Rules of Criminal Procedure for the Magistrate Courts

ARTICLE 1
General Provisions

6-101. Scope and title.

A. **Scope.** These rules govern the criminal procedure in all magistrate courts.

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

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

D. **Citation form.** These rules shall be cited by set and rule numbers, as in NMRA, Rule 6-___.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. Cowan v. Davis, 96 N.M. 69, 628 P.2d 314 (1981).

Retrial not barred by failure to reserve jurisdiction. — The failure of a magistrate court to expressly reserve the right to retry a defendant in its final order does not bar a retrial on the basis that such action would constitute double jeopardy. Cowan v. Davis, 96 N.M. 69, 628 P.2d 314 (1981).

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.

6-102. Conduct of court proceedings.

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

taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; and no such action shall be done or permitted except as provided by Rule 6-601 NMRA of these rules.

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. **Closed circuit television recordings.** The Administrative Office of the Courts (AOC) may install closed circuit television systems in the magistrate courts. The recordings produced by the closed circuit television system do not constitute a record of court proceedings, and the presence of closed circuit television recording equipment in the courtroom shall have no effect upon the status of the magistrate court as a non-record court.

[As amended, effective September 2, 1997; May 5, 1998; as amended by Supreme Court Order 08-8300-07, effective January 29, 2008.]

ANNOTATIONS

The 1997 amendment, effective September 2, 1997, inserted "as provided by Rule 6-601 of these rules or" near the end of Paragraph A.

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

The 2008 amendment, approved by Supreme Court Order 08-8300-07, effective January 29, 2008, added Paragraph C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.

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.

6-103. Rules and forms.

A. **Rules.** Each magistrate court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law, these rules or regulations

prescribed by the Administrative Office of the Courts. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court. Proposed rules or amendments shall be submitted to the director of the Administration Office of the Courts and shall not become effective until approved by the director.

B. **Forms.** Forms used or distributed by the magistrate courts shall be submitted to the director of the Administrative Office of the Courts and shall not become effective until approved by the director. A party may file a pleading or paper that is substantially in the form approved by the Supreme Court. Forms may be combined.

[Approved, effective October 31, 1974; as amended, effective January 1, 1987; as amended by Supreme Court Order 07-8300-34, effective January 22, 2008.]

ANNOTATIONS

Cross references. — For magistrate court civil rule relating to the approval of forms, *see* Rule 2-103 NMRA.

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

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

The 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, delegated the Supreme Court approval of forms used in the magistrate courts to the director of the Administrative Office of the Courts and provided for forms to be combined

6-104. Time.

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by any applicable statute, the day of the act, event or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, 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, in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

B. **Enlargement.** When by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period permit the act to be done; but it may not extend the time for commencement of trial or for taking an appeal.

C. **For motions.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereon shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time.

D. **Additional time after service by mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[As amended, effective August 1, 2004.]

ANNOTATIONS

The 2004 amendment amended Paragraph A to delete "by local rules of any magistrate court", to add after "legal holiday" in the second sentence "or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the court inaccessible" and to add the last sentence of the paragraph relating to how time is computed and defining "legal holiday"; amended Subparagraph (2) of Paragraph B to delete references to Rules 6-506 and 6-703 and amended Paragraph D to make gender neutral changes.

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

Court's jurisdiction not limited by time limits specified for preliminary examination. — Nothing in either the district court rules or the magistrate court rules limits the jurisdiction of the magistrate court to the time limits specified in Rule 6-202 NMRA; rather, they specifically grant limited jurisdiction to the magistrate court beyond

the time limits prescribed in Rule 6-202 NMRA. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Rescheduling to allow judge to attend judicial conference is permissible enlargement. — Where a preliminary hearing scheduled by the magistrate court within the time period of Rule 6-202 NMRA is rescheduled upon motion of the magistrate judge to permit the judge's attendance at a judicial conference, that constitutes good cause and permissible enlargement of time under Paragraph B of this rule. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Law reviews. — For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

6-105. Assignment and designation of judges.

A. **Assignment.** In those courts with two or more judges, the cases shall be assigned randomly among the judges of the court pursuant to a selection system administered by the Supreme Court, unless the presiding judge orders otherwise for good cause shown. 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 reassigned because the assigned judge has been recused, is excused, is sick or otherwise unavailable and another judge has been assigned; or

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

B. **Reassignment.**

(1) **Courts with two or more judges.** In magistrate courts with two or more judges, upon receipt of a notice of excusal or upon recusal, the magistrate or clerk of the magistrate court shall give written notice to the parties to the action.

(a) **Recusal.** Upon recusal, the selection system administered by the Supreme Court shall randomly assign another magistrate judge first, to another judge in the originating court, or, if all of those judges have been excused or have recused, to another judge in the same magistrate district to preside over the case unless for good cause shown the presiding magistrate shall make a specific assignment.

(b) **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 magistrate district to preside over the case and this agreement shall be contained in the notice of excusal.

(c) **Reassignment.** If the parties fail to agree on a judge, the selection system administered by the Supreme Court shall, within ten (10) days, randomly reassign the case first, to another judge in the originating court, or, if all of those judges have been excused or have recused, to another judge in the same magistrate district, unless the presiding judge determines that there is justifiable reason to assign a case to a particular judge and the reason is included in the notice of reassignment.

(d) **Certification to district court.** If all magistrates in the magistrate district have been excused or have recused themselves, within ten (10) days after service of the last notice of excusal or recusal, the presiding magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused or recused magistrate and to the designated magistrate.

(2) **Other courts.** In magistrate courts with only one magistrate, upon receipt of a notice of excusal or upon recusal, the magistrate shall give written notice to the parties to the action.

(a) **Recusal.** Upon recusal, another magistrate judge of the magistrate district shall be randomly assigned to preside over the case by the selection system administered by the Supreme Court.

(b) **Excusal.** Upon the filing of the notice of excusal, the parties or their counsel may agree to another judge of the magistrate district to preside over the case. This agreement shall be contained in the Notice of Excusal. Upon excusal, another magistrate judge of the magistrate district shall be randomly assigned to preside over the case by the selection system administered by the Supreme Court.

(c) **Certification to district court.** If all the magistrates in the magistrate district have recused themselves or been excused, within ten (10) days after filing of the last notice of recusal or excusal, the magistrate of the court where the action was first filed shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused magistrate and to the designated magistrate.

C. **Assignment out-of-district.** If a criminal proceeding is filed against a judge or an employee of the magistrate district in which a criminal proceeding is pending, no judge of the magistrate district may hear the matter without written agreement of the parties. If within ten (10) days after the proceeding is filed, the parties have not filed a stipulation designating a judge to preside over the matter, the clerk shall request the district court to designate a judge. The district court shall send notice of its designation to the parties or their counsel and to the magistrate court.

D. **Assignment of direct criminal contempt cases.** Cases of direct criminal contempt shall be assigned to the judge before whom the contempt occurred.

E. **Reassignment to multiple cases.** The district judge may designate a magistrate from another magistrate district to sit in actions arising in a particular magistrate district for a specific period of time.

F. **Subsequent proceedings.** All proceedings shall be conducted in the original magistrate court, except that with the consent of all parties and the assigned judge, proceedings may be held in another magistrate court in the same judicial district in which the original magistrate court is located. The clerk of the original magistrate court shall continue to be responsible for the court file and shall perform such further duties as may be required. Within five (5) business days after assignment or designation of a new judge, the clerk shall make a copy of the court file for the designated judge and forward it to the judge. Within ten (10) business days of adjudication of the case, the original documents of the adjudication shall be forwarded to the clerk of the original magistrate court for filing.

G. **Unavailability of judge.** At any time during the pendency of the proceedings if the assigned judge is unavailable, the assigned judge may designate another judge of the magistrate district to hear any matter that is not dispositive of the case or the parties may agree on another judge to hear any matter, including the merits of the case. The agreement is subject to the approval of the assigned judge and the judge agreed upon by the parties. If another judge is agreed upon to hear the merits of the case, the case shall be reassigned to that judge.

[As amended, effective September 1, 1989; November 1, 1995; May 1, 2002; as amended by Supreme Court Order 07-8300-34, effective January 22, 2008; by Supreme Court Order No. 10-8300-016, effective May 14, 2010.]

ANNOTATIONS

Cross references. — For disqualification of magistrate, *see* Section 35-3-7 NMSA 1978.

For the statutory right to excuse a magistrate court judge, *see* Section 35-3-7 NMSA 1978.

For constitutional right to disqualify a magistrate court judge, *see* N.M. Const., art. 6, § 18.

For form on certification of excusal or recusal, *see* Rule 4-102 NMRA.

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

For disqualification pursuant to the Code of Judicial Conduct, *see* Rule 21-400 NMRA.

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

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

The 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, added Paragraph A providing for assignment of judges in magistrate court districts with presiding judges; relettered Paragraph A as Paragraph B and revised the paragraph to add subparagraphs and reorganize the provisions; added a new Paragraph C providing for reassignment of criminal cases out of the district when charges are filed against a judge or employee of the district; added a new Paragraph D to provide for designation of a temporary magistrate to serve in a magistrate district; relettered former Paragraph B as a new Paragraph E and amended the paragraph to provide for trial in another magistrate district upon consent of the parties; and relettered former Paragraph C as Paragraph F to provide for hearings of nondispositive matters upon absence of the availability of the trial judge and to permit the parties to agree upon another judge to hear the merits of the case.

