Rules of Criminal Procedure for the Metropolitan Courts

ARTICLE 1
General Provisions

7-101. Scope and title.

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

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

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

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

[As amended, effective January 1, 1987.]

ANNOTATIONS

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

22 C.J.S. Criminal Law § 1 et seq.

7-102. Conduct of court proceedings.

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

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

C. **Appearance of the defendant and witnesses before the court.** A defendant shall not be required to appear before the jury in distinctive clothing that would give the appearance that the defendant is incarcerated. Except by order of the court, the

defendant may not appear before the jury in any visible restraint devices, including handcuffs, chains or stun belts, a visible bullet proof vest or any other item which, if visible to the jury, would prejudice the defendant in the eyes of the jury. When the defendant appears in court for a jury trial in any restraint device, the court shall state on the record, outside the presence of the jury, the kind of restraint device used and the reasons why the defendant is being restrained. For non-record jury trials, a notation shall be placed in the court's file. Before requiring a witness to appear before the jury in prison clothing or any visible restraint the court shall balance the need for courtroom security and the likelihood of prejudice to the defendant in the eyes of the jury.

[As amended, effective January 1, 1993; as amended by Supreme Court Order No. 13-8300-018, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — The Committee added Paragraph C to ensure that defendants are not prejudiced because of being restrained before the court. When the court is required under Paragraph C to state on the record the kind of restraint device used and the reasons why the defendant is being restrained, the record should be made outside the presence of the jury whether the restraint device is visible to the jury or not. For non-record jury trials, a notation shall be placed in the court's file.

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

ANNOTATIONS

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

The 2013 amendment, approved by Supreme Court Order No. 13-8300-018, effective December 31, 2013, provided for the appearance of defendant and witnesses before the jury, and added Paragraph C.

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

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

7-103. Rules and forms.

A. **Local rules; approval procedure.** A metropolitan court may from time to time make and amend local rules governing its practice not inconsistent with these rules or other rules of the Supreme Court. Copies of proposed local rules and amendments shall be submitted to the Supreme Court and to the chair of the Supreme Court's Rules for

Courts of Limited Jurisdiction Committee for review. The Rules for Courts of Limited Jurisdiction Committee shall review any proposed local rule for content, appropriateness, style and consistency with the other local rules, statewide rules and forms and the laws of New Mexico, and it shall advise the Supreme Court and the chief judge of the metropolitan court of its opinion regarding the proposed rules. Any local rule or local rule amendment promulgated by a metropolitan court shall not become effective until such rule is approved by order of the Supreme Court, filed with the clerk of the Supreme Court and published in the Bar Bulletin or in the New Mexico Rules Annotated.

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

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

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

ANNOTATIONS

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

7-104. Time.

A. **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 7-209(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 7-203 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 c.ourt 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 2004 amendment, effective August 1, 2004, amended Paragraph A to delete "by local rule of the metropolitan court", to add after "legal holiday" in the second sentence "or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible" and to add the last sentence of the paragraph relating to how time is computed and defining "legal holiday"; and amended Paragraph D to make gender neutral changes.

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

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.

7-105. Assignment and designation of judges.

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

Criminal cases filed in the metropolitan court shall be assigned among the criminal division judges of the metropolitan court as equitably as possible on a random basis. Once a judge is assigned to hear a case that judge shall have sole responsibility for the case and no other judge may take any action on the case except:

(1) at arraignment or first appearance;

(2) in cases where the judge has been recused, is excused, or the chief judge has assigned another judge; or

(3) with the approval of the assigned judge, the agreed upon judge, and all of the parties.

B. **Reassignment.**

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

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

(3) ***Certification to district court*.** If all metropolitan court judges in the district have been excused or have recused themselves, no later than ten (10) days after filing of the last notice of excusal or recusal the chief judge of the metropolitan court shall either appoint a pro tem judge in accordance with the provisions of Section 34-8A-4.2 NMSA 1978 or certify by letter to the district court of the county in which the action is pending the fact of such excusal or recusal, and the district court shall designate another judge to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel and to the metropolitan court. The chief judge of the metropolitan court also may appoint a pro tem judge or send certification to the district court if the chief judge determines, after consultation with the metropolitan court judges, that such action is appropriate.

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

D. **Unavailability of judge.** At any time during the pendency of the proceedings if the assigned judge is unavailable, the chief judge may designate another judge to hear

any matter. The designated judge may be a pro tem judge. Upon appearance of the designated judge, the parties may move to continue the case until the original judge is available to hear the matter by stipulating to an extension of the time limitations set forth in Rule 7-506 NMRA, or the parties may exercise their rights to excuse the designated judge, including a pro tem judge, under these rules. If any designated judge is excused, the chief judge may designate another judge to preside over the matter.

[As amended, effective September 1, 1989; November 1, 1995; May 1, 2002; as amended by Supreme Court Order No. 06-8300-024, effective December 18, 2006; as amended by Supreme Court Order No. 15-8300-014, effective for all cases pending or filed on or after December 31, 2015.]

ANNOTATIONS

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

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

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

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

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

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

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

The 2015 amendment, approved by Supreme Court Order No. 15-8300-014, effective December 31, 2015, authorized pro tem judges to be designated to hear any matter in a pending case when the assigned judge is unavailable, authorized the parties to exercise their rights to excuse the designated pro tem judge, and made stylistic changes; in Subparagraph B(1), after “another judge”, deleted “pursuant to” and added “under”; and

in Paragraph D, added the second sentence, and in the third sentence, after “excuse the designated judge”, added “including a pro tem judge”, and deleted “pursuant to” and added “under”.

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

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

7-106. Excusal; recusal; disability.

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

B. **Excusal.** Whenever a party to any criminal action or proceeding of any kind files a notice of excusal, the judge’s jurisdiction over the cause terminates immediately.

C. **Limitation on excusals.** No party shall excuse more than one judge, including a pro tem judge. A party may not excuse a judge after the party has requested that judge to perform any discretionary act other than conducting an arraignment or first appearance, setting initial conditions of release, or a determination of indigency. No judge may be excused from conducting an arraignment or first appearance or setting initial conditions of release. Any judge designated by the chief justice of the Supreme Court of New Mexico may not be excused except under Article VI, Section 18 of the New Mexico Constitution.

D. **Procedure for excusing a judge.** A party may exercise the statutory right to excuse the judge before whom the case is pending by filing with the clerk of the court a notice of excusal. When a judge, including a pro tem judge, is designated to hear any matter because of the unavailability of the assigned judge, subject to the limitations in Paragraph C of this rule, the parties shall exercise their right to the excusal either in writing or orally when the designated judge first calls the case. In all other instances, the notice of excusal must be signed by a party and filed within ten (10) days after the later of:

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

(2) service on the parties by the court of notice of assignment or reassignment of the case to a judge.

E. **Notice of reassignment; service of excusal.** If the case is reassigned to a different judge, the court shall give notice of the reassignment to all parties. Any party electing to excuse a judge shall serve notice of such election on all parties.

F. **Recusal.** No judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a certificate of recusal in any such action. Upon receipt of notification of recusal from a judge, the clerk of the metropolitan court shall give written notice to each party. Upon recusal, another judge shall be assigned or designated to conduct any further proceedings in the action in the manner provided by Rule 7-105 NMRA.

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

H. **Stay.** If a letter is filed with the district court and metropolitan court certifying the issue of recusal to the district court pursuant to Paragraph G of this rule, the metropolitan court judge may enter a stay of the proceedings pending action by the district court. If the metropolitan court judge fails to stay the proceedings, the party filing the letter in the district court may petition the district court for a stay of metropolitan court proceedings. The district court may grant a stay of the proceedings for not more than fifteen (15) days after the filing of a letter certifying a recusal issue to the district court. Unless a stay is granted, the metropolitan court judge shall proceed with the adjudication of the merits of the proceedings.

I. **Inability of a judge to proceed.** If a trial or hearing has been commenced and the judge is unable to proceed, any other judge of the court may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case

may be completed without prejudice to the parties. The successor judge may recall any witness. If no other judge is available, either party may certify that fact by letter to the district court of the county in which the action is pending. The district court may make such investigation as the court deems warranted. If the court finds that the metropolitan court judge is in fact disabled or unavailable, the court shall designate another judge to preside over the case.

[As amended, effective May 1, 1986; July 1, 1988; September 1, 1989; September 1, 1990; November 1, 1995; May 1, 2002; as amended by Supreme Court Order No. 06-8300-024, effective December 18, 2006; as amended by Supreme Court Order No. 15-8300-014, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — Because of the constitutional and statutory rights of a defendant to a timely arraignment, felony first appearance, and a hearing on initial conditions of release, and due to the court's need to accommodate these rights, a judge cannot be excused from these proceedings. A judge that presides over an arraignment, felony first appearance, or a hearing to determine initial conditions of release is not in violation of the Code of Judicial Conduct simply for presiding over the hearing, even if an excusal of that judge has been filed. However, the judge's conduct at the hearing remains subject to the Code of Judicial Conduct. Nothing in this commentary shall be read to remove the judge's obligation to recuse as necessary under the Code of Judicial Conduct.

[Adopted by Supreme Court Order No. 08-8300-051, effective January 15, 2009.]

ANNOTATIONS

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

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

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

The 1995 amendment, effective November 1, 1995, rewrote the rule.

The 2002 amendment, effective May 1, 2002, deleted "procedure for exercising" from the rule heading; in Paragraph C, moved the last sentence "No party shall excuse more than one judge" to be the first sentence; in Paragraph D, substituted "Excusal procedure" for "Procedure for excusing a judge" in the bold heading, deleted "magistrate court" preceding "judge" and deleted "magistrate" preceding "court" in the first sentence; in Paragraph E, substituted "Notice of reassignment; service of excusal" for "Service of notice of assignment" in the bold heading; in Paragraph F, inserted "procedure" in the bold heading, deleted "court judge" following "magistrate" and inserted "certificate of"

preceding "recusal" in the first sentence; in Paragraph G, substituted "facts requiring recusal" for "excusal" at the end of the first sentence and rewrote the pargraph from the third sentence to the end; redesignated former Paragraph H as present Paragraph I and added present Paragraph H.

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

The 2015 amendment, approved by Supreme Court Order No. 15-8300-014, effective December 31, 2015, included pro tem judges within the limitation on excusals of judges, prohibited the excusal of judges designated by the chief justice of the New Mexico Supreme Court with the exception of judges disqualified under N.M. Const., Art. VI, § 18, included pro tem judges within the procedures for excluding judges that have been designated to hear matters because of the unavailability of the assigned judge, and made stylistic changes; in Paragraph A, after “defendant”, added “and”, after “state”, deleted “a”, after “municipality”, deleted “a” and added “or”, and after “county”, deleted “or person”; in Paragraph C, in the first sentence, after “one judge”, added “including a pro tem judge”, and added the last sentence; and in Paragraph D, in the second sentence, after “When a judge”, added “including a pro tem judge”.

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

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

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

7-107. 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, 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 enters an appearance by:

(1) filing of a written entry of appearance or any pleading or paper 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 pending or filed on or after December 31, 2013.]

ANNOTATIONS

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

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

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

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

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 and added the second sentence, and in Subparagraph (2), in the first sentence, deleted “any communication” and added “communicating”.

7-108. Non-attorney prosecutions.

A. **Law enforcement officers.** Law enforcement officers may file criminal complaints against persons in the metropolitan court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the jurisdiction of the court. Law enforcement officers may prosecute misdemeanor criminal complaints they have filed in metropolitan court, except that no law enforcement officer may prosecute any case that:

(1) is tried before a jury;

(2) involves a charge of driving under the influence of intoxicating liquor or drugs; or

(3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, 30-3-18, or 40-13-6 NMSA 1978.

B. **Other authorized prosecutions.** A governmental entity may appear and prosecute any misdemeanor proceeding if the appearance is by an employee of the governmental entity authorized by the governmental entity to institute or cause to be instituted an action on behalf of the governmental entity, except that no governmental entity may prosecute through a non-attorney any case that:

(1) is tried before a jury;

(2) involves a charge of driving under the influence of intoxicating liquor or drugs; or

(3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, or 40-13-6 NMSA 1978.

C. **Trial procedures.** In cases where law enforcement officers and non-attorney government employees are authorized under Paragraphs A and B of this rule to prosecute complaints they have filed, those law enforcement officers and government 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.

[As amended, effective March 15, 1986; July 1, 1988; as amended by Supreme Court Order No. 08-8300-044, 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. — Although this rule requires that a jury trial must be prosecuted by an attorney, this rule does not require the district attorney's office to enter an appearance in all cases in which the defendant is eligible for a jury trial. Until and unless the district attorney enters an appearance in the case, a law enforcement officer may act as a prosecutor in all respects.

Prior to December 31, 2008, this rule authorized private citizens to pursue criminal prosecutions in metropolitan 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 an attorney licensed to practice law in this state to prosecute a case for any party without first having been duly appointed as a special prosecutor by the district attorney for the judicial district in which the court is located." Former Paragraph E was entitled "District attorney" and provided that "[n]othing in this rule shall be construed to prevent the district attorney in the judicial district in which the complaint is filed from dismissing the case or entering an appearance and assuming prosecutorial control over the case." 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 district attorney from appointing a special prosecutor to prosecute on behalf of the state.

