

Rules of Civil Procedure for the Magistrate Courts

ARTICLE 1

General Provisions

2-101. Scope and title.

A. **Scope.** These rules shall govern the civil procedure in all magistrate courts. These rules shall be subject to the provisions of Rule 23-114 NMRA, the rule governing free process for civil cases.

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 Civil Procedure for the Magistrate Courts.

D. **Citation form.** These rules shall be cited by set and rule numbers, as in NMRA, Rule 2-____.

[As amended, effective January 1, 1987; amended by Supreme Court Order 07-8300-40, effective February 25, 2008.]

ANNOTATIONS

Cross references. — For magistrate court juries and jurors, see Sections 35-8-1 to 35-8-7 NMSA 1978.

For attachment in magistrate courts, see Sections 35-9-1 to 35-9-8 NMSA 1978.

For forcible entry or unlawful detainer, see Sections 35-10-1 to 35-10-6 NMSA 1978.

For replevin, see Sections 35-11-1 to 35-11-3 NMSA 1978.

For garnishment, see Sections 35-12-1 to 35-12-19 NMSA 1978.

The 2007 amendment, approved by Supreme Court Order 07-8300-40, effective February 25, 2008, provided that Rule 2-101 NMRA shall be subject to the provisions of Rule 23-114 NMRA, the rule governing free process for civil cases.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Courts § 26.

Power of court to adopt general rule requiring pretrial conference as distinguished from exercising its discretion in each case separately, 2 A.L.R.2d 1061.

21 C.J.S. Courts §§ 124 to 134.

2-102. Conduct of court proceedings.

A. **Judicial proceedings.** The purpose of judicial proceedings is to ascertain the truth. Such 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; they shall not be done or permitted.

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

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 the 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 by Supreme Court Order 08-8300-06, effective January 29, 2008.]

ANNOTATIONS

The 2008 amendment, approved by Supreme Court Order 08-8300-06, effective January 29, 2008, added Paragraph C.

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

88 C.J.S. Trial §§ 36 to 54.

2-103. 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.

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

ANNOTATIONS

Cross references. — For civil and criminal forms for the district courts and courts of limited jurisdiction, see Rules 4-101 et seq. and 9-101 NMRA et seq.

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

For civil forms approved for use in the district and magistrate courts by the Supreme Court, see Form 4-101 NMRA et seq.

For the approval of forms used in the metropolitan courts, see Rule 3-102 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.

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

Power of court to prescribe rules of pleadings, practice or procedure, 110 A.L.R. 22, 158 A.L.R. 705.

Constitutionality, construction and application of statutes or rules of court which permit setting aside a plea and giving judgment by default, or dismissing suit, because of disobedience of order, summons or subpoena duces tecum requiring production of documents, 144 A.L.R. 372.

Pretrial conference, power of court to adopt general rule requiring, 2 A.L.R.2d 1061.

Consent as ground of vacating judgment, or granting new trial, in civil case, after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Contempt based on violation of court order where another court has issued contrary order, 36 A.L.R.4th 978.

2-104. 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 where the failure to act was the result of excusable neglect; but it may not extend the time for commencement of trial under Rule 2-305 NMRA or for taking an appeal under Rule 2-705 NMRA, except to the extent and under the conditions stated in them.

C. **For motions.** A written motion, other than one which may be heard ex parte, and notice of the hearing on the motion 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.

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.

E. **Applicability.** This rule shall not apply to any statutory notice that is required to be given prior to the filing of an action.

[As amended, effective August 1, 2004.]

ANNOTATIONS

The 2004 amendment, effective August 1, 2004, 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 add "where the failure to act was the result of excusable neglect"; and to add the exception at the end of the subparagraph; amended Paragraph C to delete the last sentence; and added Paragraph E.

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.

Cross references. — For examples of statutory notices that are required to be given prior to the filing of an action, see Sections 47-8-33, 47-8-27.1 and 47-8-37 NMSA 1978. See also Civil Forms 4-901 (three-day notice of nonpayment of rent); 4-901A (three-day notice of substantial violation of rental agreement); Civil Forms 4-902 (seven-day notice of noncompliance with rental agreement); and Civil Forms 4-902A (resident's seven-day notice of abatement of rent or termination of agreement).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Motions, Rules, and Orders § 10; 62B Am. Jur. 2d Process §§ 114 to 125.

Difference between date of affidavit for service by publication and date of filing or of order for publication as affecting validity of service, 46 A.L.R.2d 1364.

Inclusion or exclusion of first and last day in computing the time for performance of an act or event which must take place a certain number of days before future date, 98 A.L.R.2d 1331.

Vacating judgment or granting new trial in civil case, consent as ground of after expiration of term or time prescribed by statute or rules of court, 3 A.L.R.3d 1191.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

What circumstances excuse failure to submit will for probate within time limit set by statute, 17 A.L.R.3d 1361.

Construction and effect of contractual or statutory provisions fixing time within which arbitration award must be made, 56 A.L.R.3d 815.

Validity of service of summons or complaint on Sunday or holiday, 63 A.L.R.3d 423.

Amendment, after expiration of time for filing motion for new trial, in civil case, or motion made in due time, 69 A.L.R.3d 845.

60 C.J.S. Motions and Orders § 8; 66 C.J.S. Notice §§ 26 to 32; 71 C.J.S. Pleading §§ 98, 114, 219; 72 C.J.S. Process §§ 41, 55.

2-105. Assignment and designation of judges.

A. **Assignment.** In those courts with two or more judges, 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) 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
- (2) 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 May 1, 1986; October 1, 1987; September 1, 1989; November 1, 1995; May 1, 2002; as amended by Supreme Court Order No. 10-8300-016, effective May 14, 2010.]

ANNOTATIONS

Cross references. — For jurisdiction of magistrate to sit in any action arising in another magistrate district when designated by district judge because of unavailability of a magistrate in that magistrate district, see Section 35-3-6 NMSA 1978.

For disqualification of magistrate, see Section 35-3-7 NMSA 1978.

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

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

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

The 2010 amendment, approved by Supreme Court Order No. 10-8300-016, effective May 14, 2010, re-lettered former Paragraphs A, B, and C as Paragraphs B, F, and G, respectively; added new Paragraph A; in Paragraph B, changed the title of Paragraph B from "Procedure for replacing a magistrate upon excusal or recusal" to "Reassignment"; in Subparagraph (1) of Paragraph B, in the introductory sentence, added the title of Subparagraph (1), and after "In magistrate", changed "districts which have a presiding magistrate" to "courts with two or more judges"; in Item (a) of Subparagraph (1) of Paragraph B, deleted the former language of Item (a) which provided that within ten days after service of a notice of excusal or recusal the parties may agree upon another

judge of the magistrate district to try the case and that if the parties fail to agree upon a new judge, the presiding magistrate of the district shall assign another magistrate to try the case, and added the title and the current language of Item (a); in Item (b) of Subsection (1) of Paragraph B, deleted the former language of Item (b) which provided that if the parties fail to agree upon a new judge, the presiding magistrate of the district shall, by random selection, assign another magistrate to try the case, and added the title and current language of Item (b); added Item (c) of Subparagraph (1) of Paragraph B; in Item (d) of Subparagraph (1) of Paragraph B, added the title of Item (d) and in the first sentence, after "If all magistrates in the", added "magistrate"; in Subparagraph (2) of Paragraph B, added the title of Subparagraph (2) and in the introductory sentence, after "In magistrate", changed "districts which do not have a presiding magistrate" to "courts with only one magistrate"; in Item (a) of Subparagraph (2) of Paragraph B, deleted the former language of Item (a) which provided that within ten days after service of notice of excusal or recusal, the parties may agree to another judge of the magistrate district to try the case, and added the title and the current language of Item (a); added Item (b) of Subparagraph (2) of Paragraph B; in Item (c) of Subparagraph (2) of Paragraph C, added the title of Item (c); at the beginning of the first sentence, deleted "If the excused or recused magistrate has not received notice of such an agreement within ten (10) days after service of the notice of excusal or recusal, the excused or recused magistrate shall certify that fact by letter to the district court" and added the current language that occurs before "of the county in which the action is pending"; added Paragraphs C, D, and E; in Paragraph F, in the first sentence, after "conducted in the original magistrate court", added "except that with the consent of all parties and the assigned judge, proceedings may"; in the third sentence, after "Within five (5)", added "business"; after "designated judge", added "and forward it to the judge"; and added the last sentence; and in Paragraph G, changed the title from "Parties agree on trial judge" to "Unavailability of judge"; in the first sentence, after "assigned judge is unavailable", added "the assigned judge may designate another judge of the magistrate district to hear any matter that is not dispositive of the case or"; and added the last sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86, 88, 248, 251.

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 term time 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 §§ 36, 98 to 185.

2-106. Excusal; recusal; disability.

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

B. **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 an order for free process or a determination of indigency.

C. **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:

(1) signed by a party plaintiff or that party's attorney and filed within ten (10) days after the later of:

(a) the filing of the complaint; or

(b) service by the court of notice of assignment or reassignment of the case to a judge;

(2) signed by any other party or any other party's attorney and filed within ten (10) days after the later of:

(a) the filing of the answer pursuant to Rule 2-302 NMRA by that party; or

(b) service by the court of notice of assignment or reassignment of the case to a judge; or

(3) by each party plaintiff and defendant in a restitution case, including an action in forcible entry or detainer, by filing a notice of excusal within three (3) days after service.

D. **Notice of reassignment; service of excusal.** After the filing of the complaint, 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.

E. 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 recusal, another judge shall be assigned or designated to conduct any further proceedings in the action in the manner provided by Rule 2-105 NMRA.

F. 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 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 E 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.

G. 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 F 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.

H. 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 May 1, 1986; July 1, 1988; September 1, 1989; July 1, 1990; October 1, 1992; November 1, 1995; May 1, 2002.]

ANNOTATIONS

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

For recusal of magistrate, see N.M. Const., art. VI, § 18, Rule 21-400 NMRA, and Section 35-3-8 NMSA 1978.

For disqualification of judge in proceedings where his impartiality might be questioned, see Rule 21-400 NMRA.

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

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

The 2002 amendment, effective May 1, 2002, substituted "judge" for "magistrate" throughout the rule; in Paragraph C(3), substituted "three (3) days" for "five (5) days"; in Paragraph E, inserted "certificate of" preceding "recusal" near the end of the first sentence; in Paragraph F, substituted "facts requiring recusal" for "excusal" at the end of the first sentence, inserted "or enter an order finding that there are not reasonable grounds for recusal" at the end of the fourth sentence, added the fifth, sixth and seventh sentences and in the eighth sentence, substituted "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" for "and designating another or striking the notice of excusal as ineffective or groundless"; and redesignated former Paragraph G as present Paragraph H and added present Paragraph G.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judges §§ 86, 88, 248, 251.

Disqualifying relationship by affinity in case of judge or juror as affected by dissolution of marriage, 117 A.L.R. 800.

Relationship of judge to one who is party in an official or representative capacity as disqualification, 10 A.L.R.2d 1307.

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

Mandamus as remedy to compel assertedly disqualified judge to recuse self or certify his disqualification, 45 A.L.R.2d 937, 56 A.L.R. Fed. 494.

Relationship to attorney in case as disqualifying judge, 50 A.L.R.2d 143.

Prior representation or activity as attorney or counsel as disqualifying judge, 72 A.L.R.2d 443, 16 A.L.R.4th 550.

Disqualification of judge to relative's ownership of stock in corporation which is party to action or proceeding, 25 A.L.R.3d 1331.

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

Disqualification of judge or one acting in judicial capacity to preside in a case in which he has a pecuniary interest in the fine, penalty or forfeiture imposed upon the defendant, 72 A.L.R.3d 375.

Membership in fraternal or social club or order affected by a case as ground for disqualification of judge, 75 A.L.R.3d 1021.

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

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.

Prior representation or activity as prosecuting attorney as disqualifying judge from sitting or acting in criminal case, 85 A.L.R.5th 471.

Disqualification of judge for having decided different case against litigant - state cases, 85 A.L.R.5th 547.

Laws governing judicial recusal or disqualification in state proceeding as violating federal or state constitution, 91 A.L.R.5th 437.

48A C.J.S. Judges §§ 36, 98 to 185.

2-107. Pro se and attorney appearance.

A. **Pro se appearance by an individual.** A party to any civil action may appear, prosecute, defend and appeal any proceeding:

- (1) if the party is an individual party, in person;

(2) if the property is community property, one spouse may appear for both spouses.

B. Other authorized appearances. A party to any civil action may appear, prosecute and defend any proceeding:

(1) on a writ of garnishment or attachment:

(a) by a general partner if the partnership is brought into the suit by a writ of garnishment or attachment;

(b) by an officer, director or general manager of a corporation or limited liability company upon the filing of a notarized certificate to so act on behalf of the corporation or limited liability company, if the corporation or limited liability company is brought into the suit by writ of garnishment or attachment;

(2) in an action brought pursuant to the provisions of the Uniform Owner-Resident Relations Act [47-8-1 NMSA 1978] or the Mobile Home Park Act [47-10-1 NMSA 1978] if the appearance is by:

(a) the "owner", as defined in the Uniform Owner-Resident Relations Act;

(b) a "landlord", as defined in the Mobile Home Park Act;

(c) a licensed real estate agent authorized by the owner of the property; or

(d) the person authorized to manage the premises;

(3) if the party is a corporation or limited liability company, whose voting shares or memberships are held by a single shareholder or member or closely knit group of shareholders or members all of whom are natural persons active in the conduct of the business and the appearance is by an officer or general manager who has been authorized to appear on behalf of the corporation or limited liability company;

(4) if the party is a general partnership that meets all of the following qualifications:

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

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

(c) the appearance is by a general partner who has been authorized to appear by the general partners;

(5) if the party is a governmental entity and the appearance is by an employee of the governmental entity authorized by the entity to institute or cause to be instituted an action on behalf of the governmental entity; or

(6) if the party is a wage claimant, the director of the labor and industrial division of the Labor Department, as assignee, may appear on behalf of the claimant pursuant to Sections 50-4-11 and 50-4-12 NMSA 1978.

C. Attorney appearance. A party may appear, prosecute, defend and appeal any proceeding by an attorney. Whenever an attorney undertakes to represent a party, the attorney shall file a written entry of appearance showing the attorney's name, address and telephone number. For the purpose of this rule, the filing of any pleading or paper signed by counsel constitutes an entry of appearance. If entry of appearance is made by the filing of a pleading on behalf of a party, the attorney shall set forth on the pleading the attorney's address and telephone number. If an attorney's appearance is limited pursuant to Paragraph C of Rule 16-102 NMRA, the attorney shall:

(1) file an entry of appearance entitled "Limited Entry of Appearance" that identifies the nature of the limitation;

(2) note the limitation in the signature block of any paper the attorney files;
and

(3) include in the signature block of any paper the attorney files an address at which service may be made on the client.

D. Collection agencies. Collection agencies may take assignments of claims in their own names as real parties in interest for the purpose of billing and collection and bringing suit in their own names; provided that no suit authorized by this section may be instituted on behalf of a collection agency in any court unless the collection agency appears by a licensed attorney-at-law.

[As amended, effective July 1, 1987; July 1, 1988; July 1, 1990; October 1, 1992; October 1, 1996; November 1, 2000; March 21, 2005; as amended by Supreme Court Order 08-8300-014, effective June 20, 2008.]

ANNOTATIONS

Cross references. — For Owner-Resident Relations Act, see Section 47-8-1 NMSA 1978 et seq.

For Mobile Home Park Act, see Section 47-10-1 NMSA 1978 et seq.

For wage claim actions, costs, jurisdiction, and representation by district attorney, see Section 50-4-12 NMSA 1978.

For comparable District Court Civil rule, see Rule 1-089 NMRA.

For service and filing of pleadings and other papers, see Rule 2-203 NMRA.

For the definition of a "pleading", see Paragraph A of Rule 2-301 NMRA.

For general provision for changing attorney, see Section 36-2-14 NMSA 1978.

The 1990 amendment, effective for cases filed in the magistrate courts on or after July 1, 1990, added the last three sentences in Paragraph C.

The 1992 amendment, effective October 1, 1992, rewrote Paragraph D.

The 1996 amendment, effective October 1, 1996, added "on a writ of garnishment or attachment" in Subparagraph B(1), designated the existing language of Subparagraph B(1) as Subparagraph B(1)(a) and rewrote that subparagraph, designated former Subparagraph B(2) as B(1)(b) and rewrote that subparagraph, designated former Subparagraphs B(3) to B(6) as Subparagraphs B(2) to B(5), substituted "in an action brought" for "if the action is brought" and "or the Mobile Home Park Act if the" for "and the" in Subparagraph B(2), substituted "in the" for "by the provisions of the" in Subparagraph B(2)(a), added Subparagraph B(2)(b) and redesignated the remaining subparagraphs accordingly, substituted "by the owner of the property" for "such owner" in Subparagraph B(2)(c), and added Subparagraph B(6) and made minor stylistic changes in Subparagraph B(4) and Paragraph D.

The 2000 amendment, effective November 1, 2000, inserted "or limited liability company" in Paragraphs B(1)(b) and B(3); and inserted "or memberships", "or member" and "or member" in Paragraph B(3).

The 2005 amendment, effective March 21, 2005, added "or paper" after "pleading" and before "signed by counsel" in Paragraph C.

The 2008 amendment, approved by Supreme Court Order 08-8300-014, effective June 20, 2008, added the last sentence in Subsection C to provide for a limited appearance by an attorney.

2-108. Withdrawal or substitution of attorneys.

A. **Approval of court.** An attorney or firm who has appeared without limitation in a cause may withdraw from it upon motion and approval of the court. The motion shall be substantially in the form approved by the Supreme Court. Approval of the court may be conditioned upon substitution of other counsel or the filing by a party of an address at which service may be made upon the party, with proof of service on all other parties, or otherwise. Following withdrawal by counsel, an unrepresented party shall have twenty (20) days within which to secure counsel or be deemed to have entered an appearance pro se. 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 prior to entry of the court's order. Attorneys whose appearances are limited as set forth in Paragraph C of Rule 2-107 NMRA need not obtain consent of the court before withdrawing or otherwise ceasing to act in the matter, except if the purpose of the limited representation is not completed.

B. Withdrawal without consent. If an attorney who has appeared without limitation ceases to act in a cause for a reason other than withdrawal or consent, upon motion of any party, the court may require the taking of such steps as may be advised to insure that the cause will proceed with promptness and dispatch.

C. Representation after final judgment. Attorneys of record shall continue to be subject to service for ninety (90) days after entry of final judgment. After expiration of the ninety (90) day period, unless an attorney enters an appearance, the party shall be deemed to have entered an appearance pro se. This rule does not preclude the earlier withdrawal of counsel as provided above.

D. Service upon responding party. In the event of further legal proceedings between the parties after the ninety (90) days have elapsed, the moving party shall effect service of process upon the responding party in the manner prescribed by Rule 2-202 NMRA.

[As amended, effective July 1, 1990; September 15, 2000; February 16, 2004; as amended by Supreme Court Order 08-8300-014, effective June 20, 2008.]

ANNOTATIONS

The 1990 amendment, effective for cases filed in the magistrate courts on or after July 1, 1990, designated the former first paragraph as Paragraph A, added the present heading of that paragraph, and inserted the present third sentence therein; designated the former second paragraph as Paragraph B, adding the present heading thereto; and added present Paragraphs C and D.