The 2010 amendment, approved by Supreme Court Order No. 10-8300-016, effective May 14, 2010, in Paragraph A, in the first sentence, after "In those courts", changed "which have a presiding magistrate, the presiding magistrate shall assign cases among the judges of the court as equitably on a random basis" to "with two or more judges, the cases shall be assigned randomly among the judges of the court pursuant to a selection system administered by the Supreme Court"; in Subparagraph (1) of Paragraph B, in the title, after "Courts with", deleted "presiding magistrates" and added "two or more judges", and in the first sentence, after "In magistrate courts", deleted "which have a presiding magistrate" and added "with two or more judges"; in Item (a) of Subparagraph (1) of Paragraph B, after "Upon recusal, the", deleted "presiding magistrate of the court" and added "selection system administered by the Supreme Court"; after "Supreme Court shall", added "randomly"; added the language that occurs between "assign another magistrate judge" and "to preside over the case"; and after "to preside over the case", added the remainder of the sentence; in Item (c) of Subparagraph (1) of Paragraph B, after "agree on a judge, the", deleted "presiding judge" and added "selection system administered by the Supreme Court shall"; and added the language that occurs between "randomly reassign the case" and "unless the presiding judge determines"; in Item (d) of Subparagraph (1) of Paragraph B, in the first sentence, after "If all magistrates in the", added "magistrate"; in Subparagraph (2) of Paragraph B, in the introductory sentence, after "In magistrate courts", deleted "which do not have a presiding" and added "with only one magistrate"; in Item (a) of Subparagraph (2) of Paragraph B, after "assigned to preside over the case", deleted "chief clerk and in such a manner that all other judges of the magistrate district are assigned approximately equal numbers of cases in which another magistrate has been recused" and added the remainder of the sentence; in Item (b) of Subparagraph (2) of Paragraph B, in the third sentence, after "assigned to preside over the case", deleted "chief clerk and in such a manner that all other judges of the magistrate district are assigned approximately equal numbers of cases in which another magistrate has been excused" and added the remainder of the sentence; added Paragraph D; and in Paragraph F, in the third

sentence, after "Within five (5)", added "business" and after "court file for the designated judge", added the remainder of the sentence; and added the last sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86, 88, 91, 261 et seq.

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

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

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

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

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

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

Power of successor judge taking office during term time to vacate, set aside, or annul judgment entered by his or her predecessor, 51 A.L.R.5th 747.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 84 A.L.R.5th 399.

48A C.J.S. Judges §§ 162 to 185.

6-106. Excusal; recusal; disability.

A. **Definition of parties.** "Party" as used in this rule means the defendant, the state, a municipality, a county or person filing the complaint or an attorney representing the defendant, the state, county, municipality or other party.

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. 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 excusal of a judge scheduled to hear a preliminary hearing must be filed at least four (4) days prior to the hearing.

D. **Excusal procedure.** 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. 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; procedure.** No magistrate 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 magistrate 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 6-105 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 magistrate court judge to file a certificate of recusal or not less than five (5) days after the filing of an order in the magistrate 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 magistrate court. The district court shall make such investigation as the court deems warranted and enter an order in the action, either prohibiting the magistrate court judge from proceeding further or finding that there are insufficient grounds to reasonably question the magistrate 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 magistrate court certifying the issue of recusal to the district court pursuant to Paragraph G of this rule, the magistrate court judge may enter a stay of the proceedings pending action by the district court. If the magistrate 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 magistrate 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 magistrate 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 district 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 in the district, 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 magistrate is in fact disabled or unavailable, the court shall designate another judge to preside over the case.

[As amended, effective January 1, 1987; July 1, 1988; September 1, 1989; September 1, 1990; November 1, 1995; May 1, 2002; as amended by Supreme Court Order 07-8300-34, effective January 22, 2008.]

ANNOTATIONS

Cross references. — For form of certificate of excusal or recusal of a magistrate court judge, *see* Rule 9-102A NMRA.

For comparable metropolitan court rule, *see* Rule 7-106 NMRA.

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 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, amended Paragraph A to include a municipality, county or other party within the definition of "party" to a magistrate court criminal proceeding.

Excusal after asking magistrate to exercise discretion was not permitted. — Where the state filed a criminal complaint in magistrate court charging defendant with felony offenses and sought to establish probable cause in a preliminary hearing in magistrate court; the magistrate made a finding of no probable cause; the state filed the same charges in the district court which remanded the matter to magistrate court for a preliminary hearing; the state then peremptorily excused the original magistrate from conducting the preliminary hearing; and a second magistrate listened to a tape recording of the original preliminary hearing, and without more evidence made a finding of probable cause and bound defendant to district court for trial on the felony charges, the state could not disqualify the original magistrate after the state had asked the original magistrate to exercise discretion in the first proceeding. *State v. White*, 2010-NMCA-043, 148 N.M. 214, 232 P.3d 450.

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.

6-107. Entry of appearance.

A. **How entered.** 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. 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) any communication 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.

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

C. **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.]

ANNOTATIONS

The 2000 amendment, effective September 15, 2000, redesignated former Subsection B as present Subsection C and added Subsection B.

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 enters 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”.

6-108. Non-attorney prosecutions.

A. **Peace officers.** Peace officers may file criminal complaints against persons in the magistrate court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the trial jurisdiction of the court.

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

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

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

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

[As amended, effective March 15, 1986; July 1, 1988; as amended by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, in Paragraph A, deleted the phrase "and private citizens" from the title and deleted the phrase "and individual private citizens in their own behalf" in the first sentence and in Paragraph C, deleted the phrase "and individual private citizens in their own behalf" following the phrase "Paragraph B".

Prosecution of magistrate or municipal case in district court after appeal. — 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.

6-109. Presence of the defendant; appearance of counsel.

A. **Presence required.** The defendant shall be present at the arraignment and at every stage of the trial including the impaneling of the jury, the return of the verdict and the imposition of any sentence, except as otherwise provided by these rules.

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

(1) voluntarily absents himself after the proceeding has commenced; or

(2) engages in conduct which is such as to justify his being excluded from the proceeding.

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

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

(2) in prosecutions for offenses within magistrate court trial jurisdiction, the court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the defendant's absence.

ANNOTATIONS

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

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

Voluntary absence of accused when sentence is pronounced, 6 A.L.R.2d 997.

Voluntary absence when sentence is pronounced, 59 A.L.R.5th 135.

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

6-110. Withdrawn.

ANNOTATIONS

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

6-110A. 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, shall have the ability of private, unrecorded communication;

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

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

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

[Approved, effective November 1, 2000; as amended, effective July 1, 2002; as amended by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

Cross references. — For filing by fax, *see* Rule 6-210 NMRA.

For filing electronically, *see* Rule 6-211 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 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, in Paragraph B, changed the phrase "The court may require the defendant to appear through the use of" to the phrase "For purposes of these rules, an appearance through" and at the end of the sentence, added the phrase "as defined in Paragraph A above, constitutes an appearance in open court" and in Subparagraph (1) of Paragraph B, added the phrase "entry of any plea; or".

6-111. Contempt.

A. **Jurisdiction.** A magistrate 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; and

(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 magistrate court in criminal cases.

[As amended, effective January 1, 1996.]

ANNOTATIONS

The 1996 amendment, effective January 1, 1996, designated the existing provisions as Paragraph A and rewrote that paragraph, and added Paragraphs B through D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt, 8 A.L.R.3d 657.

Publication or broadcast, during course of trial, of matter prejudicial to criminal defendant as contempt, 33 A.L.R.3d 1116.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.

Refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

6-112. 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 magistrate 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 magistrate 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, 1995.]

6-113. Victim’s rights.

A. The court shall respect all rights of victims of crimes enumerated and filed as specified in the Victims of Crime Act, Sections 31-26-1 to 31-26-14 NMSA 1978.

B. At any scheduled court proceeding, the court shall inquire whether any victim entitled to notice of the proceeding, under Article II, Section 24, is present. If the victim is present, the court shall ascertain that the victim has been informed of the right to

(1) be treated with fairness and respect for the victim’s dignity and privacy throughout the criminal justice process;

(2) timely disposition of the case;

(3) be reasonably protected from the accused throughout the criminal justice process;

(4) notification of court proceedings;

(5) attend all public court proceedings the accused has the right to attend;

(6) confer with the prosecution;

(7) make a statement to the court at sentencing and at any post-sentencing hearings for the accused;

(8) restitution from the person convicted of the criminal offense that caused the victim's loss or injury;

(9) information about the conviction, sentencing, imprisonment, escape or release of the accused;

(10) have the prosecuting attorney notify the victim's employer, if requested by the victim, of the necessity of the victim's cooperation and testimony in a court proceeding that may necessitate the absence of the victim from work with good cause;

(11) promptly receive any property belonging to the victim that is being held for evidentiary purposes by a law enforcement agency or the prosecuting attorney, unless there are compelling evidentiary reasons for retention of the victim's property; and

(12) be informed by the court at a sentencing proceeding that the offender is eligible to earn meritorious deductions from the offender's sentence and the amount of meritorious deductions that may be earned by the offender.

C. If the victim is not present, the court shall inquire of the district attorney whether an attempt has been made to notify the victim of the proceeding. If the district attorney cannot verify that an attempt has been made, unless doing so would result in a violation of a jurisdictional rule, the court shall

(1) reschedule the hearing; or

(2) continue with the hearing but reserve ruling until the victim has been notified and given an opportunity to make a statement; and

(3) order the district attorney to notify the victim of the rescheduled hearing.

[Adopted by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

Committee Commentary. — Article II, Section 24 of the Constitution of the State of New Mexico and the Victims of Crime Act, Sections 31-26-1 to 31-26-14 NMSA 1978 (2005) provide that victims of specific crimes enumerated in the Constitution and Act have specific rights in court proceedings. This rule applies only to those crimes enumerated and filed as specified under the Victims of Crime Act.

[Adopted by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

6-114. 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 6-304 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 6-301 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 magistrate 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 6-304 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph F for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

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

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

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

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

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

Numerous statutes identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, NMSA 1978, § 7-1-4.2(H) (providing for confidentiality of taxpayer information); NMSA 1978, § 14-6-

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

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

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

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

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

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

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

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

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

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

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

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

may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

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

ANNOTATIONS

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

ARTICLE 2
Initiation of Proceedings

6-201. 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, 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 magistrate court.

B. **Jurisdiction.** Magistrates 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 magistrate 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 magistrate 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 magistrate 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. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

Cross references. — For criminal complaint form, *see* Rules 9-201 and 9-202 NMRA.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, in Paragraph A, substituted "state or local traffic enforcement officer pursuant to Section 66-8-130 NMSA 1978; or" for "full-time, salaried police officer, if permitted by law." at the end of Subparagraph (2) and added Subparagraph (3) and the last sentence of the paragraph; rewrote Paragraph D; and added Paragraph E.

The 1991 amendment, effective for cases filed in the magistrate 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 magistrate 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 Paragraph (3) of Subsection A which read "a criminal citation complying with the provisions of Section 31-1-6 NMSA".

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 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, in Paragraph A, added Subparagraphs (4) and (5).

I. GENERAL CONSIDERATION.

Unavailability of magistrate not basis for discharge. — The rule does not provide for the arrested person to be discharged if a magistrate is not available. Perea v. Stout, 94 N.M. 595, 613 P.2d 1034 (Ct. App.), cert. denied, 449 U.S. 1035, 101 S. Ct. 610, 66 L. Ed. 2d 496 (1980).

