signed or otherwise adopted or approved by such person;

(2) any mechanical, electrical, or other recording, or a transcription thereof, that is a recital of an oral statement; and

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

[As amended, effective January 1, 1995; September 15, 1997; as amended by Supreme Court Order No. 07-8300-026, effective November 1, 2007; as amended by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — Under Paragraphs A and B, the prosecution and defense are only required to disclose and permit inspection, copying, or photographing of records, papers, documents, and recorded statements of witnesses at the place where the records or statements are located. The expense of copying or photographing is to be paid by the party requesting a copy or photograph.

[As amended by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

The 2015 amendment, approved by Supreme Court Order No. 15-8300-006, effective December 31, 2015, authorized either party to request a subpoena to secure witness interviews when requests for witness interviews have been unsuccessful, and made stylistic changes; throughout the rule, deleted "which" and added "that"; in Paragraph D, added the last sentence; and in the introductory sentence of Paragraph F, after "issued", deleted "pursuant to" and added "under".

The 2007 amendment, approved by Supreme Court Order No. 07-8300-026, effective November 1, 2007, made the second sentence of Paragraph C relating to witness interviews a new Paragraph D; relettered Paragraphs D through G as Paragraphs E

through H; and revised Paragraph F to permit witness interviews and document production at the trial setting.

The 1997 amendment, effective September 15, 1997, added "Not less that ten (10) days before trial" at the beginning of Paragraphs A and B, substituted "disclose" for "produce", inserted "and photographing" and "recorded statements made by witnesses" and made a stylistic change in Paragraph A, inserted "and photographing" and made a stylistic change in Paragraph B, deleted "together with any recorded statement made by the witness" from the end of the first sentence in Paragraph C, and substituted "disclose and make available" for "produce or disclose" in Paragraph D.

The 1995 amendment, effective January 1, 1995, rewrote the rule which formerly read: "At any time during the pendency of the action, upon request of the defendant, the municipal judge may order the prosecution to produce for inspection and copying any records, papers, documents or other tangible evidence in its possession and which are material to the preparation of the defense or are intended for use by the municipality at trial or were obtained from or belong to the defendant. No other discovery proceedings shall be permitted."

Cross references. — For form on order for production, *see* Rule 9-410 NMRA.

For form motion to compel discovery, *see* Criminal Form 9-409A NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery §§ 400 to 467.

Mode of establishing that information obtained by illegal wiretapping has or has not led to evidence introduced by prosecution, 28 A.L.R.2d 1055.

Fingerprints, palm prints or bare footprints as evidence, 28 A.L.R.2d 1115, 45 A.L.R.4th 1178.

Court's power to determine, upon government's claim or privilege, whether official information contains state secrets or other matters disclosure of which is against public interest, 32 A.L.R.2d 391.

Statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 A.L.R.2d 12.

Taxation of costs and expenses in proceedings for discovery or inspection, 76 A.L.R.2d 953.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution, 7 A.L.R.3d 8.

Right of defendant in criminal case to inspection of statement of prosecution's witness for purposes of cross-examination or impeachment, 7 A.L.R.3d 181.

Right of defense in criminal prosecution to disclosure of prosecution information regarding prospective jurors, 86 A.L.R.3d 571.

22A C.J.S. Criminal Law §§ 495 to 500.

8-504.1. Discovery; redaction of witness or victim information.

A. **Scope of rule.** This rule applies to documents and other materials subject to disclosure under Rule 8-504 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 8-504 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 prosecution,

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 prosecution has an obligation to provide discovery to a pro se defendant under Rule 8-504 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 Rule 8-504 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 8-112 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).

[Adopted by Supreme Court Order No. 22-8300-025, effective for all cases pending or filed on or after December 31, 2022.]

8-505. Pretrial conference; scheduling order.

A. **Pretrial conference.** With or without the filing of a motion by a party, the court may order the parties to appear before the court to expedite the disposition of the case. Witnesses may not be called or subpoenaed for a pretrial conference unless ordered by the court.

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

(1) to file and hear motions; and

(2) to complete discovery.

The scheduling order may also include:

(3) the dates for conferences or hearings before trial;

(4) a trial date; and

(5) any other matters deemed appropriate by the court.

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

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

ANNOTATIONS

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

The 2000 amendment, effective March 1, 2000, amended this rule to encourage the use of pre-trial conferences for more than exchange of discovery materials.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21A Am. Jur. 2d Criminal Law §§ 1160, 1163.

Power of court to adopt general rule requiring pretrial conference as distinguished from exercising its discretion in each case separately, 2 A.L.R.2d 1061.

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

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

23A C.J.S. Criminal Law §§ 1192 to 1194.

8-506. Time of commencement of trial.

A. **Time limits for arraignment.**

(1) ***Defendant not in custody.*** A defendant who is not in custody shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. If the defendant fails to appear by the appearance date on a citation, the court shall issue a summons commanding the defendant to appear for arraignment within thirty (30) days of the initial appearance date on the citation.

(2) ***Defendant in custody.*** A defendant who is in custody shall be arraigned on the complaint or citation as soon as practicable, but in any event no later than three (3) days after the date of arrest if the defendant is being held in the local detention center, or no later than five (5) days after the date of arrest if the defendant is not being held in the local detention center.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after whichever of the following events occurs latest:

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

(2) if an evaluation of competency has been ordered, the date an order or remand is filed in the municipal court finding the defendant competent to stand trial;

(3) if a mistrial is declared by the trial court, the date such order is filed in the municipal court;

(4) in the event of a remand from an appeal or request for extraordinary relief, the date the mandate or order is filed in the municipal court disposing of the appeal or request for extraordinary relief;

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

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

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days; or

(3) upon stipulation of the parties and approval of the court, for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted under this subparagraph shall not exceed sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to ninety (90) days;

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the prosecution or the court that prevented the case from being heard within the time period and a written finding that the defendant would not be unfairly prejudiced, the court may grant further extensions that are necessary in the interests of justice; or

(6) if defense counsel fails to appear for trial within a reasonable time, for a period not to exceed one hundred eighty-two (182) days, provided that the aggregate of all extensions granted under this subparagraph may not exceed one hundred eighty-two (182) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial under Paragraph C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.**

(1) The court may deny an untimely petition for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the trial of any person does not commence within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed with prejudice.