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

ANNOTATIONS

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

The 2013 amendment, approved by Supreme Court Order No. 13-8300-033, effective December 31, 2013, provided limitations on the prosecution of criminal complaints by law enforcement officers and government employees; deleted the provision that private attorneys cannot prosecute criminal complaints without being designated by the district attorney as a special prosecutor; deleted the provision that the rule does not prevent the district attorney from dismissing cases or assuming the prosecution of cases filed by law enforcement officers or government employees; in Paragraph A, in the title, deleted "Peace" and added "Law enforcement", in the first sentence, at the beginning of the sentence, deleted "Peace" and added "Law enforcement", in the second sentence, after "charges within the", deleted "trial", and added the third sentence and Subparagraphs

(1) through (3); 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 and Subparagraphs (1) through (3); in Paragraph C, in the first sentence, deleted "Peace" and added "In cases where law enforcement", after "law enforcement officers and", added "non-attorney", after "non-attorney government employees", deleted "appearing on behalf of a governmental entity as provided in Paragraph B, on" and added "are authorized under Paragraphs A and B of this rule to prosecute", after "they have filed", added "those law enforcement officers and government employees", and after "government employees shall be", deleted "authorized" and added "permitted"; deleted former Paragraph D, which provided that private attorneys could not prosecute criminal complaints without being designated by the district attorney as a special prosecutor; and deleted former Paragraph E, which provided that the rule did not prevent the district attorney from dismissing cases or assuming the prosecution of cases filed by law enforcement officers or government employees.

Rule 7-108 NMRA does not bar persons who are not licensed to practice law from participating in a trial in metropolitan court. *State v. Rivera*, 2010-NMCA-109, 149 N.M. 406, 249 P.3d 944, cert. granted, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269.

Participation in trial by unlicensed persons. — Where an assistant district attorney and a person who was not licensed to practice law entered their appearances on behalf of the state in defendant's DWI bench trial in metropolitan court; the unlicensed person conducted the direct and redirect examination of the supervising officer of the roadblock where defendant was arrested; and the unlicensed person was supervised by a licensed attorney at all times, did not commence the prosecution of defendant, and did not exert control over the prosecution, the participation of the unlicensed person in defendant's case in metropolitan court was expressly authorized by Section 36-2-27 NMSA 1978. *State v. Rivera*, 2010-NMCA-109, 149 N.M. 406, 249 P.3d 944, cert. granted, 2010-NMCERT-012, 150 N.M. 492, 263 P.3d 269.

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

7-109. Presence of the defendant.

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 any audio or audio-visual communication, if permitted under Rule 7-110A NMRA.

B. **Presence required.** Except as provided in these rules, 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, including the impaneling of the jury and the return of the verdict; and

(3) and 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 the proceeding. 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;

(3) in prosecutions for offenses that may be disposed of without a hearing under Rule 7-503 NMRA; and

(4) the metropolitan court may accept a knowing, intelligent, and voluntary waiver of a 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.]

Committee commentary. — This rule permits a defendant to expressly waive appearance in metropolitan 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 7-503 NMRA, a defendant in metropolitan 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 metropolitan court shall not accept a plea of guilty or no contest without first advising the defendant as required by Rule 7-502 NMRA in open court, which may include an audio or audio-video appearance under Rule 7-110A NMRA.

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

ANNOTATIONS

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

The 2015 amendment, approved by Supreme Court Order No. 15-8300-009, effective December 31, 2015, substantially rewrote the rule and added the committee commentary; in the heading, deleted "appearance of counsel"; in Paragraph A, in the heading, after "Presence" added "defined.", and added "The defendant's 'presence,' as used in this rule, may include either", and added Subparagraphs A(1) and (2); designated the language that was formerly in Paragraph A as present Paragraph B; in Paragraph B, in the heading, added "Presence", added the designation for Subparagraph B(1), and added "the first appearance", after "arraignment", added "the plea, and any hearing to set bail or conditions of release", and deleted "and at"; added the designation for Subparagraph B(2) and after "impaneling of the jury", added "and", and after "verdict", added "and"; added the designation for Subparagraph B(3); redesignated former Paragraphs B and C as Paragraphs C and D, respectively; in Subparagraph C(1), after "the proceeding has 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", and added the last sentence; in Subparagraph D(1), after "a", deleted "corporation" and added "defendant who is an organization"; in Subparagraph D(2), added "when the proceeding involves only a conference or hearing upon a question of law"; added Subparagraph D(3); and added the designation for Subparagraph D(4), after "metropolitan court", deleted "with the written consent of the

defendant”, added “may accept a knowing, intelligent, and voluntary waiver of a defendant’s right to be present for”, deleted “may permit”, and added “first appearance”, after “arraignment”, added “entry of a”, after “plea”, added “of not guilty”, after “trial”, added a comma, deleted “and”, and added “or the”, after “imposition of”, added “any”, and after “sentence”, deleted “in the absence of defendant”, and added the last sentence.

7-110. Withdrawn.

ANNOTATIONS

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

7-110A. Audio and audio-visual appearances of defendant.

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

B. **Required audio-visual appearances.** 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, 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. 09-8300-026, effective September 10, 2009.]

ANNOTATIONS

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

For filing electronically, *see* Rule 7-211 NMRA.

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

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

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

The 2009 amendment, approved by Supreme Court Order No. 09-8300-026, effective September 10, 2009, in Paragraph B, changed the language of the initial sentence from "The court may require the defendant to appear through the use of simultaneous audio-visual communication for" to the current language; and in Subparagraph (1) of Paragraph, after "initial appearance", changed "or bail hearing; or" to "bail hearing, or entry of any plea, or".

7-111. Contempt.

A. **Jurisdiction.** A metropolitan judge has jurisdiction to punish for contempt only for:

(1) disorderly behavior in the presence of the court or close enough to the court that it obstructs the administration of justice;

(2) misconduct of court officers in official transactions;

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

B. **Disposition upon notice and hearing.** A contempt, except as provided in Paragraph C of this rule, shall be punished only after notice and hearing. The notice shall state the essential facts constituting the contempt charged. The notice may be given:

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

(2) by a summons;

(3) by a bench warrant; or

(4) by an order to show cause.

The defendant shall be entitled to bail as provided in these rules. The defendant shall be given sufficient notice of hearing to permit the preparation of a defense. If the defendant is found guilty of contempt, the court shall enter judgment and sentence within the limits of its jurisdiction.

C. **Direct contempt.** A direct contempt may be punished summarily if the judge by written order certifies to having seen or heard the conduct constituting the contempt and that it was committed in the presence of the court. The written order of contempt shall recite the facts and shall be signed by the judge and entered of record.

D. **Appeal.** Any person found guilty of contempt may appeal to the district court pursuant to the rules of procedure governing appeals from the metropolitan court in criminal cases.

[As amended, effective January 1, 1996.]

Committee commentary. — Section 35-3-9 NMSA 1978 provides statutory authority to magistrates to punish for contempt. The statute limits the jurisdiction of the magistrate to punish for disorderly behavior or breach of the peace tending to interrupt or disturb a judicial proceeding in progress before the magistrate or for disobedience of any lawful order or process of the magistrate court. The statute requires a hearing in all instances and limits the punishment to $25.00 or imprisonment for three days, or both. A right of appeal to the district court is provided in the same manner as in other criminal actions. It would thus appear that the legislature intended that the magistrate's power to punish for contempt would be limited to criminal contempt where the primary purpose is to

preserve the court's authority and to punish for disobedience of its orders. *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 315 P.2d 223 (1957).

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

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

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

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

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

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

If the metropolitan court is a "magistrate court," the rule is within the authority granted by statute except for the punishment which may be imposed. If it is not a "magistrate

court" and the provisions of 35-3-9, supra, are inapplicable, the common law duty and power of the courts to guard their proceedings from interference and to punish for contempts is authority for the rule. *State v. Kayser*, 25 N.M. 245, 181 P. 278 (1919); *State v. Magee Pub. Co.*, 29 N.M. 455, 224 P. 1028 (1924).

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

ANNOTATIONS

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

Scope of authority to punish for contempt. — Because the power to punish for contempt is an inherent power of the court, the court should be allowed to exercise its power to the limits of its authority and should not be bound by Section 35-3-9 NMSA 1978, which limits sentencing to three days. *State v. Jones*, 1987-NMCA-004, 105 N.M. 465, 734 P.2d 243.

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

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

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

7-112. Exhibits.

A. **Preservation of exhibits.** Unless otherwise ordered by the court, at the conclusion of the trial all tendered exhibits shall be preserved by the court. If the exhibits are returned to the parties, the court shall advise the parties of their responsibility to preserve and retain exhibits offered into evidence.

B. **Delivery to clerk.** The exhibits and a receipt listing the exhibits shall be prepared by the offering party and delivered to the clerk of the metropolitan court. Upon receipt of the exhibits, the clerk shall sign the receipt and file a copy in the court file.

C. **Return for appeal.** Any exhibits returned to the parties shall be returned to the clerk of the metropolitan court within ten (10) days after the filing of a notice of appeal in the district court.

D. **Final disposition.** Unless otherwise ordered by the court, all exhibits delivered to the clerk shall be disposed of by the court unless claimed by the attorney or party tendering the exhibit within ninety (90) days after final disposition of the proceedings, including any appeal.

[Adopted, effective January 1, 1994.]

7-113. 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.

(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 7-304 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 7-301 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 metropolitan 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 7-304 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. 10-8300-006, 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. 11-8300-008, 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.]

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. 10-8300-006, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-008, 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 2011 amendment, approved by Supreme Court Order No. 11-8300-008, 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.

7-114. Court Interpreters.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. **Appointment of court interpreters.**

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

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

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

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

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

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

(b) the court 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;

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

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

D. **Waiver of the right to a court interpreter.** Any case participant identified as needing a court interpreter under Paragraph B of this rule may at any point in the case waive the services of a court interpreter with approval of the court only if the court explains in open court through a court interpreter the nature and effect of the waiver and finds on the record or 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 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. If the court interpreter will provide interpretation services for a juror, the court also shall instruct the jury prior to deliberations in accordance with UJI 14-6022 NMRA.

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

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

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

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

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

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

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

(b) the court states on the record or 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 from the Jury and Witness Fee Fund in amounts consistent with guidelines issued by the Administrative Office of the Courts.

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

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

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

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

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

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

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

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

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

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

ARTICLE 2
Initiation of Proceedings

7-201. Commencement of action.

A. **How commenced.** A criminal action is commenced by filing with the court:

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

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

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

(4) an order to show cause why a person should not be held in direct or indirect contempt; or

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

A copy of every citation issued shall be delivered to the person cited, and the original shall be filed as soon as practicable with the metropolitan court.

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

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

D. **Arrest without a warrant; criminal complaint.** In all criminal cases, including cases which are not within metropolitan court trial jurisdiction, if the defendant is arrested without a warrant, a criminal complaint shall be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. If the defendant is in custody, the complaint shall be filed with the metropolitan court at the time it is given to the defendant. If the court is not open at the time the copy of the complaint is given to the defendant, and the defendant remains in custody, the complaint shall be filed the next business day of the court.

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

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

[As amended, effective September 1, 1990; November 1, 1991; May 1, 1997; September 15, 1997; as amended by Supreme Court Order No. 10-8300-012, effective May 10, 2010.]

ANNOTATIONS

Cross references. — For forms on criminal complaint, *see* Rule 9-201 NMRA.

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

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

The first 1997 amendment, effective May 1, 1997, rewrote Subparagraph (3) of Paragraph A which related to a criminal citation complying with the provisions of 31-1-6 NMSA 1978.

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

The 2010 amendment, approved by Supreme Court Order No. 10-8300-012, effective May 10, 2010, added Subparagraphs (4) and (5) of Paragraph A.

Electronic signature. — An arresting officer's electronic signature on a criminal complaint was sufficient to satisfy the requirements of the rules of criminal procedure for filing a complaint. *State v. Mitchell*, 2010-NMCA-059, 148 N.M. 842, 242 P.3d 409, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

Custodial arrest following breath alcohol test is not "initiation of judicial criminal proceedings". — A person issued a citation and placed under custodial arrest for driving while under the influence of intoxicating liquor does not have a constitutional right to counsel immediately following a breath alcohol test since this does not amount to "initiation of judicial criminal proceedings" or prosecutorial commitment, nor is the period following administration of the test a "critical stage." *State v. Sandoval*, 1984-NMCA-053, 101 N.M. 399, 683 P.2d 516.

Charging defendants generally. — The state may charge defendant with violating the same statute in two different ways. Moreover, the state need not specify which statutory subsections were violated. *State v. Watkins*, 1986-NMCA-080, 104 N.M. 561, 724 P.2d 769, cert. denied, 104 N.M. 522, 724 P.2d 231.

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

22 C.J.S. Criminal Law § 321 et seq.

7-202. Preliminary examination.

A. **Time.**

(1) ***Time limits.*** A preliminary examination shall be held within a reasonable time but in any event not later than ten (10) days after the first appearance if the defendant is in custody and no later than sixty (60) days after the first appearance if the defendant is not in custody.

(2) ***Extensions.*** Upon a showing of good cause, the court may extend the time limits for holding a preliminary examination for up to sixty (60) days. If the defendant does not consent, the court may extend the time limits in Subparagraph (A)(1) of this rule only upon a showing that extraordinary circumstances exist and justice requires the delay. The time enlargement provisions in Rule 7-104 do not apply to a preliminary examination.

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

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

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

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

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

(4) ***Cross-examination.*** The witness shall be examined in the defendant's presence, and both the prosecution and the defendant shall be afforded the right to cross-examine adverse witnesses.