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

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

22 C.J.S. Criminal Law § 324 et seq.

II. HOW COMMENCED.

Complaint commences prosecution despite later indictment. — Charges initiated by a complaint in a magistrate court should be considered as continued by a later indictment, and, for purposes of the statute of limitations, the prosecution should be considered as commenced by the filing of the complaint. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Filing of complaint tolls limitation period. — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony was timely because the limitation period was tolled by the filing of a complaint within the three-year period. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

No initials to describe offense. — The use of initials instead of words in a criminal complaint to identify the offense deprived defendant of due process of law. State v. Raley, 86 N.M. 190, 521 P.2d 1031 (Ct. App.), cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974).

Subsection designation not required. — This rule does not require reference to subsections; it requires only a reference to the specific section number of the statute which contains the offense. State v. Nixon, 89 N.M. 129, 548 P.2d 91 (Ct. App. 1976).

6-202. Preliminary examination.

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

B. **Record of hearing.** A record shall be made of the preliminary examination. If the defendant is bound over for trial in the district court, the record shall be filed with the clerk of the district court with the bind-over order. A duplicate of the tape may be requested by any party within six (6) months following the preliminary hearing. The taped record may be disposed of by the magistrate court after the expiration of six (6) months following the preliminary hearing.

C. **Findings of court.** If, upon completion of the examination, it appears to the court that there is no probable cause to believe that the defendant has committed an offense, the court shall discharge the defendant. If the defendant is bound over for trial by the magistrate court, the district attorney shall file with the magistrate court:

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

(2) if an order is entered by the district court extending the time for filing an information, a copy of such order. If the court finds that there is probable cause to believe that the defendant committed an offense not within magistrate court trial jurisdiction, it shall bind the defendant over for trial. If the court finds that there is probable cause to believe that the defendant committed only an offense within magistrate court trial jurisdiction, the action shall be set for trial as soon as possible.

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

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

F. **Bail bond.** After bindover, the magistrate court shall retain jurisdiction over the defendant and the bond until an information or indictment is filed in the district court or until twelve (12) months have passed whichever occurs first. If the defendant is indicted, the magistrate court shall transfer any bond to the district court. Unless the proceedings are remanded to the magistrate 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 07-8300-25, effective November 1, 2007.]

ANNOTATIONS

Cross references. — For form on notice of preliminary examination and certificate of mailing, *see* Rule 9-206 NMRA.

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

For the transfer of the bail bond on appeal from the magistrate court, *see* Rule 6-703 NMRA .

The 1992 amendment, effective for cases filed in the magistrate 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 2007 amendment, approved by Supreme Court Order 07-8300-25, effective November 1, 2007 added the first sentence of Paragraph F providing for jurisdiction over the release of the defendant until an information or indictment is filed in the district court and amended the second sentence to provide for transfer of the bond upon indictment.

State is collaterally estopped from presenting the same evidence in a subsequent preliminary hearing. — Where the state filed a criminal complaint in magistrate court charging defendant with felony offenses and sought to establish probable cause in a preliminary hearing in magistrate court; the magistrate made a finding of no probable cause; the state filed the same charges in the district court which remanded the matter to magistrate court for a preliminary hearing; the state then peremptorily excused the original magistrate from conducting the preliminary hearing; and a second magistrate listened to a tape recording of the original preliminary hearing, and without more evidence made a finding of probable cause and bound defendant to district court for trial on the felony charges, the state was collaterally estopped from presenting the identical evidence in the second preliminary hearing. *State v. White*, 2010-NMCA-043, 148 N.M. 214, 232 P.3d 450.

Two things must be proved in preliminary hearing before a magistrate: (1) the fact that a crime has been committed; and (2) probable cause to believe that the person charged committed it. State v. Vallejos, 93 N.M. 387, 600 P.2d 839 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

Preliminary examination deemed critical stage of proceedings. — The preliminary examination, from the arraignment of the defendant until the end of the examination, is a critical stage in criminal proceedings because a defendant needs the advice and assistance of counsel at the time of his arraignment, the entry of plea and his announcement as to whether he desires or waives a preliminary examination, and because he needs the assistance of counsel in cross-examining the state's witnesses at the preliminary examination. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685 (1966) (decided under former law).

Indictment after preliminary hearing. — Subsequent indictment is not barred when the magistrate conducts a preliminary hearing and decides that insufficient probable cause exists for binding the accused over for trial in district court. State v. Peavler, 87 N.M. 443, 535 P.2d 650 (Ct. App.), rev'd on other grounds, 88 N.M. 125, 537 P.2d 1387 (1975).

Court's jurisdiction not limited by time limits specified in this rule. — Nothing in either the district court rules or the magistrate court rules limits the jurisdiction of the magistrate court to the time limits specified in this rule; rather, they specifically grant limited jurisdiction to the magistrate court, by Rule 6-104 NMRA, and former Rule 20(e), N.M.R. Crim. P., beyond the time limits prescribed in this rule. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Failure to timely hold preliminary examination does not divest jurisdiction. — The magistrate court does not automatically lose jurisdiction upon failing to hold a preliminary examination within the time provisions of Paragraph D. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Dismissal improper. — Dismissal is not the proper remedy for a delay in holding a preliminary examination when prejudice to the defendant has not been shown. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Evidence found to support belief that defendant committed crime. — While no evidence was presented at the preliminary hearing on the cause of death of the victim, the magistrate still had probable cause to believe that the defendant committed the crime of murder where the evidence showed that the defendant shot the deceased, who remained in the hospital until his death. State v. Vallejos, 93 N.M. 387, 600 P.2d 839 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

Complaint commences prosecution despite later indictment. — Charges initiated by a complaint in a magistrate court should be considered as continued by a later indictment, and, for purposes of the statute of limitations, the prosecution should be considered as commenced by the filing of the complaint. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Filing of complaint tolls limitation period. — An indictment filed prior to dismissal of a complaint but more than three years after the commission of a third degree felony was

timely because the limitation period was tolled by the filing of a complaint within the three-year period. State v. Martinez, 92 N.M. 291, 587 P.2d 438 (Ct. App.), cert. quashed, 92 N.M. 260, 586 P.2d 1089 (1978).

Magistrate is not authorized to restrict action of district attorney in filing information. State v. McCrary, 97 N.M. 306, 639 P.2d 593 (Ct. App. 1982).

Law reviews. — For article, "Survey of New Mexico Law, 1982-83: Criminal Procedure," see 14 N.M.L. Rev. 109 (1984).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 411 to 420, 424 to 432.

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.

22 C.J.S. Criminal Law § 340 et seq.

6-203. Arrests without a warrant; probable cause determination.

A. **General rule.** 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 a probable cause determination shall be made to determine if a person shall remain in custody. The probable cause determination shall be made by a magistrate, metropolitan or district court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier.

B. **Conduct of determination.** The probable cause determination 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 there is a basis for believing 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 within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant, whichever occurs earlier with sufficient facts to show probable cause for detaining the defendant.

C. **Probable cause determination; conclusion.** If the court finds that the complaint fails to establish probable cause to believe that the defendant has committed an offense and no amendment is filed with sufficient facts to show probable cause for detaining the defendant, the court shall dismiss the complaint without prejudice and order the immediate release of the defendant. 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 6-401 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 07-8300-25, effective November 1, 2007.]

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 magistrate courts on or after September 1, 1990, added "arrests without a warrant" to the catchline; rewrote Paragraph A; deleted former Paragraph B, relating to time of determination, and redesignated former Paragraphs C and D as present Paragraphs B and C; in present Paragraph B, inserted "whether there is probable cause" near the beginning, substituted "nonadversarial" for "nonadversary" in the first sentence, and added the last sentence; and in present Paragraph C, added "Probable cause determination;" to the paragraph heading, rewrote the first sentence, and added the second, third, and fourth sentences.

The 1991 amendment, effective for cases filed in the magistrate 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 of the paragraph, relating to expiration of the prescribed period on a Saturday, Sunday, or legal holiday.

The 2007 amendment, approved by Supreme Court Order 07-8300-25, effective November 1, 2007, amends Paragraph A to provide for a probable cause determination to be made by a magistrate, metropolitan or district court judge; amends Paragraph B to provide that a written showing of probably cause within 48 hours after custody commences or at the first appearance whichever occurs earlier; amends Paragraph C to provide for a dismissal of the complaint if the complaint or any amended complaint fails to show probable cause.

Test at preliminary hearing is not whether guilt is established beyond a reasonable doubt, but whether there is that degree of evidence to bring within reasonable probabilities the fact that a crime was committed by the accused. State v. Vallejos, 93 N.M. 387, 600 P.2d 839 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

Evidence found to support belief that defendant committed crime. — While no evidence was presented at the preliminary hearing on the cause of death of the victim, the magistrate still had probable cause to believe that the defendant committed the crime of murder where the evidence showed that the defendant shot the deceased, who

remained in the hospital until his death. State v. Vallejos, 93 N.M. 387, 600 P.2d 839 (Ct. App.), cert. denied, 93 N.M. 205, 598 P.2d 1165 (1979).

Arrest and release on same day. — Where a defendant is arrested without a warrant and released from custody on the same day as the arrest, the Rules of Criminal Procedure do not contemplate a probable cause determination by either the district court under Rule 5-301(A) NMRA 2003 or the magistrate court under Paragraph A of this rule. State v. Gomez, 2003-NMSC-012, 133 N.M. 763, 70 P.3d 753.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 411 to 432.

22 C.J.S. Criminal Law § 339.

6-204. Issuance of warrant for arrest and summons.

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

B. **Preference for summons.** If the offense is within magistrate court trial jurisdiction, the court shall issue a summons, unless in its discretion and for good cause shown, the court finds that the interests of justice may be better served by the issuance of a warrant for arrest.

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

[As amended, effective July 1, 1988.]

ANNOTATIONS

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

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

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

Pretrial preventive detention by state court, 75 A.L.R.3d 956.

22 C.J.S. Criminal Law § 334 et seq.

6-205. Summons; service; failure to appear.

A. **Methods of 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 judge or 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, 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 6-104. 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 the sheriff of the county where the defendant may be found, 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 of the court, the judge or the prosecutor 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 for personal service 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 the sheriff or a deputy sheriff, proof thereof shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff, 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 process in civil actions, *see* Rule 2-202 NMRA.