[As amended, effective August 1, 1999; August 1, 2004; as amended by Supreme Court Order No. 07-8300-026, effective November 1, 2007; by Supreme Court Order No. 08-8300-057, effective January 15, 2009; as amended by Supreme Court Order No. 13-8300-019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016; 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. —

Exceptional circumstances. — "Exceptional circumstances," as used in this rule, 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. The court may grant an extension for exceptional circumstances only if the court finds that the extension will not unfairly prejudice the defendant. The defendant may move the court to dismiss the case based on a particularized showing that the extension or impending extension would subject the defendant to oppressive pretrial incarceration, anxiety and concern, or the possibility that the defense will be impaired.

Constitutional right to speedy trial. — This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico. *See State v. Urban*, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061 for the factors to be considered.

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

Computation of time. — Time periods are computed under Rule 8-104 NMRA.

Paragraph A. — Paragraph A of this rule requires arraignment within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. For defendants in custody, arraignment is required within three (3) days after the date of arrest if the defendant is being held in the local jail, or five (5) days after the date of arrest, if the defendant is being held in another jurisdiction. A failure to arraign the defendant within the time limitation will not result in a dismissal of the charge unless the defendant can show some prejudice due to the delay.

Paragraph B. — A violation of Paragraph B of this rule can result in a dismissal with prejudice under Paragraph E of this rule. *See also State v. Lopez*, ¶ 3, 1976-NMSC-012, 89 N.M. 82, 547 P.2d 565. However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. *See State v. Vigil*, 1973-NMCA-089, ¶ 28, 85 N.M. 328, 512 P.2d 88. If the state in good faith files a nolle prosequi under Rule 8-506.1(C) and (D) NMRA and later files the same charge, the trial on the refiled charges shall be commenced within the unexpired time for trial under Rule 8-506 NMRA, unless, under Rule 8-506.1(D) NMRA, the court finds the refiled complaint should not be treated as a continuation of the same case.

[As amended by Supreme Court Order No. 08-8300-057, effective January 15, 2009; as amended by Supreme Court Order No. 13-8300-019, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-002, effective for all cases filed on or after May 24, 2016; 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. 17-8300-022, effective for all cases pending or filed on or after December 31, 2017.]

ANNOTATIONS

The second 2017 amendment, approved by Supreme Court Order No. 17-8300-022, in the last paragraph of the committee commentary, effective December 31, 2017, changed “Paragraphs C and D of Rule 8-506A” to “Rule 8-506.1(C) and (D)”.

The first 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, revised the provisions relating to time limits for arraignment of defendants who are in custody and for defendants who are not in custody, and revised the committee commentary; in Paragraph A, in the heading, added “Time limits for”, added subparagraph designations “(1)” and “(2)”, in Subparagraph A(1), added the heading, deleted “The” and added “A”, after the first occurrence of “defendant”, added “who is not in custody”, and added the last sentence, and in Subparagraph A(2), added the heading, after the first occurrence of “defendant”, added “who is”, after “citation as soon as”, deleted “practical” and added “practicable”, after “no later than”, deleted “four (4)” and added “three (3)”, and after “date of arrest”, added “if the defendant is being held in the local detention center, or no later than five (5) days after the date of arrest if the defendant is not being held in the local detention center”.

The 2016 amendment, approved by Supreme Court Order No. 16-8300-002, effective May 24, 2016, increased the maximum amount of time for which a defendant may request an extension of time for commencement of trial, removed the provision that the aggregate of all extensions under Subparagraph C(5) may not exceed sixty days, required the court to make certain findings regarding prejudice to the defendant when granting certain extensions of time, and revised the committee commentary to clarify that the court must consider prejudice to the defendant when considering an extension of time based on exceptional circumstances and to make technical corrections; in Subparagraph C(2), after “a period not exceeding”, deleted “thirty (30)” and added “sixty

(60)"; in Paragraph C(5), after "beyond the control of", deleted "state" and added "prosecution", after "within the time period", deleted "provided that the aggregate of all extensions granted under this subparagraph may not exceed sixty (60) days" and added "and a written finding that the defendant would not be unfairly prejudiced, the court may grant further extensions that are necessary in the interests of justice"; in Paragraph D, after "for commencement of trial", deleted "pursuant to" and added "under"; in the committee commentary, in the paragraph under the heading "Exceptional circumstances", added the last two sentences, and in the paragraph under the heading "Computation of Time", added vendor neutral citations to the cases cited.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-019, effective December 31, 2013, provided a time limit after arrest for the arraignment of a defendant in custody, provided for the extension of the time for the commencement of trial, and required dismissal with prejudice of a complaint for noncompliance with the time limit for commencement of trial; in Paragraph A, added the second sentence; and in Paragraph E, deleted the former rule which required that a complaint be dismissed with prejudice if trial did not commence within the prescribed time limit or any extension, and added Subparagraphs (1) and (2).

The 2008 amendment, approved by Supreme Court Order No. 08-8300-057, effective January 15, 2009, in Paragraph E, changed "shall" to "may" and added "or the court may consider other sanctions as appropriate" to the end of the sentence.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-026, effective November 1, 2007, revised Paragraph C to increase the time limits in each subparagraph from 30 to 60 days and add a new Subparagraph (6) of Paragraph C to provide for an extension of the time for trial if defense counsel fails to appear for trial and amended Subparagraph (4) of Paragraph B to provide for trials to occur within 182 days after a request for extraordinary relief.