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

C. **Recording of examination.** A recording shall be made of the preliminary examination. If the defendant is bound over for trial in the district court, the recording shall be filed with the clerk of the district court with the bind-over order. Any party may request a duplicate of the recording from the district court within six (6) months following the preliminary examination.

D. **Findings of court.**

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

(2) If the only remaining charges are within metropolitan court trial jurisdiction, the case shall proceed under the Rules of Criminal Procedure for the Metropolitan Courts.

(3) If the court finds that there is probable cause to believe that the defendant committed one or more offenses not within metropolitan court trial jurisdiction, it shall bind the defendant over for trial in the district court. All misdemeanor offenses charged in the complaint shall be included in the bind-over order.

E. **Transfer to district court.**

(1) If the defendant is bound over for trial by the metropolitan court, the district attorney shall file the following with the metropolitan court:

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

(b) if an order is entered by the district court extending the time for filing an information, a copy of such order.

(2) When a copy of the information filed in district court is filed in the metropolitan court, the metropolitan court shall at that time transfer the metropolitan court record, along with the bind-over order, to the district court.

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

G. **Bail bond.** If the defendant is bound over for trial by the metropolitan court or indicted, the metropolitan court shall transfer any bond to the district court. Unless the proceedings are remanded to the metropolitan court, all further action relating to the bond shall be taken in the district court.

[As amended, effective October 1, 1992; November 1, 1995; February 16, 2004; as amended by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014.]

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

If the court dismisses a criminal charge for failure to comply with the time limits in Paragraph A of this rule or for lack of probable cause under Paragraph D of this rule, the dismissal is without prejudice, and the state may later prosecute the defendant for the same offense by filing either an indictment or an information. *See State v. Chavez*, 1979-NMCA-075, ¶ 23, 93 N.M. 270, 599 P.2d 1067; *see also State v. Peavler*, 1975-NMSC-035, ¶ 8, 88 N.M. 125, 537 P.2d 1387 (explaining that, following dismissal of an indictment, "the State can choose whether to proceed by indictment or information"); *State v. Isaac M.*, 2001-NMCA-088, ¶ 14, 131 N.M. 235, 34 P.3d 624 (concluding that the right to be free from double jeopardy does not preclude "multiple attempts to show probable cause" because "it is settled law that jeopardy does not attach pretrial"). *Cf.* Fed. R. Crim. P. 5.1(f) ("If the magistrate judge finds no probable cause to believe an offense has been committed or the defendant committed it, the magistrate judge must dismiss the complaint and discharge the defendant. A discharge does not preclude the government from later prosecuting the defendant for the same offense.").

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

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

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

report that has not been prepared and is not ready for use at the preliminary examination.

Additionally, the Rules of Evidence remain generally applicable to preliminary examinations, subject to specific exceptions for certain types of evidence not admissible at trial. *See Lopez*, 2013-NMSC-047, ¶ 4 (noting that the "Rules of Evidence generally govern proceedings in preliminary examinations" but explaining that Rule 6-608(A) NMRA, which is identical to Rule 7-608(A) NMRA, "provides a specific exception to our hearsay rule for admissibility" of certain types of written laboratory reports).

The defendant also retains the right to call and obtain subpoenas for witnesses and to cross-examine the state's witnesses. Thus, although Rule 7-608(A) may permit the state to use a laboratory report at the preliminary examination without calling the laboratory analyst as a witness, the defendant retains the right "to call witnesses to testify as to the matters covered in such report." Rule 7-608(B). And the preliminary examination remains "a critical stage of a criminal proceeding" at which "counsel must be made available to the accused." *State v. Sanchez*, 1984-NMCA-068, ¶ 10, 101 N.M. 509, 684 P.2d 1174.

[Adopted by Supreme Court Order No. 14-8300-020, effective for all cases pending or filed on or after December 31, 2014.]

ANNOTATIONS

Cross references. — For forms on notice of preliminary examination, *see* Rule 9-206 NMRA.

For form on bind-over order, *see* Rule 9-207 NMRA.

The 1992 amendment, effective for cases filed in the metropolitan courts on and after October 1, 1992, rewrote Paragraph B.

The 1995 amendment, effective November 1, 1995, added Paragraph F.

The 2003 amendment, effective February 16, 2004, added the last sentence of Paragraph F.

The 2014 amendment, approved by Supreme Court Order No. 14-8300-020, effective December 31, 2014, provided for extensions of time for holding a preliminary hearing beyond the ten day time limit; provided for appointment of counsel and discovery; provided for the application of the Rules of Evidence; added Paragraph A; in Paragraph B, deleted the title, "Subpoena of witnesses" and added the current title and in the introductory sentence, after "must be conducted", added "the following procedures shall apply"; added Paragraphs B (1) and (2), in Paragraph B (3), after "required by the", deleted "parties" and added "prosecution or the defendant", in Paragraph B (4), added the title and after "the defendant's presence and", deleted "may be cross-examined" and

added the remainder of the sentence, and added Paragraph B (5); in Paragraph C, deleted the former title "Record of hearing" and added the current title, in the first sentence, changed "record" to "recording" in two places, in the third sentence, deleted "A" and added "Any party may request a", after "duplicate of the", deleted "tape may be requested by any party" and added "recording from the district court", and after "the preliminary", deleted "hearing" and added "examination", and deleted the former fourth sentence which provided that the taped record could be disposed of six months after the preliminary hearing; in Paragraph D (1), after "of the examination", deleted "it appears to", after "examination, the court", added "finds", after "defendant has committed", deleted "an" and added "a felony", after "the court shall", added "dismiss without prejudice all felony charges for which probable cause does not exist and", and after "discharge the defendant", added "as to those offenses", added Paragraph D (2), in Paragraph D (3) in the first sentence, after "the defendant committed", deleted "an offense" and added "one or more offenses" and after "over for trial", added "in the district court" and added the second sentence; deleted former Paragraph D which is restated in Paragraph A (1); in Paragraph E (1), in the introductory sentence, after "shall file", added "the following" and after "with the", deleted "clerk of the", in Paragraph E (1)(b), deleted the former second sentence which required the court to set a trial if there was probable cause that defendant committed an offense within the metropolitan court's jurisdiction, added Paragraph E (2); and in Paragraph F, after "forthwith advise the", deleted "judge" and added "metropolitan court", after "metropolitan court and the", deleted "judge" and added "metropolitan court", and after "release set by the", deleted "judge" and added "metropolitan court".

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

7-203. Probable cause determination.

A. **General rule.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release. The probable cause determination shall be made by a metropolitan court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier. Saturdays, Sundays, and legal holidays shall be included in the forty-eight (48) hour computation, notwithstanding Rule 7-104(A) NMRA. If a metropolitan court judge is not reasonably available, the determination shall be made by a district judge.

B. **Conduct of determination.** The determination of whether there is probable cause shall be nonadversarial and may be held in the absence of the defendant and of counsel. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. No witnesses shall be required to appear unless the

court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause. If the complaint and any attached statements fail to make a written showing of probable cause, an amended complaint or a statement of probable cause may be filed at the time of the probable cause determination with sufficient facts to show probable cause for detaining the defendant.

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

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

(2) ***Probable cause found.*** If the court finds probable cause that the defendant committed an offense, the court shall review the conditions of release. If no conditions of release have been set and the offense is a bailable offense, the court shall set conditions of release in accordance with Rule 7-401 NMRA. If the court finds that there is probable cause the court shall make such finding in writing.

[As amended, effective September 1, 1990; November 1, 1991; as amended by Supreme Court Order No. 13-8300-041, effective for all cases pending or filed on or after December 31, 2013.]

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 7-501 NMRA, or a preliminary examination, *see* Rule 7-202 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 all cases pending or filed on or after December 31, 2013.]

ANNOTATIONS

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

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

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, rewrote this rule.

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

The 2013 amendment, approved by Supreme Court Order No. 13-8300-042, effective December 31, 2013, provided that the time limit on the extension of time for making a probable cause determination includes Saturdays, Sundays, and legal holidays; required the personal recognizance release of the defendant from custody pending trial if no probable cause is found; in Paragraph A, added the third sentence; 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.

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

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

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

produced by the affiant, provided that such additional evidence shall be reduced to writing and supported by oath or affirmation. The court also may permit a request for an arrest warrant by any method authorized by Paragraph F of Rule 7-208 NMRA for search warrants and may issue an arrest warrant remotely provided the requirements of Paragraph G of Rule 7-208 NMRA and this rule are met.

C. **Preference for summons.** The court shall issue a summons, unless in its discretion and for good cause shown, the court finds that the interests of justice may be better served by the issuance of 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; amended by Supreme Court Order No. 15-8300-008, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — Paragraph A was amended in 2013 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 7-208 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

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

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

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, provided for alternate methods for requesting and issuing arrest warrants; and in Paragraph A, added the last sentence.

The 2015 amendment, approved by Supreme Court Order No. 15-8300-008, effective December 31, 2015, in Paragraph A, after the heading, added the new sentence "Upon the docketing of any criminal action the court may issue either a summons or an arrest warrant." and redesignated the remainder of former Paragraph A as present Paragraph B; in present Paragraph B, added the heading "Basis for warrant.", and in the first sentence, after "arrest warrant", added "or summons"; redesignated former Paragraphs

B and C as Paragraphs C and D, respectively; in present Paragraph C, after “issuance of”, deleted “a warrant for” and added “an”, and after “arrest”, added “warrant”; in present Paragraph D, in the first sentence, after “defendant or, if”, deleted “his” and added “the defendant’s”, and after “by which”, deleted “he” and added “the defendant”.

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

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

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

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

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

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

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

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

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

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

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

G. **Summons; service by mail.** A summons and complaint may be served upon any defendant by the clerk or the prosecution mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served. If a

defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may:

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

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

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

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

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

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

I. **Return.** If service is made by mail pursuant to Paragraph G of this rule, return shall be made by the defendant appearing as required by the summons. If service is by personal service pursuant to Paragraph H of this rule, the person serving the process

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

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

[As amended, effective January 1, 1990.]

ANNOTATIONS

Cross references. — For service of warrants by police officers, *see* Section 3-13-2 NMSA 1978.

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

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

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

7-206. Arrest warrants.

A. **To whom directed.** Whenever a warrant is issued in a criminal action, including by any method authorized by Paragraph F of Rule 7-208 NMRA, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer or an Indian tribal or pueblo law enforcement officer. The warrant may limit the jurisdictions in which it may be executed. A copy of the warrant shall be docketed in the case file. The person obtaining the warrant shall cause it to be entered into a law enforcement information system. Upon arrest the defendant shall be brought before the court without unnecessary delay.

B. **Arrest.** The warrant shall be executed by the arrest of the defendant. If the warrant is in the possession of the arresting officer at the time of the arrest, a copy shall be served on the defendant upon arrest. If the warrant is not in the officer's possession at the time of arrest, the officer shall inform the defendant of the offense and of the fact

that a warrant has been issued and shall serve the warrant on the defendant as soon as practicable.

C. **Return.** The arresting officer shall make a return of the warrant, or any duplicate original, to the court which issued the warrant and notify immediately all law enforcement agencies, previously advised of the issuance of the warrant for arrest, that the defendant has been arrested. The return shall be docketed in the case file.

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

[As amended, effective July 1, 1999; March 1, 2000; as amended by Supreme Court Order No. 13-8300-011, effective for all cases pending or filed on or after July 15, 2013.]

Committee commentary. — Paragraph A was amended in 2013 to permit alternate methods for requesting and issuing arrest warrants. *See* Rule 7-208 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

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.

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

The 2000 amendment, effective March 1, 2000 has the arresting officer make a return to the court which issued the warrant instead of returning it to the magistrate and made gender neutral changes.

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 "in a criminal action", added "including by any method authorized by Paragraph F of Rule 7-208 NMRA"; and in Paragraph C, after "shall make a return", added "of the warrant, or any duplicate original".

7-207. Bench warrants.

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

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

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

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

[As amended, effective July 1, 1999; as amended by Supreme Court Order No. 15-8300-015, effective for all cases filed on or after December 31, 2015; amended by Supreme Court Order No. 15-8300-025, withdrawing amendments adopted by Supreme Court Order No. 15-8300-015.]

ANNOTATIONS

Compiler's notes. — The 2015 amendment to Rule 7-207 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.

The 1999 amendment, effective July 1, 1999, added the second sentence in Paragraph A, added Paragraphs B and D, redesignating former Paragraph B as Paragraph C, and in Paragraph C added the last sentence and made a minor stylistic change.

7-208. Search warrants.

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

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

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

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

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

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

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

D. **Return.** The return of the warrant, or any duplicate original, shall be made promptly after execution of the warrant to the clerk of the court which issued the warrant. The return shall be accompanied by a written inventory of any property taken. The inventory shall be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken, and shall be signed by the officer and the person in whose presence the inventory was taken. The court shall upon request deliver a copy of the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

E. **Probable cause.** As used in this rule, "probable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a

substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished.

F. **Methods for requesting warrant.** A request for a search warrant may be made using any of the following methods:

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

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

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

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

(1) Before ruling on a request for a warrant the judge may require the affiant to appear personally, telephonically, or by audio-video transmission and may examine under oath the affiant and any witnesses the affiant may produce, provided that such 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 7-113 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.]

Committee commentary. — In 2013, Paragraphs F and G 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 G(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 warrant may be filed under seal, provided an appropriate order is entered in accordance with Paragraph F of Rule 7-113 NMRA.

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

ANNOTATIONS

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

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

The 2013 amendment, approved by Supreme Court Order No. 13-8300-011, 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 D, in the first sentence, after "The return", added "of the warrant, or any duplicate original"; added Paragraph F; in Paragraph G, added the title of the paragraph; in Subparagraph (1) of Paragraph G, 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 G.