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

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

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

The 1989 amendment, effective for cases filed in the magistrate courts on or after January 1, 1990, rewrote the rule heading which read "Service of summons; failure to appear"; substituted Paragraph A for former Paragraph A, which read "A summons shall be served in accordance with the rules governing service or process in civil actions in magistrate court"; deleted former Paragraph B, relating to failure to appear; and added Paragraphs B to J.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 659, 861.

22 C.J.S. Criminal Law § 334 et seq.

6-206. Arrest warrants.

A. **To whom directed.** Whenever a warrant is issued in a criminal action, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer or an Indian tribal or pueblo law enforcement officer. 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 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.]

ANNOTATIONS

Cross references. — For forms on warrant for arrest and return where defendant is found, *see* Rule 9-210 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 the last sentence in Paragraph C, and substituted Paragraph D, relating to the duty to remove warrants, for former Paragraph D, relating to severance of offenses or defendants.

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.

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

22 C.J.S. Criminal Law § 334 et seq.

6-207. Bench warrants.

A. **Failure to appear or act.** If any person who has been ordered by the magistrate 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.]

ANNOTATIONS

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 of the state police to 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 C, redesignating former Paragraph B as Paragraph C, and in Paragraph C, added the last sentence and made a minor stylistic change.

6-208. 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 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 prosecution for a criminal offense; or

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

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

C. **Form.** A search warrant shall be substantially in the form approved by the supreme court.

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

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

F. **Probable cause.** As used in this rule, "probable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a

warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

ANNOTATIONS

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

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

For notice of trial form, *see* Rule 9-501 NMRA.

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

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

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, 111 N.M. 226, 804 P.2d 417 (Ct. App. 1990).

Nighttime searches. — Where defendant challenged the denial of his motion to suppress evidence from a nighttime search, since the search was conducted on people who were seen to be active in nighttime, and probable cause was developed in the nighttime, the search was constitutional. State v. Garcia, 2002-NMCA-050, 132 N.M. 180, 45 P.3d 900, cert. denied, 132 N.M. 193, 46 P.3d 100 (2002).

Separate reasonable cause for authorization to execute a nighttime search is required. State v. Scott, 2006-NMCA-003, 138 N.M. 751, 126 P.3d 567, cert. granted, 2006-NMCERT-001.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 68 Am. Jur. 2d Searches and Seizures §§ 108 to 233.

Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.

Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.

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

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

6-209. 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 order not entered in open court, 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 it to the attorney or party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

"Delivery of a copy" within this rule means:

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

(2) sending a copy by facsimile or electronic transmission when permitted by Rule 6-210 NMRA or Rule 6-211 NMRA;

(3) 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;

(4) 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

(5) placing a copy in a box maintained by the attorney for purposes of serving the attorney.

C. **Filing; 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, shall be filed with the court within a reasonable time after service.

D. **Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the 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 form 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 pursuant to Rule 6-210 NMRA or Rule 6-211 NMRA. A paper filed by electronic means in compliance with Rule 6-210 NMRA constitutes a written paper for the purpose of applying these rules. 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.

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

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

[As amended, effective March 1, 2000.]

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 773, 1009.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

22 C.J.S. Criminal Law § 324 et seq.

6-210. 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 magistrate district 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 (8½ 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.

6-211. 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 6-209 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 6-210 NMRA.

ARTICLE 3
Pleadings and Motions

6-301. General rules of pleading; captions.

A. **Caption.** Pleadings and papers filed in the magistrate 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 _____

Magistrate 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, 101 N.M. 716, 688 P.2d 34 (Ct. App. 1984).

6-302. Pleas allowed; motions.

A. **Pleadings.** In actions within magistrate trial jurisdiction, 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 nolo contendere. No other pleas or pleadings shall be permitted. Defenses and objections not raised by the plea shall be asserted in the form of motions to dismiss or for appropriate relief. In actions not within magistrate trial jurisdiction, no plea shall be entered.

B. **Refusal of defendant to enter a plea.** If the defendant fails to enter a plea, the court shall enter a plea of not guilty on behalf of such defendant.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Motions for abatement. — Proceedings pending in an inferior court ought to be abated when charges are instituted in district court in relation to the same episode. Since such procedures would promote judicial economy, the overriding state interest being the efficient prosecution of all crimes and especially felonies, a defendant in such a situation would have a right to move the inferior court for an abatement to abide the event in district court; and should a defendant in such a case, for whatever reason, fail to so move, he might well have thereby waived any right to complain of piecemeal prosecution. State v. Tanton, 88 N.M. 333, 540 P.2d 813 (1975).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 443 to 511.

Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 A.L.R.2d 326.

22 C.J.S. Criminal Law § 355 et seq.

6-303. 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 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 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 January 1, 1987; May 15, 2001.]

ANNOTATIONS

The 2001 amendment, effective May 15, 2001, inserted "or citation" following "complaint" throughout the rule and added Subsection E, conforming this rule to Rule 5-204 NMRA.

Allowable amendment of complaint. — The magistrate court properly allowed the amendment of a complaint because no additional or different offense was charged and there was no showing that substantial rights of the defendant were prejudiced. State v. Nixon, 89 N.M. 129, 548 P.2d 91 (Ct. App. 1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 420.

22 C.J.S. Criminal Law § 324 et seq.

6-304. Motions.

A. **Defenses and objections which 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.** In cases within the trial court's jurisdiction:

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

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

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 6-209 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 pursuant to Rule 6-801 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 06-8300-37, effective March 1, 2007.]

ANNOTATIONS

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

The 1990 amendment, effective for cases filed in the magistrate 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" following "raised" 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.

Written motions are always permitted but oral motions are insufficient if the magistrate court directs they be written. State v. Foster, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824.

Police required to inquire into ownership of item to be searched. — In cases where the issue of ownership of an item to be searched is in question and the police can easily verify ownership without risk to their safety or the integrity of the search, police officers should be required to inquire into ownership before assuming abandonment. State v. Celusniak, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Search of purse left in vehicle being searched. — A police officer who has obtained a valid consent from the driver to search a vehicle cannot search a purse which contained marihuana left in that vehicle when he has not determined whether the consenting party owned the purse. State v. Celusniak, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

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.

6-305. Unnecessary allegations.

A. **Examples.** It shall be unnecessary for a complaint 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 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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 409, 410, 422.

Right of accused to bill of particulars, 5 A.L.R.2d 444.

22 C.J.S. Criminal Law § 331.

6-306. 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 September 1, 1990; September 15, 1997.]

ANNOTATIONS

The 1997 amendment, effective September 15, 1997, 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 "of offenses" in the paragraph heading, substituted "court" for magistrate", 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

6-401. Bail.

A. **Right to bail.** The court shall not deny bail before conviction to a person charged with an offense within the court's trial jurisdiction. 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 finds that the defendant poses a danger to the complaining witness or alleged victim, the court may refuse to allow the complaining witness or alleged victim to post bond for the defendant. This rule does not prevent the use of community funds to post a bond. 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 [59A-51-1 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 6-401A NMRA; or

(3) the execution of a bail bond with licensed sureties as provided in Rule 6-401B NMRA 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 magistrate 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 payor as indicated in the cash receipt.

I. **Petition to district court.** A person charged with an offense which is not within magistrate 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 magistrate 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 NMRA of the Rules of Criminal Procedure for the District Courts. Any bail set or condition of release imposed by the magistrate 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 magistrate 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 presiding judge of the magistrate court. The designated responsible person must utilize the form of receipt authorized by the Supreme 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 presiding judge of the magistrate district in which the jail or detention facility is located.

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. 07-8300, effective January 22, 2008; by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

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

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

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

For bench warrant, *see* 9-212C NMRA.

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

The first 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, rewrote Paragraphs A through D; inserted Paragraph E and redesignated former Paragraphs E through L as Paragraphs F through M; rewrote Paragraph F; in Paragraph G, inserted "increase or reduce the amount of bail set or" in the first sentence, substituted "If such amendment of the release order" for "If the

imposition of such additional or different conditions" at the beginning of the second sentence, and substituted "Paragraph F" for "Paragraph E" near the end thereof; in Paragraph H, substituted "Subparagraph (1) or (3)" for "Subparagraph (3)"; in 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 last sentence; and rewrote Paragraph J.

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

The 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, amended Paragraph A prohibiting the denial of bail prior to conviction of a person charged with an offense within the magistrate court trial jurisdiction, except when posted by a complaining witness or alleged victim, and the court finds the defendant poses a danger to the complaining witness or alleged victim; amended Paragraph A to add the explanatory note relating to the posting of a community bond; and amended Paragraph H to delete the provision permitting the refund of a cash bond to a personal representative or assignor and providing for the return to the payor.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, in Paragraph A, in the second sentence, changed the phrase "unless the court determines that such release" to the phrase "unless the court makes a written finding that such release" and in the fourth sentence, changed the phrase "If the court determines that release" to the phrase "If the court makes a written finding that release".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 8A Am. Jur. 2d Bail and Recognizance §§ 11, 14, 15, 17, 18, 20, 21, 24 to 27, 31, 32, 104, 106.

Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.

Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.

Burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption great, 89 A.L.R.2d 355.

8 C.J.S. Bail § 1 et seq.

6-401A. Bail; unpaid surety.

Any bond authorized by Subparagraph (2) of Paragraph A of Rule 6-401 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.

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

ANNOTATIONS

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

6-401B. 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 6-401 shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law [Article 51, Chapter 59A NMSA 1978] and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond. 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 6-401 in any magistrate 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 6-401. 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.

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

ANNOTATIONS

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

6-402. 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 6-401 a defendant not released prior to or during trial.

[As amended, effective January 1, 1997.]

ANNOTATIONS

Cross references. — For release pending appeal, *see* Rule 6-703 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — State court's power to place defendant on probation without imposition of sentence, 56 A.L.R.3d 932.

Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 A.L.R.3d 474.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780.

6-403. 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 6-401 NMRA; 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. If the court revokes bail or recognizance, it shall set a new bond in compliance with Rule 6-401 NMRA.

C. **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; as amended by Supreme Court Order No. 08-8300-44, effective December 31, 2008.]

ANNOTATIONS

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

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, in Paragraph A, deleted "Paragraph A of" in Subparagraph (1), deleted former Subparagraph (2), relating to imposing conditions authorized under Paragraph C of Rule 6-401, and redesignated former Subparagraph (3) as present Subparagraph (2); rewrote Paragraph B; and deleted Paragraph C, relating to record on review, and former Paragraph D, relating to evidence.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, added a new Paragraph B and designated former Paragraph B as Paragraph C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 567, 568.