The 2004 amendment, effective August 1, 2004, deleted all of former Paragraphs A through E and added new Paragraph A through E of this rule. See Paragraphs A through C of Rule 8-506A NMRA for former Paragraphs A through C of Rule 8-506 NMRA

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

Cross references. — For procedure to withdrawal of a plea by the defendant or rejection plea by the court, *see* Rule 8-502 NMRA.

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

8-506.1. Voluntary dismissal and refiled proceedings.

A. **Voluntary dismissal.** The prosecution may dismiss a citation or criminal complaint by filing a notice of dismissal. The notice of dismissal shall be substantially in the form approved by the Supreme Court. Unless otherwise stated in the notice, the dismissal is without prejudice. A notice of dismissal shall be filed:

(1) prior to commencement of the trial; or

(2) after the acceptance of a plea of guilty or no context, but prior to sentencing.

B. **Bail bond.** The filing of a notice of dismissal under Paragraph A of this rule shall exonerate a bond only as provided in Rule 8-406 NMRA. If the dismissed charges are later filed in another court, the state shall notify the municipal court, and the municipal court shall transfer any bond to that court.

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

(1) the court in which the original charges were filed;

(2) the case file number of the dismissed charges;

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

(4) the reason the charges were dismissed.

D. **Procedure after refile.** If a citation or complaint is dismissed without prejudice and the charges are later refiled, the case shall be treated as a continuation of the same case, and the trial on the refiled charges shall be commenced within the unexpired time for trial under Rule 8-506 NMRA, unless the court, after notice and a hearing, finds the refiled complaint should not be treated as a continuation of the same case. The time between dismissal and refiling shall not be counted as part of the unexpired time for trial under Rule 8-506 NMRA.

[Adopted, effective August 1, 2004; as amended by Supreme Court Order No. 13-8300-030, effective for all cases pending or filed on or after December 31, 2013; 8-506A recompiled and amended as 8-506.1 by Supreme Court Order No. 17-8300-024, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — The court's acceptance of a no contest or guilty plea does not raise a double jeopardy bar to subsequent prosecution if the charges to which the defendant has pled subsequently are dismissed prior to sentencing. *See State v. Angel*, 2002-NMSC-025, 132 N.M. 501, 51 P.3d 1155 (holding that double jeopardy did not bar subsequent prosecution in district court where the magistrate court accepted the

defendant's no contest plea to misdemeanor offenses but dismissed the charges prior to sentencing); *see also State v. Lizzol*, 2007-NMSC-024, ¶ 7, 141 N.M. 705, 160 P.3d 886 (explaining that whether a dismissal constitutes an acquittal, and therefore bars reprosecution on double jeopardy grounds, depends on "whether the trial court's ruling, however labeled, correctly or incorrectly resolved some or all of the factual elements of the crime").

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

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-024, effective December 31, 2017, revised the provisions for voluntary dismissals, and made technical revisions; in Paragraph A, deleted former Subparagraph A(1) and redesignated former Subparagraph A(2) as new Subparagraph A(1), and added a new Subparagraph A(2); and in Paragraph B, after "shall", deleted "not automatically", after "exonerate a bond", deleted "prior to the expiration of six (6) months after the date the bond was executed" and added "only as provided in Rule 8-406 NMRA", after "If", deleted "prior to the expiration of six (6) months", and after "charges are", added "later".

The 2013 amendment, approved by Supreme Court Order No. 13-8300-030, effective December 31, 2013, required that a notice of dismissal be filed after the acceptance of a plea and before sentencing; provided that the time between dismissal and refiling a complaint is not counted as part of the time for trial under Rule 6-506 NMRA; added Subparagraph (1) of Paragraph A; and in Paragraph D, added the second sentence.

The 2004 amendment. — Paragraphs A and B of this rule are the same as Paragraphs A through B of Rule 8-506 prior to the August 1, 2004 amendment of that rule. Paragraph C of this rule relating to refiled complaints replaces former Paragraph C of Rule 8-506 NMRA. Paragraph D of this rule replaces former Paragraph D of Rule 8-506 NMRA.

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-024, former 8-506A NMRA was recompiled and amended as 8-506.1 NMRA, effective December 31, 2017.

Cross references — For procedure to withdrawal of a plea by the defendant or rejection plea by the court, *see* Rule 8-502 NMRA.

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

8-506A. Recompiled.

ANNOTATIONS

Recompilations. — Pursuant to Supreme Court Order No. 17-8300-024, former 8-506A NMRA was recompiled and amended as 8-506.1 NMRA, effective December 31, 2017.

8-507. Insanity; transfer to district court.

If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense", the action shall be transferred to the district court for further proceedings under the Rules of Criminal Procedure for the District Courts. The municipal court shall retain jurisdiction over the defendant and conditions of release until the action is filed in district court.

[As amended by Supreme Court Order No. 11-8300-041, effective for cases filed on or after December 2, 2011; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

ANNOTATIONS

The 2018 amendment, approved by Supreme Court Order No. 18-8300-023, effective February 1, 2019, removed provisions related to the mental competency of the defendant to stand trial; in the heading, deleted " or incompetency"; deleted "pleads" and added "raises the defense of", and "at the time of commission of an offense", and deleted "or if an issue is raised as to the mental competency of the defendant to stand trial".

The 2011 amendment, approved by Supreme Court Order No. 11-8300-042, effective December 2, 2011, added the last sentence to provide for the retention of jurisdiction by the municipal court until the action is filed in district court.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

8-507.1. Competency; transfer to district court.