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. — Necessity that police obtain warrant before taking possession of, examining, or testing evidence discovered in search by private person, 47 A.L.R.4th 501.

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

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

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

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

7-209. Service and filing of pleadings and other papers.

A. **Service; when required.** Unless the court otherwise orders, every pleading subsequent to the citation or complaint, every 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 7-210 NMRA or Rule 7-211 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 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 7-210 NMRA or Rule 7-211 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.

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. **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 7-104(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.]

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 2000 amendment, effective March 1, 2000, inserted "pleadings and other" in the rule heading and amended this rule to more clearly require notice to the public defender in criminal cases for post-conviction cases when a case is dismissed without prejudice.

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), at the beginning of the sentence, changed "Delivery of" to "Delivering", and after "a copy", deleted "within this rule", added Paragraph C (1)(e), added Paragraph C (2), 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, after "Filing", 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.

7-210. Service and filing of pleadings and other papers by facsimile.

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each metropolitan court shall designate one or more telephone numbers to receive fax filings.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[Adopted, effective January 1, 1997.]

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

Electronic signature. — An arresting officer's electronic signature on a criminal complaint was sufficient to satisfy the requirements of the rules of criminal procedure for filing a complaint. *State v. Mitchell*, 2010-NMCA-059, 148 N.M. 842, 242 P.3d 409, cert. denied, 2010-NMCERT-006, 148 N.M. 582, 241 P.3d 180.

7-211. Electronic service and filing of pleadings and other papers.

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

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

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

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

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

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

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

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

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

F. **Service by electronic transmission.** Service pursuant to Rule 7-209 of these rules may be made by electronic transmission on any attorney who has registered pursuant to Paragraph B of this rule and on any other person who has agreed to service in this manner.

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

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

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

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

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

(3) the electronic address of the recipient;

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

[Approved, effective July 1, 1997.]

ANNOTATIONS

Cross references. — For definition of "signed", *see* Rule 7-210 NMRA.

ARTICLE 3
Pleadings and Motions

7-301. General rules of pleading; captions.

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

(1) the name of the court as follows:

"State of New Mexico

County of _____

Metropolitan Court";

(2) the names of the parties; and

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

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

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

[As amended, effective December 17, 2001.]

ANNOTATIONS

The 2001 amendment, effective December 17, 2001, inserted "captions" in the rule heading; added Paragraph A; and redesignated former Paragraphs A and B as present Paragraphs B and C.

Attorney general or district attorney must represent state in criminal proceeding. — Although 36-1-18A NMSA 1978 does not require the district attorney to appear in a nonrecord court, such as the metropolitan court, 36-1-19 NMSA 1978 prohibits anyone other than the attorney general's office or district attorney's office from representing the state in a criminal proceeding, except on order of the court and with the consent of those offices. *State v. Baca*, 1984-NMCA-096, 101 N.M. 716, 688 P.2d 34.

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

22 C.J.S. Criminal Law § 375 et seq.

7-302. Pleas allowed.

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

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

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

ANNOTATIONS

Conviction based on nolo contendere plea may not be sole basis of probation revocation. *State v. Baca*, 1984-NMCA-056, 101 N.M. 415, 683 P.2d 970.

Rule 5-304F NMRA applies to metropolitan courts. — Since Rule 21(g)(6), N.M.R. Crim. P. (now see Rule 5-304F NMRA), providing for inadmissibility of plea discussions is applicable to district court proceedings on revocation of parole, there is no reason why it should not apply to metropolitan courts. *State v. Baca*, 1984-NMCA-056, 101 N.M. 415, 683 P.2d 970.

7-303. Amendment of complaints and citations.

A. **Defects, errors and omissions.** A complaint or citation shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, because of any defect, error, omission, imperfection or repugnancy therein which does not prejudice the substantial rights of the defendant

upon the merits. The court may at any time prior to a verdict cause the complaint or citation to be amended with respect to any such defect, error, omission, imperfection or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

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

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

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

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

[As amended, effective May 15, 2001.]

ANNOTATIONS

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

7-304. 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. **Suppression of evidence.**

(1) In cases within the trial court’s jurisdiction:

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

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

(2) Except for good cause shown, motions to suppress must be filed and determined prior to trial.

C. **Motions and other papers.** An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. Motions shall be served on each party as provided by Rule 7-209 NMRA.

D. **Unopposed motions.** The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order initialed by opposing counsel shall accompany the motion. The motion is not granted until the order is approved by the court.

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

(1) motion to dismiss;

(2) motion regarding bonds and conditions of release;

(3) motion for new trial;

(4) motion to suppress evidence; or

(5) motion to modify a sentence under Rule 7-801 NMRA.

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

F. **Response.** Unless otherwise specifically provided in these rules, any written response shall be filed within fifteen (15) days after service of the motion. Affidavits, statements, depositions, or other documentary evidence in support of the response may be filed with the response.

[As amended, effective January 1, 1987; September 1, 1990; as amended by Supreme Court Order 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. 15-8300-017, effective for all cases pending or filed on or after December 31, 2015.]

Committee commentary. — Paragraph B 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 & committee commentary. Prior to the entry of a final judgment in metropolitan court, the state may obtain judicial review of an order suppressing evidence by filing a nolle prosequi 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; *State v. Gardea*, 1999-NMCA-116, ¶ 5, 128 N.M. 64, 989 P.2d 439; *see also* Rule 7-506A NMRA. But if the trial 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 state 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 state will be able to exercise its right to appeal any order suppressing evidence.

If a suppression issue is untimely raised, the trial judge may order a continuance in order to ascertain whether there is good cause for the late filing. Examples of good cause may include, but are not limited to, failure of the prosecution to disclose evidence relevant to the motion to suppress to the defense prior to trial, failure of either party to provide discovery, or the discovery of allegedly suppressable evidence during the course of the trial. If good cause is shown, the judge may excuse the late filing and hold a suppression hearing. Absent good cause shown, the judge may deny the motion for failure to comply with the rule.

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

ANNOTATIONS

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

The 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, substituted "Defenses and objections which may be raised" for "Subject matter" as the heading of Paragraph A and inserted "before trial" near the end of that paragraph.

The 2006 amendment, approved by Supreme Court Order 06-8300-37, effective March 1, 2007, deleted former Paragraph B providing motions may be written or oral; deleted former Paragraph D relating to notice of hearings; relettered former Paragraph C as Paragraph B and added Paragraphs C through E to conform this rule with Rule 5-120 NMRA.

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 2015 amendment, approved by Supreme Court Order No. 15-8300-017, effective December 31, 2015, made stylistic changes; in Paragraph A, in the heading, after "objections", deleted "which" and added "that"; in Paragraph B, after the heading, deleted the duplicate language "In cases within the trial court's jurisdiction"; and in Subparagraph E(5), after "modify a sentence", deleted "pursuant to" and added "under".

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

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

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

7-305. Unnecessary allegations.

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

(1) time of the commission of offense;

(2) place of the commission of offense;

(3) means by which the offense was committed;

(4) value or price of any property;

(5) ownership of property;

(6) intent with which an act was done;

(7) description of any place or thing;

(8) the particular character, number, denomination, kind, species, or nature of money, checks, drafts, bills of exchange or other currency;

(9) the specific degree of the offense charged;

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

(11) any other similar allegation.

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

7-306. Joinder; consolidation; severance.

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

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

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

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

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

[As amended, effective January 1, 1987; September 1, 1990; September 15, 1997.]

ANNOTATIONS

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

The 1997 amendment, effective September 15, 1997, inserted "of" in the paragraph heading of Paragraph A; deleted former Paragraphs B and C relating to joinder of defendants and effect of joinder and redesignated former Paragraphs D and E as Paragraphs B and C; in Paragraph B, substituted "for preliminary examination or trial" for "offenses; defendants" in the paragraph heading, inserted "or heard on preliminary examination" and rewrote the last sentence; and inserted "motion for" in the paragraph heading and substituted "or consolidation of defendants for trial" for "or of defendants in any complaint or by joinder for trial" in Paragraph C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Consolidated trial upon several indictments or informations against same accused, over his objection, 59 A.L.R.2d 841.

ARTICLE 4
Release Provisions

7-401. Bail.

A. **Right to bail.** Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, subject to any release conditions imposed pursuant to Paragraph C of this rule, unless the court makes a written finding that such release will not reasonably assure the appearance of the person as required. If the court makes a written finding that release on personal recognizance or upon execution of an unsecured appearance bond will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph C of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community:

(1) the execution of a bail bond in a specified amount executed by the person and secured by a deposit of cash of ten percent (10%) of the amount set for bail or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required. The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law [Chapter 59A, Article 51 NMSA 1978] provided such paid surety also executes a bail bond for the full amount of the bail set;

(2) the execution of a bail bond by the defendant or by unpaid sureties in the full amount of the bond and the pledging of real property as required by Rule 7-401A; or

(3) the execution of a bail bond with licensed sureties as provided in Rule 7-401B or execution by the person of an appearance bond and deposit with the clerk of

the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.

Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.

B. **Factors to be considered in determining conditions of release.** The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, take into account the available information concerning:

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

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

(3) the history and characteristics of the person, including:

(a) the person's character and physical and mental condition;

(b) the person's family ties;

(c) the person's employment status, employment history and financial resources;

(d) the person's past and present residences;

(e) the length of residence in the community;

(f) any facts tending to indicate that the person has strong ties to the community;

(g) any facts indicating the possibility that the person will commit new crimes if released;

(h) the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and

(i) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;

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

(5) any other facts tending to indicate the person is likely to appear.

C. **Additional conditions; conditions to assure orderly administration of justice.** The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:

(1) the condition that the person not commit a federal, state or local crime during the period of release; and

(2) the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:

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

(b) a condition that the person maintain employment, or, if unemployed, actively seek employment;

(c) a condition that the person maintain or commence an educational program;

(d) a condition that the person abide by specified restrictions on personal associations, place of abode or travel;

(e) a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;

(f) a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(g) a condition that the person comply with a specified curfew;

(h) a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon;

(i) a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

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

(k) a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;

(l) a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m)a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

D. **Explanation of conditions by court.** The release order of the court shall:

(1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct;

(2) advise the person of:

(a) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(b) the consequences for violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

(c) the consequences of intimidating a witness, victim or informant or otherwise obstructing justice; and

(3) unless the defendant is released on personal recognizance, set forth the circumstances which requires that bail be set.

E. **Detention.** Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied pursuant to Article 2, § 1 of the New Mexico Constitution.

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

requirement. A hearing to review conditions of release pursuant to this paragraph shall be held by the court imposing the conditions.

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

H. **Return of cash deposit.** If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, when the conditions of the appearance bond have been performed and the defendant for whom bail was required has been discharged from all obligations, the clerk shall return to the defendant, his personal representatives or assigns the sum which has been deposited.

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

J. **Release from custody by designee.** Any or all of the provisions of this rule, except the provisions of Paragraphs E, F and G of this rule, may be carried out by responsible persons designated in writing by the chief judge of the metropolitan court. No person shall be qualified to serve as a designee if such person or such person's spouse is:

(1) related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state; or

(2) employed by a jail or detention facility unless designated in writing by the chief judge of the metropolitan court.

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

L. **Forms.** Instruments required by this rule shall be substantially in the form approved by the Supreme Court.

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

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 08-8300-059, effective February 2, 2009.]

Committee commentary. — The requirement that the court make a written finding if the defendant is not released on his or her personal recognizance or upon the execution of an unsecured appearance bond does not require an evidentiary hearing be held. It is sufficient for a judge to simply check a box on the conditions of release form indicating that the court has decided that a defendant's release on his or her own recognizance or an unsecured bond is insufficient to ensure the defendant's appearance at subsequent proceedings or to protect the public.

[Adopted by Supreme Court Order No. 08-8300-59, effective February 2, 2009.]

ANNOTATIONS

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

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

The first 1990 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1990, rewrote Paragraphs A through D; added present Paragraph E and redesignated former Paragraphs E through L as present Paragraphs F through M; rewrote present Paragraphs F and G; in present Paragraph H, substituted "Subparagraph (1) or (3)" for "Subparagraph (3)"; in present Paragraph I deleted "Paragraph I of" preceding "Rule 5-401" in the third sentence, substituted "Any bail set or condition of release" for "Any condition" at the beginning of the fourth sentence, and made the same substitution near the end of the paragraph; and rewrote present Paragraph J.

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

The 2008 amendment, approved by Supreme Court Order No. 08-8300-59, effective February 2, 2009, in Paragraph A, changed the word "determines" to the phrase "makes a written finding" in two places and added the committee commentary.

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.

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

7-401A. Bail; unpaid surety.

Any bond authorized by Subparagraph (2) of Paragraph A of Rule 7-401 shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

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

ANNOTATIONS

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

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

A. **Justification of sureties.** Any bond submitted to the court by a paid surety pursuant to Paragraph A of Rule 7-401 shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law [Chapter 59A, Article 51 NMSA 1978] and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond. If authorized by law, a paid surety licensed under the Bail Bondsmen Licensing Law may deposit cash with the court in lieu of a surety or property bond, provided that the paid surety executes the appearance bond.

B. **Property bondsman.** If a property bond is submitted by a compensated surety, the bail bondsman or solicitor must be licensed as a property bondsman and must file, in each court in which he posts bonds, an irrevocable letter of credit in favor of the court, a sight draft made payable to the court and a copy of his license.