The 2000 amendment, effective September 15, 2000, in Subsection A, deleted "magistrate" preceding "court" in the first sentence; substituted "Consent of the court" for "Such consent may" at the beginning of the second sentence and inserted "subject to the provisions of Rule 2-107 NMRA" at the end of the second sentence; in Subsection C, rewrote the bold catchline and added the second sentence.

The 2003 amendment, effective February 16, 2004, in Paragraph A, substituted "approval of court" for "consent and notice" in the introductory language, "an" for "no" and "upon motion and approval of the court" for "without written consent of the court, filed with the clerk" in the first sentence, inserted the present second sentence, substituted "approval" for "consent" in the present third sentence, deleted "subject to the provisions of Rule 2-107 NMRA" at the end of the present fourth sentence, and substituted the present last sentence for "notice of withdrawal or substitution of counsel

shall be given to all parties either by withdrawing counsel or by substituted counsel and proof of service filed with the clerk”, and deleted “subject to the provisions of Rule 2-107 NMRA” at the end of the second sentence of Paragraph C.

The 2008 amendment, approved by Supreme Court Order 08-8300-014, effective June 20, 2008, added the last sentence in Subsection A to provide for a limited appearance by an attorney and limited the application of the remainder of the provisions of Subsection A and the provisions of Subsection B to the withdrawal of attorneys who have appeared without limitation.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 7 Am. Jur. 2d Attorneys At Law §§ 181 to 191.

Construction and effect of statutory provision requiring adverse party to give notice when attorney ceases to act as such, 42 A.L.R. 1347.

Necessity of order of substitution where new attorney is employed to prosecute an appeal, 70 A.L.R. 834.

Adjustment or determination of compensation of discharged attorney as condition of substitution of attorney by court order, 124 A.L.R. 725.

7A C.J.S. Attorney and Client §§ 218 to 233.

2-109. Withdrawn.

ANNOTATIONS

Withdrawals. — Pursuant to Supreme Court Order 08-8300-06, Rule 2-109 NMRA, which defined "record", was withdrawn effective January 29, 2008.

2-110. 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;
- (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 the Rules of Criminal Procedure for the Magistrate Courts. 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 at the time of the contempt 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

Cross references. — For jurisdiction for contempt, see Section 35-3-9 NMSA 1978.

For rules of procedure governing criminal actions in magistrate court, see Rule 6-101 NMRA et seq.

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. — 17 Am. Jur. 2d Contempt §§ 52, 53.

Misconduct of officers in selection or summoning of jurors or grand jurors as contempt of court, 7 A.L.R. 345.

Assault as contempt of court, 18 A.L.R. 212, 55 A.L.R. 1230, 52 A.L.R.2d 1297.

Forcing party or prosecuting witness to withdraw or not to institute action or proceeding as contempt of court, 23 A.L.R. 187.

Communicating with grand jury as contempt, 29 A.L.R. 489.

Affidavit to disqualify judge as contempt, 29 A.L.R. 1273.

Criticism of attitude of the court or judge toward violations of liquor law as contempt, 58 A.L.R. 1001.

Criticism of court's appointment of receiver as contempt, 97 A.L.R. 903.

Refusal of attorney to disclose identity of, whereabouts of, or other information relating to, his client as contempt, 101 A.L.R. 470.

Refusal or failure of clerk of court to comply with direction of court or judge upon ground of its invalidity or supposed invalidity as contempt, 119 A.L.R. 1380.

Alteration, substitution, abstraction, withholding or destruction of pleadings and papers by attorneys as criminal contempt, 151 A.L.R. 750.

Bail jumping after conviction, failure to surrender or to appear for sentencing, and the like, as contempt, 34 A.L.R.2d 1100.

Assaulting, threatening or intimidating witness as contempt of court, 52 A.L.R.2d 1297.

Published article or broadcast as direct contempt of court, 69 A.L.R.2d 676.

Accused's right to, and prosecution's privilege against, disclosure of identity of informer, 76 A.L.R.2d 262.

False or inaccurate report of judicial proceedings as contempt, 99 A.L.R.2d 440.

Release of information concerning forthcoming or pending trial as ground for contempt proceedings or other disciplinary measures against member of the bar, 11 A.L.R.3d 1104.

Effect of witness's violation of order of exclusion, 14 A.L.R.3d 16.

Attack on judiciary as a whole as indirect contempt, 40 A.L.R.3d 1204.

Mortgagor's interference with property subject to order of foreclosure and sale as contempt of court, 54 A.L.R.3d 1242.

Picketing court or judge as contempt, 58 A.L.R.3d 1297.

Assault on attorney as contempt, 61 A.L.R.3d 500.

Addressing allegedly insulting remarks to court during course of trial as contempt, 68 A.L.R.3d 273.

Conduct of attorney in connection with making objections or taking exceptions as contempt of court, 68 A.L.R.3d 314.

Power of court to impose standard of personal appearance or attire, 73 A.L.R.3d 353.

Contempt for violation of compromise and settlement the terms of which were approved by court but not incorporated in court order, decree or judgment, 84 A.L.R.3d 1047.

Contempt based on violation of court order where another court has issued contrary order, 36 A.L.R.4th 978.

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

Contempt: state court's power to order indefinite coercive fine or imprisonment to exact promise of future compliance with court's order - anticipatory contempt, 81 A.L.R.4th 1008.

Profane or obscene language by party, witness, or observer during trial proceedings as basis for contempt citation, 29 A.L.R.5th 702.

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

17 C.J.S. Contempt §§ 43 to 61.

2-111. Telephone conferences.

A. **When permitted.** The court may hear any matter by telephone conference call when to do so would legitimately serve justice considering, among other issues, the economic needs of the parties.

B. **Requirements.** No matter or setting will be heard by telephone and no witness will appear telephonically without the prior express approval of the judge.

C. **Cost.** When a telephone conference call is conducted, it will be arranged and paid for by the person seeking the telephone conference call.

[Approved, effective November 1, 2000.]

2-112. Public inspection and sealing of court records.

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

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

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

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

(3) “protected personal identifier information” means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, 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) Unless otherwise ordered by the court, court records filed with the court shall not contain protected personal identifier information except as follows:

(a) any person waives the protections of this paragraph as to that person’s own protected personal identifier information by filing a court record containing that person’s own unredacted protected personal identifier information; and

(b) any person filing a court record containing redacted protected personal identifier information may also file an unredacted copy of the court record under seal. The court shall retain the unredacted copy as part of the court file but shall not disclose the unredacted version except as permitted by Subparagraph (2) of this paragraph or Paragraph H of this rule.

(2) If the court requires protected personal identifier information in a court record issued by the court, such information shall not be disclosed to the public except by order of the court. Such information may otherwise be disclosed to local, state, tribal and federal agencies authorized by law to collect or use the information disclosed.

(3) The court clerk is not required to review documents submitted by the parties 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.

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 2-307 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 2-203.1 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 1-079 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 2-307 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.]

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 also 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). 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 prohibits the inclusion of protected personal identifier information in a court record without a court order. If the court requires protected personal identifier information in a court record, such information shall not be disclosed to the public without court approval. However, such information may be disclosed to governmental agencies authorized by law to use the information.

Although a party shall not include protected personal identifier information in court records absent a court order, a party may file a motion requesting permission to file a court record that does contain protected personal identifier information. If the court grants a motion to file a court record containing protected personal identifier information, the court should consider requiring the movant to file a redacted and unredacted version of the court record so that the redacted version of the court record can be made available for public access without the unnecessary disclosure of protected personal identifier information. Alternatively, a party may elect to file an unredacted version of the court record under seal at the same time that the redacted version of the court record is filed. A party waives protection of the party's own personal identifier information by filing a court record that contains the party's unredacted personal identifier information, but the court may in its discretion nevertheless protect the party's personal identifier information if the waiver was inadvertent.

Finally, it is the responsibility of a party filing a court record to ensure that it does not contain protected personal identifier information. 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. Instead, the onus is on the parties and their attorneys to alert the court when protected personal identifier information is included in a court record in violation of this rule. If a party fails to comply with the provisions of Paragraph C, the court may consider sanctions as appropriate under Paragraph I of the rule.

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.]

ARTICLE 2

Commencement of Action

2-201. Commencement of action.

A. **How commenced.** A civil action is commenced by filing with the court a complaint consisting of a written statement of a claim or claims setting forth briefly the facts and circumstances giving rise to the action.

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

C. **Form of complaint.** The complaint shall be in substantially the form approved by the court administrator and the supreme court.

D. **Verified accounts.** Accounts duly verified by the oath of the party claiming the same, or his agent, and promissory notes and other instruments in writing not barred by law are sufficient evidence in any suit to create a rebuttable presumption, sufficient to enable the plaintiff to recover judgment for the account thereof.

ANNOTATIONS

Cross references. — For jurisdiction of magistrate courts, see Section 35-3-3 NMSA 1978.

For form on civil complaint, see Rule 4-201 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Conclusive election of remedies as predicated on commencement of action, or its prosecution short of judgment on the merits, 6 A.L.R.2d 10.

Tolling of statute of limitations where process is not served before expiration of limitation period, as affected by statutes defining commencement of action, or expressly relating to interruption of running of limitations, 27 A.L.R.2d 236.

72 C.J.S. Process § 3.

2-202. Summons.

A. Summons; issuance. Upon receipt of a complaint and payment of the docket fee, the clerk or the magistrate shall docket the action and issue a summons and deliver it to the plaintiff or plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon the request of the plaintiff, separate, additional or amended summons shall issue against any defendant. A defendant waives the service of summons by filing an answer in the proceedings.

B. Summons; how issued; form. The summons shall be signed by the clerk, be directed to the defendant, be substantially in the form approved by the Supreme Court and must contain:

(1) the name of the court in which the action is brought, the name of the county in which the complaint is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed;

(2) a direction that the defendant serve a responsive pleading or motion within twenty (20) days after service of the summons, and file the same, all as provided by law, and a notice that unless the defendant so serves and files a responsive pleading or motion, the plaintiff will apply to the court for the relief demanded in the complaint;

(3) the name and address of the plaintiff's attorney, if any, shall be shown on every summons, otherwise the plaintiff's address.

C. Summons; service of copy. A copy of the summons with a copy of complaint attached and a copy of the form for answer shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary.

D. Summons; by whom served. In civil 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, except for writs of attachment and writs of replevin, which shall be served by the sheriff or by any person not a party to the action over the age of eighteen (18) years who may be designated by

the court to perform such service or by the sheriff of the county where the property or person may be found.

E. Summons; service by mail. A summons and complaint may be served upon a defendant of any class referred to in Subparagraph (1) or (2) of Paragraph F of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two (2) copies of a notice and acknowledgement substantially conforming with the form approved by the Supreme Court and a return envelope, postage prepaid, addressed to the sender. If no acknowledgement of service under this subdivision of this rule is received by the sender within twenty (20) days after the date of mailing plus three (3) days as provided by Rule 2-104, service of such summons and complaint shall be made by a person authorized by Paragraph D of this rule, in the manner prescribed by Paragraph F of this rule. Service of a summons by mail is only effective if an acknowledgment of service signed by the person being served is filed with the court. The court shall order the payment of the costs of personal service by the person served if such person does not complete and return to the sender within twenty-three (23) days after mailing the notice and acknowledgement of receipt of summons, unless good cause is shown for not signing, filing and serving a signed acknowledgment of service in the time required by this paragraph.

The form of the notice and acknowledgement of receipt of summons and complaint shall be substantially in the form approved by the Supreme Court.

F. Summons; how served. Personal service shall be made as provided by law 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 is absent, service may be made by delivering a copy of the process or other papers to be served to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years; and if there is 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;

(3) upon the State of New Mexico:

(a) in garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head of the branch, agency, bureau, department, commission or institution;

(b) service of process on the governor, attorney general, agency, bureau, department, commission or institution or head thereof may be made either by delivering a copy of the summons and of the complaint to the head or to his receptionist. Where an executive secretary is employed, he shall be considered as the head;

(4) upon any county by delivering a copy of the summons and of the complaint to the county clerk, who shall forthwith notify the district attorney of the judicial district in which the county sued is situated;

(5) upon a municipal corporation by delivering a copy of the summons and of the complaint to the city clerk, town clerk or village clerk, who in turn shall forthwith notify the head of the commission or other form of governing body;

(6) upon the board of trustees of any land grant referred to in Sections 49-1-1 through 49-10-6 NMSA 1978, process shall be served upon the president or in his absence upon the secretary of such board;

(7) upon a minor, whenever there shall be a conservator of the estate or guardian of the person of such minor, by delivering a copy of the summons and of the complaint to the conservator or guardian. Service of process so made shall be considered as service upon the minor. In all other cases process shall be served by delivering a copy of the summons and of the complaint to the minor, and if the minor is living with an adult a copy of the summons and of the complaint shall also be delivered to the adult residing in the same household. In all cases where a guardian ad litem has been appointed, a copy of the summons and of the complaint shall be delivered to such representative, in addition to serving the minor as herein provided;

(8) upon an incapacitated person, whenever there shall be a conservator of the estate or guardian of the person of such incapacitated person, by delivering a copy of the summons and of the complaint to the conservator or guardian. Service of process

so made shall be considered as service upon the ward. In all other cases process shall be served upon the ward in the same manner as upon competent persons;

(9) upon a personal representative, guardian, conservator, trustee or other fiduciary in the same manner as provided in Subparagraph (1) or (2) of this paragraph as may be appropriate.

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.

G. Return. If service is made by mail pursuant to Paragraph E of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such paragraph. Where service within the state includes mailing, the return shall state the date and place of mailing. If service is by personal service pursuant to Paragraph F 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 deputy), proof thereof shall be by certificate; and when made by a person other than a sheriff (or deputy), proof thereof shall be made by affidavit. Where service within the state includes mailing, the return shall state the date and place of mailing. Failure to make proof of service shall not affect the validity of service.

H. Service by publication. Service by publication may not be made, except as provided by law in cases of attachment or replevin.

I. Alias process. When any process has not been returned, or has been returned without service, or has been improperly served, it shall be the duty of the clerk, upon the application of any party to the suit, to issue other process as the party applying may direct.

J. Service; applicable statute. Where no provision is made in these rules for service of process, process shall be served as provided for by any applicable statute.

K. 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; July 1, 1990; January 1, 1993; May 1, 1994; October 15, 2002.]

ANNOTATIONS

Cross references. — For sheriff or deputy to serve and execute process and orders, see Section 4-41-14 NMSA 1978.

For service by publication in attachment cases, see Section 35-9-3 NMSA 1978.

For forms on civil summons and return, see Rule 4-204 NMRA.

The 1989 amendment, effective for cases filed in the magistrate courts on or after January 1, 1990, rewrote Paragraph A and former Paragraphs B to G, redesignating former Paragraphs B to G as present Paragraphs D, F, E, G, I, and K respectively; added present Paragraphs B and C; in Paragraph I, substituted "clerk" for "court" and "may direct" for "may request"; and added Paragraph J.

The 1990 amendment, effective for cases filed in the magistrate courts on or after July 1, 1990, substituted "as provided by law" for "within the magistrate district" in the first sentence of Paragraph E and near the beginning of Paragraph F.

The 1993 amendment, effective January 1, 1993, substituted "how issued" for "execution" in the heading for Paragraph B; in Paragraph E, substituted "sender" for "court" throughout, deleted "as provided by law" following "may be served" in the first sentence, and substituted "twenty-three (23) days" for "twenty (20) days" in the last sentence of the first paragraph; deleted the last sentence in Paragraph F(3)(a), which read "A copy of the writ of garnishment shall be delivered or mailed by registered or certified mail to the defendant employee"; and, in Paragraph G, substituted "sender's filing with the court the acknowledgment received pursuant to such paragraph" for "defendant filing with the court the Notice and Receipt of Summons and Complaint", added the second sentence, and made gender neutral changes.

The 1994 amendment, effective May 1, 1994, substituted the present last sentence of Paragraph A for "Any defendant may waive the issuance or service of summons", inserted "be substantially in the form approved by the Supreme Court" in the introductory language of Paragraph B, deleted former Subparagraph B(4) which read "the summons shall be substantially in the form approved by the Supreme Court", and substituted "where the defendant may be found or by" for "where the magistrate court is located if the defendant may be found therein, or by" near the beginning of Paragraph D.

The 2002 amendment, effective October 15, 2002, deleted "entering an appearance or" following "of summons by" in the last sentence in Paragraph A; in Paragraph E, added the third sentence, and, in the fourth sentence, deleted "Unless good cause is shown for not doing so" from the beginning and inserted "unless good cause is shown for not signing, filing and serving a signed acknowledgment of service in the time required by this paragraph" at the end.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 19 Am. Jur. 2d Corporations § 2192; 62B Am. Jur. 2d Process § 59 et seq.

Power to amend nunc pro tunc return of service of summons in divorce suit, 7 A.L.R. 1148.

Appearance to make application for extension of time or continuance, or order in that regard, as waiver of objection to jurisdiction for lack of personal service, 81 A.L.R. 166.

Defects or informalities as to appearance or return day in summons or notice of commencement of action, 97 A.L.R. 746.

Relief as to costs or disbursements as changing special appearance to general appearance, 102 A.L.R. 224.

Return of service of process in action in personam showing personal or constructive service in state as subject to attack by showing that defendant was a nonresident and was not served in state, 107 A.L.R. 1342.

Affidavit of substantial defense to merits in an attachment or garnishment proceeding as general appearance, 116 A.L.R. 1215.

Power of infant to acknowledge service of process or to bind himself by waiver or estoppel in that regard, 121 A.L.R. 957.

Filing cross-petition or other step amounting to general appearance after judgment based upon valid constructive service as affecting right under statute to open judgment, 122 A.L.R. 159.

Amendment of process or pleading by changing or correcting mistake in name of party, 124 A.L.R. 86.

Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction, 129 A.L.R. 1240.

Necessity, in service by leaving process at place of abode, etc., of leaving a copy of summons for each party sought to be served, 8 A.L.R.2d 343.

What amounts to doing business in a state within statute providing for service of process in action against nonresident natural person or persons doing business in state, 10 A.L.R.2d 200.

Sufficiency of affidavit as to due diligence in attempting to learn whereabouts of party to litigation, for the purpose of obtaining service by publication, 21 A.L.R.2d 929.

Appealability of order overruling or sustaining motion to quash or set aside service of process, 30 A.L.R.2d 287.

Omission of signature of issuing officer on civil process or summons as affecting jurisdiction of the person, 37 A.L.R.2d 928.

Service of process on person in military service by serving person at civilian abode or residence, or leaving copy there, 46 A.L.R.2d 1239.

Service of process upon dissolved domestic corporation in absence of express statutory direction, 75 A.L.R.2d 1399.

Failure to make return as affecting validity of service or court's jurisdiction, 82 A.L.R.2d 668.

Manner of service of process upon foreign corporation which has withdrawn from state, 86 A.L.R.2d 1000.

Propriety of service of process in an in personam action on resident minor defendant whose only guardian is a nonresident and cannot be served validly either within or without state, 86 A.L.R.2d 1183.

Place or manner of delivering or depositing papers, under statutes permitting service of process by leaving copy at usual place of abode or residence, 87 A.L.R.2d 1163.

Juvenile delinquency and dependency proceedings, necessity of service of process upon infant itself, 90 A.L.R.2d 293.