22 C.J.S. Criminal Law § 352.

6-404, 6-405. Reserved.

6-406. 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 6-403 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 6-407 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.

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 6-407 NMRA, execution may issue thereon. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

F. **Appeal.** Any aggrieved person may appeal from a judgment or order entered under this rule as authorized by law for appeals in civil actions in accordance with the Rule 2-705 NMRA of the Rules of Civil Procedure for the Magistrate Courts and Rule 1-072 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. 10-8300-034, effective December 10, 2010.]

ANNOTATIONS

The 2010 amendment, approved by Supreme Court Order No. 10-8300-034, effective December 10, 2010, in Paragraph B, in the last sentence, after "the court may absolve the", deleted "bondsman" and added "the paid surety" and added Paragraph F.

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.

6-407. 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

6-501. 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 6-302 NMRA, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty", the defendant remains in custody, the action shall be set for trial as soon as possible. If the defendant pleads "not guilty by reason of insanity" or if an issue is raised as to the mental competency of the defendant to stand trial, 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 or 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 6-202 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 6-401 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.]

ANNOTATIONS

Cross references. — For explanation of right to, and opportunity to consult with, public defender, *see* Section 31-15-12 NMSA 1978.

For waiver of counsel form, *see* Rule 9-401 NMRA.

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

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.

Failure to timely hold preliminary examination does not divest jurisdiction. — The magistrate court does not automatically lose jurisdiction upon failing to hold a preliminary examination within the time provisions of Rule 6-202D NMRA. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 632, 635, 825.

Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

6-502. Pleas and plea agreements.

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

(1) a plea of guilty; or

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

B. **Advice to defendant.** The court shall not accept a plea of guilty or no contest without first, by addressing the defendant personally in open court, which shall include an appearance through an audio-visual proceeding under Rule 6-110A 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 there will not be a trial in this case, so that by pleading guilty or no contest the defendant waives the right to a trial;

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

(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. 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; January 1, 1987; May 1, 1997; as amended by Supreme Court Order 07-8300-30, effective December 15, 2007; as amended by Supreme Court Order No. 08-8300-44, effective December 31, 2008; by Supreme Court Order No. 10-8300-030, effective December 3, 2010.]

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

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

[Adopted by Supreme Court Order No. 10-8300-030, 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 Paragraph A, deleted "further" preceding "trial" and substituted "in this case" for "of any kind" in Subparagraph B(4), substituted "substantially in the" for "on a" in the first sentence of Subparagraph D(2), rewrote Subparagraph D(4), and made gender neutral changes throughout the rule.

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 2008 amendment, approved by Supreme Court Order No. 08-8300-44, effective December 31, 2008, in Paragraph B, in the first sentence, added the phrase "which shall include an appearance through an audio-visual proceeding under Rule 6-110A NMRA".

The 2010 amendment, approved by Supreme Court Order No. 10-8300-030, effective December 3, 2010, in Subparagraph (2) of Paragraph B, after "the plea is offered", added "including any possible sentence enhancements"; in Subparagraph (2) of Paragraph D, in the first sentence, after "entry of a plea of guilty or no contest", deleted "in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed", and added the second sentence; in Subparagraph (3) of Paragraph D, in the first sentence, 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.

New Mexico does not have a rule formally codifying the conditional plea in magistrate court. State v. Celusniak, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Conditional pleas in magistrate court should meet the same requirements of issue preservation and reservation, prosecutorial consent, and court approval as those in district and metropolitan courts. State v. Celusniak, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

An accused who has entered into a plea agreement is not an "aggrieved party" entitled to an appeal, although the agreement is not reduced to writing, as required by this rule. State v. Johnson, 107 N.M. 356, 758 P.2d 306 (Ct. App. 1988).

Preferred procedure for appeal to Court of Appeals after conditional plea is entered in magistrate court is for the district court to issue a final and appealable order dismissing the appeal or to issue an order granting the motion to suppress. State v. Celusniak, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

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.

6-503. Disposition without hearing.

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

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

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

6-504. Discovery; cases within magistrate court trial jurisdiction.

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

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

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

D. **Witness interviews.** Upon request of a party, any witness named on the witness list of the opposing party, other than the defendant, shall be made available for interview prior to trial.

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

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

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

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

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

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

(5) enter such other order as it deems appropriate under the circumstances, including but not limited to holding an attorney or party in contempt of court.

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

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

(2) any mechanical, electrical or other recording, or a transcription thereof, 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.

H. **Applicability.** This rule applies only to cases within magistrate court trial jurisdiction.

[As amended, effective January 1, 1995; October 1, 1996; September 15, 1997; as amended by Supreme Court Order 07-8300-25, effective November 1, 2007.]

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

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

The 1995 amendment, effective January 1, 1995, designated the existing language as Paragraph A and rewrote that paragraph, and added Paragraphs B, C, D, E, and F.

The 1996 amendment, effective October 1, 1996, added "cases within magistrate 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; in Paragraph A, inserted "and photographing" and "recorded statements made by witnesses" and substituted "prosecution" for "state"and made a stylistic change; rewrote 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 2007 amendment, approved by Supreme Court Order 07-8300-25, effective November 1, 2007, made the second sentence of Paragraph C relating to witness interviews a new Paragraph D; relettered Paragraphs D through G as Paragraphs E through H; and revised Paragraph F to permit witness interviews and document production at the trial setting.

6-505. 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 not be called or subpoenaed for a pretrial conference unless ordered by the court.

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

(1) to file and hear motions; and

(2) to complete discovery.

The scheduling order may also include:

(3) the dates for 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

Cross references. — For form on notice of pretrial conference, *see* Rule 9-411 NMRA.

The 2000 amendment, effective March 1, 2000, amended this rule to encourage the use of pre-trial conferences.

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

Law reviews. — For survey, "Children's Court Practice in Delinquency and Need of Supervision Cases Under the New Rules," see 6 N.M.L. Rev. 331 (1976).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 411 to 432.

22 C.J.S. Criminal Law § 340 et seq.

6-506. 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.

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

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

(2) if an evaluation of competency has been ordered, the date an order or remand is filed in the magistrate 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 magistrate court;

(4) in the event of a remand from an appeal or request for extraordinary relief, the date the mandate or order is filed in the magistrate court disposing of the appeal or request for extraordinary relief;

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

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

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

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

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

(2) upon motion of the defendant for good cause shown and approval of the court for a period not exceeding thirty (30) days, provided that the aggregate of all extensions granted pursuant to this subparagraph shall not exceed sixty (60) days;

(3) upon stipulation of the parties and approval of the court for a period not exceeding sixty (60) days, provided that the aggregate of all extensions granted pursuant to this subparagraph shall not exceed sixty (60) days;

(4) upon withdrawal of a plea or rejection of a plea for a period up to ninety (90) days;

(5) upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the time period provided that the aggregate of all extensions granted pursuant to this subparagraph may not exceed sixty (60) days; or

(6) if defense counsel fails to appear for trial within a reasonable time, for a period not to exceed one hundred eighty-two (182) days, provided that the aggregate of all extensions granted pursuant to this subparagraph may not exceed one hundred eighty-two (182) days.

D. **Time for filing motion.** A motion to extend the time period for commencement of trial pursuant to 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.** In the event the trial of any person does not commence within the time specified in Paragraph B of this rule or within the period of any extension provided in this rule, the complaint or citation filed against such person may be dismissed with prejudice or the court may consider other sanctions as appropriate.

[As amended, effective August 1, 1999; effective August 1, 2004; as amended by Supreme Court Order 07-8300-25, effective November 1, 2007; by Supreme Court Order 08-8300-54, effective January 15, 2009.]

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.

Constitutional right to speedy trial. — This rule is distinct from any speedy trial rights a defendant may have under the constitutions and laws of the United States and the State of New Mexico. *See State v. Urban*, 2004-NMSC-007, 135 N.M. 279, 87 P.3d 1061 for the factors to be considered.

Duty of prosecutor. — It is the continuing duty of the prosecutor to seek the commencement of trial within the time specified in this rule. It is the obligation of both parties to make a good faith effort to complete their separate discovery and to advise the court of non-compliance with Rule 6-504 NMRA.

Computation of time. — Time periods are computed pursuant to Rule 6-104 NMRA.

Paragraph A. — Paragraph A of this rule requires arraignment within thirty (30) days after the filing of the complaint or citation or the date of arrest, whichever is later. A failure to arraign the defendant within the time limitation will not result in a dismissal of the charge unless the defendant can show some prejudice due to the delay.

Paragraph B. — A violation of Paragraph B of this rule can result in a dismissal with prejudice of criminal proceedings. *See* Paragraph E of this rule. *See also State v. Lopez*, 89 N.M. 82, 547 P.2d 565 (1976). However, the rules do not create a jurisdictional barrier to prosecution. The defendant must raise the issue and seek dismissal. *State v. Vigi*l, 85 N.M. 328, 512 P.2d 88 (Ct. App. 1973). Where the state in good faith files a *nolle prosequi* pursuant to Paragraphs C and D of Rule 6-506A NMRA and later files the same charge, the trial on the refiled charges shall be commenced within the unexpired time for trial pursuant to Rule 6-506 NMRA, unless, pursuant to Paragraph D of Rule 6-506, the court finds the refiled complaint should not be treated as a continuation of the same case. *See also* commentary to Rule 6-506A NMRA; *State ex rel. Delgado v. Stanley*, 83 N.M. 626, 495 P.2d 1073 (1972); *State v. Lucero*, 91 N.M. 26, 569 P.2d 952 (Ct. App. 1977).

ANNOTATIONS

Cross references. — For procedure to withdrawal of a plea by the defendant or rejection plea by the court, *see* Rule 6-502 NMRA.

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

The 2004 amendment 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 6-506A NMRA for former Paragraphs A through C of Rule 6-506 NMRA

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

The 2007 amendment, approved by Supreme Court Order 07-8300-25, effective November 1, 2007, added a new Subparagraph (6) of Paragraph C to provide for an extension of the time for trial if defense counsel fails to appear for trial and amended Subparagraph (4) of Paragraph B to provide for trials to occur within 182 days after a request for extraordinary relief.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-054, effective January 15, 2009, in Paragraph E, changed "shall" to "may" and added "or the court may consider other sanctions as appropriate" to the end of the sentence.