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. Unless otherwise ordered by the court, 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 issue 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.**

(1) ***By motion of a party represented by counsel*.** When a question of competence is raised by a party who is represented by counsel, 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 8-304 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) ***By motion of a self-represented defendant or upon the court's own motion*.** When a question of competence is raised by a party who is self-represented or upon the municipal court's own motion, the municipal court shall dispose of the motion by filing an order substantially in the form approved by the Supreme Court that addresses the following:

(a) whether the motion is based on a good faith belief that the defendant is not competent to stand trial;

(b) a description of the facts and observations about the defendant that have formed the basis for the motion;

(c) whether the motion is advanced for purposes of delay;

(d) whether the motion is opposed; and

(e) whether a competency evaluation is requested.

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 case is remanded from the district court. The filing of a motion for a competency evaluation shall not affect a court's authority to set or review conditions of release under Rule 8-401 NMRA.

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 solely upon the allegations in the motion and 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) unless the court determines that a hearing on the motion is necessary, 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 fifteen (15) days of the filing of the response finding whether the motion is supported by a reasonable belief that the defendant may not be competent to stand trial.

G. **Transfer to district court; effect on municipal court proceedings.** An order finding a reasonable belief that the defendant may not be competent to stand trial under Paragraph E of this rule also shall transfer the case to the district court for further proceedings under Rule 5-602.1 NMRA. The order shall be delivered to the district court within two (2) days of the finding of a reasonable belief. When such an order is filed, jurisdiction over the defendant and any conditions of release shall be transferred to the district court. Any conditions of release and any bond set by the municipal court shall continue in effect unless amended by the district court. The municipal court shall suspend its case pending remand from the district court.

H. **Remand from district court.** Upon remand from the district court after proceedings to determine the defendant's competency, the municipal court shall proceed as follows.

(1) ***Defendant found competent*.** If the defendant has been found competent to stand trial, the municipal court shall resume the proceedings against the defendant as otherwise provided under these rules.

(2) ***Defendant found not competent*.** If the defendant has been found not competent to stand trial, the municipal court may dismiss the case without prejudice in the interests of justice. Upon dismissal, the municipal court may advise a person authorized under Section 43-1-10 or 43-1-11 NMSA 1978 to consider initiation of proceedings under the Mental Health and Developmental Disabilities Code. In the alternative, the municipal 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.

[Approved by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019.]

Committee commentary. — The municipal court shall transfer a case to the district court for a competency determination when the court finds that the motion is supported by a reasonable belief that the defendant may not be competent to stand trial. A reasonable belief may arise from the court's own observations or from the factual allegations in a party's motion. If the municipal court finds a reasonable belief that the defendant may not be competent, the municipal court shall suspend the proceedings and transfer the case to district court for a determination of competency.

The reasonable belief standard 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. State v. Hovey*, 1969-NMCA-049, ¶ 18, 80 N.M. 373, 456 P.2d 206 ("[T]here must be a showing of reasonable cause for the belief that an accused is not competent to stand trial.").

For further discussion of the procedures set forth in this rule, *see* the committee commentary to Rule 5-602.1 NMRA.

Courtroom closure

Hearings under this rule may be closed only upon motion and order of the court. *See* Rule 8-114(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 8-114 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.]

ARTICLE 6
Trials

8-601. Conduct of trials.

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

B. **Evidence.** Evidence shall be admitted in accordance with the New Mexico Rules of Evidence. The trial shall be conducted expeditiously, but each party shall be permitted to present the position of that party amply and fairly.

C. **Oath of witnesses.** The municipal court shall administer an oath or affirmation to each witness substantially in the following form: "Do you solemnly swear or affirm that

the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?"

[As amended, effective September 2, 1997; as amended by Supreme Court Order No. 05-8300-005, effective March 21, 2005; as amended by Supreme Court Order No. 16-8300-021, effective for all cases pending or filed on or after December 31, 2016.]

ANNOTATIONS

The 2016 amendment, approved by Supreme Court Order No. 16-8300-021, effective December 31, 2016, deleted Paragraphs D through H, relating to the "Record of proceedings", their use at trial, copies of the record of proceedings, and the definition of "record".

The 2005 amendment, effective March 21, 2005, revised Paragraph C to add "or affirmation", revised Paragraph D to change "transcription" to "record", revised Paragraph E to delete the reference to Rule 1-032 NMRA of the Rules of Civil Procedure for the District Courts and the out-dated reference to Paragraph N of Rule 5-503 of the Rules of Criminal Procedure for the District Courts, added a new Paragraph F, relating to the form of record, added a new Paragraph G, relating to audio and video copies of court proceedings and added a new Paragraph H, the definition of record.

The 1997 amendment, effective September 2, 1997, substituted "Transcription of proceeding" for "Record" in the paragraph heading in Paragraph D and rewrote Paragraph D, which read "A party may cause a record, as defined in Rule 8-109, to be made of the proceeding at the expense of the party".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17 Am. Jur. 2d Continuance § 1 et seq.

Refusal of continuance in criminal trial, asked for on account of occurrences during trial, as abuse of discretion, 5 A.L.R. 914.

Right to continuance to procure witness to alibi, 41 A.L.R. 1530.

Right of attorney to have case continued to protect his compensation, 67 A.L.R. 42.

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

Physical condition or conduct of party, his family, friends, or witnesses during trial, tending to arouse sympathy of jury, as ground for continuance or mistrial, 131 A.L.R. 323.

Right of accused to continuance because of absence of witness who is fugitive from justice, 42 A.L.R.2d 1229.

Continuance of criminal case because of illness or death of counsel, 66 A.L.R.2d 267.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 A.L.R.3d 725.

75 Am. Jur. 2d Trial § 180 et seq.

23A C.J.S. Criminal Law § 1145 et seq.

8-602. Subpoenas.

A. **Form; issuance.**

(1) Every subpoena shall:

(a) state the name of the court from which it is issued;

(b) state the title of the action and action number;

(c) command each person to whom it is directed to attend a trial or hearing and give testimony or to produce designated books, documents or tangible things in the possession, custody or control of that person at a time and place therein specified; and

(d) be substantially in the form approved by the Supreme Court.

(2) All subpoenas shall issue from the court for the court in which the matter is pending.