C. **Property bond in certain districts.** A real or personal property bond may be executed for the release of a person pursuant to Rule 7-401 in any metropolitan district in which the chief judge of the district court upon concurrence of a majority of the district judges of the district has entered an order finding that the provisions of Paragraph B of this rule will result in the detention of persons otherwise eligible for pretrial release pursuant to Rule 7-401. If a property bond is submitted by a compensated surety pursuant to this paragraph, the bail bondsman or solicitor must be licensed as a property bondsman and must pledge or assign real or personal property owned by the property bondsman as security for the bail bond. In addition, a licensed property bondsman must file, in each court in which he posts bonds:

(1) proof of the licensed bondsman's ownership of the property used as security for the bonds; and

(2) a copy of the bondsman's license.

The bondsman must attach to the bond a current list of all outstanding bonds, encumbrances and claims against the property each time a bond is posted, using the court approved form.

D. **Limits on property bonds.** No single property bond submitted pursuant this rule can exceed the amount of real or personal property pledged. The aggregate amount of all property bonds by the surety cannot exceed ten times the amount pledged. Any collateral, security or indemnity given to the bondsman by the principal shall be limited to a lien on the property of the principal, must be reasonable in relation to the amount of the bond and must be returned to the principal and the lien extinguished upon exoneration on the bond. If the collateral is in the form of cash or a negotiable security, it shall not exceed fifty percent (50%) of the amount of the bond and no other collateral may be taken by the bondsman. If the collateral is a mortgage on real property, the mortgage may not exceed one hundred percent (100%) of the amount of the bond. If the collateral is a lien on a vehicle or other personal property, it may not exceed one

hundred percent (100%) of the bond. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium authorized by the superintendent of insurance.

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

ANNOTATIONS

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

7-402. Release.

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

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

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

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

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

[As amended, effective January 1, 1997.]

ANNOTATIONS

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

The 1997 amendment, effective January 1, 1997, substituted "defendant" for "person" throughout the rule, substituted "or" for "appeal and" in the Paragraph B heading and deleted "any appeal or" following "disposition of" near the middle of Paragraph B,

deleted former Paragraph C relating to release after sentencing and redesignated former Paragraph D as Paragraph C, and made gender neutral changes in Paragraphs A and B.

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

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

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

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

7-403. Revocation of release.

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

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

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

B. **Review of additional conditions.** A person may petition the district court for release, if pursuant to Paragraph A of this rule, new or additional conditions of release are imposed and:

(1) after twenty-four (24) hours from the time of the imposition of the new conditions, the person continues to be detained as a result of his inability to meet the new conditions of release; or

(2) the person is ordered released on a condition which requires that he return to custody after specified hours.

[As amended, effective September 1, 1990.]

ANNOTATIONS

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

7-406. Bail bonds; exoneration; forfeiture.

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

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

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

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

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

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

C. **Forfeiture.** If there is a breach of condition of a bond, the court may declare a forfeiture of the bail. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Order to Show Cause on the clerk of the court in the manner provided by Rule 7-407 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 the surety into custody prior to the entry of a judgment of default on the bond. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

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

F. **Appeal.** Any aggrieved person may appeal from a judgment or order entered pursuant to this rule as authorized by law for appeals in civil actions in accordance with the Rule 3-706 NMRA of the Rules of Civil Procedure for the Metropolitan Courts and Rule 1-073 NMRA of the Rules of Civil Procedure for the District Courts. 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. 10-8300-035, effective December 10, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-035, effective December 10, 2010, in Paragraph B, after "the court may absolve the", deleted "bondsman" and added "the paid surety" and added Paragraph F.

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

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

7-407. Bail bonds; notice.

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

[Effective, October 1, 1987.]

ARTICLE 5
Arraignment and Preparation for Trial

7-501. 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 maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;

(3) the right to bail;

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

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

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

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

(8) in those cases not within the court's trial jurisdiction the right to a preliminary examination;

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

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

(11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act [29-11A-1 NMSA 1978].

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

B. **Offense within the court's trial jurisdiction.** If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint, pursuant to Rule 7-302, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty", the defendant remains in custody, the action shall be set for trial as soon as possible. If the defendant pleads "not guilty by reason of insanity", after setting conditions of release, the action shall be transferred to the district court.

C. **Waiver of arraignment or first appearance.** With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea of not guilty or a waiver of first appearance shall be substantially in the form approved by the Supreme Court.

D. **Felony offenses; preliminary hearing.** If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district court. If the defendant does not waive preliminary examination the court shall proceed to conduct such an examination in accordance with Rule 7-202 NMRA of these rules.

E. **Bail.** If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 7-401 NMRA of these rules.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order 07-8300-30, effective December 15, 2007.]

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

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

ANNOTATIONS

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

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

The 2007 amendment, approved by Supreme Court Order 07-8300-30, effective December 15, 2007, added Subparagraphs 9, 10 and 11 of Paragraph A, providing for a determination by the court as to whether the defendant has been counseled on immigration, domestic violence and sex offender registration laws.

Explanation of rights on appeal. — The rules promulgated by the supreme court do not require that waiver of the right to a jury in a trial de novo in district court on appeal from a metropolitan court conviction must be accompanied by advice to the defendant on the record in district court of his right to a jury trial. *State v. Ciarlotta*, 1990-NMCA-050, 110 N.M. 197, 793 P.2d 1350.

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

22 C.J.S. Criminal Law § 355 et seq.

7-502. Pleas and plea agreements.

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

(1) a plea of guilty;

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

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

B. **Advice to defendant.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, which shall include an appearance through an audio-visual proceeding under Rule 7-110A 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:

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

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

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

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

(7) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act [Sections 29-11A-1 to -10 NMSA 1978].

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

D. **Plea agreement procedure.**

(1) The government or its agent and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged

offense or to a lesser or related offense, the government or its agent will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest, 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. If the plea is withdrawn, neither the plea nor any statements arising out of the plea proceeding shall be admissible against the defendant in any criminal proceedings. 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 May 1, 1986; May 1, 1997; February 16, 2004; as amended by Supreme Court Order 07-8300-30, effective December 15, 2007; as amended by Supreme Court Order No. 09-8300-026, effective September 10, 2009; by Supreme Court Order No. 10-8300-032, 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."

[As amended, effective May 1, 1986; May 1, 1997; February 16, 2004; as amended by Supreme Court Order 07-8300-30, effective December 15, 2007; by Supreme Court Order No. 09-8300-026, effective September 10, 2009; by Supreme Court Order No. 10-8300-032, effective December 3, 2010.]

ANNOTATIONS

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

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

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

The 2007 amendment, approved by Supreme Court Order 07-8300-30, effective December 15, 2007, added Subparagraphs 5, 6 and 7 of Paragraph B, providing for a determination by the court as to whether the defendant understands the effect of a plea under immigration, domestic violence and sex offender registration laws.

The 2009 amendment, approved by Supreme Court Order No. 09-8300-026, effective September 10, 2009, in Paragraph B, after "personally in open court", added "which shall include an appearance through an audio-visual proceeding under Rule 110A NMRA".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-032, 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, 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.

Plea agreements will be specifically enforced. — Where defendant entered into three plea agreements in which the state agreed that defendant would serve zero to nine years of incarceration, supervised probation, treatment program, or a combination thereof and that the sentences in each case would be served concurrently with each other; and the district court accepted the plea agreements and sentenced defendant to twenty-one years in prison, with sixteen years suspended, for an actual prison term of five year, plus five years of supervised probation, the sentence violated the terms of the plea agreements because the suspended sentence allowed for the possibility that defendant could actually serve more than nine years in prison and defendant was entitled to specific performance of the plea agreements. *State v. Gomez*, 2011-NMCA-120, 267 P.3d 831.

Plea agreement provided for a specific sentence. — Where the plea agreement provided for a maximum sentence of forty years and the court accepted the plea, the plea agreement constituted a promise, not a recommendation, for a sentence within a particular range that the court was bound to enforce and the imposition of a forty-two year sentence, nine of which were suspended, violated the sentence cap in the plea agreement. *State v. Miller,* 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

Plea agreement for a maximum sentence "at initial sentencing". — Where the plea agreement provided for a maximum sentence of forty years "at initial sentencing", the phrase "at initial sentencing" did not transform the limit on sentencing into a limit on the initial period of incarceration because the sentence could not be increased at a later date and the court's sentence of forty-two years imprisonment, nine of which were

suspended, violated the plea agreement. *State v. Miller,* 2012-NMCA-051, 278 P.3d 561, cert. granted, 2012-NMCERT-005.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Guilty plea as affected by fact that sentence contemplated by plea bargain is subsequently determined to be illegal or unauthorized, 87 A.L.R.4th 384.

7-503. Disposition without hearing.

A. **General.** This rule establishes procedures governing disposition of cases within metropolitan 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 statute, 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 statute 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.

[As amended 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 the warrant 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.

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

A. **Disclosure by prosecution.** Unless a different period of time is ordered by the trial court, within thirty (30) days after arraignment or the date of filing of a waiver of arraignment, the prosecution shall disclose and make available to the defendant for inspection, copying and photographing any records, papers, documents and statements made by witnesses or other tangible evidence in its possession, custody and control that are material to the preparation of the defense or are intended for use by the prosecution at the trial or were obtained from or belong to the defendant. Such disclosure shall include a written list of the names and addresses of all witnesses whom the prosecution intends to call at the trial, together with any statement made by the witness and any record of any prior convictions of any such witness that is within the knowledge of the prosecution. In cases involving charges of domestic violence, the prosecution may use the district attorney's office as the address for the alleged victim.

B. **Disclosure by defendant.** Unless a different period of time is ordered by the trial court, within forty-five (45) days after arraignment or the date of filing of a waiver of arraignment, the defendant shall disclose and make available to the prosecution for inspection, copying and photographing any records, papers, documents and statements made by witnesses or other tangible evidence in possession, custody and control of defendant which are intended for use by the defendant at trial. Such disclosure shall include a written list of the names and addresses of all witnesses whom the defendant intends to call at the trial, together with any statement made by the witness and any record of any prior convictions of any such witness that is within the knowledge of the defendant.

C. **Pre-trial interviews by statement or deposition.**

(1) **Statements.** If requested by either party, any person, other than the defendant, with information that is subject to discovery, shall give a statement. A party may obtain the statement by serving a written notice of statement upon the person to be examined and upon the other party not less than fourteen (14) days before the date scheduled for the statement. The party requesting the statement must make reasonable efforts to confer in good faith with opposing counsel and the person to be examined regarding scheduling of a statement before serving a notice of statement. For any case in which the defendant faces potential incarceration upon conviction, a subpoena, signed by the judge assigned to the case, may also be served to secure the presence of the person to be examined or the materials to be examined during the statement. A party seeking a subpoena shall file a written motion requesting subpoena to the judge, which motion shall set forth good cause or a reasonable basis for the subpoena. Unless the judge denies the motion in writing within five (5) business days of filing of the motion, the request for subpoena shall be deemed approved and the requesting party shall sign the subpoena. If the judge denies the motion, the judge shall state the reason for the denial in writing, and the requesting party may file a motion for reconsideration and hearing on the merits. Such motion for reconsideration shall be set within five (5) business days of the filing of the motion. A subpoena will only be issued after good faith efforts to secure the statement have been unsuccessful. Either party may record the statement.

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

(a) agreement of the parties; or

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

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

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

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

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

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

H. **Failure to comply.** If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials, grant a continuance, or prohibit the party from calling a witness, or prohibit the party from introducing in evidence the material, or it may enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney, party or witness in contempt of court.

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

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

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

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

[As amended, effective January 1, 1994; October 1, 1996; September 15, 1997; as amended by Supreme Court Order 05-8300-21, effective January 1, 2006; by Supreme Court Order 07-8300-07, effective May 21, 2007; by Supreme Court Order 07-8300-32, effective November 15, 2007; by Supreme Court Order No. 10-8300-012, effective May 10, 2010.]

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

ANNOTATIONS

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

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

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

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

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

For Order of Production, *see* Criminal Form 9-410 NMRA.

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

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

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

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

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

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

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

The 2005 amendment, approved by Supreme Court Order 05-8300-21 effective January 1, 2006, added new Paragraph D relating to failure to complete discovery, redesignated Paragraphs D through G as Paragraphs E through F and added to the new Paragraph designated "D" "except as otherwise provided in Paragraph D of this rule". For provisions of the 2004 version of Rule 7-504 NMRA, see the 2004 NMSA 1978 on New Mexico One Source of Law DVD

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

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

The 2010 amendment, approved by Supreme Court Order No. 10-8300-012, effective May 10, 2010, in Subparagraph (1) of Paragraph C, in the fourth sentence, at the beginning of the sentence, added "For any case in which the defendant faces potential incarceration upon conviction"; added the fifth, sixth, seventh, and eighth sentences; and in the ninth sentence, after "subpoena will only be issued", deleted "upon a showing that the party requesting the subpoena made good faith efforts to procure the appearance of the witness without the need for a subpoena" and added the remainder of the sentence.

7-505. Pretrial conference; scheduling order.

A. **Pretrial conference.** With or without the filing of a motion, the court may order the parties to appear before the court to expedite the disposition of the case. Witnesses may be called or subpoenaed for a pretrial conference unless ordered by the court.

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

(1) to file and hear motions; and

(2) to complete discovery.

The scheduling order may also include:

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

(4) a trial date; and

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

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

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

ANNOTATIONS

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

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

7-506. Time of commencement of trial.