Construction and effect of provision for service of process against minor on a parent, guardian or other designated person, 92 A.L.R.2d 1336.

Sufficiency of designation of court or place of appearance in original civil process, 93 A.L.R.2d 376.

Attack on personal service as having been obtained by fraud or trickery, 98 A.L.R.2d 551.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons or the like, 6 A.L.R.3d 1179.

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

Civil liability of one making false or fraudulent return of process, 31 A.L.R.3d 1393.

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

72 C.J.S. Process §§ 6 to 23, 25, 33 to 49, 50, 58 to 72, 77 to 91.

2-203. Service and filing of pleadings and other papers.

A. Service; when required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint, every order not entered in open court, every paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. Service on a party is not required if:

(1) the party is in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 2-202 NMRA; or

(2) the party unconditionally admits to all of the allegations of the complaint prior to entry of a judgment on the pleadings.

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

C. Definitions. As used in this rule:

(1) "delivery of a copy" means:

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

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 2-204 NMRA or Rule 2-205 NMRA;

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

(d) if the party cannot be served at the office of the party's attorney or at the office of the party because the party's office is closed or the party to be served has no office, the party may be served by leaving it at the party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; and

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

D. Filing; certificate of service. All papers after the complaint required to be served upon a party, together with a certificate of service indicating the date and

method of service, shall be filed with the court within a reasonable time after service, except that the following papers shall not be filed unless on order of the court or for use in the proceeding:

- (1) summonses without completed returns;
- (2) subpoenas without completed returns;
- (3) offers of settlement when made.

Except for the papers described in Subparagraph (1) of this paragraph, the attorney or party, if the party is unrepresented, shall file a certificate of service with the court within a reasonable time after service, indicating the date and method of service of any paper not filed with the court.

E. 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 2-204 NMRA or Rule 2-205 NMRA. A paper filed by electronic means in compliance with Rule 2-205 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.

[As amended, effective March 1, 2000; November 1, 2004; March 21, 2005.]

ANNOTATIONS

Cross references. — For comparable District Court Civil rule, see Rule 1-089 NMRA.

For service and filing of pleadings and other papers, see Rule 2-203 NMRA.

For the definition of a "pleading", see Paragraph A of Rule 2-301 NMRA.

For general provision for changing attorney, see Section 36-2-14 NMSA 1978.

The 2000 amendment, effective March 1, 2000, inserted "pleadings and other" in the rule heading and amended this rule to conform it with Rule 1-005 NMRA provisions relating to service by fax or electronic mail.

The 2004 amendment, effective November 1, 2004, rewrote the former last sentence in Paragraph A so as to create the present last sentence and Subparagraph (1) of that paragraph and added Subparagraph (2) therein.

The 2005 amendment, effective March 21, 2005, revised this rule to make it consistent with Rule 1-005 NMRA as amended in 2004. The 2005 amendments revised Paragraph A, designated the definition of "delivery of a copy" as a new Subparagraph (1) of Paragraph C and added the definition of "mailing a copy" as a new Subparagraph (2) of Paragraph C, designated former Paragraph C and Paragraph D and inserted Subparagraphs (1) to (3), the exceptions for filing papers, redesignated former Paragraph D as Paragraph E and deleted all of Paragraphs E and F relating to "proof of service" and "motions".

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61B Am. Jur. 2d Pleading §§ 901, 902.

Appearance for purpose of making application for removal of cause to federal court as a general appearance, 81 A.L.R. 1219.

Affidavit of substantial defense to merits in an attachment or garnishment proceeding as general appearance, 116 A.L.R. 1215.

Attack by defendant upon attachment or garnishment as an appearance subjecting him personally to jurisdiction, 129 A.L.R. 1240.

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

71 C.J.S. Pleading §§ 409, 411, 413.

2-203.1. Pleadings and papers; captions.

Pleadings and papers filed in the magistrate court shall have a caption or heading, which shall briefly include:

A. the name of the court as follows:

"State of New Mexico

County of _____

Magistrate Court";

B. the names of the parties; and

C. 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.

[Approved, effective December 17, 2001.]

ANNOTATIONS

Cross references. — For district courts, see Rule 1-008.1 NMRA.

2-204. 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 service by court of notices, orders or writs. Facsimile service may be used by the court for issuance of any notice, order or writ. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ.

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

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

- (1) a fee is not required to file the pleading or paper;
- (2) only one copy of the pleading or paper is required to be filed;
- (3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and
- (4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

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

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

G. Service by facsimile. Any document required to be served by Paragraph A of Rule 2-204 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has:

- (1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;
- (2) a letterhead with a facsimile telephone number; or
- (3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

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

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

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

[Approved, effective January 1, 1997; as amended, effective March 21, 2005.]

ANNOTATIONS

Cross references. — For general rule on service and filing of pleadings and papers, see Rule 2-203 NMRA.

The 2005 amendment, effective March 21, 2005, conformed this rule with Rule 1-005.1 NMRA as amended by the Supreme Court effective January 3, 2005. The 2005 amendment substituted "service" for "transmission" in Paragraph B, revised Paragraph D to substitute "filed with the court" for "faxed directly to the court by facsimile", revised Subparagraph (3) of Paragraph C to permit fax filing of pleadings and papers exceeding 10 pages when approved by the court, rewrote Paragraph G to change "transmission by facsimile" to "service by facsimile", deleted former Paragraph H and redesignated former Paragraph I as H and added Paragraph I relating to conformed copies.

2-205. 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. **Service by electronic transmission.** Any document required to be served by Paragraph A of Rule 2-203 NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic mail, a party served by electronic mail notifies the sender of the electronic mail that the pleading or paper cannot be read, the pleading or paper shall be served by any other method authorized by Rule 2-203 NMRA designated by the party to be served.

C. **Service by electronic transmission by the court.** The court may serve any document by electronic service to an attorney or party 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 with the court 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. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative.

G. **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.

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

[As amended, effective March 21, 2005.]

ANNOTATIONS

Cross references. — For definition of "signature", see Rule 2-301 NMRA.

For general rule on service and filing of pleadings and papers, see Rule 2-203 NMRA.

For service and filing of pleadings and papers by fax, see Rule 2-204 NMRA.

The 2005 amendment, effective March 21, 2005, conformed this rule with District Court Civil Rule 1-005.2 NMRA as amended by the Supreme Court effective January 3, 2005.

ARTICLE 3 Pleadings and Motions

2-301. Pleadings allowed; signing of pleadings, motions and other papers; sanctions.

A. **Pleadings.** There shall be a complaint and, if the defendant wishes to contest the plaintiff's claim in any way, an answer. The answer may assert a counterclaim or a setoff. If a counterclaim is filed, a reply shall be filed and served on each party within twenty (20) days. The complaint may interplead two (2) or more persons who have or may have a claim to funds owed by the plaintiff.

B. **Joinder of claims.** A party asserting a claim for relief may join either as independent or as alternate claims as many claims as the party may have against an opposing party.

C. **Permissive joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of related transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or related series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action.

D. **Third-party practice.** Within ten (10) days after service of a defendant's answer on the plaintiff, a defendant may file a third-party complaint against any person who is or may be liable to the defendant for all or part of the plaintiff's claim against the defendant. A third-party complaint shall be served on the third-party defendant in the manner

provided by Rule 2-202 NMRA of these rules. A copy of the third-party complaint shall be served on all other parties pursuant to Rule 2-203, 2-203.1 or 2-204 NMRA of these rules. Upon motion and hearing the court may permit a defendant to file a third-party complaint at any time prior to trial.

E. Interpleader. Persons having claims for funds against the plaintiff may be named as defendants and required to adjudicate their claims for the funds when their claims are such that the plaintiff is or may be exposed to double or multiple liability. A defendant exposed to similar liability for funds may adjudicate the right to funds by third-party complaint, cross-claim or counterclaim. Any person who is named as a defendant or third-party defendant pursuant to this paragraph shall file an answer within the time set forth in these rules setting forth the facts and circumstances giving rise to such person's claim and why such person is entitled to the funds owed by the plaintiff. The disposition of the proceedings shall be binding upon all parties to the action upon whom service has been made.

F. Separate trials. The court may make such orders as will prevent a party from being embarrassed, delayed or put to expense by the inclusion of a party against whom he asserts no claim and who asserts no claim against him, and may order separate trials or make other orders to prevent delay or prejudice.

G. Exhibits. An exhibit to a pleading is a part thereof for all purposes.

H. Signing of pleadings. Every pleading, motion and other paper of a party represented by an attorney, shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of a party or attorney constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief there is good ground to support it; and that it is not filed to delay the proceedings. If a pleading, motion or other paper is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or other paper had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. The signature of a party or attorney constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief, there is good ground to support it; and that it is not filed to delay the proceedings. If a pleading, motion or other paper is signed with intent to defeat the purpose of this rule, it may be stricken and the action may proceed as though the pleading or other paper had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action. Similar action may be

taken if scandalous or indecent matter is inserted. A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[As amended, effective October 1, 1987; October 1, 1992; January 1, 1997; December 17, 2001; March 21, 2005.]

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.

ANNOTATIONS

Cross references. — For motions rule, see Rule 2-307 NMRA.

For rule comparable to Paragraph H of this rule, see Rule 1-011 NMRA.

The 1992 amendment, effective October 1, 1992, added present Paragraphs B and C, redesignated former Paragraphs B and C as present Paragraphs D and E, added present Paragraph F, and redesignated former Paragraphs D to F as present Paragraphs G to I.

The 1997 amendment, effective January 1, 1997, added the last sentence in Paragraph I defining "signature".

The 2001 amendment, effective December 17, 2001, substituted "why" for "any" following "person's claim and" in the third sentence of Paragraph E; and rewrote Paragraph I, expanding its scope to include pleadings, motions, and other papers and adding the third and fourth sentences.

The 2005 amendment, effective March 21, 2005, revised Paragraph A to require a reply to be served on each party within 20 days if a counterclaim is filed, rewrote Paragraph D, substituted "claims for funds against the plaintiff" for "claims for funds against a third party" in the first sentence of Paragraph E, deleted Paragraph G, relating to motions, redesignated former Paragraphs H and I as Paragraphs G and H, added the first three sentences of redesignated Paragraph H.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 56 Am. Jur. 2d Motions, Rules, and Orders § 1; 61A Am. Jur. 2d Pleading §§ 1 to 4; 61B Am. Jur. 2d Pleading §§ 881, 888 to 898.

Sufficiency of verification of pleading by person other than party to action, 7 A.L.R. 4

Perjury in verifying pleadings, 7 A.L.R. 1283.

Setting up counterclaim, setoff or recoupment in reply, 42 A.L.R. 564.

Necessity and sufficiency of reply to answer pleading statute of limitations, 115 A.L.R. 755.

Motion to strike pleading, appealability of order entered on, 1 A.L.R.2d 422.

Claim barred by limitation as subject of setoff, counterclaim, recoupment, cross bill or cross action, 1 A.L.R.2d 630.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Effect of nonsuit, dismissal or discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Right to punish for contempt for failure to obey court order or decree either beyond power or jurisdiction of court or merely erroneous, 12 A.L.R.2d 1059.

Appealability of order granting or denying right of intervention, 15 A.L.R.2d 336.

Pretrial conference, binding effect of court's order entered after, 22 A.L.R.2d 599.

Necessity that trial court give parties notice and opportunity to be heard before ordering new trial on its own motion, 23 A.L.R.2d 852.

Judgment on the pleadings, court's power, on motion for, to enter judgment against movant, 48 A.L.R.2d 1175.

Judgment on the pleadings, proper procedure and course of action by trial court, where both parties move for, 59 A.L.R.2d 494.

Statute of limitations, raising defense by motion for judgment on pleadings, 61 A.L.R.2d 300.

Litigant's pleading to the merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 A.L.R.2d 937.

Counsel's right, in summation in civil case, to point out inconsistencies between opponent's pleading and testimony, 72 A.L.R.2d 1304.

Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

Summary judgment, propriety of entering for plaintiff before defendant files or serves answer to complaint or petition, 85 A.L.R.2d 825.

Independent venue requirements as to cross-complaint or similar action by defendant seeking relief against a codefendant or third party, 100 A.L.R.2d 693.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings or directed verdict, 36 A.L.R.3d 1113.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

71 C.J.S. Pleading §§ 63 to 210.

2-302. Defenses; answer.

A. **Answer; when filed.** The defendant shall file his answer on or before the appearance date as fixed in the summons.

B. **Defenses; how presented.** The answer shall describe in concise and simple language the reasons why the defendant denies the claim of the plaintiff as well as any defenses he may have to the claim of the plaintiff. Defenses shall be raised in the answer and not by motion. A party may file a motion to have the answer clarified or explained. On the filing of such motion, the magistrate may, in his discretion, require a more explicit answer or order a pretrial conference to clarify the issues.

C. **Form of answer.** The answer shall be in substantially the form approved by the court administrator and the supreme court.

D. **Permissive counterclaim or setoff.** If the defendant possesses a claim or claims against the plaintiff at the time the action is begun, they may be asserted in the answer as a counterclaim or setoff. The facts and circumstances giving rise to the claim or claims must be briefly described, in the form of answer approved by the supreme court.

E. **Nature of claim and amount claimed.** The nature of the defendant's claim or claims and the total sum claimed shall comply with applicable law. A claim which exceeds the jurisdiction of the magistrate court shall be amended by the defendant prior to trial to conform to the court's jurisdiction or shall be dismissed without prejudice. There shall be no compulsory counterclaim.

ANNOTATIONS

Cross references. — For form on answer to civil complaint, see Rule 4-301 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 20 Am. Jur. 2d Counterclaim, Recoupment, and Setoff §§ 1 et seq., 56 et seq.; 61A Am. Jur. 2d Pleading §§ 220 to 248, 278, 279.

Right to voluntary dismissal of suit without prejudice before trial as affected by filing counterclaim after motion for dismissal, 71 A.L.R. 1001.

Right to dismissal as affected by filing of, or as affecting, cross-complaint, counterclaim, intervention and the like, 90 A.L.R. 387.

Asking relief in addition to vacation of service of process as waiver of special appearance or of right to rely upon lack of jurisdiction, 111 A.L.R. 925.

Pleading last clear chance doctrine, 25 A.L.R.2d 254.

Objection before judgment to jurisdiction of court over subject matter as constituting general appearance, 25 A.L.R.2d 833.

Agency, manner and sufficiency of pleading in contract action, 45 A.L.R.2d 583.

Litigant's participation on merits, after objection to jurisdiction of person made under special appearance or the like has been overruled, as waiver of objection, 62 A.L.R.2d 937.

Propriety of entering summary judgment for plaintiff before defendant files or serves answer to complaint or petition, 85 A.L.R.2d 825.

Proceeding for summary judgment as affected by presentation of counterclaim, 8 A.L.R.3d 1361.

71 C.J.S. Pleading §§ 99 to 129, 167 to 176.

2-303. Judgment on the pleadings.

A. **For claimant.** A party seeking to recover upon a claim or counterclaim may, at any time after an answer or a reply by the adverse party, move for a judgment on the pleadings in his favor upon all or any part thereof.

B. **For defending party.** A party against whom a claim or counterclaim is asserted may, at any time, move for a judgment on the pleadings in his favor as to all or any part thereof.

C. **Motion and proceedings thereon.** The motion shall be served by mail at least five (5) days before the time fixed for the hearing. The judgment sought shall be rendered forthwith if the pleadings, on file, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A

judgment on the pleadings may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

D. Judgment on the pleadings. The court may, on its own motion, enter judgment on the pleadings if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A judgment on the pleadings may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. At least fifteen days before entering such judgment on the pleadings, the court shall provide written notice of its intention to the parties to enter the judgment unless objections are received by a certain date.

[As amended, effective December 17, 2001; as amended by Supreme Court Order 07-8300-27, effective November 1, 2007.]

ANNOTATIONS

Cross references. — For court form of notice of intention to enter a judgment on the pleadings, see Civil Form 4-303A NMRA.

The 2001 amendment, effective December 17, 2001, substantially rewrote this rule to include some of the provisions of Rule 1-015 NMRA.

The 2007 amendment, approved by Supreme Court Order 07-8300-27, effective November 1, 2007 adds Paragraph D relating to provide for judgment on the pleadings.

2-304. Amended and supplemental pleadings.

A. Amendments before response. At any time before a responsive pleading is served, a party may amend that party's initial pleading once without permission of the court. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

B. Amendments after response to pleading. At any time after the filing of an answer or response, upon request of a party, the court may, upon reasonable notice and upon such terms as may be just, permit a party to amend the party's pleading. Permission to amend the party's pleading shall be freely granted when justice so requires. The court may grant a continuance to permit an objecting party to respond to the amended pleading.

C. Supplemental pleadings. Upon motion of a party, the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events that have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the

supplemental pleading, it shall so order, specifying the time for filing the response. The court may grant a continuance to permit an objecting party to respond to the supplemental pleading.

[As amended, effective December 17, 2001.]

ANNOTATIONS

The 2001 amendment, effective December 17, 2001, substantially rewrote this rule to include some of the provisions of Rule 1-015 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 61A Am. Jur. 2d Pleading § 745 et seq.; 61B Am. Jur. 2d Pleading § 789 et seq.

Amendment of pleading to correct designation of court or judge, 65 A.L.R. 709.

Declaratory relief, leave to amend complaint, 87 A.L.R. 1205.

Amendment of pleading by changing description or characterization of party from corporation to individual, partnership, or other association, or vice versa, 111 A.L.R. 1317, 151 A.L.R. 987.

Amendment of process or pleading by changing or correcting mistake in name of party, 124 A.L.R. 86.

Substitution of plaintiff as proper subject for amendment of complaint, 135 A.L.R. 325.

Pleading last clear chance doctrine, 25 A.L.R.2d 254.

Statute of limitations, amendment of pleadings to assert, 59 A.L.R.2d 169.

Statute of limitations, timely suit to enforce policy as interrupting limitation against claimant's amended pleading to reform it, or vice versa, 92 A.L.R.2d 168.

71 C.J.S. Pleadings §§ 275 to 338.

2-305. Dismissal of actions.

A. Voluntary dismissal; effect thereof.

(1) An action may be dismissed by the plaintiff without order of the court:

(a) by filing a notice of dismissal at any time before service by the adverse party of an answer or other responsive pleading; or

(b) by filing a stipulation of dismissal signed by all parties who have appeared generally in the action.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim.

(2) Except as provided in Subparagraph (1) of this paragraph, an action shall not be dismissed on motion of the plaintiff except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim, cross-claim or third-party claim has been filed by a party prior to the service upon such party of the plaintiff's motion to dismiss, the action shall not be dismissed against the party's objection unless the counterclaim, cross-claim or third-party claim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice.

B. Involuntary dismissal; effect thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. Unless the court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.

C. Dismissal of counterclaim, cross-claim or third-party claim. The provisions of this rule apply to the dismissal of any counterclaim, cross-claim or third-party claim. A voluntary dismissal by the claimant alone pursuant to Subparagraph (1) of Paragraph A of this rule shall be made before a responsive pleading is served, or if there is none, before the introduction of evidence at the trial or hearing.

D. Dismissal for failure to prosecute. Any action pending for six (6) months from the date the complaint is filed, in which the plaintiff or defendant asserting a counterclaim has failed to take all available steps to bring the matter to trial, shall be dismissed without prejudice.

E. Costs of previously dismissed action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

[As amended, effective November 1, 1995; November 1, 2000.]