(3) The judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. Except as provided in Paragraph B of this rule, an attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.

(4) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. **Interviews.** A subpoena compelling the attendance of a witness must be signed by the judge. A witness may be required to attend an interview anywhere within jurisdiction of the court.

C. **Service.**

(1) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person's attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (1)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 6-209 NMRA;

(2) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

D. **Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)

(a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection of the premises and copying of designated books, papers, documents or tangible things need not appear in person at the hearing or trial.

(b) Subject to Subparagraph (2) of Paragraph D of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If

objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance,

(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

E. **Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents,

communications or things not produced that is sufficient to enable the demanding party to contest the claim.

F. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court punishable by fine or imprisonment.

[As amended, effective January 1, 1987; January 1, 1994; May 1, 1994; May 1, 2002; as amended by Supreme Court Order No. 07-8300-026, effective November 1, 2007.]

ANNOTATIONS

The 2007 amendment, approved by Supreme Court Order No. 07-8300-026, effective November 1, 2007, added Paragraph B providing that a subpoena to compel the attendance of a witness must be signed by the judge; and relettered Subsections B to E as Paragraphs C to F.

The 2002 amendment, effective May 1, 2002, rewrote the rule.

Cross references. — For forms on subpoena and certificate of service, *see* Rule 9-503 NMRA.

For form on subpoena to produce document or object, *see* Rule 9-504 NMRA.

For motion to compel discovery, *see* Criminal Form 9-409A NMRA.

For order of production, *see* Criminal Form 9-410 NMRA.

For jurisdiction of magistrate court in criminal cases, *see* Section 35-3-4 NMSA 1978 and cross references following that section.

8-603. Blood and breath alcohol test reports; controlled substance chemical analysis reports.

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

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

(a) the report is of an analysis conducted by a laboratory certified by the scientific laboratory division of the health and environment department [department of health] to perform breath and blood alcohol tests;

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

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

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

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

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

(3) a written report of the conduct and results of a chemical analysis of a substance to determine if such substance is a controlled substance and the circumstances surrounding receipt and custody of the test sample if:

(a) the report is of an analysis conducted by an authorized agency of the State of New Mexico or any of its political subdivisions, other than a law enforcement agency or agency under the direction and control of a law enforcement agency;

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

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

B. **Proof of mailing; authentication.** If the evidence is a written report of the conduct and results of a chemical analysis of breath, blood or controlled substance prepared pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, except for the portion of the report which is completed by the law enforcement officer, proof of mailing and authentication of the report shall be by certificate on the report.

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

[As amended, effective October 1, 1987; October 1, 1991.]

ANNOTATIONS

The 1991 amendment, effective for cases filed in the municipal courts on or after October 1, 1991, added "controlled substance chemical analysis reports" to the catchline; in Paragraph A, rewrote Subparagraph (1)(a) and added Subparagraph (3); in Paragraph B, substituted "breath, blood or controlled substance" for "breath or blood" and inserted "or (3)"; and, in Paragraph C, inserted "chemical analysis of a controlled substance".

Bracketed material. — The bracketed references to the department of health in Subparagraphs A(1)(a) and A(2)(a) were inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the department of health and environment, and enacts a new 9-7-4 NMSA 1978, relating to the department of health, which is defined as including the scientific laboratory. The bracketed material was not approved by the Supreme Court and is not part of the rule.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 357, 364, 366.

Requiring submission to physical examination or test as violation of constitutional rights, 25 A.L.R.2d 1407.

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 A.L.R.2d 971.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Motorist's right to private sobriety test, 45 A.L.R.4th 11.

22A C.J.S. Criminal Law §§ 759, 761 to 769, 852.

ARTICLE 7
Judgment and Appeal

8-701. Judgment.

A final order shall be entered in every case. If the defendant has been found guilty, a judgment of guilty shall be rendered. If the defendant has been acquitted, a judgment of not guilty shall be rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The court shall give notice of the final order in accordance with Paragraph B of Rule 8-208 NMRA. A final order includes, but is not limited to, a judgment and sentence or the back of the traffic citation on a penalty assessment where the defendant pled

guilty or no contest and did not receive a deferred sentence. If the traffic citation is the final order, a copy need not be provided to the prosecution unless requested.

[As amended, effective October 1, 1992; October 15, 2002; as amended by Supreme Court Order No. 11-8300-013, effective April 25, 2011.]

ANNOTATIONS

The 2011 amendment, approved by Supreme Court Order No. 11-8300-013, effective April 25, 2011, required that a final order be entered in every case and provided that a final order may be a judgment and sentence or the back of a traffic citation on a penalty assessment if the defendant pled guilty or no contest and did not receive a deferred sentence and that if the final order is a traffic citation, the final order need not be given to the prosecution unless the prosecution requests a copy.

The 2002 amendment, effective October 15, 2002, deleted the former first sentence which read "If the defendant is acquitted, a judgment of not guilty shall be entered"; substituted "has been found guilty" for "is found guilty a written" in the present first sentence; substituted "rendered in open court and thereafter a written judgment and sentence shall be signed by the" for "signed by the municipal" in the second sentence; and in the fourth sentence, deleted "municipal" preceding "court" at the beginning and substituted "Paragraph B" for "Paragraph H" at the end of the sentence.

The 1992 amendment, effective for cases filed in the municipal courts on and after October 1, 1992, added the third sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534, 588.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

24 C.J.S. Criminal Law §§ 1458 to 1505.

8-702. Advising defendant of right to appeal.

At the time of entering a judgment and sentence, the court shall advise the defendant of the defendant's right to a new trial in the district court. The court shall also advise the defendant that if the defendant wishes to appeal, a notice of appeal shall be filed in the district court within fifteen (15) days after entry of the judgment and sentence.

[As amended, effective September 1, 1990; January 1, 1997; October 15, 2002; as amended by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012.]