A. **Arraignment.** The defendant shall be arraigned on the complaint or citation within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. A defendant in custody shall be arraigned on the complaint or citation as soon as practical, but in any event no later than two (2) calendar days after the date of arrest.

B. **Time limits for commencement of trial.** The trial of a criminal citation or complaint shall be commenced within one hundred eighty-two (182) days after whichever of the following events occurs latest:

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

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

(3) if a mistrial is declared by the trial court, the date such order is filed in the metropolitan court;

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

(5) if the defendant is arrested for failure to appear or surrenders in this state for failure to appear, the date of arrest or surrender of the defendant;

(6) if the defendant is arrested for failure to appear or surrenders in another state or country for failure to appear, the date the defendant is returned to this state; or

(7) if the defendant has been referred to a preprosecution or court diversion program, the date a notice is filed in the metropolitan court that the defendant has been deemed not eligible for, is terminated from, or is otherwise removed from the preprosecution or court diversion program.

C. **Extension of time.** The time for commencement of trial may be extended by the court:

(1) upon the filing of a written waiver of the provisions of this rule by the defendant and approval of the court;

(2) upon motion of the defendant, for good cause shown, and approval of the court, for a period not exceeding thirty (30) days;

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

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

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period, provided that the aggregate of all extensions granted under this subparagraph may not exceed thirty (30) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial granted under Subparagraph (5) of Paragraph C of this rule may be filed at any time within the applicable time limits or upon exceptional circumstances shown within ten (10) days after the expiration of the time period. At the request of either party, the court shall hold a hearing prior to the commencement of trial to determine whether an extension may be appropriately granted.

E. **Effect of noncompliance with time limits.**

(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 Orders No. 08-8300-051 and No. 08-8300-053, 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.]

Committee commentary. —

Exceptional circumstances. — "Exceptional circumstances," as used in this rule, would include conditions which are unusual or extraordinary such as: death or illness of the judge, prosecutor, or a defense attorney immediately preceding the commencement of the trial; and circumstances which ordinary experience or prudence would not foresee, anticipate, or provide for.

Speedy trial. — This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico.

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

ANNOTATIONS

Cross references — For procedure to withdrawal of a plea by the defendant or rejection plea by the court, *see* Rule 7-502 NMRA.

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

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

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

The first 2008 amendment, as approved by Supreme Court Order 08-8300-051, effective January 15, 2009, in Subparagraph (7) of Paragraph B, changed "if the defendant has been placed in a preprosecution diversion program, the date a notice is filed in metropolitan court that the preprosecution program has been terminated for failure to comply with the terms," to "if the defendant has been referred to a preprosecution or court diversion program, the date a notice is filed in the metropolitan court that the defendant has been deemed not eligible for, is terminated from, or is otherwise removed from the preprosecution or court diversion program."

The second 2008 amendment, approved by Supreme Court Order No. 08-8300-053, effective January 15, 2009, in Paragraph E, after "Paragraph", changed "E" to "B", after "such person", replaced "shall" with "may", and added "or the court may consider other sanctions as appropriate" at the end of the sentence.

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 of a complaint with prejudice 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).

A defendant is not required to file a motion to dismiss before the 182-day time period has passed. *State v. Martinez*, 2008-NMCA-052, 143 N.M.773, 182 P.3d 154.

A defendant does not invite error by not objecting to the metropolitan court's extension of the 182-day period before the expiration of the time to commence trial. *State v. Martinez*, 2008-NMCA-052, 143 N.M.773, 182 P.3d 154.

Date of commencement of trial. — Where the state and the defendant were present and prepared to commence a bench trial on the scheduled trial date which was within the 182-day period; on the scheduled trial date, the court agreed to hear the defendant's motion to suppress evidence and took the motion under advisement without hearing opening statements or testimony other than testimony related to the suppression motion; and the case came back for trial after the expiration of the 182-day period, the trial was deemed to have commenced on the originally scheduled trial date within the 182-day period in the absence of any indication in the record of an attempt by the state to circumvent the rule. *State v. Candelario*, 2008-NMCA-119, 144 N.M. 794, 192 P.3d 789.

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

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

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

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

Insufficient notice of trial. — An order to appear for trial, without sufficient notice, cannot be the basis for a bench warrant, and the surrender in response to an improperly issued bench warrant does not restart the 182-day time period within which to commence trial. *State v. Carroll*, 2015-NMCA-034, *cert. granted*, 2015-NMCERT-001.

Where defendant failed to appear at trial because the court sent notice of trial a mere six days before the trial date, the notice was not sufficient, and the insufficient notice could not be the basis for the issuance of the bench warrant issued for failure to appear; the improperly issued bench warrant was not within the discretion of the metropolitan court, and defendant's surrender in response to the improperly issued bench warrant did not restart the 182-day time period within which to commence trial. *State v. Carroll*, 2015-NMCA-034, *cert. granted*, 2015-NMCERT-001.

7-506A. Voluntary dismissal and refiled proceedings.

A. **Voluntary dismissal.** The prosecution may dismiss a citation or criminal complaint by filing a notice of dismissal. The notice of dismissal shall be substantially in the form approved by the Supreme Court. Unless otherwise stated in the notice, the dismissal is without prejudice. A notice of dismissal shall be filed:

(1) prior to commencement of the trial if the charges are within metropolitan court trial jurisdiction; or

(2) prior to the commencement of a preliminary examination in the metropolitan court, if the charges are not within metropolitan court trial jurisdiction.

B. **Bail bond.** The filing of a notice of dismissal under Paragraph A of this rule shall not exonerate a bond prior to the expiration of the time for automatic exoneration pursuant to Subparagraphs A(1) or A(2) of Rule 7-406 NMRA of these rules. If the dismissed charges are later filed in the district court, the state shall notify the metropolitan court and the metropolitan court shall transfer any bond to the district court.

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

(1) the court in which the original charges were filed;

(2) the case file number of the dismissed charges;

(3) the name of the assigned judge at the time the charges were dismissed; and

(4) the reason the charges were dismissed.

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

[Approved, effective August 1, 2004.]

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

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

ANNOTATIONS

Cross references — For procedure to withdrawal of a plea by the defendant or rejection plea by the court, *see* Rule 7-502 NMRA .

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

2004 compiler's notes. — Paragraphs A and B of this rule are the same as Paragraphs A through B of Rule 7-506 prior to the August 1, 2004 amendment of that rule. Paragraph C of this rule relating to refiled complaints replaces former Paragraph C of Rule 7-506 NMRA. Paragraph D of this rule replaces former Paragraph D of Rule 7-506 NMRA.

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

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

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

B. **Competency to stand trial.**

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

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

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

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

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

(a) dismiss the charges; or

(b) transfer the proceedings to the district court.

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

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

D. **Statement made during psychiatric examination.** A statement made by a person during a psychiatric examination or treatment subsequent to the commission of the alleged crime shall not be admissible in evidence against such person in any

criminal proceeding on any issue other than that of the person's competency to stand trial.

[As amended, effective September 1, 1990; October 1, 1996; as amended by Supreme Court Order No. 10-8300-032, effective December 3, 2010.]

ANNOTATIONS

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

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

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

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

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

The 2010 amendment, approved by Supreme Court Order No. 10-8300-032, effective December 3, 2010, in Paragraph A, after "pleads 'not guilty by reason of insanity'", deleted "or 'guilty, but mentally ill'".

ARTICLE 6
Trials

7-601. Conduct of trials.

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

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

C. **Oath of witness.** The court shall administer an oath or affirmation to each witness, substantially in the following form: “You do solemnly swear or affirm that the testimony you give is the truth, the whole truth and nothing but the truth under penalty of perjury”?

D. **Record of proceedings.** With prior approval of the judge, a party in a metropolitan court proceeding or any person with a claim arising out of the same transaction or occurrence giving rise to the metropolitan court proceeding, may at the party’s or person’s expense, make a record of the testimony in the metropolitan court proceeding. Any person causing a transcription of testimony to be made under this rule shall make a copy of the transcription available to all parties in the metropolitan court proceeding.

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

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

(2) criminal proceedings if it is admissible under the Rules of Evidence.

F. **Form of record.**

(1) If the record is a stenographic or voice to print real time transcript, the court reporter shall transcribe the record prior to use in the metropolitan court.

(2) If the record is an audiotape or videotape recording made under this rule, the person seeking to use the record in the metropolitan court under this rule shall be responsible for having available appropriate playback equipment and an operator.

(3) If only part of the record of the proceedings is offered in evidence, any adverse party may require the offeror to offer any other part relevant to the part offered, and any party may introduce any other parts, subject to the Rules of Evidence.

G. **Copies.** At the request of any party to the proceeding or the deponent, a person who makes an audio or video record of testimony in the metropolitan court shall:

(1) permit any other party or the deponent to review a copy of the audiotape or videotape and the original exhibits, if any; and

(2) furnish a copy of the audiotape or videotape in the format in which it was recorded to the requesting party on receipt of payment of the reasonable cost of making the copy.

H. **Definition.** As used in this rule, “record” means:

(1) stenographic notes which must be transcribed prior to use under this rule;

(2) a realtime voice-to-print recording which must be transcribed prior to use under this rule;

(3) a statement of facts stipulated to by the parties; or

(4) any audio or video recording.

[As amended, effective September 2, 1997; March 21, 2005; 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 1996 amendment, effective October 1, 1996, deleted former Paragraph D relating to a record of the proceeding.

The 1997 amendment, effective September 2, 1997, added Paragraph D.

The 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 2015 amendment, approved by Supreme Court Order No. 15-8300-017, effective December 31, 2015, made technical corrections and stylistic changes; in Paragraph D, in the second sentence, after “testimony to be made”, deleted “pursuant to” and added “under”; in Subparagraph F(1), after “prior to use in the”, changed “magistrate” to “metropolitan”; in Subparagraph F(2), after “recording made”, deleted “pursuant to” and added “under”, after “record in the”, changed “magistrate” to “metropolitan”, and after “court”, deleted “pursuant to” and added “under”; in Paragraph G, after “testimony in the”, changed “magistrate” to “metropolitan”; in Subparagraph H(1), after “prior to use”, deleted “pursuant to” and added “under”; and in Subparagraph H(2), after “prior to use”, deleted “pursuant to” and added “under”.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75 Am. Jur. 2d Trial § 180 et seq.

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

7-602. Jury trial.

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

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

(2) in writing to the court within ten (10) days after the time of entering a plea. If demand is not made as provided in this paragraph, trial by jury is deemed waived.

B. **Misdemeanor offense.** If the offense is a misdemeanor or other offense or combination of offenses where the potential or aggregate penalty includes imprisonment in excess of six (6) months, the case shall be tried by jury unless the defendant waives a jury trial with the approval of the court and the consent of the state.

[As amended, effective October 1, 1992; as amended by Supreme Court Order No. 08-8300-51, effective January 15, 2009.]

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

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

ANNOTATIONS

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

The 1992 amendment, effective for cases filed in the metropolitan courts on and after October 1, 1992, inserted "or other offense or combination of offenses where the potential or aggregate penalty includes imprisonment in excess of six (6) months" in Paragraph B.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-51, effective January 15, 2009, in Subparagraph (2) of Paragraqph A, at the end of the first sentence, deleted the phrase "and at least twenty-four (24) hours before any time set for trial on the merits" following the word "plea".

7-603. Trials to juries.

Juries in the metropolitan court shall hear the evidence in the action which shall be delivered in public in its presence. After hearing the evidence, the members of the jury shall be kept together until they unanimously agree upon a verdict or are discharged by the judge. Whenever the judge is satisfied that there is no reasonable probability that a

jury can agree on a verdict, he may discharge it and summon a new jury unless the parties agree that the judge may render judgment.

7-604. Nonjury trials.

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

[As amended, effective May 1, 1986.]

7-605. Jurors.

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

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

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

D. **Selection of jury.**

(1) The judge shall cause the name of each prospective juror present to be entered into the court's jury management system. A list of the names of the prospective jurors present shall be prepared at the direction of the judge, and a copy of the list shall be provided to each party or the party's attorney.

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

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

(4) One or more alternate jurors may be selected at the direction of the judge. The parties may exercise their peremptory challenges in the selection of the alternate

juror or jurors, if their peremptory challenges have not been exhausted in the selection of the other jurors.

E. **Additional jurors.** If a jury cannot be completed by reading the name of those present, the sheriff or other responsible person shall summon a sufficient number of jurors to fill the deficiency.

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

G. **Juror qualification and questionnaire form; retention schedule.** Prior to the examination of prospective jurors under this rule, the court shall require each prospective juror to complete a juror qualification and questionnaire form as approved by the Supreme Court. All completed juror qualification and questionnaire forms in the possession of the court as well as in the possession of others, including attorneys, parties, and any other individual or entity, shall be destroyed ninety (90) days after expiration of the term of service of the juror or prospective juror unless an order has been entered directing the retention of the form.

H. **Supplemental questionnaires.** The court may order prospective jurors to complete supplemental questionnaires. Unless otherwise ordered by the court, the party requesting supplemental questionnaires shall be required to pay the actual costs of producing and mailing the supplemental questionnaires.

[As amended, effective September 1, 1989; as amended by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Paragraph G of this rule was added to clarify the procedure for using and retaining juror qualification and questionnaire forms. In cases where an issue may be raised on appeal concerning jury selection or a particular juror, the appellant may consider filing a motion in the district court within ninety (90) days of the jury verdict to request an order requiring the retention of the juror qualification and questionnaire forms for inclusion in the record proper filed in the appellate court. Paragraph G of this rule supersedes administrative regulations concerning the retention of juror qualification and questionnaire forms. *See* NMAC 1.17.230.107 (providing for the retention of juror questionnaires until sixty (60) days after the date of the last possible appeal in a case involving the juror or prospective juror but no less than three (3) years after the date the juror list was created that contains the name of the juror or prospective juror).