Nolle prosequi in magistrate court. — Where the State, less that two months after the six-month rule had begun to run, filed a nolle prosequi in magistrate court and refiled the case in district court before the magistrate court ruled on the defendant's motion to suppress, the nolle prosequi was not filed for the purpose of delay or to circumvent operation of the six-month rule because the district court required that nolle prosequis in magistrate court be filed within sixty days after the date when the six-month rule began to run and because no appeal would be permitted from a magistrate court suppression order. State v. Neal, 2008-NMCA-008, 143 N.M. 371, 176 P.3d 330.

Circumventing rule. — The state cannot escape the effect of the six-month rule if the dismissal of an aggravated DWI case in the magistrate court and re-filing in the district court is done to circumvent the six-month rule. State v. Carreon, 2006-NMCA-145, 140 N.M. 779, 149 P.3d 95, cert. granted, 2006-NMCERT-011.

State burden of proof not satisfied. — Where the state continued to participate in proceedings in the magistrate court DWI case against defendant, without any plea offer, and dismissed the case in magistrate court several days before the six-month period expired and refiled the case in district court, the state's explanation that it was acting pursuant to the state's policy to file DWI cases in magistrate court to determine whether the defendant will plead to the charge or otherwise settle the case and if the defendant does not plead or settle the case, to dismiss the case in magistrate court and refile it in district court, does not satisfy the state's burden of showing that the dismissal and refiling were not done for a bad reason, including doing so for the purpose of circumventing the six-months rule. State v. Carreon, 2006-NMCA-145, 140 N.M. 779, 149 P.3d 95, cert. granted, 2006-NMCERT-011.

6-506A. 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 magistrate court trial jurisdiction; or

(2) prior to the commencement of a preliminary examination in the magistrate court, if the charges are not within magistrate 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 6-406 NMRA of these rules. If the dismissed charges are later filed in the district court, the state shall notify the magistrate court and the magistrate court shall transfer any bond to the district court.

C. **Refiled complaints; cases within magistrate 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 6-506 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.]

ANNOTATIONS

Committee Commentary — In 2004, Rule 6-506 NMRA was split into two rules. This rule is former Paragraphs A through D of Rule 6-506 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).*

Cross references — For procedure to withdrawal of a plea by the defendant or rejection plea by the court, *see* Rule 5-502 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 6-506 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 6-506 NMRA. Paragraph D of this rule replaces former Paragraph D of Rule 6-506 NMRA.

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

Review of suppression order. — The state may obtain judicial review of a suppression order of a magistrate court by filing a nolle prosequi to dismiss some or all of the charges in the magistrate court after the suppression order is entered, and refiling in the district court for a trial de novo. State v. Heinsen, 2005-NMSC-035, 138 N.M. 441, 121 P.3d 1040.

6-507. Insanity or incompetency; transfer to district court.

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

ANNOTATIONS

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

ARTICLE 6
Trials

6-601. Conduct of trials.

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

B. **Evidence.** Evidence shall be admitted in accordance with the New Mexico Rules of Evidence. The trial shall be conducted expeditiously, but each party shall be permitted to present the position of that party amply and fairly.

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

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

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

(1) civil proceedings when permitted by the Rules of Civil Procedure for the Magistrate Courts; 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 magistrate court.

(2) If the record is an audiotape or videotape recording made pursuant to this rule, the person seeking to use the record in the magistrate court pursuant to 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 magistrate 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 pursuant to this rule;

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

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

(4) any audio or video recording.

I. **Competence of court interpreter.** Any party in interest or the court on its own motion may question the interpreter under oath as to the interpreter's fitness, competence or impartiality. If the judge finds that the interpreter is incompetent, partial or otherwise unfit, the interpreter shall be prohibited from acting as an interpreter during the hearing. Interpreters certified by the Administrative Office of the Courts are presumed competent.

[As amended, effective October 1, 1996; September 2, 1997; March 21, 2005; as amended by Supreme Court Order 07-8300-34, effective January 22, 2008.]

Committee commentary. — This rule is meant to operate in reference to the Court Interpreters Act, 38-10-1 to 38-10-8 NMSA 1978.

ANNOTATIONS

Cross references. — For certification of court interpreters, *see* Section 38-10-5 NMSA 1978.

For court interpreters code of responsibility, *see* Rule 23-111 NMRA.

For interpreter oath, *see* Rule 13-212 NMRA.

For court interpreter pre-deliberation instruction to jury, *see* Rule 14-6022 NMRA.

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 present 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 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, added Paragraph I providing for questioning of court interpreters.

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.

6-602. Jury trial.

A. **Petty misdemeanor offense.** If the offense charged is a petty misdemeanor or an offense punishable by no more than six (6) months in jail, 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.]

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 magistrate courts on and after October 1, 1992, inserted "or an offense punishable by no more than six (6) months in jail" in the first sentence in Paragraph A and 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 672, 677.

Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.

Right to jury trial under federal constitution where two or more petty offenses, each having penalty of less than six months' imprisonment, have potential aggregate penalty in excess of six months when tried together, 26 A.L.R. Fed. 736.

50 C.J.S. Juries § 9 et seq.

6-603. Trials to juries.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law § 787.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.

6-604. Nonjury trials.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — Right of accused, in state criminal trial, to insist, over prosecutor's or court's objection, on trial by court without jury, 37 A.L.R.4th 304.

6-605. Jurors.

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

B. **Challenges for cause.** At the time of the trial, the parties, their attorneys or the magistrate may examine the jurors who have been summoned to determine whether they should be disqualified for cause. Jurors shall be excused for cause if the

examination discloses bias, relationship to a party or other grounds of actual or probable partiality. If examination of any juror discloses any basis for his disqualification, he shall be excused.

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

D. **Selection of jury.**

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

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

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

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

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

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

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

[As amended, effective September 1, 1989.]

ANNOTATIONS

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

designation from the beginning and deleted former (b), which read "or (b) the magistrate may draw six slips with the juror's names thereon from the box and these six jurors may be questioned as a group and individually" from the end of the first sentence.

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).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 679 to 685.

Right of consent to trial of criminal case before less than 12 jurors; and effect of consent upon jurisdiction of court to proceed with less than 12, 70 A.L.R. 279, 105 A.L.R. 1114.

Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.

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

50 C.J.S. Juries § 155 et seq.

6-606. 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, interview or hearing and give testimony or to produce designated books, documents or tangible things in the possession, custody or control of that person at a time and place therein specified; and

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

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

(3) The judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. Except as provided in Paragraph B of this

rule, an attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.

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

B. **Interviews.** A subpoena compelling the attendance of the witness must be signed by the judge. A witness may be required to attend an interview anywhere within jurisdiction of the court.

C. **Service.**

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

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

(b) for all persons not described in Subparagraph (1)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 6-209 NMRA;

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

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

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

(2)

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

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

(3)

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

(i) fails to allow reasonable time for compliance,

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

(iii) subjects a person to undue burden.

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

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

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

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

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures

that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

E. **Duties in responding to subpoena.**

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

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

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

[As amended, effective January 1, 1987; January 1, 1994; May 1, 1994; May 1, 2002; as amended, by Supreme Court Order 07-8300-25, effective November 1, 2007.]

ANNOTATIONS

Cross references. — For jurisdiction of the magistrate court, *see* Section 35-3-6 NMSA 1978.

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.

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 07-8300-25, effective November 1, 2007, added Paragraph B providing that a subpoena to compel the attendance of a witness must be signed by the judge; and relettered Subsections B to E as Paragraphs C to F.

6-607. Blood and breath alcohol test reports; controlled substance analysis reports.

A. **Admissibility.** In any prosecution of an offense within the trial jurisdiction of the magistrate 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 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 blood alcohol, *see* Rule 9-505 NMRA.

Bracketed material. — The bracketed reference to the department of health in Subparagraph A(2)(a) was inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the department of health and environment, and enacts a new 9-7-4 NMSA 1978, relating to the department of health, which is defined as including the scientific laboratory. The bracketed material was not approved by the Supreme Court and is not part of the rule.

The 1991 amendment, effective for cases filed in the magistrate courts on or after October 1, 1991, rewrote Paragraph A(1)(a); added Paragraph A(3); inserted "or controlled substance" and "or (3)" and made a related stylistic change in Paragraph B; and inserted "chemical analysis of a controlled substance or" in Paragraph C.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 710, 713, 941 to 950.

22A C.J.S. Criminal Law § 760 et seq.

6-608. 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 Section 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, 1987; 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).

Clinical Laboratory Improvement Act. — The federal Clinical Laboratory Improvement Act of 1988, referred to in Subparagraph A(1)(d), is codified as 42 U.S.C. § 463a.

6-609. Instructions to juries.

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

"Ladies and gentlemen of the jury:

The case will now be submitted to you for decision. Upon retiring to the jury room and before commencing your deliberations you will select one of your members as

foreman. You will then determine the facts in the case from the evidence that has been presented here in open court during the trial. From the facts and the law as you understand it you will decide upon a verdict.

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

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, in the last paragraph of Paragraph A, inserted "applicable parts" in the first parenthetical and rewrote the second parenthetical, which read "Applicable instructions from Uniform Jury Instructions U.J.I. Criminal may be added here"; and in Paragraph B, made stylistic changes and deleted "but no other instructions on the law shall be given" following "Criminal" in the first sentence, and added the second sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 1077 et seq.

Duty in instructing jury in criminal prosecution to explain and define offense charged, 169 A.L.R. 315.

Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.

Duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.

Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery, 58 A.L.R.2d 808.

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

Instruction as to entrapment with respect to violation of fish and game laws, 75 A.L.R.2d 709.

Additional instruction to jury after submission of felony case, in accused's absence, 94 A.L.R.2d 270.

Instructions as to presumption of deliberation and premeditation from circumstances attending killing, 96 A.L.R.2d 1435.

Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.

Duty of court, in absence of specific request, to instruct on subject of alibi, 72 A.L.R.3d 547.

Sympathy to accused as appropriate factor in jury consideration, 72 A.L.R.3d 842.

Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in criminal trial, 17 A.L.R. Fed. 249.

23A C.J.S. Criminal Law § 1351 et seq.

6-610. 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.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 1012 to 1019.

Requirement of jury unanimity as to mode of committing crime under statute setting forth the various modes by which offense may be committed, 75 A.L.R.4th 91.

Criminal law: propriety of reassembling jury to amend, correct, clarify, or otherwise change verdict after jury has been discharged, or has reached or sealed its verdict and separated, 14 A.L.R.5th 89.

23A C.J.S. Criminal Law § 1395 et seq.