ANNOTATIONS

The 2012 amendment, approved by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012, eliminated the requirement that appeals be tried by the district court within six months; deleted the paragraph letter and the title, "Duty of court", of former Paragraph A; in the second sentence added "in the district court"; deleted former Paragraph B which required the defendant to obtain a trial in district court within six months of an appeal and to request a trial date in the notice of appeal; and deleted former Paragraph C which provided for automatic affirmance if the appeal was not tried in district court within six months or the time for trial was not extended by the Supreme Court.

The 2002 amendment, effective October 15, 2002, in Paragraph A, deleted "the municipal" from the bold heading, inserted "defendant's" preceding "right to a new trial" in the first sentence; and, in Paragraph C, substituted "judgment and sentence" for "conviction".

The 1997 amendment, effective January 1, 1997, deleted "or within fifteen (15) days after the filing of the notice of appeal" from the end of Paragraph B, and substituted "the right" for "his right" in Paragraph A.

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, rewrote the introductory paragraph and former Paragraph A to appear as Paragraph A; in Paragraph B, substituted "The defendant" for "He", deleted "date" following "trial" in the first sentence, and added the last sentence; and, in Paragraph C, substituted "Any appeal which has not been" for "If his appeal is not", deleted "his appeal" preceding "will be dismissed", and substituted "the conviction" for "his conviction".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534, 588.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

24 C.J.S. Criminal Law §§ 1680, 1686, 1688.

8-703. Appeal.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a criminal action may appeal, as permitted by law, to the district court of the county within which the 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 municipal court clerk's office in accordance with Rule 5-826 NMRA.

B. **Conditions of release.** The appearance bond set to ensure the defendant's appearance for trial shall be released. The court may set an appeal bond to ensure the defendant's appearance in the district court on appeal and may set any conditions of release as are necessary to ensure the appearance of the defendant or the orderly administration of justice. The municipal court may utilize the criteria listed in Rule 8-401(C) NMRA and may also consider the fact of the defendant's conviction and the length of the sentence imposed. The amount of the appeal bond and the conditions of release shall be included on the judgment and sentence. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to trial. Upon filing of the notice of appeal, the appeal bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the appeal bond until remand to the municipal court.

C. **Review of terms of release.** If the municipal court has refused release pending appeal or has imposed conditions of release that 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 that has been endorsed by the clerk of the district court shall be filed with the municipal court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the municipal court.

D. **Stay of execution of sentence.** Execution of any sentence, fine, fee, or probation shall be stayed pending the results of the appeal to district court. An abstract of record of the defendant's conviction shall not be prepared and sent in accordance with Section 66-8-135 NMSA 1978 until the later of the following dates:

(1) expiration of the deadline for filing a notice of appeal under this rule if the defendant does not file a notice of appeal; or

(2) ten (10) days after remand from the district court or issuance of mandate by the Court of Appeals or Supreme Court if the defendant does file a notice of appeal under this rule.

[As amended, effective September 1, 1989; September 1, 1990; January 1, 1994; January 1, 1995; January 1, 1997; February 16, 2004; as amended by Supreme Court Order No. 07-8300-034, effective January 22, 2008; by Supreme Court Order No. 08-8300-055, effective January 15, 2009; by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012; 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. — Former Paragraph H was redesignated as Paragraph B and revised to clarify that bond liability terminates upon a finding of guilt pursuant to NMSA 1978, § 31-3-10 (1987). Paragraph D was added to clarify that all aspects of the sentence shall be stayed pending appeal because there were wide variances in interpretation and practice. The provision in Paragraph D regarding preparation and

issuance of the abstract of record of the defendant's conviction is intended to reconcile the potentially conflicting ten (10) day deadline in NMSA 1978, Section 66-8-135 and the fifteen (15) day notice of appeal deadline in this rule and NMSA 1978, Section 35-15-1.

[Adopted by Supreme Court Order No. 12-8300-019, effective August 3, 2012.]

ANNOTATIONS

The 2017 amendment, approved by Supreme Court Order No. 17-8300-005, effective July 1, 2017, revised the citation to Rule 8-401 NMRA to reflect amendments to that rule, and made other stylistic changes; in Paragraph A, after "Rule 5-826 NMRA", deleted "of the Rules of Criminal Procedure for the District Courts"; in Paragraph B, replaced "assure" with "ensure" throughout, after "criteria listed in", deleted "Paragraph B of", and after "Rule 8-401", added "(C)"; and in Paragraph C, replaced each occurrence of "which" with "that".

The 2012 amendment, approved by Supreme Court Order No. 12-8300-019, effective for all cases pending or filed on or after August 3, 2012, required that appeals follow the Rules of Criminal Procedure for the District Courts; terminated bond liability upon a finding of guilt; authorized the court to set an appeal bond; specified the criteria for setting conditions of release; stayed all aspects of a sentence pending appeal; provided deadlines for the preparation of an abstract of record of the defendant's conviction; in Paragraph A added "in accordance with Rule 5-826 NMRA of the Rules of Criminal Procedure for the District Courts", deleted the former third sentence which provided that the three day mailing period did not apply to the time limits for appeal, deleted the former fourth sentence which provided for the filing of a notice of appeal before the filing of the judgment, and deleted the former fifth sentence which provided that no docket fee or cost would be imposed on the state or political subdivision or a defendant represented by a public defender or court appointed counsel; relettered Paragraph H as Paragraph B; in Paragraph B, deleted the former first through the sixth sentences which provided for the review of the conditions of release pending appeal, criteria for setting conditions of release, the continuance of former conditions of release and bond unless changed by the court, and added the first four sentences of the paragraph; added Paragraph D; deleted former Paragraph B which provided for the filing of a notice of appeal; deleted former Paragraph C which required that the notice of appeal substantially conform to the approved form; deleted former Paragraph D which provided for service of the notice of appeal; deleted former Paragraph E which provided for the docketing of the appeal; deleted former Paragraph F which provided for the record on appeal; deleted former Paragraph G which provided for the correction of the record; deleted former Paragraph J which provided for a trial de novo; deleted former Paragraph K which provided for notice of a trial setting by the clerk of the district court; deleted former Paragraph L which required a trial in district court to be held within six months; deleted former Paragraph M which provided for the extension of the time for trial by the Supreme Court; deleted former Paragraph N which provided for the procedure on appeal; deleted former Paragraph O which provided for the disposition of

appeals by the district court; deleted former Paragraph P which provided for remand to the municipal court; deleted former Paragraph Q which provided for appeals to the Supreme Court or to the Court of Appeals; and deleted former Paragraph R which provided for the return of the record.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-057, effective January 15, 2009, in Paragraph L, changed "shall" to "may" and added ", or the court may consider other sanctions as appropriate" to the end of the last sentence.