ANNOTATIONS

Cross references. — For form on stipulation of dismissal, see Rule 4-304 NMRA.

For form on notice of dismissal of complaint, see Rule 4-305 NMRA.

For form on order dismissing action for failure to prosecute, see Rule 4-306 NMRA.

The 1995 amendment, effective November 1, 1995, rewrote Paragraph A, added Paragraphs B and C, redesignated former Paragraph B as Paragraph D, and added Paragraph E.

The 2000 amendment, effective November 1, 2000, made stylistic changes in Paragraph A.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit §§ 10, 11, 55 to 106.

Mandamus to compel a court to take jurisdiction of a cause that it has erroneously dismissed for supposed insufficiency or lack of service, 4 A.L.R. 610.

Right of plaintiff to dismiss an action brought in behalf of himself and other persons, 8 A.L.R. 950, 91 A.L.R. 587.

Waiver of right to dismissal because of plaintiff's failure to furnish security for costs by applying for continuance, 8 A.L.R. 1528.

Forcing party or prosecuting witness to withdraw or not institute action or proceeding as contempt of court, 23 A.L.R. 187.

Dismissal of suit as affecting election of remedies as between damages and specific performance, 26 A.L.R. 111.

Constitutionality of statute forbidding direction of verdict or nonsuit, 29 A.L.R. 1287.

Arbitration agreement made pending action, 42 A.L.R. 727.

Joint tort-feasors, dismissal or nolle prosequi as to part, 66 A.L.R. 206, 104 A.L.R. 846, 124 A.L.R. 1298, 148 A.L.R. 1270.

Right of voluntary dismissal of suit without prejudice before trial as affected by filing counterclaim after motion for dismissal, 71 A.L.R. 1001.

Dismissal of action or proceeding to enforce mechanic's lien because of delay in prosecuting, 79 A.L.R. 847.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case against codefendant, 80 A.L.R. 1186, 114 A.L.R. 759.

Power of attorney general to settle and compromise or dismiss suit or proceeding, 81 A.L.R. 124.

May or must claim for damages from wrongful seizure of property be interposed in action or proceeding in which seizure is made, 85 A.L.R. 644.

Dismissal of action against resident defendant, or failure to get decision against him, as ground of removal to federal court of action in which resident defendant is joined with nonresident, 85 A.L.R. 799.

Constitutionality, construction and effect of statutes relating to exceptions to rule denying contribution or indemnity between joint tort-feasors, 85 A.L.R. 1091, 122 A.L.R. 520, 141 A.L.R. 1207.

What amounts to nonsuit within contemplation of statute extending time for new action in case of nonsuit, 86 A.L.R. 1048.

Nonsuit within contemplation of statute extending time for new action in case of nonsuit, dismissal as to one of several defendants, 86 A.L.R. 1049.

Stage of trial at which plaintiff may take voluntary dismissal, 89 A.L.R. 13, 126 A.L.R. 284.

Right to dismissal as affected by filing of, or as affecting, cross-complaint, counterclaim, intervention and the like, 90 A.L.R. 387.

May question as to qualification or competency of witness be raised by or upon motion for nonsuit or for directed verdict, absent objection on that ground when testimony was given, 93 A.L.R. 788.

Conclusiveness of judgment sustaining demurrer where plaintiff procured dismissal of the suit, 106 A.L.R. 437.

Right to revive by amendment an action dismissed by judgment entered upon plea of abatement or demurrer, 106 A.L.R. 570.

Reinstatement, after expiration of term, of case which has been voluntarily withdrawn, dismissed or nonsuited, 111 A.L.R. 767.

Raising question of estoppel by prior adjudication by motion to dismiss, 120 A.L.R. 8

Objectionable evidence, admitted without objection, as entitled to consideration on demurrer to evidence or motion for nonsuit or directed verdict, 120 A.L.R. 205.

Construction and application of rules of court which permit dismissing suit because of disobedience of order, summons or subpoena duces tecum requiring production of documents, 144 A.L.R. 372.

Provision that judgment is "without prejudice" or "with prejudice" as affecting its operation as res judicata, 149 A.L.R. 553.

Relief from stipulations, 161 A.L.R. 1161.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 A.L.R. 496.

Original notice of lis pendens, as effective upon renewal of litigation after dismissal, reversal or nonsuit, reserving right to bring another proceeding, 164 A.L.R. 515.

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

Voluntary dismissal or withdrawal of proceedings to probate or contest will, 173 A.L.R. 959.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Effect of discontinuance of action on previous orders, 11 A.L.R.2d 1407.

Necessity of notice of application or intention to correct error in judgment entry, 14 A.L.R.2d 224.

Appellate review at instance of plaintiff who has requested, induced or consented to dismissal or nonsuit, 23 A.L.R.2d 664.

Res judicata effect of judgment dismissing action, or otherwise denying relief, for lack of jurisdiction or venue, 49 A.L.R.2d 1036.

Dismissal of civil action for want of prosecution as res judicata, 54 A.L.R.2d 473.

Authority of attorney to dismiss or otherwise terminate action, 56 A.L.R.2d 1290.

What dismissals preclude a further suit, under federal and state rules regarding two dismissals, 65 A.L.R.2d 642.

Maintenance of second or successive stockholder's derivative action, 70 A.L.R.2d 1305.

Dismissal of injunction action or bill without prejudice as breach of injunction bond, 91 A.L.R.2d 1312.

Attack on personal service as having been obtained by fraud or trickery, 98 A.L.R.2d 551.

Time when voluntary nonsuit or dismissal may be taken as of right under statute so authorizing at any time before "trial," "commencement of trial," "trial of the facts" or the like, 1 A.L.R.3d 711.

Dismissing action or striking testimony where party to civil action asserts privilege against self-incrimination as to pertinent question, 4 A.L.R.3d 545.

Dismissal, nonsuit, judgment or direction of verdict on open statement of counsel in civil action, 5 A.L.R.3d 1405.

Dismissal of action because of party's perjury or suppression of evidence, 11 A.L.R.3d 1153.

Attorney's inaction as excuse for failure to timely prosecute action, 15 A.L.R.3d 674.

Application to period of limitations fixed by contract, of statute permitting new action to be brought within specified time after failure of prior action for cause other than on the merits, 16 A.L.R.3d 452.

Voluntary dismissal of replevin action by plaintiff as affecting defendant's right to judgment for the return or value of the property, 24 A.L.R.3d 768.

What amounts to "final submission" or "retirement of jury" within statute permitting plaintiff to take voluntary dismissal or nonsuit without prejudice before submission or retirement of jury, 31 A.L.R.3d 449.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings or directed verdict, 36 A.L.R.3d 1113.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

Dismissal of plaintiff's action as entitling defendant to recover attorneys' fees or costs as "prevailing party" or "successful party", 66 A.L.R.3d 1087.

27 C.J.S. Dismissal and Nonsuit §§ 7, 11, 42 to 91.

2-306. 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 for a pretrial conference to clarify the pleadings and to consider other matters to aid 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 join other parties and to amend the pleadings;
- (2) to file and hear motions; and
- (3) to complete any permitted discovery.

The scheduling order may also include:

- (4) the dates for conferences or hearings before trial;
- (5) a trial date; and
- (6) any other matters deemed appropriate by the court.

[As amended, effective December 17, 2001.]

ANNOTATIONS

Cross references. — For form on notice of pretrial conference, see Rule 4-307 NMRA.

The 2001 amendment, effective December 17, 2001, inserted "scheduling order" in the rule heading and amended this rule to prohibit the calling of witnesses for pretrial conferences unless ordered by the court and added Paragraph B.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 62A Am. Jur. 2d Pretrial Conference and Procedure § 12 et seq.

Pretrial conference procedures as affecting right to discovery, 161 A.L.R. 1151.

Relief from stipulations, 161 A.L.R. 1161.

General rule requiring pretrial conference, power of court to adopt, 2 A.L.R.2d 1061.

Disclosure, in pretrial proceedings, of trade secret, formula or the like, 17 A.L.R.2d 383.

Binding effect of court's order entered after pretrial conference, 22 A.L.R.2d 599.

Appealability of order entered in connection with pretrial conference, 95 A.L.R.2d 1361.

Failure of party or his attorney to appear at pretrial conference, 55 A.L.R.3d 303.

88 C.J.S. Trial § 17(2).

2-307. 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. All motions shall state with particularity the grounds and the relief sought.

B. **Requirement of written motion.** All motions, except motions made during a pretrial conference or trial, or as may be permitted by the court, shall be in writing. A copy of every written motion shall be served on each party or the party's attorney as provided by Rule 2-203 NMRA. A motion for relief filed more than ninety (90) days after entry of the judgment shall be served on the opposing party in the manner provided by Rule 2-202 NMRA for service of a summons.

C. **Unopposed motions.** If both parties are represented by attorneys, prior to filing a written motion, the moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order approved by opposing counsel shall accompany the motion.

D. **Opposed motions.** A motion filed by an attorney in a case in which the opposing party is represented by an attorney shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from opposing counsel unless the motion is a:

- (1) motion to dismiss;
- (2) motion for new trial;
- (3) motion for judgment on the pleadings.

E. **Notice and hearing.** No written motion shall be considered by the court unless served on each party or the party's attorney as required by these rules.

[Approved, effective March 21, 2005.]

ANNOTATIONS

Cross references. — For the request for hearing form, see Civil Form 4-112 NMRA.

For the notice of hearing form, see Civil Form 4-113 NMRA.

2-308. Offer of settlement.

Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until thirty (30) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant's costs, excluding attorney fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant shall pay the costs, excluding attorney fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

The fact that an offer has been made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.

[Approved by Supreme Court Order 07-8300-34, effective January 22, 2008.]

ANNOTATIONS

Cross references. — For comparable district court offer of settlement rule, see 1-068 NMRA and the 2003 Committee Commentary following 1-068 NMRA.

For computation of time, see 2-104 NMRA.

For court costs, see 2-701 NMRA.

ARTICLE 4

Parties

2-401. Parties; capacity.

A. **Real party in interest.** Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, personal representative, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so provides, an action for the use or benefit of another shall be brought in the name of the state. Where it appears that an action, by reason of honest mistake, is not prosecuted in the name of the real party in interest, the court may allow a reasonable time for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

B. **Capacity to sue or be sued.** The capacity of an individual, including those acting in a representative capacity, to sue or be sued shall be determined by the law of this state. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless some statute of this state provides to the contrary.

C. **Minors or incompetent persons.** When a minor or incompetent person has a representative, such as a general guardian, or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person.

ANNOTATIONS

Cross references. — For standing of personal representative to sue, see Section 45-3-703 NMSA 1978.

For powers of guardian of minor, see Section 45-5-209 NMSA 1978.

For powers of guardian of incapacitated person, see Section 45-5-312 NMSA 1978.

For power of conservator in administration to sue, see Section 45-5-424 NMSA 1978.

For power of trustee to sue, see Section 45-7-401 NMSA 1978.

For power of corporation to sue, see Section 53-11-4 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 34 to 40, 241, 245 to 251.

Compensation for services rendered to infant in the litigation, right of next friend to, 9 A.L.R. 1537.

Shares of corporate stock as within statute enabling assignee to maintain action in his own name, 23 A.L.R. 1322.

Mortgagee or other lienholder as entitled to maintain action against third person for damage to property, 37 A.L.R. 1120.

Waste, who may maintain action to recover multiple damages against tenant committing, 45 A.L.R. 774.

Sealed instrument, right of third person to maintain action at law, 47 A.L.R. 5, 170 A.L.R. 1299.

Local improvements, power of municipality to transfer or assign its right to enforce assessment or lien for, 55 A.L.R. 667.

Refusal to deal with corporation as giving stockholder right of action, 59 A.L.R. 1099.

Fire or marine policy taken out by bailee, warehouseman or carrier, right of owner to sue, 61 A.L.R. 720.

Subscription to stock in corporation to be formed, who may enforce, 61 A.L.R. 1504.

Charitable trust, right of trustees to maintain suit to administer or enforce, 62 A.L.R. 881, 124 A.L.R. 1237.

Duty of one learning of action instituted in his name without authority, 63 A.L.R. 1068.

Bondholder's right to maintain action against trustee for money received by trustee to discharge bond or coupon, 64 A.L.R. 1186.

Rendition of judgment against one not a formal party, who has assumed the defense, 65 A.L.R. 1134.

Amendment of verdict as to parties, reassembling jury after discharge, for purpose of, 66 A.L.R. 549.

Corporate name, right of bondholders to maintain action to prevent use by another corporation, 66 A.L.R. 948, 115 A.L.R. 1241, 72 A.L.R.3d 8.

Promoters, right of corporation to sue on contract made before its organization, 66 A.L.R. 1425.

Care to be exercised or precautions to be taken for protection of third persons, availability in action by third person for damages against public contractor, of provisions in contract as to, 69 A.L.R. 522.

Delay or mistake, right of undisclosed principal to recover against telegraph company because of, 72 A.L.R. 1198.

Right of person furnishing material or labor to maintain action on contractor's bond to owner or public body, or on owner's bond to mortgagee, 77 A.L.R. 21, 118 A.L.R. 57.

Right of one brought into action as a party by original defendant upon ground that he is or may be liable to latter in respect to matter in suit, to raise or contest issues with plaintiff, 78 A.L.R. 327.

Partner, party plaintiff in action against, for profits earned subsequently to death or dissolution, 80 A.L.R. 12, 55 A.L.R.2d 1391.

Right of third person to enforce contract between others for his benefit, 81 A.L.R. 1271, 148 A.L.R. 359.

Inducing breach of contract, who may maintain action for, 84 A.L.R. 43, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Tax wrongfully exacted on shares of its stock, corporation paying as proper party to maintain action for its recovery, 84 A.L.R. 107.

Indemnity or liability insurer, parties plaintiff in action against, by injured person, under statutory or policy provisions, 85 A.L.R. 20, 106 A.L.R. 516.

Declaratory judgment, who may petition for, 87 A.L.R. 1205.

Bonds of municipality, taxpayer's right of action for sale at less than par, in violation of statute, 91 A.L.R. 7, 162 A.L.R. 396.

Reciprocal insurance association, proper party plaintiff in actions by, or on behalf of, 94 A.L.R. 836, 141 A.L.R. 765, 145 A.L.R. 1121.

Collective labor agreement, right of individual employee to sue for breach, 95 A.L.R. 10.

Escrow, proper party defendant in action for refusal of depository to deliver instrument or property placed in, notwithstanding performance of conditions of delivery, 95 A.L.R. 293.

Proper party plaintiff to action against tort-feasor for damages to insured property where insurer is entitled to subrogation to extent of loss paid by it, 96 A.L.R. 864, 157 A.L.R. 1242.

Registration lists, who may bring action to purge, 96 A.L.R. 1035.

Bank in charge of liquidating officer who refuses or fails to enforce liability of persons to bank, right of creditors to maintain action for that purpose, and conditions of such right, 97 A.L.R. 169, 116 A.L.R. 783.

Water user as necessary or proper party to litigation involving right of ditch or canal company or irrigation of drainage district from which he takes water, 100 A.L.R. 561.

Ward's right, after majority to maintain action on contracts entered into by guardian on ward's behalf, 102 A.L.R. 269.

Insurance, right of third person to sue upon promise made by beneficiary to insured, to pay proceeds to third person, 102 A.L.R. 594.

Removal of disability, statute providing that an insane person, minor or other person under disability may bring suit within specified time after removal of disability as affecting right to bring action before disability removed, 109 A.L.R. 954.

Rescission of deed or land contract for grantee's breach of agreement to support grantor, right of heirs of grantor to maintain suit for, 112 A.L.R. 670.

Heir or next of kin, standing to attack gift or conveyance made by ancestor in his lifetime, as affected by will by which he is disinherited in whole or part, 112 A.L.R. 1405.

Bucketshops or bucket-shop transactions, violation of statute relating to, as ground of action by customer or patron, 113 A.L.R. 853.

Title, joinder of claims to separate parcels in suit to quiet title, or to remove cloud on, or to determine adverse claims of land, 118 A.L.R. 1400.

Holders of mortgage or other lien upon an undivided interest in real property as a necessary or proper party to a suit for partition, 126 A.L.R. 414.

Unauthorized prosecution of suit in name of another as ground of action in tort, 146 A.L.R. 1125.

Vendee under executory contract, right of, to bring action against third person for damage to land, 151 A.L.R. 938.

Decedent's estate, right of creditors to maintain action in interest of, 158 A.L.R. 729.

Massachusetts or business trust, 159 A.L.R. 209.

Timber contract, necessary and proper parties in action growing out of delay in performance of, 164 A.L.R. 423.

Mortgage lienholder as proper or necessary party to suit in respect of contract for sale of mortgaged property, 164 A.L.R. 1044.

Insurance, who may enforce policy containing facility of payment clause, 166 A.L.R. 10.

Defendant's right to bring in third person asserted to be solely liable to the plaintiff, 168 A.L.R. 600.

Contract for joint, mutual or reciprocal wills, parties to action to enforce, 169 A.L.R. 9

Dissolved corporation as indispensable party to stockholder's derivative action, 172 A.L.R. 691.

Restrictions on right of action by individual holder of series of corporate bonds or other obligations, validity, construction and application of, 174 A.L.R. 435.

Overcharges, representation of several claimants in action against carrier of public utility to recover, 1 A.L.R.2d 160.

Dismissal of action for failure or refusal of plaintiff to obey court order, 4 A.L.R.2d 348, 56 A.L.R.3d 1109, 27 A.L.R.4th 61, 32 A.L.R.4th 212, 3 A.L.R.5th 237.

Who may complain of underassessment or nonassessment of property for taxation, 5 A.L.R.2d 576, 9 A.L.R.4th 428.

Limitation of actions, change in party after statute has run, 8 A.L.R.2d 6.

Trust beneficiaries as necessary parties to action relating to trust or its property, 9 A.L.R.2d 10.

Right of third person not named in bond or other contract, conditioned for support of, or services to, another, to recover thereon, 11 A.L.R.2d 1010.

Right and capacity of taxpayer to a tax sale by municipal corporation or other taxing unit of its property, 17 A.L.R.2d 475.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423, 41 A.L.R.3d 904, 6 A.L.R.4th 1066.

Validity and enforceability of contract in consideration of naming child, 21 A.L.R.2d 1061.

Right of owner's employee injured by subcontractor, to recovery against general contract or for breach of contract between the latter and the owner requiring contractor and subcontractors to carry insurance, 22 A.L.R.2d 647.

Necessary parties defendant to action to set aside conveyance in fraud of creditors, 24 A.L.R.2d 395.

Joint liability for slander, 26 A.L.R.2d 1031.

Liability for procuring breach of contract, 26 A.L.R.2d 1227, 96 A.L.R.3d 1294, 44 A.L.R.4th 1078.

Necessary parties defendant to suit to prevent or remove obstruction or interference with easement of way, 28 A.L.R.2d 409.

Re-employment of discharged servicemen, 29 A.L.R.2d 1279, 9 A.L.R. Fed. 225, 83 A.L.R. Fed. 908.

Guaranty, who may enforce, 41 A.L.R.2d 1213.

Conflict of laws as to proper party plaintiff in contract action, 62 A.L.R.2d 486.

Continuance, amendment of pleadings with respect to parties or their capacity as ground for, 67 A.L.R.2d 477.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 A.L.R.2d 1247.