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

ANNOTATIONS

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

The 2013 amendment, approved by Supreme Court Order No. 13-8300-042, effective December 31, 2013, required the names of prospective jurors to be entered into the court's juror management system; required prospective jurors to complete an approved juror qualification and questionnaire form and supplemental questionnaires, if ordered by the court; provided for the destruction of juror qualification and questionnaire forms; in Paragraph D, Subparagraph (1), deleted the former first sentence, which required the judge to place the names of prospective jurors on a slip of paper and place the slips of paper into a box, added the current first sentence, after "shall be prepared" deleted "by" and added "at the direction of", and after "direction of the judge", deleted "or at his direction"; in Subparagraph (4), in the first sentence, after "One", added "or more" and after "may be selected", added "at the direction of" and after "judge", deleted "at his discretion, so elects"; in Paragraph E, after "completed by", deleted "drawing additional slips" and added "reading the names of those present"; and added Paragraphs G and H.

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

7-606. Subpoena.

A. **Form; issuance.**

(1) Every subpoena shall:

(a) state the name of the court from which it is issued;

(b) state the title of the action and action number;

(c) command each person to whom it is directed to attend a trial, hearing, statement or deposition and give testimony or to produce designated books, documents or tangible things in the possession, custody or control of that person;

(d) state the time and date of the hearing, trial, statement or deposition, the name of the judge before whom the witness is to appear or produce documents; and

(e) be substantially in the form approved by the Supreme Court.

(2) All subpoenas shall issue from the court for the court in which the matter is pending.

(3) In matters involving trial, hearings or production of documents or tangible things, the judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.

(4) In matters involving statements or depositions, no subpoena to appear to give a statement or deposition shall be valid unless signed by the trial judge.

(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. **Service.**

(1) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person's attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (1)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. When the subpoena is issued on behalf of the defendant in criminal actions and when the person whose attendance is commanded is an officer or agent of the state or any agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 7-209 NMRA;

(2) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court;

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

C. **Protection of persons subject to subpoenas.**

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things need not appear in person at the hearing or trial.

(b) Subject to Subparagraph (2) of Paragraph D of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance;

(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information;

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

D. **Duties in responding to subpoena.**

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court punishable by fine or imprisonment.

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

ANNOTATIONS

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

For forms on subpoena and certificate of service, *see* Rule 9-503 NMRA.

For form on subpoena to produce document or object, *see* Rule 9-504 NMRA.

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

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

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

For the subpoena of witnesses in the district court in criminal cases, *see* Rule 5-511 NMRA.

The 2002 amendment, effective May 1, 2002, rewrote Paragraph A, which formerly related to attendance of witnesses, deleted former Paragraphs B through D relating to production of documentary evidence, service and manner of service; added present Paragraphs B, C and D; in Subsection E, deleted "magistrate" preceding "court" and deleted the former second sentence relating to service by mail.

The 2007 amendment, approved by Supreme Court Order 07-8300-07, effective May 21, 2007, amended Subparagraph (1) of Paragraph A to permit a subpoena to be issued for the taking of a statement or deposition; amended Subparagraph (2) of Paragraph A to permit blank subpoenas to be issued to the parties for compelling witnesses to attend trial or hearings or to produce documents or tangible things; added Subparagraph (4) of Paragraph A to require the trial judge to sign subpoenas to compel witnesses to appear for pretrial statements or depositions; amended Subparagraph (1)(b) of Paragraph B to permit the defendant to compel the attendance of witnesses without payment of per diem and mileage.

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

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

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

(a) the report is of an analysis conducted by a laboratory certified by the scientific laboratory division of the health department to perform breath and blood alcohol tests;

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

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

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

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

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

(3) a written report of the conduct and results of a chemical analysis of a substance to determine if such substance is a controlled substance and the circumstances surrounding receipt and custody of the test sample if:

(a) the report is of an analysis conducted by an authorized agency of the State of New Mexico or any of its political subdivisions, other than a law enforcement agency or agency under the direction and control of a law enforcement agency;

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

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

B. **Proof of mailing; authentication.** If the evidence is a written report of the conduct and results of a chemical analysis of breath, blood or controlled substance prepared pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, except for the portion of the report which is completed by the law enforcement officer, proof of mailing and authentication of the report shall be by certificate on the report.

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

[As amended, effective October 1, 1987; October 1, 1991.]

ANNOTATIONS

Cross references. — For report of analysis on blood alcohol, *see* Rule 9-505 NMRA.

Bracketed material. — The bracketed reference to the department of health was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former Section 9-7-4 NMSA 1978, relating to the department of health and environment, and enacts a new Section 9-7-4 NMSA 1978, relating to the department of health, which is defined as including the scientific laboratory. The bracketed material was not approved by the Supreme Court and is not part of the rule.

The 1991 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1991, added "controlled substance chemical analysis reports" to the catchline; in Paragraph A, rewrote Subparagraph (1)(a) and added Subparagraph (3); in

Paragraph B, substituted "breath, blood or controlled substance" for "breath or blood" and inserted "or (3)"; and, in Paragraph C, inserted "chemical analysis of a controlled substance or".

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

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

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

7-608. Controlled substance test and autopsy reports; preliminary hearings.

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

(1) the report is of an analysis conducted by:

(a) the New Mexico State Police Crime Laboratory;

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

(c) the Office of the Medical Investigator; or

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

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

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

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

[As amended, effective January 1, 1995.]

ANNOTATIONS

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

7-609. Instructions to juries.

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

"Ladies and gentlemen of the jury:

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

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

The law which the defendant is accused of violating is as follows: (Read applicable parts of statute.) In order to convict the defendant of this offense, you must find him guilty beyond a reasonable doubt. (Applicable instructions from UJI Criminal, including the instructions on reasonable doubt and criminal intent, may be added here.)

Your verdict must be unanimous. When all of you have agreed upon a verdict, you will return to open court and your foreman will then announce the verdict."

B. **UJI instructions.** If requested by a party or, if the court deems it appropriate, on the court's own motion, the court may give the jury any other applicable instructions contained in the New Mexico Uniform Jury Instructions (UJI) Criminal. Whenever the court determines the jury should be instructed on a subject and no applicable instruction on the subject is found in UJI Criminal, the instruction given on that subject shall be brief, impartial and free from hypothesized facts.

[As amended, effective January 1, 1994.]

ANNOTATIONS

The 1994 amendment, effective January 1, 1994, added all of the language at the end of Paragraph A beginning "Such instructions shall be given"; and in Paragraph B, substituted the present paragraph heading for "UJI and requested instructions" and rewrote the paragraph, which read "The judge shall give the jury applicable instructions contained in UJI Criminal and, if requested by a party or on his own motion, and if he deems it appropriate, the judge may give the jury any other appropriate instructions."

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

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

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

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

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

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

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

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

(1) their verdict has been received;

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

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

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

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

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

C. **Extension of time for appeal.** If a party timely files a motion for new trial pursuant to this rule, the full time prescribed by Rule 7-703 for the filing of the notice of appeal shall commence to run and be computed from either the entry of an order expressly disposing of the motion for new trial or the date of any automatic denial of the motion, whichever occurs first. An order granting a motion for new trial is not appealable and renders any prior judgment non-appealable.

[Adopted, effective January 1, 1994.]

ARTICLE 7
Judgment and Appeal

7-701. Judgment.

A final order shall be entered in every case. If the defendant is found guilty, a judgment of guilty shall be rendered. If the defendant has been acquitted, a judgment of not guilty shall be rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The court shall give notice of the final order in accordance with Paragraph B of Rule 7-209 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; January 1, 1995; as amended by Supreme Court Order No. 11-8300-014, effective April 25, 2011.]

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

ANNOTATIONS

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

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

The 1992 amendment, effective for cases filed in the metropolitan courts on and after October 1, 1992, substituted "the defendant has" for "he has" in the second sentence and added the fourth sentence in Paragraph A; and deleted Paragraph C, relating to fine receipts.

The 1995 amendment, effective January 1, 1995, deleted "costs" following "Judgment" in the rule heading, deleted the Paragraph A designation and the paragraph heading "Judgment" in former Paragraph A, and deleted former Paragraph B relating to costs against the defendant.

The 2011 amendment, approved by Supreme Court Order No. 11-8300-014, 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.

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

24 C.J.S. Criminal Law § 1458 et seq.

7-702. Advising defendant of right to appeal.

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

(1) if the appeal is an appeal de novo, to a new trial in the district court, or;

(2) if the appeal is an appeal on the record, to appeal on the record to the district court.

B. **Notice of appeal filed in 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, 1994; January 1, 1997; September 2, 1997; October 15, 2002; as amended by Supreme Court Order No. 12-8300-020, effective for all cases pending or filed on or after August 3, 2012.]

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

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

ANNOTATIONS

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

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

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, rewrote the introductory paragraph and former Paragraph A to appear as present Paragraph A; in Paragraph B, substituted "The defendant" for "He", deleted "date" following "trial" in the first sentence, and added the second sentence; and in Paragraph C, substituted "Any appeal which has not been" for "If his appeal is not", deleted "his appeal" preceding "will be dismissed", and substituted "the conviction" for "his conviction".

The 1994 amendment, effective January 1, 1994, in Paragraph A, substituted "of the defendant's right" for "of his right" near the beginning, inserted the Subparagraph A(1) designation and inserted "if the appeal is an appeal de novo" in that subparagraph, inserted Subparagraph A(2), and inserted "in the district court" near the end; in Paragraph B, added "In trial de novo appeals" at the beginning, inserted "in the district court" near the middle, and substituted "the time the notice of appeal is filed in the district court" for "the time of filing the notice of appeal" near the end; and inserted "de novo" near the beginning of Paragraph C.

The first 1997 amendment, effective January 1, 1997, deleted "or within fifteen (15) days after the filing of the notice of appeal" from the end of Paragraph B.

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

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

The 2012 amendment, approved by Supreme Court Order No. 12-8300-020, effective August 3, 2012, eliminated the requirement that appeals be determined within six months after the filing of a notice of appeal and the requirement that the clerk of the district court maintain a log of all appeals; added the title to Paragraph B; deleted former Paragraph B which required the defendant to obtain a trial within six months in *trial de novo* appeals; deleted former Paragraph C which provided for automatic dismissal and affirmance if a *trial de novo* appeal were not tried within the six month period; deleted former Paragraph D which required the district court to enter a judgment in appeals on the record within six months after the filing of a notice of appeal; and deleted former Paragraph E which required the clerk of the district court to maintain a log of all pending appeals for public inspection.

Scope of duty to advise. — The rules promulgated by the supreme court do not require that waiver of the right to a jury in a trial de novo in district court on appeal from a metropolitan court conviction must be accompanied by advice to the defendant on the record in district court of his right to a jury trial. *State v. Ciarlotta*, 1990-NMCA-050, 110 N.M. 197, 793 P.2d 1350.

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

7-703. Appeal.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a criminal action may appeal, as permitted by law, to the district court of the county within which the metropolitan court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the metropolitan court clerk's office in accordance with Rule 5-827 NMRA of the Rules of Criminal Procedure for the District Courts.

B. **Conditions of release.** The appearance bond set to assure the defendant’s appearance for trial shall be released. The court may set an appeal bond to assure the defendant’s appearance in the district court on appeal and may set such conditions of release as are necessary to assure the appearance of the defendant or the orderly administration of justice. The metropolitan court may utilize the criteria listed in Paragraph B of Rule 7-401 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 or during 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 metropolitan court.

C. **Review of terms of release.** If the metropolitan court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the metropolitan court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the metropolitan court.

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 July 1, 1988; September 1, 1989; September 1, 1990; January 1, 1994; January 1, 1994; January 1, 1995; January 1, 1997; February 16, 2004; as amended by Supreme Court Order 08-8300-056, effective January 15, 2009; by Supreme Court Order No. 12-8300-020, effective for all cases pending or filed on or after August 3, 2012.]

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

Paragraph H was redesignated as Paragraph C 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 34-8A-6.

[Adopted by Supreme Court Order No. 12-8300-020, effective for all cases pending or filed on or after August 3, 2012.]

ANNOTATIONS

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

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

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

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

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

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

The 2008 amendment, approved by Supreme Court Order No. 08-8300-56, effective January 15, 2009, in Paragraph L, changed "shall" to "may" and added ", or the court may consider other sanctions as appropriate" at the end of the last sentence.