ARTICLE 7
Judgment and Appeal

6-701. 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 6-209 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. 11-8300-013, effective April 25, 2011.]

ANNOTATIONS

Cross references. — For form on judgment and sentence, *see* Rule 9-601 NMRA.

For form on final order on criminal complaint, *see* Rule 9-603 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 magistrate courts on and after October 1, 1992, in Paragraph A, substituted "the defendant has" for "he has" in the second sentence and added the fourth sentence; 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. 11-8300-013, effective April 25, 2011, required that a final order be entered in every case and provided that a final order may be a judgment and sentence or the back of a traffic citation on a penalty assessment if the defendant pled guilty or no contest and did not receive a deferred sentence and that if the final order is a traffic citation, the final order need not be given to the prosecution unless the prosecution requests a copy.

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. Cowan v. Davis, 96 N.M. 69, 628 P.2d 314 (1981).

Effect of failure to obtain timely trial date. — Failure to comply with the six-month rule for obtaining a trial date under Paragraph B of Rule 6-702 NMRA, absent an extension, requires a dismissal of the appeal and remand to the magistrate court for enforcement of its judgment. State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

Court has power to impose conditions on deferred or suspended sentences. 1979 Op. Att'y Gen. No. 79-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

24 C.J.S. Criminal Law § 1458 et seq.

6-702. Advising defendant of right to appeal.

A. **Duty of magistrate court.** At the time of entering a judgment and sentence, the court shall advise the defendant of the defendant's right to a new trial in the district court. The court shall also advise the defendant that if the defendant wishes to appeal, a notice of appeal must be filed within fifteen (15) days after entry of the judgment and sentence.

B. **Duty of defendant.** The defendant has the duty of obtaining a trial before the district court within six (6) months of the date of the filing of the notice of appeal. A defendant shall request a trial date at the time of filing the notice of appeal.

C. **Automatic affirmance.** Any appeal which has not been tried by the district court within six (6) months after the date of the filing of the notice of appeal, will be dismissed and the judgment and sentence will be affirmed, unless the time has been extended by a justice of the New Mexico Supreme Court upon a showing of good cause.

[As amended, effective September 1, 1990; January 1, 1997; October 15, 2002.]

ANNOTATIONS

Cross references. — For form on judgment and sentence, *see* Rule 9-601 NMRA.

For form on final order on criminal complaint, *see* Rule 9-603 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 form 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 1997 amendment, effective January 1, 1997, deleted "or within fifteen (15) days after the filing of the notice of appeal" from the end of Paragraph B, and substituted "the defendant's right" for "his right" in Paragraph A.

The 2002 amendment, effective October 15, 2002, substituted "judgment and sentence" for "conviction" in Paragraph C.

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. Cowan v. Davis, 96 N.M. 69, 628 P.2d 314 (1981).

Effect of failure to obtain timely trial date. — Failure to comply with the six-month rule for obtaining a trial date under this rule, absent an extension, requires a dismissal of the appeal and remand to the magistrate court for enforcement of its judgment. State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

Court has power to impose conditions on deferred or suspended sentences. 1979 Op. Att'y Gen. No. 79-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

24 C.J.S. Criminal Law § 1458 et seq.

6-703. 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 magistrate court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate court clerk's office. The three (3) day mailing period set forth in Rule 6-104 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the magistrate court clerk's office, shall be treated as timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state or its political subdivisions or against a defendant who is represented by a public defender or court appointed counsel.

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

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

(2) promptly filing with the magistrate court:

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

(b) unless the appeal has been filed by the state, a political subdivision of the state or by a defendant represented by a public defender or court appointed counsel, a copy of the receipt of payment of the docket fee.

C. **Content of the notice of appeal.** The notice of appeal shall be substantially in the form approved by the Supreme Court.

D. **Service of notice of appeal.** At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or each party's attorney in the proceedings in the magistrate court with a copy of the notice of appeal in accordance with Rule 5-103 NMRA of the Rules of Criminal Procedure for the District Courts; and

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 5-103 NMRA.

E. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court.

F. **Record on appeal.** Within fifteen (15) days after the appellant files a copy of the notice of appeal in the magistrate court pursuant to Paragraph B of this rule, the magistrate court shall file with the clerk of the district court the record on appeal taken in the action in the magistrate court. For purposes of this rule, the record on appeal shall consist of:

(1) a title page containing the caption of the case in the magistrate court and the names and mailing addresses of each party or, if the party is represented by counsel, the name and address of the attorney;

(2) a copy of all papers and pleadings filed in the magistrate court;

(3) a copy of the judgment or final order sought to be reviewed with date of filing; and

(4) any exhibits.

The magistrate court clerk shall give prompt notice to all parties of the filing of the record on appeal with the district court.

Any party desiring a copy of the record on appeal shall be responsible for paying the cost of preparing the copy.

G. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the magistrate court or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court.

H. **Conditions of release.** At the time of the entry of the judgment and sentence, the magistrate court shall review the conditions of release pending appeal to assure the conditions are sufficient to secure the appearance of the defendant and the judgment of the magistrate court. The magistrate court may utilize the criteria listed in Paragraph B of Rule 6-401 NMRA, and may also consider the fact of defendant's conviction and the length of sentence imposed. The conditions of release shall be included on the judgment and sentence. A defendant released pending trial shall continue on release pending an appeal to the district court under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions are necessary to assure the defendant's appearance or to assure that the defendant's conduct will not obstruct the orderly administration of justice. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court. If the court determines that the previously imposed conditions are not sufficient to assure the appearance of the defendant or the orderly administration of justice, the court may increase the amount of the bond on appeal or terminate the conditions of release to assure the appearance of the defendant or the orderly administration of justice. 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 bond shall be transferred to the district court pending disposition of the appeal. The district court shall dispose of all matters relating to the bond until remand to the magistrate court.

I. **Review of terms of release.** If the magistrate court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition for release which has been endorsed by the clerk of the district court shall be filed with the magistrate court. If the district court releases the defendant on appeal, a copy of the order of release shall be filed in the magistrate court.

J. **Trial de novo appeals.** Trials upon appeals from the magistrate court to the district court shall be de novo.

K. **Notice; trial de novo appeals.** In trial de novo appeals, the clerk of the district court shall give notice to all parties of the time and date set for a trial de novo not less than ten (10) days prior to the date set for trial. If the defendant is represented by counsel, the clerk shall give written notice to the defendant and the defendant's counsel. Notice to the defendant shall be mailed to the defendant's last known address.

L. **Disposition; time limitations.** The time for trial in the district court on a de novo appeal shall be within six (6) months after the filing of the notice of appeal or the events described in Subparagraphs (2), (3), (4) or (8) of Paragraph B of Rule 5-604 NMRA of the Rules of Criminal Procedure for the District Courts. Any appeal pending without disposition upon expiration of the time for trial may be dismissed and the cause remanded to the magistrate court for enforcement of its judgment, or the court may consider other sanctions as appropriate.

M. **Extension of time.** The time limit specified in Paragraph L of this rule may be extended one time for a period not exceeding ninety (90) days upon a showing of good cause to a justice of the Supreme Court. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause to extend the time period for trial. The petition shall be filed within the six (6) month period, except that it may be filed within ten (10) days after the expiration of the six (6) month period if it is based on exceptional circumstances beyond the control of the party or trial court which justify the failure to file the petition within the six (6) month period. A party seeking an extension of time shall promptly serve a copy on opposing counsel. Within five (5) days after service of the petition, opposing counsel may file an objection to the extension setting forth the reasons for the objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the six (6) month period, it shall fix the time limit within which the defendant must be tried. No other extension of time shall be allowed.

N. **Procedure on appeal.** Unless there is a conflict with this rule or Rules 6-702 NMRA, 6-704 NMRA or 6-705 NMRA of these rules, the Rules of Criminal Procedure for the District Courts [5-101 NMRA] shall govern the procedure on appeal from the magistrate court.

O. **Disposal of appeals.** The district court shall dispose of appeals by entry of a judgment or order disposing of the appeal. The court in its discretion may accompany the judgment or order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases. A mandate shall be issued by the court upon expiration of whichever of the following events occurs latest:

(1) fifteen (15) days after entry of the order disposing of the case;

(2) fifteen (15) days after disposition of a motion for rehearing; or

(3) if a notice of appeal is filed, upon final disposition of the appeal.

P. **Remand.** Upon expiration of the time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the magistrate court, the district court shall remand the case to the magistrate court for enforcement of the district court's judgment.

Q. **Appeal.** Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure [12-101 NMRA]. The conditions of release and bond approved or continued in effect by the district court during the pendency of the appeal to the district court shall continue in effect pending appeal to the Court of Appeals, unless modified pursuant to Rule 12-205 NMRA of the Rules of Appellate Procedure.

R. **Return of record.** After final determination of the appeal, the clerk of the district court shall return the record on appeal to the magistrate court clerk.

[As amended, effective September 1, 1989; September 1, 1990; January 1, 1994; January 1, 1995; January 1, 1997; February 16, 2004; as amended by Supreme Court Order 07-8300-34, effective January 22, 2008; by Supreme Court Order 08-8300-55, effective January 15, 2009.]

ANNOTATIONS

Cross references. — For form on notice of appeal, *see* Rule 9-607 NMRA.

For form on title page of transcript of criminal proceedings, *see* Rule 9-608 NMRA.

For notice of appeal, *see* Rule 9-607 NMRA.

For title page of transcript of proceedings, *see* Rule 9-608 NMRA.

For the withdrawal or rejection of a plea by the magistrate court, *see* Rule 6-501 NMRA.

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, added Paragraph K.

The 1990 amendment, effective for cases filed in the magistrate courts on or after September 1, 1990, deleted Subparagraph (5) in Paragraph E, which read "the record of the hearing in the magistrate court, if any".

The 1994 amendment, effective January 1, 1994, in Paragraph A, deleted "by defendant" in the paragraph heading and rewrote the paragraph, which read "A

defendant who is aggrieved by any judgment rendered by the magistrate court may appeal to the district court of the county within which the magistrate court is located within fifteen (15) days after entry of the judgment or final order"; and substituted "any recording of the proceedings" for "any record of proceedings" in Subparagraph E(2).

The 1995 amendment, effective January 1, 1995, added Paragraph I, and redesignated the remaining paragraphs accordingly and made related changes.