Guardian's capacity to sue or be sued outside state where appointed, 94 A.L.R.2d 162.

Insurance, proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where insured has paid part of loss, 13 A.L.R.3d 140.

Insurance, proper party plaintiff, under real party in interest statute, to action against tort-feasor for damage to insured property where loss is entirely covered by insurance, 13 A.L.R.3d 229.

Dismissal of state court action for failure or refusal of plaintiff to answer written interrogatories, 56 A.L.R.3d 1109.

State Consumer Protection Act, right to private action under, 62 A.L.R.3d 169.

Who is minor's next of kin for guardianship purposes, 63 A.L.R.3d 813.

Bailor's right of direct action against bailee's theft insurer for loss of bailed property, 64 A.L.R.3d 1207.

Proper party plaintiff in action for injury to common areas of condominium development, 69 A.L.R.3d 1148.

Necessary or proper parties to suit or proceeding to establish private boundary line, 73 A.L.R.3d 948.

Modern status of the Massachusetts or business trust, 88 A.L.R.3d 704.

Liability for interference with invalid or unenforceable contract, 96 A.L.R.3d 1294.

Defamation of class or group as actionable by individual member, 52 A.L.R.4th 618.

Condominium, standing to bring action relating to title in real property of, 74 A.L.R.4th 165.

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.

What is "cause" justifying discharge from employment of veteran reemployed under § 9 of the Military Selective Service Act of 1967, 9 A.L.R. Fed. 225.

67A C.J.S. Parties §§ 5, 10, 112 to 120.

2-402. Notice of trial; joint or separate trials.

A. **Notice of trial.** After the answer has been filed, the magistrate shall set a date for trial of the action. He shall issue a written notice of trial announcing the time and place thereof, file the original and send copies to all parties not in default. The notice of trial shall be in substantially the form approved by the court administrator and the supreme court.

B. **Consolidation.** When actions involving a common question of law or fact are pending before the magistrate, he may make such orders providing for joint trials as may tend to avoid unnecessary costs or delay.

C. **Separate trials.** The magistrate in furtherance of convenience or to avoid prejudice may order a separate trial of any claim or issue.

ANNOTATIONS

Cross references. — For form on notice of trial, see Rule 4-401 NMRA.

Court not to dismiss complaint without notice. — The words "he shall issue a written notice of trial announcing the time and place thereof" do not allow the magistrate court to dismiss the complaint of the plaintiff without notice to the plaintiff in the event that a defendant is in default for failure to file a written answer and/or to appear on the return date for the answer. 1971 Op. Att'y Gen. No. 71-110.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 1 Am. Jur. 2d Actions § 110 et seq.; 75 Am. Jur. 2d Trial §§ 60 et seq., 115 et seq.

Power of equity to enjoin prosecution of independent actions at law by different persons injured by the same tort, 75 A.L.R. 1444.

Propriety of consolidation for trial of actions for personal injuries, death or property damage arising out of same accident, 104 A.L.R. 62, 68 A.L.R.2d 1372.

Right of defendant sued jointly with another or others in action for personal injury or death to separate trial, 174 A.L.R. 734.

Right to appellate review, on single appellate proceeding, of separate actions consolidated for trial together in lower court, 36 A.L.R.2d 823.

Maintenance of second or successive stockholder's derivative action, 70 A.L.R.2d 1305.

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

Separate trial of issues of liability and damages in tort, 85 A.L.R.2d 9.

Right of plaintiff suing jointly with others to separate trial or order of severance, 99 A.L.R.2d 670.

Propriety of separate trials of issues of tort liability and of validity and effect of release, 4 A.L.R.3d 456.

1A C.J.S. Actions §§ 205, 220 to 228; 88 C.J.S. Trial §§ 6 to 10.

2-403. Substitution of parties.

A. Death or incompetency. If a party dies or becomes incompetent and the claim is not extinguished or barred, the magistrate may, within ninety (90) days after notice of the death or incompetency of the party is made in the file of the pending case, order a substitution of the proper party. If substitution is not so made, the action shall be dismissed as to the deceased or incompetent party, without prejudice.

B. Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party, unless the magistrate directs the person to whom the interest is transferred to be substituted in the action.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 59 Am. Jur. 2d Parties §§ 23, 25, 210 et seq.

Survival of action or cause of action for alienation of affections or criminal conversation, 24 A.L.R. 488, 57 A.L.R. 351.

Does right of grantor to maintain a suit in equity to set aside his conveyance for cause survive to his heir, 33 A.L.R. 51.

Survival of action or cause of action for breach of contract to marry, 34 A.L.R. 1363.

Abatement of action which does not survive, by death of party pending appeal or writ of error, 62 A.L.R. 1048.

Survival of liability on joint obligation, 67 A.L.R. 608.

Right of one to notice and hearing on motion to add him as a party, or substitute him for an original party, to pending action or proceeding, 69 A.L.R. 1247.

Does a right of action on bond to recover for damages personal in their nature, and not affecting property rights, survive principal's death, 70 A.L.R. 122.

Survival of cause of action for personal injury or death against tort-feasor killed in the same accident, 70 A.L.R. 1319.

Survivability or assignability of action or cause of action in tort for damages for fraudulently procuring purchase or sale of property, 76 A.L.R. 403.

Survival of claim for usury against estate of usurer, 78 A.L.R. 451.

Survival upon death of wrongdoer of husband's or parent's action or right of action for consequential damages arising from injury to wife or minor child, 78 A.L.R. 593.

Survival of action or cause of action for personal injuries upon death of tort-feasor, 78 A.L.R. 600.

Abatement upon death, of cause of action to enforce personal liability of corporate officer, director or trustee, 79 A.L.R. 1517.

Relation between survivability of cause of action and abatability of pending action, 92 A.L.R. 956.

What actions or causes of action involve injury to reputation within statutes relating to survival of causes of action or abatement of actions, 117 A.L.R. 574.

Assignability or survivability of cause of action to enforce civil liability under securities acts, 133 A.L.R. 1038.

Abatement or survival, upon death of party, of action, or cause of action, based on libel or slander, 134 A.L.R. 717.

Priority between devisee under devise pursuant to testator's agreement and third person claiming under or through testator's unrecorded deed, 7 A.L.R.2d 544.

Conflict of laws as regards survival of cause of action and revival of pending action upon death of party, 42 A.L.R.2d 1170.

Parties to action for specific performance of contract for conveyance of realty after death of party to the contract, 43 A.L.R.2d 938.

Marriage, right to attack validity after death of party thereto, 47 A.L.R.2d 1393.

Effect of death of appellant upon appeal from judgment of mental incompetence against him, 54 A.L.R.2d 1161.

Death of principal as exoneration, defense or ground for relief, of sureties on bail or appearance bond, 63 A.L.R.2d 830.

Real estate mortgage executed by one of joint tenants as enforceable after his death, 67 A.L.R.2d 999.

Capacity of one who is mentally incompetent but not so adjudicated to sue in his own name, 71 A.L.R.2d 1247.

Relative rights as between assignee of conditional seller and a subsequent buyer from the conditional seller after repossession or the like, 72 A.L.R.2d 342.

Right of trustee in bankruptcy, or his assignee, to sue on turnover order in state court, 84 A.L.R.2d 668.

Enforceability, under statute of frauds provision as to contracts not to be performed within a year, of oral employment contract for more than one year but specifically made terminable upon death of either party, 88 A.L.R.2d 701.

Annulment of marriage, mental incompetency of defendant at time of action as precluding, 97 A.L.R.2d 483.

Enforceability of warrant of attorney to confess judgment against assignee, guarantor or other party obligating himself for performance of primary contract, 5 A.L.R.3d 426.

Bank's right to apply or set off deposit against debt of depositor not due at time of his death, 7 A.L.R.3d 908.

Validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by death of creditor or obligee, 11 A.L.R.3d 1427.

Cause of death, official death certificate as evidence of in civil or criminal action, 21 A.L.R.3d 418.

Attorney's death prior to final adjudication or settlement of case as affecting compensation under contingent fee contract, 33 A.L.R.3d 1375.

Validity, in contract for installment sale of consumer goods, or commercial paper given in connection therewith, of provision waiving, as against assignee, defenses good against seller, 39 A.L.R.3d 518.

Franchise contract, validity, construction and effect of clause in, prohibiting transfer of franchise or contract, 59 A.L.R.3d 244.

Wrongful death, modern status of rule denying a common-law recovery for, 61 A.L.R.3d 906.

Conservator or guardian for an incompetent, priority and preference in appointment of, 65 A.L.R.3d 991.

Husband's death as affecting periodic payment provision of separation agreement, 5 A.L.R.4th 1153.

67A C.J.S. Parties § 56 et seq.

ARTICLE 5

Discovery and Pretrial Matters

2-501. Discovery.

A. **Disclosure by plaintiff.** Unless otherwise ordered by the court, not less than twenty (20) days before trial, the plaintiff or the plaintiff's attorney shall disclose and make available for inspection, copying and photographing any records, papers, documents or other tangible objects in the plaintiff's possession, custody and control which the plaintiff intends to introduce in evidence at the trial. The plaintiff shall also disclose to the defendant an itemized list of the damages that the plaintiff claims.

B. **Disclosure by defendant.** Unless otherwise ordered by the court, not less than fifteen (15) days before trial, the defendant shall disclose and make available to the plaintiff for inspection, copying and photographing any records, papers, documents or other tangible objects in the defendant's possession, custody or control which the defendant intends to introduce in evidence at the trial.

C. Witness disclosure. Unless otherwise ordered by the court, not less than twenty (20) days before trial, the plaintiff shall disclose to the defendant or the defendant's counsel a list of the names, addresses and telephone numbers of the witnesses that the plaintiff intends to call at the trial, along with a summary of their testimony. Not less than fifteen (15) days before trial, the defendant shall disclose to the plaintiff or the plaintiff's counsel a list of the names, addresses and telephone numbers of the witnesses that the defendant intends to call at the trial, along with a summary of their testimony.

D. 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.

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

F. Production of documents. At any time during the pendency of the action, for good cause shown, the judge may order either party to produce for inspection and copying any records, papers, documents or other tangible evidence in the possession of that party or available to that party.

G. Further discovery. The court may, for good cause shown, order further discovery as permitted by the Rules of Civil Procedure for the District Courts.

[As amended, effective May 1, 2002.]

ANNOTATIONS

Cross references. — For district court rules for discovery, see Rules 1-026 to 1-037 NMRA.

For form on motion for production, see Rule 4-501 NMRA.

For form on order for production, see Rule 4-502 NMRA.

For production order, see Civil Form 4-502 NMRA.

The 2002 amendment, effective May 1, 2002, deleted former Paragraph A relating to production of documents and added Paragraph A to F; redesignated Paragraph B as

Paragraph G, and in present Paragraph G, deleted "If both parties are represented by counsel" from the beginning.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 23 Am. Jur. 2d Depositions and Discovery § 21.

Constitutional rights, requiring submission to physical examination or test as violation of, 25 A.L.R.2d 1407.

Physical examination of injured person, power to require in action by his parent or spouse to recover for his injury, 62 A.L.R.2d 1291.

Admissibility in civil action of electroencephalogram, electrocardiogram or other record made by instrument used in medical test, or of report based upon such test, 66 A.L.R.2d 536.

Pretrial examination, right to copy of physician's report where there is no specific statute or rule providing therefor, 70 A.L.R.2d 384.

Physical examination of personal injury plaintiff, court's power to order as affected by distance or location of place of examination, 71 A.L.R.2d 973.

Treating physician, reports of, delivered to litigant's own attorney as subject of pretrial or other disclosure, production or inspection, 82 A.L.R.2d 1162.

Physical examination of allegedly negligent person with respect to defect claimed to have caused or contributed to accident, 89 A.L.R.2d 1001.

Mandamus or prohibition as available to compel or to prevent discovery proceedings, 95 A.L.R.2d 1229.

Right of party to have his attorney or physician, or a court reporter, present during his physical or mental examination by a court-appointed expert, 7 A.L.R.3d 881.

Timeliness of application for compulsory physical examination of injured party in personal injury action, 9 A.L.R.3d 1146.

Medical malpractice action, scope of defendant's duty of pretrial discovery in, 15 A.L.R.3d 1446.

Right of defendant in personal injury action to designate physician to conduct medical examination of plaintiff, 33 A.L.R.3d 1012.

Patient's statements or declarations, admissibility of physician's testimony as to, other than res gestae, during medical examinations, 37 A.L.R.3d 778.

Propriety and extent of state court protective order restricting party's right to disclose discovered information to others engaged in similar litigation, 83 A.L.R.4th 987.

Right of party to have attorney or physician present during physical or mental examination at instance of opposing party, 84 A.L.R.4th 558.

27 C.J.S. Discovery § 21.

2-502. Subpoenas.

A. Form; issuance.

(1) Every subpoena shall:

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

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

(c) command each person to whom it is directed to attend a trial or hearing and give testimony or to produce for trial or hearing designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises of a party, at a time and place therein specified;

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

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

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

(3) The judge or clerk shall issue a subpoena, other than a subpoena duces tecum, 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. 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. 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, 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 of a party before trial, notice shall be served on each party in the manner prescribed by Rule 2-203 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.

C. Protection of persons subject to subpoenas.

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

(2)

(a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises of a party 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 inspection of the premises of a party. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect premises 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.

D. Duties in responding to subpoena.

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

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

E. Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued.

[As amended, effective January 1, 1994; May 1, 1994; May 1, 2002.]

ANNOTATIONS

Cross references. — For contempt, see Rule 2-110 NMRA.

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 sheriff serving and executing process of magistrate courts, see Section 4-41-14 NMSA 1978.

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

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.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 81 Am. Jur. 2d Witnesses §§ 1 to 3, 7 to 32.

Inconvenience or expense as excuse for disobeying subpoena duces tecum, 9 A.L.R. 163.

Mandamus to compel court or judge to require witness to testify or produce documents, 41 A.L.R. 436.

Service of a subpoena as an arrest within constitutional or statutory immunity of members of legislature from arrest, 79 A.L.R. 1214.

Privilege against self-incrimination as justification for refusal to comply with subpoena requiring production of books or documents of private corporation, 120 A.L.R. 1102.

Practice or procedure for testing validity or scope of the command of subpoena duces tecum, 130 A.L.R. 327.

Form, particularity and manner of designation required in subpoena duces tecum for production of corporate books, records and documents, 23 A.L.R.2d 862.

Compelling expert to testify, 77 A.L.R.2d 1182, 66 A.L.R.4th 213.

Privilege against self-incrimination as ground for refusal to produce noncorporate documents in possession of person asserting privilege but owned by another, 37 A.L.R.3d 1373.

Who has possession, custody or control of corporate books or records for purposes of order to produce, 47 A.L.R.3d 676.

97 C.J.S. Witnesses §§ 19 to 34, 45.

ARTICLE 6

Trials

2-601. 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. At his own expense and for the purpose of preserving testimony, a party may cause a record, as defined in Rule 2-109 NMRA, to be made. The trial shall be conducted expeditiously, but each party shall be permitted to present his position amply and fairly.

C. **Oath of witnesses.** The magistrate shall administer the following oath to each witness: "You do solemnly swear (or affirm) that the testimony you give is the truth, the whole truth and nothing but the truth under penalty of perjury?"

D. **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.

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

ANNOTATIONS

Cross references. — For Rules of Evidence, see Rule 11-101 NMRA et seq.

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

The 2007 amendment, approved by Supreme Court Order 07-8300-34, effective January 22, 2008, added a new Paragraph D relating to the competency of court interpreters.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 17 Am. Jur. 2d Continuance § 1 et seq.; 81 Am. Jur. 2d Witnesses §§ 876, 877, 886, 888, 890, 891.

Evidence contrary to scientific principles or laws of nature, 21 A.L.R. 141.

Validity of proceedings as affected by taking evidence out of court, 43 A.L.R. 1516, 18 A.L.R.3d 572.

Comparative value of positive and negative testimony, 98 A.L.R. 161.

Time during or after civil trial at which court may entertain, or properly grant or deny, motion for continuance of trial, 112 A.L.R. 395.

Right to continuance because counsel is in attendance at another court, 112 A.L.R. 593.

Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or transactions upon which prosecution is predicated, 123 A.L.R. 1453.

Refreshment of recollection by use of memoranda or other writing, 125 A.L.R. 19, 82 A.L.R.2d 473.

Distinction between positive and negative evidence, 140 A.L.R. 530.

Appealability of order granting or refusing stay or continuance under Soldiers' and Sailors' Civil Relief Act because of military service of litigant, 34 A.L.R.2d 1149.

Prejudicial effect, in civil case, of denial of continuance to call nonappearing witness whom adversary had been expected to call, 39 A.L.R.2d 1445.

Illness of relative or member of family, party litigant's absence from civil case because of, as ground for continuance, 47 A.L.R.2d 1058.

Counsel, withdrawal or discharge, in civil case as ground for continuance, 48 A.L.R.2d 1155.

Counsel, absence because of attendance on legislature, 49 A.L.R.2d 1073.

Bankruptcy proceedings, false oath or account as bar to discharge in, 59 A.L.R.2d 791.

Illness or death of counsel, continuance of civil case because of, 67 A.L.R.2d 497.

Illness or death of party, continuance of civil cases because of, 68 A.L.R.2d 470.

Hostile sentiment or prejudice as ground for continuance in civil case, 68 A.L.R.2d 540.

Soldiers' and Sailors' Civil Relief Act of 1940, as amended, as affecting negligence actions, 75 A.L.R.2d 1062.

Consideration, in determining facts, of inadmissible hearsay evidence introduced without objection, 79 A.L.R.2d 890.

Mental incompetency of defendant at time of action for annulment of marriage as ground for continuance, 97 A.L.R.2d 483.

Admissions to prevent continuance sought to secure testimony of absent witness in civil case, 15 A.L.R.3d 1272.

Modern status of rules governing legal effect of failure to object to admission of extrinsic evidence violative of parol evidence rule, 81 A.L.R.3d 249.

Continuance of civil case as conditioned upon applicant's payment of costs or expenses incurred by other party, 9 A.L.R.4th 1144.

17 C.J.S. Continuances §§ 1 to 13; 88 C.J.S. Trial §§ 55 to 93; 98 C.J.S. Witnesses §§ 315 to 429.

2-602. Jury trial.

A. **Right preserved.** The right of trial by jury exists as provided by law.

B. **Demand.** Either party to an action may demand trial by jury. The demand shall be made in the complaint if made by the plaintiff and in the answer if made by the defendant, and the magistrate shall collect from the demanding party the non-refundable jury fee established by law and, an additional deposit of seventy-five dollars (\$75.00) to be used for payment of the actual costs of empaneling the jury, which fee shall be refundable all or in part.

C. **Waiver.** If demand is not made as provided in Paragraph B of this rule, or if the jury fee is not paid at the time demand is made, trial by jury is deemed waived.

[As amended, effective October 1, 1996; as amended by Supreme Court Order No. 08-8300-35, effective December 15, 2008.]

ANNOTATIONS

Cross references. — For constitutional provision as to trial by jury, see N.M. Const., art. II, § 12.

For contributions to magistrate or metropolitan retirement fund from magistrate court fees, see Section 10-12C-11 NMSA 1978.

For jury and witness fee fund, see Section 34-9-11 NMSA 1978.

For magistrate court costs, schedule, and definition of "convicted", see Section 35-6-1 NMSA 1978.