The 2012 amendment, approved by Supreme Court Order No. 12-8300-020, effective August 3, 2012, provided that appeals to district court be filed as set forth in the Rules of Criminal Procedure for the District Courts; provided that bond liability terminates upon a finding of guilty and authorizes the metropolitan court to set appeal bonds and conditions of release to assure the appearance of the defendant; required the stay of execution of a sentence pending the appeal; provided for a stay of the preparation of the abstract of record of conviction; in Paragraph A, deleted former provisions relating to the three day mailing period, the filing of a notice of appeal before the filing of a judgment, and the waiver of the docket fee for appeals by the state and the public defender; deleted former Paragraph B which provided the procedure for filing a notice of appeal; deleted former Paragraph C which specified the content of the notice of appeal; deleted former Paragraph D which provided for service of the notice of appeal; deleted former Paragraph E which provided for docketing the appeal; deleted former Paragraph F which provided for filing the record on appeal; deleted former Paragraph G which provided for the correction or modification of the record on appeal; changed the letter designation of former Paragraph H to Paragraph B; in Paragraph B, deleted provisions

which required the metropolitan court to review the conditions of release and which provided that a defendant on release pending trial would continue on release on the same terms and conditions and on the same bond unless modified by the metropolitan court; deleted former Paragraph J which provided for *trials de novo* on appeal; deleted former Paragraph K which provided for notice of settings of *trials de novo*; deleted former Paragraph L which required that *trials de novo* be heard within six months after the filing of the notice of appeal; deleted former Paragraph M which provided for the extension of the six month period; deleted former Paragraph N which provided that the Rules of Criminal Procedure govern appeals; deleted former Paragraph O which provided for rehearing of appeals; deleted former Paragraph P which provided for the disposal of appeals; deleted former Paragraph Q which provided for remand by the district court; deleted former Paragraph R which provided for appeals from the district court to the Court of Appeals; deleted former Paragraph S which provided for the return of the record to the metropolitan court; and added Paragraph D.

A defendant may not attack the validity of a metropolitan court plea for the first time in an on-the-record appeal to the district court. *State v. Spillman*, 2010-NMCA-019, 147 N.M. 676, 227 P.3d 1058.

Attack on the validity of a plea for the first time on appeal. — Where defendant pled no contest in metropolitan court to a charge of battery against a household member pursuant to a plea and disposition agreement and defendant appealed the sentence to district court, the district court, sitting as an appellate court, was without authority to address defendant's contention that defendant did not fully understand the basis of the plea. *State v. Spillman*, 2010-NMCA-019, 147 N.M. 676, 227 P.3d 1058.

This rule does not unconstitutionally abridge right of appeal guaranteed by N.M. Const. art. VI, § 27. *State v. Ball*, 1986-NMSC-030, 104 N.M. 176, 718 P.2d 686.

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

One who agrees not to be aggrieved cannot appeal. — One who agrees not to be aggrieved by entering into a plea and disposition agreement in the metropolitan court, who alleges no constitutional invalidity in the agreement, and who does not seek to have his plea and agreement withdrawn, is not an "aggrieved" party and cannot appeal to the district court. *State v. Bazan*, 1982-NMCA-018, 97 N.M. 531, 641 P.2d 1078, *overruled on other grounds by State v. Ball*, 1986-NMSC-030, 104 N.M. 176, 718 P.2d 686.

"Aggrieved" defendant. — A defendant who properly has entered a plea of guilty or nolo contendere in metropolitan court is not an "aggrieved" party entitled to appeal to

the district court for a trial de novo. *State v. Ball*, 1986-NMSC-030, 104 N.M. 176, 718 P.2d 686.

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

Prosecution has no right to appeal the metropolitan court's suppression of evidence. *State v. Giraudo*, 1983-NMCA-042, 99 N.M. 634, 661 P.2d 1333.

But may appeal order of dismissal. — Since an order of dismissal for failure to timely prosecute is a final judgment, the prosecution may appeal it from the metropolitan court to the district court. *State v. Giraudo*, 1983-NMCA-042, 99 N.M. 634, 661 P.2d 1333.

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.

Technical deficiency in metropolitan court transcript may be harmless. — Where trial court has sufficient information to proceed with the trial, a technical deficiency in transcript of metropolitan court, such as failure to include all pleadings or metropolitan court's final order, did not deprive trial court of power to proceed with the trial. *State v. Gallegos*, 1984-NMCA-069, 101 N.M. 526, 685 P.2d 381.

Counsel's failure to file timely notice of appeal. — Defendant was denied effective assistance of counsel by counsel's failing to file a timely notice of appeal in district court when counsel was aware of defendant's intent to appeal his metropolitan court judgment and sentence. *State v. Manuelito*, 1993-NMCA-045, 115 N.M. 394, 851 P.2d 516.

Single notice of appeal valid for two convictions where notice identified the two cases and internal wording of notice stated that appeal was taken in both cases. *State v. Gallegos*, 1984-NMCA-069, 101 N.M. 526, 685 P.2d 381.

Failure to preserve issue. — When a defendant fails to show the district court that he preserved issue in metropolitan court, the district court is not required to make an

independent determination of whether the metropolitan court six-month rule was violated. *State v. Hoffman*, 1992-NMCA-098, 114 N.M. 445, 839 P.2d 1333.

Ineffective assistance of counsel on appeal. — When the state purports to satisfy a criminal defendant's constitutional right to counsel, ineffective assistance of the appointed counsel may overcome the mandatory precondition to the district court's exercise of jurisdiction under Paragraph J of this rule. *Varela v. State*, 1993-NMSC-030, 115 N.M. 586, 855 P.2d 1050.

Dismissal of de novo appeals for failure to appear. — Before a de novo appeal can be dismissed for failure to appear, the court must give the defendant notice of the pending dismissal and 10 days to show cause why the appeal should not be dismissed. *State v. Wilson*, 1993-NMCA-032, 116 N.M. 802, 867 P.2d 1184.

A showing of extreme willfulness is necessary before the district court can dismiss an appeal for failure to appear prior to the expiration of the six-month rule. *State v. Wilson*, 1993-NMCA-032, 116 N.M. 802, 867 P.2d 1184.

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

7-704. Harmless error; clerical mistakes.

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

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

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

ANNOTATIONS

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

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

Technical deficiency in metropolitan court transcript may be harmless. — Where trial court has sufficient information to proceed with the trial, a technical deficiency in transcript of metropolitan court, such as failure to include all pleadings or metropolitan court's final order, does not deprive trial court of power to proceed with the trial. *State v. Gallegos*, 1984-NMCA-069, 101 N.M. 526, 685 P.2d 381.

Am. Jur. 2d, A.L.R. and C.J.S. references. — What constitutes harmless or plain error under Rule 52 of the Federal Rules of Criminal Procedure - Supreme Court cases, 157 A.L.R. Fed. 521.

7-705. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 12-8300-020, Rule 7-705 NMRA, relating to tape recordings of proceedings, was withdrawn effective August 3, 2012.

7-706. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 12-8300-020, Rule 7-706 NMRA, relating to statement of appellate issues, was withdrawn effective August 3, 2012.

7-707. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 12-8300-020, Rule 7-707 NMRA, relating to scope of review by the district court, was withdrawn effective August 3, 2012.

7-708. Withdrawn.

ANNOTATIONS

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

7-709. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order No. 12-8300-020, Rule 7-709 NMRA, relating to dismissals for failure to comply with rules or failure to appear, was withdrawn effective August 3, 2012.

ARTICLE 8
Special Proceedings

7-801. Modification of sentence.

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

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

ANNOTATIONS

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

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

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

24 C.J.S. Criminal Law § 1610 et seq.

7-802. Return of the probation violator.

A. **Probation.** The court shall have the power to suspend or defer a sentence and impose conditions of probation during the period of suspension or deferral.

B. **Violation of probation.** At any time during probation if it appears that the probationer may have violated the conditions of probation:

(1) the court may issue a warrant or bench warrant for the arrest of a probationer for violation of any of the conditions of probation. The warrant shall order the probationer to the custody of the court or to any suitable detention facility;

(2) the court may issue a notice to appear to answer a charge of violation.

C. **Hearing.** On notice to the probationer, the court shall hold a hearing on the violation charged. If the violation is established, the court may continue the original probation, revoke the probation and either order a new probation or require the probationer to serve the balance of the sentence imposed or any lesser sentence. Unless otherwise provided by law, if imposition of sentence was deferred, the court may impose any sentence which might originally have been imposed, but credit shall be given for time served on probation.

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

[As amended, effective September 1, 1989; May 1, 2002; as amended by Supreme Court Order No. 13-8300-006, effective for all cases pending or filed on or after May 5, 2013.]

Committee commentary. — Rule 7-802 NMRA was amended in 2013 to resolve a conflict with the following statutes: NMSA 1978, Sections 30-3-15 (battery on household member); 30-3-16 (aggravated battery on household member); and 66-8-102(T) (driving under the influence).

[Adopted by Supreme Court Order No. 13-8300-006, effective for all cases pending or filed on or after May 5, 2013.]

ANNOTATIONS

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

The 2002 amendment, effective May 1, 2002, in Paragraph A, deleted "violation of probation" in the bold heading and deleted the second sentence relating to the violation of probation; and rewrote Pargraphs B and C relating to issuance of warrants and imposition of sentence, respectively.

The 2013 amendment, approved by Supreme Court Order No. 13-8300-006, effective May 5, 2013, required the court to give credit for time served on probation if the court

imposes a new sentence except as otherwise provided by law; and in Paragraph C, in the third sentence, added "Unless otherwise provided by law".

7-810. Fugitive complaint.

A. **Complaint.** A fugitive action may be commenced in the metropolitan court by filing a sworn fugitive complaint:

(1) identifying the defendant;

(2) identifying the demanding state for which the defendant's arrest is being made;

(3) stating the grounds for extradition; and

(4) stating either that a warrant for the arrest of the defendant is sought or the date and time of arrest for extradition.

The complaint may be amended by the state without leave of court prior to arraignment.

B. **Where commenced.** A fugitive action shall be commenced in the county in which the defendant has been arrested or where the defendant is expected to be found.

C. **Service of complaint.** If the fugitive is arrested without a warrant, a fugitive complaint shall be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. The complaint shall be filed with the metropolitan court at the time it is given to the defendant. If the court is not open at the time the copy of the complaint is given to the defendant, the complaint shall be filed the next business day of the court.

[Adopted, effective October 1, 1996.]

ANNOTATIONS

Cross references. — For Uniform Criminal Extradition Act, *see* Section 31-4-1 NMSA 1978 et seq.

7-811. Arraignment and commitment hearing prior to issuance of the governor's rendition warrant.

A. **Time.** Within two (2) business days after arrest, the defendant shall be brought before the court for an arraignment and commitment hearing.

B. **Procedure.** At the arraignment, the court shall:

(1) inform the defendant of the defendant's right to retain counsel;

(2) provide the defendant with copies of any documents on which the prosecution will rely at the commitment hearing;

(3) inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited and of the right to obtain a writ of habeas corpus pursuant to law; and

(4) ask the defendant to admit or deny that the defendant is the person described in the fugitive complaint.

C. **Waiver of extradition.** The defendant may waive extradition proceedings by signing a written waiver of extradition substantially in the form approved by the Supreme Court. If the court finds the waiver is voluntary, the court shall issue an order to hold the defendant without bail for delivery to an authorized agent of the demanding state.

D. **Identity question.** If the defendant denies being the person described in the fugitive warrant, the court shall examine the information on which the arrest was made and determine whether it appears that the defendant is the person sought.

E. **Conditions of release.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the court may set conditions of release on the surrender of the defendant upon issuance of the rendition warrant by the governor.

F. **Time limits for governor's rendition.** If the defendant does not waive extradition or denies being the person described in the fugitive complaint, the defendant may be held in custody for a period of not more than thirty (30) days pending arrest on a rendition warrant from the governor. On motion, the court may extend the commitment or conditions of release pending arrest on a governor's rendition warrant for a period of not more than sixty (60) additional days.

G. **Dismissal of fugitive complaint.** If a governor's rendition warrant is not filed pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as provided by Paragraph F of this rule, the fugitive complaint shall be dismissed without prejudice and the defendant released. The time limits set forth in Paragraph F in this rule do not constitute the deadline for the completion of extradition proceedings under Rule 5-822 NMRA.

[Adopted, effective October 1, 1996; as amended by Supreme Court Order No. 10-8300-032, effective December 3, 2010.]

ANNOTATIONS

Cross references. — For Uniform Criminal Extradition Act, *see* Section 31-4-1 NMSA 1978 et seq.

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

The 2010 amendment, approved by Supreme Court Order No. 10-8300-032, effective December 3, 2010, in Paragraph F, after "thirty (30) days pending", deleted "receipt of" and added "arrest on", and in the second sentence, after "release pending", deleted "issuance of" and added "arrest on"; and in Paragraph G, in the first sentence, after "governor's rendition warrant is not filed", deleted "within the times" and added "pursuant to Rule 5-822 NMRA before the expiration of the time for holding the defendant in custody as", after "Paragraph F", added "of this rule", and added the last sentence.

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

If a fugitive action is pending in the metropolitan court when the governor issues a warrant for the arrest and extradition of the defendant, the fugitive action shall be transferred to the district court for further action.

[Adopted, effective October 1, 1996.]

ANNOTATIONS

Cross references. — For Uniform Criminal Extradition Act, *see* Section 31-4-1 NMSA 1978 et seq.

Table Of Corresponding Rules

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

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

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1	3-101, 7-101
2	Withdrawn
3	3-202

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4	3-203, 7-209
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7	3-606, 7-604
8	3-601, 7-601
9	3-502, 7-606
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12	3-110, 7-111
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14	3-103, 7-103
15, 16	3-705, 7-704
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18	3-201
19	3-202
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25	3-403
26	3-402
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56	7-501
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58	7-402
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60	7-504
61	7-507
62	7-607
62.1	7-608
63	7-605
64	7-605
65	7-603
66	7-609
67	7-610
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70.1	7-802
71	7-703
72	3-706
73	3-707
74	3-708
74.1	3-109, 7-110
75	None
76	3-710
77	None
78	3-709
79	3-711

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7-106	11
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7-201	38
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7-209	4
7-301	40
7-302	41
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7-410A	None
7-410B	None

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7-406	None
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