The 2007 amendment, approved by Supreme Court Order No. 07-8300-034, effective January 22, 2008, amended Paragraph L to delete the time limitations for the disposition of criminal cases and adopt by reference from Rule 5-604 NMRA the following time limits for commencement of trial:

B. Time limits for commencement of trial. The trial of a criminal case or habitual criminal proceeding shall be commenced six (6) months after whichever of the following events occurs latest:

(2) if the proceedings have been stayed to determine the competency of the defendant to stand trial, the date an order is filed finding the defendant competent to stand trial;

(3) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed;

(4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal;

(8) the date the court allows the withdrawal of a plea or the rejection of a plea made pursuant to Paragraphs A to F of Rule 5-304 NMRA.

The 2003 amendment, effective February 16, 2004, substituted “against the” for “upon a” and deleted “other” preceding “court” in the last sentence of Paragraph A, and added the last two sentences of Paragraph H and “clerk” to the end of Paragraph R.

The 1997 amendment, effective January 1, 1997, in Paragraph A, substituted "aggrieved by the judgment or final order of" for "aggrieved by any final order or judgment rendered by" in the first sentence, inserted "in the district court" in the second sentence, and rewrote the last sentence; in Paragraph B, inserted "with proof of service" in Subparagraph (1) and "promptly" in Paragraph (2), and added Subparagraph (2)(b); rewrote Paragraphs C and D which formerly related to stay and docketing of the appeal, respectively; added Paragraph E; redesignated former Paragraph E as Paragraph F and rewrote that paragraph; added Paragraph G and redesignated former Paragraphs F through K as Paragraphs H through M; rewrote Paragraph H; added the last two sentences in Paragraph I; rewrote Paragraph J; substituted "appeals" for "cases" in Paragraph K; substituted "a trial *de novo* appeal" for "the appeal" in Paragraph L;

rewrote Paragraph M; added Paragraph N; deleted former Paragraph L relating to final order and remand to municipal court; and added Paragraphs O to R.

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

The 1994 amendment, effective January 1, 1994, in Paragraph A, deleted "by defendant" at the end of the paragraph heading and rewrote the paragraph, which read "A defendant who is aggrieved by any judgment rendered by the municipal court may appeal to the district court of the county within which the municipal court is located within fifteen (15) days after entry of the judgment or final order"; and deleted former Paragraph B relating to appeals by the municipality and redesignated the remaining paragraphs and made related changes accordingly.

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, deleted Subparagraph (5) of Paragraph F, which read "(5) the record of the hearing in the municipal court, if any".

Cross references. — For form on notice of appeal, *see* Rule 9-607 NMRA.

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

For notice of appeal, *see* Rule 9-607 NMRA.

For the withdrawal or rejection of a plea by the municipal court judge, *see* Rule 8-502 NMRA.

District court reviews, de novo, the merits of pretrial motions on appeal. — Because the right of appeal from courts not of record is the right to a trial or hearing de novo in the district court, the district court must make an independent determination, de novo, of the merits of any pretrial motions raised by the parties on appeal. *City of Farmington v. Pinon-Garcia*, 2013-NMSC-046, *aff'g* 2012-NMCA-079, 284 P.3d 1086.

Scope of district court review of pretrial motions on appeal. — When a district court reviews a lower court's grant or denial of a dispositive pretrial motion, it does so independently. The district court does not consider whether the lower court abused its discretion; rather, it must consider the merits of the motion without regard to what the lower court decided. *City of Farmington v. Pinon-Garcia*, 2013-NMSC-046, *aff'g* 2012-NMCA-079, 284 P.3d 1086.

District court independently determines the merits of pretrial motions on appeal. — Where defendant was arrested and charged in municipal court with DWI in violation of municipal ordinances; the municipal court granted defendant's motion to dismiss all charges because the arresting officer, who was the only witness to observe defendant driving and who administered defendant's breath alcohol test, did not appear at trial;

and the municipality appealed the dismissal of the DWI charge to the district court, the district court was required to review, de novo, the merits of the municipal court's pretrial ruling on defendant's motion to dismiss the DWI charge and independently determine the merits of the motion without regard to what the municipal court decided. *City of Farmington v. Pinon-Garcia*, 2013-NMSC-046, ***aff'g*** 2012-NMCA-079, 284 P.3d 1086.

Appeals are subject to de novo review of all issues raised in the lower court. — Where defendant was charged with various traffic violations; when the municipality's main witness, the arresting officer, failed to appear at trial, the municipal court dismissed the charges with prejudice; and the municipality appealed to district court, before the district court conducted a new trial on the charges against defendant, the district court was required to conduct de novo pretrial proceedings and review all preliminary matters raised by the parties, including whether it was appropriate for the municipal court to dismiss the charges against defendant. *City of Farmington v. Pinon-Garcia*, 2012-NMCA-079, 284 P.3d 1086, cert. granted, 2012-NMCERT-008, ***aff'd***, 2013-NMSC-046.