For magistrate court costs, witness fees and reimbursement, see Section 35-6-4 NMSA 1978.

For right to jury trials in magistrate courts, see Section 35-8-1 NMSA 1978.

For demand for jury trial in magistrate court, see Section 35-8-2 NMSA 1978.

For magistrate court civil jury fees, see Section 35-8-7 NMSA 1978.

For mileage and compensation for jurors, see Section 38-5-15 NMSA 1978.

The 1996 amendment, effective October 1, 1996, in Paragraph B, inserted "non-refundable" and added the language beginning "and, an additional deposit" at the end of the paragraph.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-35, effective December 15, 2008, in Paragraph B, increased the amount of the jury fee from \$50.00 to \$75.00.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury §§ 28, 96 et seq.

Right to jury trial in proceeding for removal of public officer, 3 A.L.R. 232, 8 A.L.R. 1476.

Statute providing for revocation of license of physician, surgeon or dentist, as denial of right to trial by jury, 5 A.L.R. 94, 79 A.L.R. 323.

Request by both parties for directed verdict as waiver of submission to jury, 18 A.L.R. 1433, 68 A.L.R.2d 300.

Attorney's right to trial where he is charged with failure to turn over money or property to client, 22 A.L.R. 1501.

Statutes giving right to jury trial in contempt proceedings for violating injunction in industrial disputes, 27 A.L.R. 411, 35 A.L.R. 460, 97 A.L.R. 1333, 106 A.L.R. 361, 120 A.L.R. 316, 124 A.L.R. 751, 127 A.L.R. 868, 150 A.L.R. 819.

Reduction or increase of verdict, by court, without giving party affected option to submit to new trial, 53 A.L.R. 779, 95 A.L.R. 1163.

Equity jurisdiction to cancel insurance policy upon ground within incontestable clause prior to termination of period, as depriving beneficiary of right to jury trial, 73 A.L.R. 1529, 111 A.L.R. 1275.

Constitutionality, construction and effect of statute providing for jury trial in disbarment proceedings, 78 A.L.R. 1323.

Statute in relation to subject matter or form of instructions by court as impairing constitutional right to jury trial, 80 A.L.R. 906.

Declaratory judgment action as infringement of right to jury trial, 87 A.L.R. 1205.

Statute prohibiting new trial on ground of inadequacy of damages, 88 A.L.R. 943.

Determination of facts involved in original quo warranto proceedings in appellate court, 98 A.L.R. 237.

Waiver of right to jury trial as operative after expiration of term during which it was made, or as regards subsequent trial, 106 A.L.R. 203.

Statute providing supplementary proceedings for an infringement of right to jury trial, 106 A.L.R. 383.

Validity and effect of plan or practice of consulting preferences of persons eligible for jury service as regards periods or times of service or character of actions, 112 A.L.R. 995.

Right to jury trial of issues as to personal judgment for deficiency in suit to foreclose mortgage, 112 A.L.R. 1492.

Right to jury trial in suit to remove cloud, quiet title or determine adverse claims, 117 A.L.R. 9

Right of defendant to waive right of trial by jury where he is not represented by counsel, 143 A.L.R. 445.

Nature and effect of jury's verdict in equity, 156 A.L.R. 1147.

Right to jury trial in action concerning failure of purchaser to remove timber within time fixed by timber contract, 164 A.L.R. 423.

Right to jury trial as to fact essential to action or defense but not involving merits thereof, 170 A.L.R. 383.

Jury trial in action for declaratory relief, 13 A.L.R.2d 777, 33 A.L.R.4th 146.

Right to notice and hearing before revocation of suspension of sentence, parole, conditional pardon, or probation, 29 A.L.R.2d 1074.

Re-employment of discharged serviceman, 29 A.L.R.2d 1279, 9 A.L.R. Fed. 225, 83 A.L.R. Fed. 908.

Constitutional right to jury trial in proceeding for adjudication of incompetency or insanity or for restoration, 33 A.L.R.2d 1145.

Mandamus or prohibition as remedy to enforce right to jury trial, 41 A.L.R.2d 780.

Withdrawal or disregard of waiver of jury trial in civil action, 64 A.L.R.2d 506, 9 A.L.R.4th 1041.

Waiving submission of fact questions to jury, request by each party for directed verdict as, 68 A.L.R.2d 300.

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

Rule or statute requiring opposing party's consent to withdrawal of demand for jury trial, 90 A.L.R.2d 1162.

Sufficiency of waiver of full jury, 93 A.L.R.2d 410.

Right to jury trial in juvenile court delinquency proceedings, 100 A.L.R.2d 1241.

How to obtain jury trial in eminent domain, waiver, 12 A.L.R.3d 7.

Right in equity suit to jury trial of counterclaim involving legal issue, 17 A.L.R.3d 1321.

Issues in garnishment as triable to court or to jury, 19 A.L.R.3d 1393.

Statute reducing number of jurors as violative of right to trial by jury, 47 A.L.R.3d 895.

Authority of state court to order jury trial in civil case where jury has been waived or not demanded by parties, 9 A.L.R.4th 1041.

Validity of law or rule requiring state court party who requests jury trial in civil case to pay costs associated with jury, 68 A.L.R.4th 343.

Contractual jury trial waivers in state civil cases, 42 A.L.R.5th 53.

What is "cause" justifying discharge from employment of veteran reemployed under § 9 of the Military Selective Service Act of 1967, 9 A.L.R. Fed. 225.

50A C.J.S. Juries §§ 8, 10, 12, 14, 17, 28 to 30, 182 to 222.

2-603. 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. Each party shall be entitled to one peremptory challenge. 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

Cross references. — For jury trials in magistrate courts, see Section 35-8-1 NMSA 1978 et seq.

For selecting and impaneling a magistrate jury, see Section 35-8-3 NMSA 1978.

For qualification of jurors, see Section 38-5-1 NMSA 1978 et seq.

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, in the first paragraph of Paragraph D(2), deleted the "(a)" designation from the beginning and "(b) the magistrate may draw six slips with the jurors' names from the box and these six jurors may be questioned as a group and individually" at the end, and made related stylistic changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury § 215 et seq.

Unfamiliarity with English as affecting competency of juror, 34 A.L.R. 194.

Statutory grounds for challenge of jurors for cause as exclusive of common-law grounds, 64 A.L.R. 645.

Right to introduce extrinsic evidence in support of challenge to juror for cause, 65 A.L.R. 1056.

Peremptory challenge after acceptance of juror, 3 A.L.R.2d 499.

Waiver of peremptory challenge or challenges in civil case other than by acceptance of juror, 56 A.L.R.2d 742.

Right to peremptory challenge as prejudiced by appearance of additional counsel in civil case after impaneling of jury, 56 A.L.R.2d 971.

Relationship of juror to witness in civil case as ground of disqualification, 85 A.L.R.2d 851.

Confusion of names or identities in drawing, summoning, calling impaneling, or examining jurors in civil case, as affecting verdict, 89 A.L.R.2d 1242.

Effect of allowing excessive number of peremptory challenges, 95 A.L.R.2d 957.

Claustrophobia or other neurosis of juror as subject of inquiry on voir dire or of disqualification of juror, 20 A.L.R.3d 1420.

Number of peremptory challenges allowable in civil case where there are more than two parties involved, 32 A.L.R.3d 747.

Use of peremptory challenge to exclude from jury persons belonging to a class or race, 79 A.L.R.3d 14, 20 A.L.R.5th 398.

Professional or business relations between proposed juror and attorney as ground for challenge for cause, 52 A.L.R.4th 964.

Prospective juror's connection with insurance company as ground for challenge for cause, 9 A.L.R.5th 102.

Use of preemptory challenges to exclude caucasian persons, as a racial group, from criminal jury-post-batson state cases, 47 A.L.R.5th 259.

50A C.J.S. Juries §§ 261 et seq.; 89 C.J.S. Trials § 494.

2-604. Trial by jury.

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 five of them agree upon a verdict or are discharged by the magistrate. Whenever the magistrate is satisfied that five jurors cannot agree on a 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

Cross references. — For trial by magistrate jury, see Section 35-8-4 NMSA 1978.

For discharge of jury upon failure to agree, see Section 35-8-5 NMSA 1978.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 47 Am. Jur. 2d Jury §§ 1, 2.

89 C.J.S. Trial §§ 462, 473.

2-605. 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.

You should first decide whether or not the defendant is liable to the plaintiff at all (and whether or not the plaintiff is liable to the defendant on the defendant's counterclaim/setoff). If you find the defendant liable to the plaintiff (or the plaintiff liable to the defendant), you should then determine the amount of damages that should be awarded.

When five or more 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) Civil. Whenever the court determines the jury should be instructed on a subject and no applicable instruction on the subject is found in UJI Civil, the instruction given on that subject shall be brief, impartial and free from hypothesized facts.

[As amended, effective January 1, 1994.]

ANNOTATIONS

Cross references. — For Uniform Jury Instructions - Civil, see UJI 13-101 NMRA et seq.

The 1994 amendment, effective January 1, 1994, in the first sentence of Paragraph B, made stylistic changes throughout and deleted "but no other instructions on the law shall be given" at the end, and added the last sentence of Paragraph B.

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

Necessity of repeating definition of legal or technical term in different parts of instructions in which it is employed, 7 A.L.R. 135.

Use of emphatic words, like "great care," "utmost care" or "highest care," in instructing jury as to duty of carrier to passengers, 32 A.L.R. 1190.

Duty to instruct, and effect of failure to instruct jury as to reduction to present worth of damages for future loss on account of death or personal injury, 77 A.L.R. 1439, 154 A.L.R. 796.

Statutes in relation to subject matter or form of instructions by court as impairing constitutional right to jury trial, 80 A.L.R. 906.

Right of court to instruct or to communicate with jury in civil case in absence of counsel, 84 A.L.R. 220.

Instructions regarding measurement of damages for pain and suffering, 85 A.L.R. 1010.

Instructions regarding determination of life expectancy in action for personal injuries or death, 87 A.L.R. 910.

Instructions defining term "preponderance or weight of evidence", 93 A.L.R. 155.

Furnishing or reading instructions to jury in jury room, after retirement, as error, 96 A.L.R. 899.

Sufficiency of instruction on contributory negligence as respects the element of proximate cause, 102 A.L.R. 411.

Right or duty of court to instruct jury as to presumptions, 103 A.L.R. 126.

Necessity of expert testimony to warrant submission to jury of issue as to permanency of injury or as to future pain and suffering, or to sustain award of damages on that basis, 115 A.L.R. 1149.

Failure to comply with statute, constitutional provision or court rule providing for giving instructions to jury in writing as prejudicial or reversible error, 115 A.L.R. 1332.

"And/or," use of, or comment on use of, in instruction, 118 A.L.R. 1367, 154 A.L.R. 866.

Instructions regarding good or bad character of witnesses as affecting their credibility, 120 A.L.R. 1443.

Propriety, where actual damages are not shown, of instructions on compensatory damages which do not embody jury's right to award small or nominal damages, 122 A.L.R. 853.

Duty of court in civil case to correct, and to give as corrected, a requested instruction which includes a clerical or inadvertent mistake, 125 A.L.R. 685.

Propriety of instruction, or requested instruction, in civil case, as to caution in considering testimony of oral admissions, or as to weight of such admissions as evidence, 126 A.L.R. 66.

Propriety and effect of instruction or requested instruction which either affirms or denies jury's right to draw unfavorable inference against a party because he invokes privilege

against testimony of person offered as witness by the other party or because he fails to call such person as a witness, 131 A.L.R. 693.

Propriety of instructions on matters of common knowledge, 144 A.L.R. 932.

Comments in judge's charge to jury disparaging expert testimony, 156 A.L.R. 530.

Instructions in ejectment on rule that plaintiff must recover on strength of own title, 159 A.L.R. 646.

Right of plaintiff in *res ipsa loquitur* case to an instruction respecting inference by jury, 173 A.L.R. 880.

Modern view as to propriety and correctness of instructions referable to maxim "*falsus in uno, falsus in omnibus*", 4 A.L.R.2d 1077.

Propriety and effect of court's indication to jury that court would suspend sentence, 8 A.L.R.2d 1001.

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

Prejudicial effect of judge's disclosure to jury of motions or proceedings in chambers in civil case, 77 A.L.R.2d 1253.

Provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules and statutes, requiring court to inform counsel, prior to argument to jury, of its proposed action upon requests for instructions, 91 A.L.R.2d 836.

Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case stressing desirability and importance of agreement, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil case commenting on weight of majority view or authorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case admonishing jurors to refrain from intransigence or reflecting on integrity or intelligence of jurors, 41 A.L.R.3d 1154.

Construction of statutes or rules making mandatory the use of pattern or uniform approved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on alternative theories of negligence or breach of warranty, where instruction on strict liability in tort is given in products liability case, 52 A.L.R.3d 101.

Construction and effect of provision in Rule 51, Federal Rules of Civil Procedure, and similar state rules, that counsel be given opportunity to make objections to instructions out of hearing of jury, 1 A.L.R. Fed. 310.

88 C.J.S. Trial §§ 266 to 426; 89 C.J.S. Trial §§ 427 to 448.

2-606. 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 enter the appropriate judgment or final order; provided however, the magistrate may delay announcing his decision for a period not exceeding thirty (30) days if briefs or further research are required in the case.

[As amended, effective May 1, 1986.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. — 75A Am. Jur. 2d Trial § 714.

When does jeopardy attach in a nonjury trial, 49 A.L.R.3d 1039.

88 C.J.S. Trial § 203; 89 C.J.S. Trial §§ 574 to 608.

ARTICLE 7

Judgment and Appeal

2-701. Judgments; costs.

A. **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not contain a recital of pleadings or the record of prior proceedings.

B. Judgment upon multiple claims or involving multiple parties.

(1) Except as provided in Subparagraph (2) of this paragraph, when more than one claim for relief is presented in an action, whether as a claim or counterclaim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all of the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(2) When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final judgment unless the court, in its discretion, expressly provides otherwise in the judgment. If the judgment provides that it is not a final judgment, it shall not terminate the action as to such party or parties and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

C. Entry of judgment. Following the trial the court shall enter a written judgment in accordance with the verdict of the jury or, if the trial was without a jury, in accordance with the court's decision. The court may direct counsel for any party to prepare the judgment. If any setoff or counterclaim is established by the defendant, the amount of the setoff or counterclaim shall be offset against any sum owed the plaintiff and judgment entered accordingly.

D. Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that claimed in the complaint. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings.

E. Costs. Any docket fee, jury fee or copying fee paid by the prevailing party to the court shall be awarded to the prevailing party against the losing party. The court may award any fees actually paid by the prevailing party for service of the complaint, summons and subpoenas and for attendance of witnesses, including expert witnesses. No costs or fees shall be taxed against the state, its officers and agencies. Expert witness fees for any case shall not exceed five hundred dollars (\$500), plus the fee for per diem expenses provided by Subsection A of Section 10-8-4 NMSA 1978 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.

[As amended, effective January 1, 1995.]

ANNOTATIONS

Cross references. — For fees and costs in magistrate or metropolitan courts, see Section 35-6-1 NMSA 1978 et seq.

For witness' per diem and mileage, see Section 38-6-4 NMSA 1978.

For form on judgment, see Rule 4-701 NMRA.

The 1995 amendment, effective January 1, 1995, added Paragraphs A and B; redesignated former Paragraph A as Paragraph C and, in that paragraph, added the second sentence, substituted "offset" for "balanced" in the third sentence, and deleted the former last sentence which read "The judgment shall be in substantially the form approved by the supreme court"; redesignated former Paragraph B as Paragraph D and rewrote the first sentence and added the second sentence in that paragraph; deleted former Paragraph C relating to costs collected by magistrates; redesignated former Paragraph D as Paragraph E and rewrote that paragraph; and made minor stylistic changes throughout the rule.

Witness fees taxable. — Witnesses in civil suits in justice of the peace (now magistrate) courts could receive witness fees, which were taxed in favor of the prevailing party. 1964 Op. Att'y Gen. No. 64-48.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 121 et seq.

Correction of entry or amendment of judgment nunc pro tunc as affecting intervening liens and property rights, 48 A.L.R. 1182.

Right to costs where judgment is against plaintiff on his complaint and against defendant on his counterclaim, 75 A.L.R. 1400.

Costs in habeas corpus, 81 A.L.R. 151.

Correcting clerical errors in judgments, 126 A.L.R. 956, 14 A.L.R.2d 224.

Date of verdict or date of entry of judgment thereon as beginning of interest period on judgment, 1 A.L.R.2d 479.

Disagreement of jury, entry of final judgment after, 31 A.L.R.2d 885.

Unsuccessful litigant's payment of costs as barring his right to appeal from judgment on merits, 39 A.L.R.2d 194.

Multiple defendants, effect of verdict "for plaintiff" in action against, 47 A.L.R.2d 803.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 A.L.R.2d 927.

Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty, 55 A.L.R.2d 723.

Court's power to increase amount of verdict or judgment over either party's refusal or failure to consent to addition, 56 A.L.R.2d 213.

Liability of state, or its agency or board, for costs of appeal in civil action to which it is a party, 72 A.L.R.2d 1379.

Sunday or holiday, validity of court's judgment rendered on, 85 A.L.R.2d 595.

Recoverability under property insurance or insurance against liability for property damage of insured's expenses to prevent or mitigate damages, 33 A.L.R.3d 1262.

Dismissal of plaintiff's action as entitling defendant to recover attorney's fees or costs as "prevailing party" or "successful party", 66 A.L.R.3d 1087.

Who is the "successful party" or "prevailing party" for purposes of awarding costs where both parties prevail on affirmative claims, 66 A.L.R.3d 1115.

Attorney's personal liability for expenses incurred in relation to services for client, 66 A.L.R.4th 256.

20 C.J.S. Costs §§ 36 to 38, 134 et seq.; 49 C.J.S. Judgments §§ 112 to 114.

2-702. Default.

A. Entry at time of appearance. If the defendant fails to appear or has not filed an answer within the time prescribed by Rule 2-202 NMRA, and if the plaintiff proves by an appropriate return that proper service was made upon the defendant, the magistrate may enter judgment for the plaintiff for the amount due, including interest, costs and other items allowed by law. The magistrate may require evidence as to any fact before entering default judgment.

A copy of the default judgment shall forthwith be mailed by the clerk of the court to each party against whom judgment has been entered. The clerk shall endorse on the judgment the date of mailing.

B. At time of trial. Failure to appear at the time and date set for trial shall be grounds for entering a default judgment against the nonappearing party.

C. Setting aside default. For good cause shown, within thirty (30) days after entry of judgment and if no appeal has been timely taken, the magistrate may set aside a default judgment.

ANNOTATIONS

Cross references. — For form on default judgment, see Rule 4-703 NMRA.

For form on motion to set aside default judgment, see Rule 4-704 NMRA.

For form on order setting aside default judgment and giving notice of trial date, see Rule 4-705 NMRA.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments § 265 et seq.

Judgment by consent, confession or default of principal as affecting sureties whose obligation is conditioned upon judicial determination of liability or rights of principal, 51 A.L.R. 1489.

Successful defense by one codefendant, or a finding for "defendants," as inuring to benefit of defaulting defendant, 78 A.L.R. 938.

What amounts to waiver by plaintiff of right to enter default judgment against defendant, or of the default itself after entry, 124 A.L.R. 155.