The 1997 amendment, effective January 1, 1997, in Paragraph A, substituted "aggrieved by the judgment or final order in a criminal action" for "aggrieved by any final order or judgment" in the first sentence, inserted "in the district court" in the second sentence, and rewrote the last sentence; in Paragraph B, inserted "with proof of service" in Subparagraph (1) and "promptly" in Paragraph (2), and added Subparagraph (2)(b); rewrote Paragraphs C and D which formerly related to stay and docketing of the appeal, respectively; added Paragraph E; redesignated former Paragraph E as Paragraph F and rewrote that paragraph; added Paragraph G and redesignated former Paragraphs F through K as Paragraphs H through M; rewrote Paragraph H; added the last two sentences in Paragraph I; rewrote Paragraph J; substituted "appeals" for "cases" in Paragraph K; substituted "a trial *de novo* appeal" for "the appeal" in Paragraph L; rewrote Paragraph M; added Paragraph N; deleted former Paragraph L relating to final order and remand to magistrate court; and added Paragraphs O to R.

The 2003 amendment, effective February 16, 2004, added the last two sentences in Paragraph H.

The 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, amended Paragraph L to delete the time limitations for the disposition of criminal cases and adopt by reference from Rule 5-604 NMRA the following time limits for commencement of trial:

B. **Time limits for commencement of trial.** The trial of a criminal case or habitual criminal proceeding shall be commenced six (6) months after whichever of the following events occurs latest:

(2) if the proceedings have been stayed to determine the competency of the defendant to stand trial, the date an order is filed finding the defendant competent to stand trial;

(3) if a mistrial is declared or a new trial is ordered by the trial court, the date such order is filed;

(4) in the event of an appeal, including interlocutory appeals, the date the mandate or order is filed in the district court disposing of the appeal;

(8) the date the court allows the withdrawal of a plea or the rejection of a plea made pursuant to Paragraphs A to F of Rule 5-304 NMRA.

The 2008 amendment, approved by Supreme Court Order 08-8300-55, effective January 15, 2009, in Paragraph L, changed "shall" to "may" and added ", or the court may consider other sanctions as appropriate" to the end of the last sentence.

Order of dismissal is an appealable final order. — Where, after a hearing pursuant to a "Notice of Probable Cause/Bench Trial", the magistrate court entered an order which dismissed the action due to no probable clause, the order was an appealable final order. State v. Montoya, 2008-NMSC-043, 144 N.M. 458, 188 P.3d 1209.

Order suppressing evidence is not a final order. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008.

Magistrate court orders suppressing evidence were not final orders in either an actual or practical sense. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 97 P.3d 627, cert. granted, 2004-NMCERT-008.

Former rule applies to appeal pending on effective date of amendments. — N.M. Const., art. IV, § 34, which provides that no act of the legislature shall change rules of procedure in any pending case, applies to court rules as well as to legislation. State v. DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct. App. 1977).

Applicability of rule. — District court erred in reversing defendant's convictions on grounds that Rule 5-604 was violated; because the case was heard before a magistrate, Rule 5-604 NMRA was inapplicable and this rule should have been applied. State v. Wilson, 1998-NMCA-084, 125 N.M. 390, 962 P.2d 636.

Preferred procedure for appeal to Court of Appeals after conditional plea is entered in magistrate court is for the district court to issue a final and appealable order dismissing the appeal or to issue an order granting the motion to suppress. State v. Celusniak, 2004-NMCA-070, 135 N.M. 728, 93 P.3d 10.

Magistrate controls judgment until opportunity to appeal expires. — A magistrate has continuing control over a criminal judgment only until such time as the aggrieved party's opportunity to file an appeal expires. The time limitation for filing the appeal is 15 days. State v. Ramirez, 97 N.M. 125, 637 P.2d 556 (1981).

Officer may not continue municipal or magistrate 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.

Limited authority of district court upon expiration of six-month period. — Absent a hearing on an appeal from a magistrate court within six months of the date of the notice of appeal, the district court's only authority is to dismiss the appeal and remand the cause to the magistrate court for enforcement of its judgment. State v. Rivera, 92 N.M.

155, 584 P.2d 202 (Ct. App. 1978); State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

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, 117 N.M. 273, 871 P.2d 369 (1994).

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, 117 N.M. 273, 871 P.2d 369 (1994).

Order of remand not final. — When the district court enters an order of remand to the magistrate court that does not resolve the issue of sentencing, the order is not final and appealable. State v. Montoya, 2005-NMCA-005, 136 N.M. 674, 104 P.3d 540, cert. granted, 2005-NMCERT-001.

Sentence must be imposed prior to final order. — The district court must impose a sentence prior to remanding a case to magistrate court for enforcement of the district court's final order. State v. Cordova, 114 N.M. 22, 833 P.2d 1203 (Ct. App. 1992).

An accused who has entered into a plea agreement is not an "aggrieved party" entitled to an appeal, although the agreement is not reduced to writing, as required by Rule 6-502. State v. Johnson, 107 N.M. 356, 758 P.2d 306 (Ct. App. 1988).

Scope of appeal. — Where defendant did not challenge his convictions on appeal and did not claim to be aggrieved, but only challenged constitutionality of a federal statute and its effect on him, defendant lacked the right to appeal his conviction. State v. Garcia, 2003-NMCA-045, 133 N.M. 444, 63 P.3d 1164.

There is no authority provided in the magistrate rules which allows an appeal for other than judgments or final orders from magistrate courts to the district courts. State v. Heinsen, 2004-NMCA-110, 136 N.M. 295, 96 P.3d 627, cert. granted, 2004-NMCERT-008.

Failure of counsel to timely appeal conditional plea agreement. - Defense counsel’s failure to timely appeal defendant’s magistrate court conditional plea agreement presumptively constituted ineffective assistance of counsel and the district court’s

dismissal of defendant's appeal was improper. State v. Eger, 2007-NMCA-039, 141 N.M. 379, 155 P.3d 784.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time, 69 A.L.R.3d 933.

24 C.J.S. Criminal Law §§ 1674 et seq.

6-704. 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 final orders or other parts of the file and errors therein arising from oversight or omission may be corrected by the magistrate 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 magistrate orders.

[As amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "on the judge's own initiative" for "of his own initiative" in Paragraph B, and deleted the former last sentence of Paragraph B relating to correction of mistakes before filing the transcript.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 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.

6-705. Appeals; dismissals for failure to comply with rules or failure to appear.

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

B. **Failure to appear; trial de novo appeals.** If the defendant fails to appear at the trial de novo, the district court shall set a hearing within thirty (30) days for the defendant to show good cause why the defendant's appeal should not be dismissed. The clerk of the district court shall mail notice of the hearing to the defendant and to the defendant's counsel at least ten (10) days prior to the hearing. If the defendant fails to

show good cause for the failure to appear for trial, the district court may dismiss the appeal and remand the case to the magistrate court for enforcement of the judgment and sentence. If the district court finds good cause for the defendant's failure to appear, the district court shall reschedule the trial:

(1) prior to the expiration of the six-month time period for trial provided by Rule 6-703; or

(2) within the time fixed by the Supreme Court if the defendant obtains an extension of time for trial pursuant to Rule 6-703.

C. **By motion of the appellee.** If the appellant fails to comply with these rules, the appellee may file a motion in the district court to dismiss the appeal. The motion shall identify the rule violated. The appellant shall have ten (10) days from the date of service to respond to the motion.

[Adopted, effective January 1, 1995; as amended, effective January 1, 1997.]

ANNOTATIONS

The 1997 amendment, effective January 1, 1997, substituted "date of the notice" for "date thereof" in Paragraph A, and substituted "appellant fails" for "appellant shall fail" in Paragraph C.

ARTICLE 8
Special Proceedings

6-801. Modification of sentence.

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

ANNOTATIONS

Cross references. — For form on judgment and sentence, *see* Rule 9-601 NMRA.

For form on final order on criminal complaint, *see* Rule 9-603 NMRA.

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

Magistrate court not required to expressly reserve jurisdiction. — There is nothing in these rules or in the supreme court approved forms for the magistrate courts which requires a magistrate court to expressly reserve jurisdiction. Cowan v. Davis, 96 N.M. 69, 628 P.2d 314 (1981).

Effect of failure to obtain timely trial date. — Failure to comply with the six-month rule for obtaining a trial date under Paragraph B of Rule 6-702 NMRA, absent an extension, requires a dismissal of the appeal and remand to the magistrate court for enforcement of its judgment. State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

Court at fault for not setting timely hearing on appeal. — If the district court is at fault in not setting an appeal for hearing within six months, it does not err in denying the state's motion to dismiss the appeal and it has jurisdiction to dismiss the complaint with prejudice. State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

Court has power to impose conditions on deferred or suspended sentences. 1979 Op. Att'y Gen. No. 79-18.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 21 Am. Jur. 2d Criminal Law §§ 525 to 534.

Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.

24 C.J.S. Criminal Law § 1660 et seq.

6-802. 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. 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 magistrate court.

[As amended, effective September 1, 1989; May 1, 2002.]

ANNOTATIONS

The 1989 amendment, effective for cases filed in the magistrate 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 Paragraphs B and C formerly relating to issuance of warrants and imposition of sentence, respectively.

Appeal of probation revocation. — Because a probation revocation proceeding in magistrate court is not of record, a defendant who appeals the probation revocation is entitled to a de novo hearing in district court. *State v. Begay*, 2010-NMCA-089, 148 N.M. 685, 241 P.3d 1125.

6-810. Fugitive complaint.

A. **Complaint.** A fugitive action may be commenced in the magistrate 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 magistrate 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* 31-4-1 NMSA 1978 et seq.

6-811. 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. 10-8300-030, effective December 3, 2010.]

ANNOTATIONS

Cross references. — For Uniform Criminal Extradition Act, *see* 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. 10-8300-030, 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.

6-812. Transfer of fugitive actions after issuance of a governor's rendition warrant.

If a fugitive action is pending in the magistrate 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* 31-4-1 NMSA 1978 et seq.

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Criminal Procedure for the Magistrate Courts. The left-hand column contains the former rule number, and the right-hand column contains the corresponding present Rule of Criminal Procedure for the Magistrate Courts.

The second table below reflects the antecedent provisions in the former Rules of Criminal Procedure for the Magistrate Courts, Rules of Civil Procedure for the Magistrate Courts (Mag. Civ.), and the Rules of Procedure for the Metropolitan Courts (Metro.) (right-hand column) of the present Rules of Criminal Procedure for the Magistrate Courts (left-hand column).

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