Trial commenced beyond time limit not barred. — A trial in the district court commenced beyond the time limit is not a jurisdictional bar. Rather, the beneficiary of the rule has to raise the issue in order to reap the benefits of the rule. *Village of Ruidoso v. Rush*, 1982-NMCA-056, 97 N.M. 733, 643 P.2d 297.

Late filing of appeal. — Because timely filing of an appeal is a mandatory precondition rather than an absolute jurisdictional requirement, a trial court may, under unusual circumstances, use its discretion and entertain an appeal even though it is not timely filed. The decision to dismiss an appeal is extreme and must be determined on a case-by-case basis. *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

Court error may excuse late appeal. — One unusual circumstance which would warrant permitting an untimely appeal is if the delay is a result of judicial error. To deny a party the constitutional right to an appeal because of a mistake on the part of the court runs against the most basic precepts of justice and fairness. *Trujillo v. Serrano*, 1994-NMSC-024, 117 N.M. 273, 871 P.2d 369.

Court must uphold agreement not to raise bar of time limitation. — It is unfair in the due process sense for the district court to negate the prosecutor's agreement not to assert the six-month rule. *Village of Ruidoso v. Rush*, 1982-NMCA-056, 97 N.M. 733, 643 P.2d 297.

Defendant is not entitled to trial *de novo* on direct contempt charges which took place before a municipal court. *City of Bernalillo v. Aragon*, 1983-NMCA-142, 100 N.M. 547, 673 P.2d 831.

Officer may not continue case in district court. — A peace officer who has prosecuted a criminal case in magistrate or municipal court may not continue to

prosecute the case in district court after an appeal of the magistrate or municipal court judgment has been filed in district court. 1989 Op. Att'y Gen. No. 89-27.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 1 et seq.

24 C.J.S. Criminal Law § 1660 et seq.

8-704. Harmless error; clerical mistakes.

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

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

[As amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "on the judge's own initiative" for "of his own initiative" in Paragraph B, and deleted the former last sentence of Paragraph B relating to correction of mistakes before filing the transcript.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 586; 58 Am. Jur. 2d New Trial § 31.

8-705. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 12-8300-019, Rule 8-705 NMRA, relating to dismissals of appeals for failure to comply with rules or failure to appear, was withdrawn effective August 3, 2012.

ARTICLE 8
Special Proceedings

8-801. Modification of sentence.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534, 588.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

24 C.J.S. Criminal Law §§ 1544 to 1548.

8-802. Return of the probation violator.

A. **Probation.** The court shall have the power to suspend or defer a sentence and impose conditions of probation during the period of suspension or deferral.

B. **Violation of probation.** At any time during probation if it appears that the probationer may have violated the conditions of probation

(1) the court may issue a warrant or bench warrant for the arrest of a probationer for violation of any of the conditions of probation. The warrant shall order the probationer to the custody of the court or to any suitable detention facility;

(2) the court may issue a notice to appear to answer a charge of violation.

C. **Initial hearing.**

(1) Probationer not in custody. A probationer who is not in custody shall be noticed to appear not more than fifteen (15) days after the filing of a probation violation or, if no violation is filed, not more than fifteen (15) days after the court has reason to believe that the probationer may have violated the conditions of probation.

(2) Probationer in custody. A probationer who is in custody shall be arraigned on the probation violation as soon as practicable, but in any event no later than three (3) days after the probationer is detained if the probationer is being held in the local detention center, or no later than five (5) days after the probationer is detained if the probationer is not being held in the local detention center.

D. **Adjudicatory hearing.** On notice to the probationer, the court shall hold a hearing on the violation charged. If the probationer is in custody the hearing shall be held as soon as practicable, but in any event no later than ten (10) days after the initial hearing. If the probationer is not in custody the hearing shall be held no later than thirty (30) days after the initial hearing. If the violation is established, the court may continue the original probation, revoke the probation, and either order a new probation or require the probationer to serve the balance of the sentence imposed or any lesser sentence. If imposition of sentence was deferred, the court may impose any sentence which might originally have been imposed, but credit shall be given for time served on probation, unless that credit is specifically prohibited by statute or ordinance.

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

[As amended, effective September 1, 1989; May 1, 2002; as amended by Supreme Court Order No. 13-8300-007, effective for all cases pending or filed on or after May 5, 2013; as amended by Supreme Court Order No. 21-8300-027, effective for all cases pending or filed on or after December 31, 2021.]

ANNOTATIONS

The 2021 amendment, approved by Supreme Court Order No. 21-8300-027, effective December 31, 2021, set certain time limits for initial probation violation hearings and adjudicatory probation violation hearings, distinguishing between in-custody probationers and out-of-custody probationers; added a new Paragraph C and redesignated former Paragraphs C and D as Paragraphs D and E, respectively; and in Paragraph D, changed the paragraph heading from “Hearing” to “Adjudicatory hearing”, and added “If the probationer is in custody the hearing shall be held as soon as practicable, but in any event no later than ten (10) days after the initial hearing. If the probationer is not in custody the hearing shall be held no later than thirty (30) days after the initial hearing.”

The 2013 amendment, approved by Supreme Court Order No. 13-8300-007, effective May 5, 2013, required the court to give credit for time served on probation if the court imposes a new sentence unless the credit is specifically prohibited by statute or ordinance; and in Paragraph C, in the third sentence, after "time served on probation", added "unless such credit is specifically prohibited by statute or ordinance".

The 2002 amendment, effective May 1, 2002, in Paragraph A, deleted "violation of probation" in the bold heading and deleted the second sentence relating to the violation of probation; and rewrote Pargraphs B and C relating to issuance of warrants and imposition of sentence, respectively.

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

Crediting of time served on probation. — A reading of Subsections B and C of 31-21-15 NMSA 1978, together, indicates that all time served on probation shall be credited unless the defendant is a fugitive. *State v. Kenneman*, 1982-NMCA-145, 98 N.M. 794, 653 P.2d 170.