Doctrine of res judicata as applied to judgment by default, 128 A.L.R. 472, 77 A.L.R.2d 1410.

Mistaken belief or contention that defendant had not been served, or had not been legally served, with summons, as ground for setting aside default judgment, 153 A.L.R. 449.

Validity, construction and application of statutes providing for entry of default judgment by clerk without intervention of court or judge, 158 A.L.R. 1091.

Failure of complaint to state cause of action for unliquidated damages as ground for dismissal of action at hearing to determine amount of damages following defendant's default, 163 A.L.R. 496.

Setting aside default judgment for failure of statutory agent on whom process was served to notify defendant, 20 A.L.R.2d 1179.

Necessity of taking proof as to liability against defaulting defendant, 8 A.L.R.3d 1070.

Appealability of order setting aside, or refusing to set aside, default judgment, 8 A.L.R.3d 1272.

Defaulting defendant's right to notice and hearing as to determination of amount of damages, 15 A.L.R.3d 586.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers, 21 A.L.R.3d 1255.

Failure to give notice of application for default judgment where notice is required only by custom, 28 A.L.R.3d 1383.

49 C.J.S. Judgments §§ 195 to 242.

2-703. Relief from judgment or order.

A. **Clerical mistakes.** Clerical mistakes in judgments, orders, or other parts of the file and errors therein arising from oversight or omission may be corrected by the magistrate at any time of his own initiative or on the request of any party after such notice to the opposing party, if any, as the magistrate orders. During the pendency of an appeal, such mistakes may be so corrected before the transcript is filed in the district court, and thereafter while the appeal is pending may be so corrected with leave of the district court.

B. **Mistakes; inadvertence; excusable neglect; fraud, etc.** If the judgment has not been filed in the district court, on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise or excusable neglect;
- (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;
- (3) the judgment is void; or
- (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated.

A motion filed pursuant to Subparagraph (1) or (2) of this paragraph shall be filed not more than one (1) year after the judgment, order or proceeding was entered or taken. A motion under this paragraph does not affect the finality of a judgment or suspend its operation.

An order granting or denying relief from a final judgment under this rule may be appealed to the district court in the same manner as other appeals from final judgments of the magistrate court are taken.

C. **Satisfied judgments.** Upon the filing with the court of a motion for an order declaring the judgment to be satisfied and notice to the opposing party, the court may set a hearing to determine if the judgment has been satisfied, released or discharged.

The application shall be served upon the judgment creditor in the manner prescribed by Rule 2-202 for service of summons and complaint. A hearing on the application shall be held within a reasonable time after the filing of the application. Notice of the hearing shall be mailed to the parties by the clerk of the court. If the judgment creditor fails to appear at such hearing, a default satisfaction of judgment may be entered upon:

(1) the filing of the return of service or an affidavit that after "diligent search" the judgment creditor could not be located. For purposes of this subparagraph "diligent search" includes, but shall not be limited to an affidavit that:

(a) the judgment creditor no longer has a business or residence at the judgment creditor's last known address as shown in the court file; and

(b) the judgment creditor could not be located through a search of telephone and city directories in each county where the judgment creditor was known to have resided or maintained a place of business in this state; and

(2) proof of payment of the full amount of such judgment with interest thereon to date of payment, plus post-judgment costs incurred by the judgment creditor which can be determined from the court record or, if the judgment, including any interest and costs has not been paid in full, payment into the court of a money order or cashier's check made payable to the administrative office of the courts. Upon receipt of a money order or cashier's check pursuant to this subparagraph, the administrative office of the courts shall deposit such money order or cashier's check in a suspense account in the state treasury. Funds deposited in such account shall be disbursed in accordance with Section 39-1-6.2 NMSA 1978.

D. Filing in district courts. If the judgment has been filed in the district court pursuant to Paragraph E of Rule 2-803 [Rule 2-804 NMRA], the motion for an order declaring the judgment satisfied shall be filed in the district court.

[As amended, effective July 1, 1990; January 1, 1993; January 1, 1997.]

ANNOTATIONS

Cross references. — For appeal to the district court from final judgments to the magistrate court, see Rule 2-705 NMRA.

Bracketed material. — The bracketed reference in Paragraph D was inserted by the compiler. The reference to Paragraph E of Rule 2-803 in Paragraph D should be a reference to Paragraph E of Rule 2-804 NMRA as a result of the 1996 amendment that renumbered that rule.

The 1990 amendment, effective for cases filed in the magistrate courts on or after July 1, 1990, rewrote all of Paragraph B, which formerly related to relief from void or satisfied judgments, except the last sentence thereof, and added Paragraphs C and D.

The 1993 amendment, effective January 1, 1993, substituted "Paragraph E of Rule 2-803" for "Paragraph L of Rule 2-802" in Paragraph D.

The 1997 amendment, effective January 1, 1997, substituted "judgment creditor" for "defendant" near the end of Subparagraph C(1)(b).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 46 Am. Jur. 2d Judgments §§ 165, 175.

Failure to perform the duty to make disclosures which rests upon one because of trust or confidential relation as fraud for which equity, in an independent suit, will relieve against a judgment, 5 A.L.R. 672.

Correcting clerical errors in judgments, 10 A.L.R. 526, 67 A.L.R. 828, 126 A.L.R. 956, 14 A.L.R.2d 224.

Right of infant to set aside consent judgment in action for personal injuries, 15 A.L.R. 667, 20 A.L.R. 1249.

Character of judgment which refers to representative or fiduciary character of one against whom it is rendered, 21 A.L.R. 908.

Reliance of attorney on agreement or supposed agreement of opposing attorney to give notice when case was set for trial as ground for relief from judgment, 29 A.L.R. 1336.

Mental incompetency at the time of rendition of judgment in civil action as ground of attack upon it, 34 A.L.R. 221, 140 A.L.R. 1336.

Judgment on substituted service as within provision for relief from judgment taken through mistake, surprise or excusable neglect, 44 A.L.R. 618.

Correction of entry or amendment of judgment nunc pro tunc as affecting intervening liens and property rights, 48 A.L.R. 1182.

Fraud or perjury in misrepresenting status or relationship essential to the judgment as ground of relief from, or injunction against, judgment, 49 A.L.R. 1219.

Is service of notice or process in proceeding to vacate or modify judgment to be made upon owner of the judgment or upon the attorney, 78 A.L.R. 370.

Criterion of extrinsic fraud as distinguished from intrinsic fraud, as regards relief from judgment on ground of fraud, 88 A.L.R. 1201.

Asking relief in addition to vacation of service of process as waiver of special appearance or right to rely upon lack of jurisdiction, 111 A.L.R. 925.

Perjury as ground of attack on judgment or order of court, 126 A.L.R. 390.

Secreting witness or other conduct preventing summoning or appearance of witness as ground for relief from judgment, 131 A.L.R. 1519.

Correction of mistake in judgment entered under warrant of attorney to confess judgment, 144 A.L.R. 830.

Lapse of time as bar to action or proceeding for relief in respect of void judgment, 154 A.L.R. 818.

Misinformation by judge or clerk of court as to status of case or time of trial or hearing as ground for relief from judgment, 164 A.L.R. 537.

Interlocutory decree as subject to modification after term other than correction of clerical errors, 169 A.L.R. 121.

Notice contemplated by statute for relief from judgment upon application within specified time after notice, 171 A.L.R. 253.

Scope and character of meritorious defense as condition of relief from judgment, 174 A.L.R. 10.

Remedy and procedure to avoid release or satisfaction of judgment, 9 A.L.R.2d 553.

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

Necessity of notice of application or intention to correct error in judgment entry, 14 A.L.R.2d 224.

Conditioning the setting aside of judgment or grant of new trial on payment of opposing attorney's fees, 21 A.L.R.2d 863.

Motion to vacate judgment or order as constituting general appearance, 31 A.L.R.2d 262.

Judgment ambiguous or silent as to amount of recovery as defective for lack of certainty, 55 A.L.R.2d 723.

Formal requirements of judgment or order as regards appealability, 73 A.L.R.2d 250.

Filing of notice of appeal as affecting jurisdiction of state trial court to consider motion to vacate judgment, 5 A.L.R.5th 422.

Amendment of record of judgment in state civil case to correct judicial errors and omissions, 50 A.L.R.5th 653.

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.

Vacating or opening judgment by confession on ground of fraud, illegality, or mistake, 91 A.L.R.5th 485.

49 C.J.S. Judgments §§ 275, 280.

2-704. 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, or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice.

ANNOTATIONS

Magistrate court has no jurisdiction to set aside a jury verdict. Jaramillo v. O'Toole, 97 N.M. 345, 639 P.2d 1199 (1982).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 5 Am. Jur. 2d Appellate Review §§ 690, 705 et seq.

Admissibility, in action involving motor vehicle accident, of evidence as to manner in which participant was driving before reaching scene of accident, 46 A.L.R.2d 9.

5 C.J.S. Appeal and Error § 468; 66 C.J.S. New Trial § 17.

2-705. Appeal.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a civil 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. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 2-104 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 in any such appeal.

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) 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. A copy of the magistrate court judgment or final order appealed from, showing the date of the judgment or final order, shall be attached to the notice of appeal filed in the district 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 such party's attorney in the proceedings in the magistrate court with a copy of the notice of appeal in accordance with Rule 1-005 NMRA of the Rules of Civil 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 1-005 NMRA.

E. Record on appeal. Within fifteen (15) days after the appellant files a copy of the notice of appeal with 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 order sought to be reviewed with date of filing;

(4) any exhibits; and

(5) any transcript of the proceedings made by the magistrate court, either stenographically recorded or tape recorded. If the transcript of the proceedings is a tape recording, the magistrate court shall prepare and file with the district court a duplicate of the tape and index log.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost of preparing such copy.

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

F. 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.

G. Stay of proceedings to enforce a judgment.

(1) Except as provided in Subparagraph (2) of this paragraph, when an appeal is taken, the appellant may obtain a stay of the proceedings to enforce the judgment by posting a supersedeas bond with the clerk of the magistrate court. The bond may be posted at any time after docketing the appeal. The stay is effective when the supersedeas bond is approved by the magistrate court and shall continue in effect until final disposition of the appeal. The bond shall be conditioned for the satisfaction of and compliance with the judgment in full, as may be modified by an appellate court, together with costs, attorneys' fees and interest, if any. The bond shall be enforceable upon dismissal of the appeal or affirmance of the judgment. If the judgment is reversed or satisfied, the bond is void. The surety, sureties or collateral securing such bond, and the terms thereof, must be approved by and the amount fixed by the magistrate court. If a bond secured by personal surety or sureties is tendered, the bond may be approved only on notice to the appellee. Each personal surety shall be required to show a net worth of at least double the amount of the bond. If the judgment is for the recovery of money, the amount of the bond shall be the amount of the judgment remaining unsatisfied, together with costs, attorneys' fees and interest, if any. In determining the sufficiency of the surety or sureties and the extent to which the surety or sureties shall be liable on the bond, or whether any surety will be required, the court shall take into consideration the type and value of any collateral which is in, or may be placed in, the custody or control of the court and which has the effect of securing payment of and compliance with the judgment.

(2) When an appeal is taken by the state, by an officer or agency of the state, by direction of any department of the state, by any political subdivision or institution of the state or by any municipal corporation, the taking of an appeal shall operate as a stay.

H. District court review of supersedeas. At any time after appeal is filed pursuant to Paragraph B of this rule, the district court may, upon motion and notice, review any action of, or any failure or refusal to act by, the magistrate court dealing with supersedeas or stay. If the district court modifies the terms, conditions or amount of a supersedeas bond, or if it determines that the magistrate court should have allowed

supersedeas and failed to do so on proper terms and conditions, it may grant additional time within which to file in the district court a supersedeas bond as provided by this rule. Any change ordered by the district court shall be certified by the clerk of the district court and filed with the magistrate court clerk by the party seeking the review.

I. **Procedure on appeal.** The Rules of Civil Procedure for the District Courts shall govern the procedure on appeal from the magistrate court.

J. **Remand.** Upon remand of the case by the district court to the magistrate court, the magistrate court shall enforce the mandate of the district court.

K. **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 November 1, 1988; January 1, 1994; July 1, 1996.]

ANNOTATIONS

Cross references. — For right of appeal, see Section 35-13-1 NMSA 1978.

For rules of Civil Procedure for District Courts, see Rule 1-001 NMRA et seq.

For appeal from magistrate courts in trial de novo cases, see Rule 1-072 NMRA.

For form on title page of transcript of civil proceedings, see Rule 4-708 NMRA.

The 1996 amendment, effective for appeals filed after July 1, 1996, rewrote the rule.

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).

Magistrate's continuing control over civil judgments expires 15 days after entry of judgment. *State v. Ramirez*, 97 N.M. 125, 637 P.2d 556 (1981).

Transcripts. — Because transcripts are designated separately from papers in the rules listing the contents of the record on appeal, transcripts are not “papers,” but transcripts

that are properly admitted into evidence as exhibits may be part of the record on appeal. State v. Foster, 2003-NMCA-099, 134 N.M. 224, 75 P.3d 824.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 4 Am. Jur. 2d Appellate Review § 85 et seq.

Will questions which might have been, but were not, raised on prior appeal or error, be considered on subsequent appeal or error, 1 A.L.R. 725.

Necessity and sufficiency of election to stand on demurrer to support appeal from decision overruling, 21 A.L.R. 264.

Power of legislature to require appellate court to review evidence, 33 A.L.R. 10.

Power of trial court indirectly to extend time for appeal, 89 A.L.R. 941, 149 A.L.R. 740.

Judgment or order dismissing action as against one defendant as subject of appeal or error before disposition of case as against codefendant, 114 A.L.R. 759.

Abandonment of appeal or right of appeal by commencement or prosecution to judgment of another action, 115 A.L.R. 121.

Right of public officer or board to appeal from judicial decision affecting his or its order or decision, 117 A.L.R. 216.

Provision for future accounting as affecting finality of judgment or decree for purposes of review, 3 A.L.R.2d 342.

Motion or petition for rehearing in court below as affecting time within which appellate proceedings must be taken or instituted, 10 A.L.R.2d 1075.

Bastardy proceedings, right to appeal from order or judgment entered in, 18 A.L.R.2d 948.

Amendment of judgment as affecting time for taking or prosecuting appellate review proceedings, 21 A.L.R.2d 285.

Appellate review at instance of plaintiff who has requested, induced or consented to dismissal or nonsuit, 23 A.L.R.2d 664.

Sexual psychopathy, appealability of adjudication as to, 24 A.L.R.2d 350.

Defeated party's payment or satisfaction of, or other compliance with civil judgment as barring his right to appeal, 39 A.L.R.2d 153.

Appealability of order or judgment awarding or denying costs but making no other adjudication, 54 A.L.R.2d 927.

Exclusion or inclusion of terminal Sunday or holiday in computing time for taking or perfecting appellate review, 61 A.L.R.2d 482.

Acceptance of new trial as precluding appellate review of order granting it, 67 A.L.R.2d 191.

Full relief sought, right of winning party to appeal from judgment granting him, 69 A.L.R.2d 701.

Right to appellate review of consent judgment, 69 A.L.R.2d 755.

Formal requirements of judgment or order as regards appealability, 73 A.L.R.2d 250.

Appealability of order vacating, or refusing to vacate, approval of settlement of infant's tort claim, 77 A.L.R.2d 801.

Reviewability, on appeal from final judgment, of interlocutory order, as affected by fact that order was separately appealable, 79 A.L.R.2d 1352.

Void judgment, appealability of, 81 A.L.R.2d 537.

Appealability of order or decree compelling or refusing to compel arbitration, 94 A.L.R.2d 1071, 6 A.L.R.4th 652.

Dismissal of appeal or writ of error for want of prosecution as bar to subsequent appeal, 96 A.L.R.2d 312.

Appealability of judgment confirming or setting aside arbitration award, 7 A.L.R.3d 608.

Default judgment, appealability of order setting aside, or refusing to set aside, 8 A.L.R.3d 1272.

Executor's or administrator's right to appeal from order granting or denying distribution, 16 A.L.R.3d 1274.

Party's acceptance of remittitur in lower court as affecting his right to complain in appellate court as to amount of damages for personal injury, 16 A.L.R.3d 1327.

Bankruptcy, right of creditor who has not filed timely petition for review of referee's order to participate in appeal secured by another creditor, 22 A.L.R.3d 914.

Contempt adjudication or conviction, appealability of, 33 A.L.R.3d 448.

Contempt adjudication or conviction as subject to review, other than by appeal or writ of error, 33 A.L.R.3d 589.

Appealability of state court's order or decree compelling or refusing to compel arbitration, 6 A.L.R.4th 652.

Modern status of state court rules governing entry of judgment on multiple claims, 80 A.L.R.4th 707, 89 A.L.R. Fed. 514.

4 C.J.S. Appeal and Error § 2 et seq.

ARTICLE 8

Special Proceedings

2-801. Writs of execution.

A. **Issuance of writs of execution.** Unless the judgment has been stayed, the clerk of the court shall issue a writ of execution for seizure of property to satisfy a judgment on an underlying dispute:

(1) if the judgment debtor is not a natural person, at any time after the filing of the judgment;

(2) if the judgment debtor is a natural person:

(a) upon filing of either a certificate by an attorney for the judgment creditor or an affidavit by the judgment creditor stating that:

(i) the judgment creditor served the judgment debtor with a notice of right to claim exemptions as required by this rule; and

(ii) the judgment debtor has not filed a claim of exemption for the property to be seized and sold as provided by this rule;

(b) upon entry of an order finding that the property to be seized and sold is not exempt from execution; or

(c) upon filing of a waiver of the right to claim a statutory exemption from execution. The judgment debtor's written waiver shall specifically describe the property which may be seized and sold to satisfy the debt.

B. **Service of notice of right to claim exemptions from execution.** If the judgment debtor is a natural person, unless a shorter time is ordered by the court, not later than ten (10) days prior to the date of seizure of property to be sold under a writ of

execution, the judgment creditor shall serve upon each judgment debtor a notice of right to claim exemptions and a claim of exemption form in the following manner:

(1) if the judgment debtor has entered an appearance in the proceeding, service shall be made and proof of service filed with the court in the manner provided by Rule 2-203;

(2) if the judgment debtor has not entered an appearance in the proceeding, service shall be made and return of service filed in the same manner as provided by Rule 2-202 for service of the summons and complaint; or

(3) if service cannot be made on the judgment debtor pursuant to Subparagraph (1) or (2) of this Paragraph, service shall be made on the judgment debtor in a manner reasonably calculated to ensure actual notice of the right to claim exemptions.

C. Claim of exemptions from execution. Within ten (10) days after service of a notice of right to claim exemptions, a judgment debtor who is a natural person may claim a statutory exemption by filing a claim of exemption form with the court.

D. Service of claim of exemption. At the time of filing of the claim of exemption, the judgment debtor shall serve a copy of the claim of exemption on the judgment creditor.

E. Failure to file claim of exemption. If the judgment debtor fails to file a claim of exemption within ten (10) days after service of the notice of the right to claim exemptions, the judgment debtor shall be deemed to have waived the right to claim an exemption.

F. Dispute of claimed exemption. Within ten (10) days after service of a claim of exemption on the judgment creditor pursuant to Paragraph D of this rule, the judgment creditor may dispute any claimed exemption and request a hearing. If the judgment creditor does not dispute a claimed exemption, the property shall be exempt and the judgment creditor may proceed against any other property as provided in Paragraph A of this rule. If the judgment creditor files a notice of dispute and request for hearing, the judgment creditor shall at the time of filing of the notice serve a copy on the judgment debtor.

G. Notice of hearing on dispute. If the judgment creditor files a notice of dispute and request for hearing, the court shall promptly give notice of the date and time of the hearing to the parties.

H. Hearing on disputed claim of exemptions. Within ten (10) days after the filing of a notice of dispute and request for hearing, the court shall hold a hearing on the disputed claim. At the hearing the court may determine the merits of the dispute or may

postpone decision pending such discovery as may be required to determine the status of the property.

I. **Issuance and executions of writ.** A writ of execution issued pursuant to Paragraph A of this rule shall be served by the sheriff within sixty (60) days from the date issued. If an execution is not served within that time, upon request of the judgment creditor, a second or subsequent writ shall be issued by the clerk. A writ of execution issued pursuant to this rule may be served in the manner provided by law.

J. **Sheriff's sale.** A sale shall be conducted in the manner provided by law.

K. **Form of writs, notices and claim of exemptions.** Applications for writs of execution, writs of execution, answers, notices of right to claim exemptions, claims of exemptions, notices of dispute of claimed exemptions and request for hearing, and judgments shall be substantially in the form approved by the Supreme Court.

[Withdrawn and new rule adopted, effective January 1, 1996.]

ANNOTATIONS

Cross references. — For exemptions in civil actions, see Section 35-4-2 NMSA 1978.

For right to execution, issuance, levy and sale, see Section 39-4-1 NMSA 1978.

For docketing money judgments, see Section 39-1-6 NMSA 1978.

For sales under execution and foreclosure, see Section 39-5-1 NMSA 1978 et seq.

For forms on garnishment and writs of execution, see Rules 4-801 to 4-816 NMRA.

For writ of execution, see Rule 4-801 NMRA.

For notice of right to claim exemptions, see Rule 4-808A NMRA.

For claim of exemption, see Rule 4-803 NMRA.

For order on claim of exemption, see Rule 4-804 NMRA.

For notice of dispute and request for hearing, see Rule 4-810A NMRA.

The 1996 amendment, effective January 1, 1996, deleted "Garnishment" from the rule heading and rewrote the rule.

Case law. — The postjudgment execution statutes are unconstitutional as not providing adequate notice of allowable exemptions and the right to a hearing. *Aacen v. San Juan County Sheriff's Dep't*, 944 F.2d 691 (10th Cir. 1991).

By creating exemptions from execution, New Mexico has granted judgment debtors a property interest in retaining their exempt property. While the state need not grant such exemptions, once given, the property rights they create are entitled to due process protection. *Aacen v. San Juan County Sheriff's Dep't*, 944 F.2d 691 (10th Cir. 1991).

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions §§ 86 et seq., 364 et seq.; 47 Am. Jur. 2d Judicial Sales §§ 83, 98.

Attachment or execution creditor as purchaser within rule that first of two purchasers to obtain possession will prevail, 21 A.L.R. 1031.

Judicial, execution, or tax sale on election day, holiday or Sunday, 58 A.L.R. 1273.

Presence of chattels at place of sale as a condition of a judicial or execution sale, 69 A.L.R. 1194.

Validity of judicial, execution, tax or other public sale as affected by the particular point in courthouse or other place identified by notice, or designated by statute or by mortgage or trust deed, at which the sale was made, or by indefiniteness of notice as regards that point, 120 A.L.R. 660.

Interest of vendee under executory contract as subject to execution, judgment, lien, or attachment, 1 A.L.R.2d 727.

Irregularities or defects in execution or judicial sale, estoppel of or waiver by parties or participants regarding, 2 A.L.R.2d 6.

"Public sale," what constitutes, 4 A.L.R.2d 575.

Statutory provisions respecting registration of mortgages or other liens on personal property in case of residents of other states as affecting priority of execution lien over lien of chattel mortgage or conditional sale contract, 10 A.L.R.2d 764.

Duties, rights and remedies between attorney and client where attorney purchases property of client at or through tax, execution or judicial sale, 20 A.L.R.2d 1280.

Applicability of sales tax to judicial or bankruptcy sales, 27 A.L.R.2d 1219.

Right of creditors of life insured as to options or other benefits available to him during his lifetime, 37 A.L.R.2d 268.

Motor vehicle as exempt from seizure for debt, 37 A.L.R.2d 714.

Note or bond, execution or similar process in action on, not resulting in sale of mortgaged property, as precluding foreclosure of real estate mortgage, 37 A.L.R.2d 959.

Part payment or promise to pay judgment as affecting time for execution, 45 A.L.R.2d 967.

Appeal or writ of error, ruling on motion to quash execution as ground of, 59 A.L.R.2d 692.

Mere rendition, or formal entry or docketing, of judgment as prerequisite to issuance of valid execution thereon, 65 A.L.R.2d 1162.

Time of equitable conversion of real estate sold under and by court order, 66 A.L.R.2d 1266.

Real estate mortgage executed by one of joint tenants as enforceable after his death, 67 A.L.R.2d 999.

Solid mineral royalty as real or personal property, 68 A.L.R.2d 728.

Interest of spouse in estate by entirety as subject to judicial sale in satisfaction of his or her individual debt, 75 A.L.R.2d 1172.

Judgment lien, issuance or levy of execution as extending period of, 77 A.L.R.2d 1064.

Propriety of accepting check or promissory note in satisfaction of bid at execution or judicial sale had for cash, 86 A.L.R.2d 292.

Court or place of appearance, sufficiency of designation of in original civil process, 93 A.L.R.2d 376.

Inclusion or exclusion of first and last days in computing the time for performance of an act or event which must take place a certain number of days before a known future date, 98 A.L.R.2d 1331.

Construction and effect of provision for execution sale on short notice, or sale in advance of judgment under writ of attachment, where property involved is subject to decay or depreciation, 3 A.L.R.3d 593.

Mistake or error in middle initial or middle name of party as vitiating or invalidating civil process, summons or the like, 6 A.L.R.3d 1179.

Death of creditor or obligee, validity and effect of agreement that debt or legal obligation contemporaneously or subsequently incurred shall be canceled by, 11 A.L.R.3d 1427.

Joint bank account as subject to attachment, garnishment or execution by creditor of one of the joint depositors, 11 A.L.R.3d 1465.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

Modification of judgment, execution sale as affected by, 32 A.L.R.3d 1019.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

Wrongful execution against business property, injury to credit standing, reputation, solvency or profit potential as elements of damage resulting from, 55 A.L.R.3d 911.

33 C.J.S. Executions §§ 1 to 3, 69, 80, 225 to 229.

2-802. Garnishment.

A. **Garnishment procedure.** After the filing of the judgment on the underlying dispute and upon application of the judgment creditor, including an affidavit from the judgment creditor that the judgment creditor has made reasonable investigation and has no knowledge that the judgment debtor owns property within the state subject to execution, the clerk of the court shall issue a writ of garnishment.

B. **Service of writ of garnishment.** Within thirty (30) days of its issuance, a writ of garnishment issued pursuant to this rule shall be served by the judgment creditor on the garnishee wherever the garnishee may be found in the State of New Mexico. The writ shall be served and return of service filed in the same manner as provided by Rule 2-202 NMRA for service of the summons and complaint.

C. **Service of additional forms on garnishee.** In addition to the writ, the following forms shall be served by the judgment creditor on the garnishee:

(1) a copy of the application for writ of garnishment and the writ of garnishment; and

(2) unless the garnishment is for wages, a copy of the notice of right to claim exemptions and a copy of the claim of exemption form.

D. **Answer by garnishee.** The garnishee shall answer the writ of garnishment within twenty (20) days of service as required by Section 35-12-4 NMSA 1978.

E. **Appearance by garnishee.** A garnishee may appear in person in any garnishment proceeding. If the garnishee is a partnership, the garnishee may appear by one of its general partners. If the garnishee is a corporation, an officer, director or general manager of the corporation may answer the writ; however, any other appearance shall be through an attorney representing the garnishee corporation. The court shall award reasonable attorney fees and costs to the garnishee.

F. Service on judgment debtor by garnishee. On or before the fourth business day following service of the writ of garnishment, the garnishee shall mail or otherwise deliver to each named judgment debtor or to the judgment debtor's attorney of record a copy of the forms served on the garnishee by the judgment creditor pursuant to Paragraph C of this rule.

G. Exemption from garnishment. A judgment debtor who is a natural person:

(1) shall receive an exemption from garnishment of wages to the extent provided by law; and

(2) may claim a statutory exemption from garnishment other than wages by filing with the court a claim of exemption within ten (10) days after service by the garnishee of notice of the right to claim exemptions.

H. Service of the claim of exemption. The judgment debtor shall serve a copy of the completed and signed claim of exemption form upon the judgment creditor and the garnishee in the manner provided by Rule 2-203 NMRA.

I. Failure to file claim of exemption other than wages. If the judgment debtor fails to file a claim of exemption within ten (10) days after service of the notice of the right to claim exemptions, the judgment debtor shall be deemed to have waived the right to claim a statutory exemption other than wages.

J. Notice of dispute. Within ten (10) days after service on the judgment creditor of a claim of exemption, the judgment creditor may dispute any claimed exemption by filing a notice of dispute and request for hearing with the court. If the judgment creditor fails to file the notice of dispute and request for hearing within the time permitted, the judgment debtor's claim of exemption is granted. If the judgment creditor files a notice of dispute, the judgment creditor shall at the time of filing of the notice serve a copy of the notice of dispute and request for hearing on the judgment debtor.

K. Notice of hearing on dispute. If the judgment creditor files a notice of dispute and request for hearing, the court shall promptly give notice of the date and time of the hearing to the judgment creditor, garnishee and the judgment debtor. The judgment creditor shall serve a copy of the notice of dispute and request for hearing on the judgment debtor and the garnishee.

L. Hearing. A hearing on the claim of exemption shall be held within ten (10) days after the filing of a notice of dispute and request for hearing. At the hearing, the court must determine the merits of the dispute unless the court postpones decision pending such discovery as may be required to determine the status of the property.

M. Judgment on writ of garnishment. If a notice of dispute and request for hearing is filed pursuant to this rule, judgment on the writ of garnishment shall not enter until a hearing has been held on the dispute. If the court finds that the property is not exempt

from garnishment, the court shall enter a judgment on the writ of garnishment requiring the garnishee to turn over to the judgment creditor the property or amount of money set forth in the judgment. Interest shall continue to accrue on the judgment until the date the judgment is satisfied. To collect interest accruing after the entry of the writ of garnishment, a new application must be made.

N. Form of writs, notices and claim of exemptions. Applications for writs of garnishment, writs, answers, notices of right to claim exemptions, claims of exemptions, notices of dispute of claimed exemptions and request for hearing, and judgments shall be substantially in the form approved by the Supreme Court.

[As adopted, effective January 1, 1996; as amended by Supreme Court Order No. 08-8300-46, effective December 31, 2008.]

ANNOTATIONS

Compiler's notes. — Former Rule 2-802 was recompiled as Rule 2-803 NMRA effective January 1, 1996.

Cross references. — For application for writ of garnishment, see Rule 4-805 NMRA.

For writ of garnishment, see Rule 4-806 NMRA.

For answer by garnishee, see Rule 4-807 NMRA.

For notice of right to claim exemptions, garnishment, see Rule 4-808 NMRA.

For claims of exemption, see Rule 4-809 NMRA.

For notice of dispute and request for hearing, see Rule 4-810A NMRA.

For judgment on writ of garnishment and claim of exemption, see Rule 4-812 NMRA.

The 2008 amendment, approved by Supreme Court Order No. 08-8300-46, effective December 31, 2008, in Paragraph A, added the provision that requires the judgment creditor to file an affidavit that the judgment creditor has made reasonable investigation and has no knowledge that the judgment debtor owns property within the state subject to execution; in Paragraph B, added the provision that requires the writ of garnishment to be served within 30 days of its issuance; and in Paragraph M, added the last two sentences.

2-803. Prejudgment writs of attachment; exemptions.

A. Application for issuance of writs. Prejudgment writs of attachment may be issued by the court upon application of a party pursuant to Sections 35-9-1 to 35-9-8 NMSA 1978.

B. Exemptions; how claimed. Exemptions of personal property provided by Sections 42-10-1 to 42-10-7 NMSA 1978 also apply to attachment proceedings. If the party is a natural person, notice of a right to claim exemptions shall be given as provided by Rule 2-801. A claim of exemption may be filed and served in the same manner and time as required in execution proceedings. The petitioner may dispute the claimed exemption in the same manner and time provided for a dispute on a claim of exemption in an execution proceeding.

C. Hearing. If the petitioner disputes a claimed exemption, the court shall proceed in the manner provided for hearings on claims of exemptions in execution proceedings.

D. Appeal from judgment. If an order on the claim of exemption is rendered in an attachment proceeding after expiration of the time for appeal on the main issue in the action, either party aggrieved by the order on the claim of exemption may appeal from that judgment to the district court in the same manner as other appeals from final judgments are taken. If an order on the claim of exemption is rendered before judgment on the main issue in the cause, the order on the claim of exemption may be appealed to the district court within fifteen (15) days after entry of the judgment on the merits as provided by these rules.

[As amended, effective July 1, 1988; July 1, 1992; as recompiled and amended effective January 1, 1996.]

ANNOTATIONS

Compiler's notes. — Former Rule 2-803 was recompiled as Rule 2-804 NMRA effective January 1, 1996.

Cross references. — For exemptions in civil actions, see Section 35-4-2 NMSA 1978.

For claim of exemptions, see Rule 4-803 NMRA.

For order of exemption, see Rule 4-804 NMRA.

The 1996 amendment, effective January 1, 1996, recompiled this rule, which was formerly Rule 2-802 NMRA, rewrote the rule heading, added Paragraph A and redesignated the remaining paragraphs accordingly, rewrote paragraphs B and C, and substituted the language following "claim of exemption" for "issue shall be decided by the district court" at the end of Paragraph D.

Am. Jur. 2d, A.L.R. and C.J.S. references. — Debtor's exemption of personalty as attaching to proceeds of sale or exchange thereof, 119 A.L.R. 467.

Motor vehicle as exempt from seizure for debt, 37 A.L.R.2d 714.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

49 C.J.S. Judgments § 569.

2-804. Judgment; supplementary proceedings.

A. Examinations in aid of judgment or execution. After the filing of a judgment for the payment of money, upon request of the judgment creditor or the judgment creditor's successor in interest, the clerk may issue a subpoena directing any person with knowledge that will aid in enforcement of or execution on the judgment, including the judgment debtor, to appear before the court to respond to questions relating to that knowledge. The subpoena shall be served in the same manner as other subpoenas except that it shall be served not less than three (3) days prior to the date the examination is to be conducted.

B. Statements. Any person with information which is subject to discovery shall give a statement relating to the assets of a judgment debtor. If the statement is to be obtained from the judgment debtor or from a person who refuses to voluntarily give a statement, the judgment creditor may obtain a statement by serving a written "notice of statement" upon the person to be examined and upon the judgment debtor not less than five (5) days before the date scheduled for the statement. The notice will state the time and place for taking of the statement. A subpoena may also be served to secure the presence of the person to be examined or the materials to be examined during the statement.

C. Depositions; interrogatories. The judgment creditor may serve interrogatories upon or take the deposition of the person whom the judgment creditor desires to examine in the manner provided by the Rules of Civil Procedure for the District Courts.

D. Notice and service of pleadings. A party desiring to take the deposition or statement of any person shall give notice to every other party to the action. Notice of the taking of depositions, issuance of a subpoena or the taking of a statement pursuant to this rule is not required if the judgment debtor failed to appear and a default judgment was entered.

E. Docketing judgment in district court. Upon the expiration of the time for appeal, the judgment creditor may file in the district court of the county in which the magistrate issued the judgment a certified copy of the judgment. Upon payment of the prescribed docket fee, the clerk of the district court shall docket the judgment, in the same manner in which judgments of the district court are docketed, and shall issue a transcript of judgment as though the judgment had been issued by the district court. The docketing of a judgment in the district court pursuant to this paragraph shall not prevent

the magistrate court from issuing writs and other orders in aid of enforcement of the judgment of the magistrate court.

[As amended, effective July 1, 1988; July 1, 1992; as amended and recompiled, effective January 1, 1996.]

ANNOTATIONS

Withdrawals. — Pursuant to a court order dated May 26, 1988, former Rule 2-804 NMRA, relating to supplementary proceedings in aid of judgment, was withdrawn, effective for cases filed in the magistrate courts on or after July 1, 1988.

Cross references. — For appeal from final judgments of magistrate court, see Rule 2-705 NMRA.

For claim of exemptions, see Rule 4-803 NMRA.

For order of exemption, see Rule 4-804 NMRA.

For exemptions in civil actions, see Section 35-4-2 NMSA 1978.

The 1996 amendment, effective January 1, 1996, recompiled this rule, which was formerly Rule 2-803 NMRA, and rewrote the rule.

Am. Jur. 2d, A.L.R. and C.J.S. references. — 30 Am. Jur. 2d Executions § 643 et seq.

Debtor's exemption of personalty as attaching to proceeds of sale or exchange thereof, 119 A.L.R. 467.

Motor vehicle as exempt from seizure for debt, 37 A.L.R.2d 714.

Family allowance from decedent's estate as exempt from attachment, garnishment, execution and foreclosure, 27 A.L.R.3d 863.

What is "necessary" furniture entitled to exemption from seizure for debt, 41 A.L.R.3d 607.

49 C.J.S. Judgments § 569.

2-805. Mediation.

A. **Purpose.** The purpose of mediation programs in the magistrate courts is the early, efficient, cost-effective and informal resolution of disputes.

B. **Administration.** Mediation shall be administered by a court. Mediators shall be volunteers who have been (1) certified by the Administrative Office of the Courts as

qualified to conduct mediations in the magistrate courts and (2) approved by the local presiding judge.

C. **Order required.** All referrals to mediation require a written court order. When the court orders mediation, notice shall be provided and the parties shall appear and mediate in good faith. Nothing in the rules governing the mediation programs shall be construed to require settlement. Nothing in the rules governing the mediation programs shall be construed to discourage or prohibit parties from stipulating to private alternative dispute resolution.

D. **Immunity.** Persons certified by the Administrative Office of the Courts to serve as mediators under these rules are appointed to serve as arms of the court and as such are immune from liability for conduct within the scope of their appointment.

E. **Confidentiality.** Mediation proceedings shall be held in private and shall be confidential as provided by law.

F. **Report to the court.** No report of the content of mediation shall be made to the court. The mediator shall inform the court by written report of the result of the mediation session. If the mediation process is successful, the mediator shall reduce the agreement to writing on a form to be signed by the parties.

G. **Costs.** If a party fails to appear as ordered by the court for mediation, and the other party or parties appear, the court may, after a hearing, assess costs against a party who fails to appear as ordered for a mediation to reimburse the party or parties who did appear for attorney fees or lost wages.

[Approved by Supreme Court Order 07-8300-34, effective January 22, 2008.]

Committee Commentary. — The committee feels that mandatory attendance at mediation serves the same purpose as mandatory attendance at a pretrial conference and will serve to encourage voluntary settlement.

Table Of Corresponding Rules

The first table below reflects the disposition of the former Rules of Civil 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 Civil Procedure for the Magistrate Courts.

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