RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

1986 Recompilation

Article

ARTICLE 1
GENERAL PROVISIONS

Rule

8-101. Scope and title.

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

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

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

D. **Citation form.** These rules shall be cited by set and rule number, as in SCRA 1986, Rule 8-____.

[As amended, effective January 1, 1987.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts § 30.

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

8-102. Conduct of court proceedings.

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

recess thereof and the transmitting or sound recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; and no such action shall be done or permitted except upon express approval of the supreme court.

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.

8-103. Rules; forms; fees.

A. **Rules.**

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

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

B. **Forms.** Forms used in the municipal courts shall be substantially in the form approved by the supreme court.

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

[As amended, effective January 1, 1987.]

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts §§ 83, 85.

8-104. Time.

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by the local rules of any municipal court, 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 shall be included, unless it is a Saturday, a Sunday or a legal holiday in which event the period runs until the end of the next day which is not a Saturday, a Sunday or a legal holiday.

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

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

(2) upon motion made after the expiration of the specified period, permit the act to be done, but it may not extend the time for commencement of trial under Rule 8-506 or for taking an appeal under Rule 8-703.

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

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

ANNOTATIONS

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

8-105. Designation of judge.

A. **Appointment of temporary municipal judge.** Upon recusal or disqualification of a municipal judge, or if by reason of absence, death, sickness or other cause, a municipal judge is unable or unavailable to perform the duties of the municipal judge, a temporary municipal judge shall be appointed in the manner prescribed by law. If no municipal ordinance shall govern the temporary appointment of a municipal court judge, or if none shall be appointed in accordance therewith, the district court, upon certification of that fact by letter from the municipal court judge or any party, will designate a qualified elector of the municipality to sit as municipal court judge in the action.

B. **Transfer of records.** After designation of a temporary municipal court judge, whether by ordinance or order of the district court, the disqualified judge shall forthwith send to the designated judge a copy of all proceedings in the action, pay to the designated judge all money received in the action and mark his records of the action "transferred by disqualification to [designated judge's name]". The designated judge shall include in his records the copy of proceedings in the action prior to its transfer,

including a reference to the name of the disqualified judge, and shall keep a record of all subsequent proceedings in the same manner as if the action had originally been filed with the designated judge.

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

ANNOTATIONS

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

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

8-106. Disqualification; recusal.

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

B. **Recusal.** Whenever the municipal judge before whom the action is pending is disqualified by the terms of the New Mexico Constitution or the Code of Judicial Conduct, he shall not sit in the action and shall give notice of recusal to all other parties.

ANNOTATIONS

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

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

8-107. Entry of appearance.

A. **Written entry of appearance.** Unless appointed by written order of the court, counsel undertaking representation of a defendant in municipal court shall file a written entry of appearance in the cause. For the purpose of this rule, the filing of any pleading signed by counsel constitutes an entry of appearance.

B. **Oral entry of appearance.** An attorney may enter an appearance on behalf of a defendant by oral communication with the court, provided a written entry of appearance is filed with the clerk of the court or the judge if there is no clerk, within three (3) days thereafter. Upon the making of an oral entry of appearance, the clerk of the court or the

judge shall enter in the file the name, office address and telephone number of the attorney.

C. **Duration of representation.** An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by the court.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Appearance § 13.

6 C.J.S. Appearances § 17.

8-108. Presence of the defendant; appearance of counsel.

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

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

(1) is voluntarily absent after the proceeding has commenced; or

(2) engages in conduct which justifies excluding the defendant from the proceeding.

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

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

(2) The municipal court, with the written consent of the defendant, may permit arraignment, plea, trial and imposition of sentence in the absence of the defendant.

ANNOTATIONS

Cross-references. - For forms on waiver of appearance and certificate of defense counsel, see Form 9-104.

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

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

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

Right of accused to be present at polling of jury, 49 A.L.R.2d 640.

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

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

Right of accused to be present at trial as violated by trial while under influence of drugs or intoxicants, 83 A.L.R.2d 1069.

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

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

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

8-109. Record.

As used in these rules, the term "record" means:

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

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

(C) any mechanical, electrical or other recording. No broadcast or reproduction of any mechanical, electrical or other recording shall be made for any person other than an official of the court without the express written consent of the New Mexico Supreme Court.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts §§ 51 to 55.

21 C.J.S. Courts §§ 178 to 185.

8-110. Contempt.

A. **Jurisdiction.** A municipal judge has jurisdiction to punish for contempt of its authority only for:

(1) misbehavior in the presence of the court or so near thereto as to obstruct the administration of justice;

(2) misbehavior of court officers in official transactions;

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

B. **Summary disposition.** A contempt may be punished summarily if the judge certifies that he saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

C. **Disposition upon notice and hearing.** A contempt, except as provided in Paragraph B of this rule, shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and describe it as such. The notice may be given:

(1) orally by the judge in open court in the presence of the person charged with the contempt;

(2) by a summons; or

(3) by a bench warrant.

The person charged with the contempt shall be entitled to bail as provided in these rules. Upon a finding of guilt, the court shall enter judgment and sentence within the limits of its jurisdiction.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 17 Am. Jur. 2d Contempt § 1 et seq.

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.

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

Separate contempt punishments on successive refusals to respond to same or similar questions, 94 A.L.R.2d 1246.

Appealability of contempt adjudication or conviction, 33 A.L.R.3d 448.

Right to counsel in contempt proceedings, 52 A.L.R.3d 1002.

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

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

Affidavit or motion for disqualification of judge as contempt, 70 A.L.R.3d 797.

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

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.

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 § 1 et seq.

8-111. Non-attorney prosecutions.

A. **Peace officers and private citizens.** Municipal police officers and individual private citizens acting in their own behalf may file criminal complaints against persons in the municipal court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the trial jurisdiction of the court.

B. **Other authorized appearances.** A municipal officer or employee may appear and prosecute any petty misdemeanor proceeding on behalf of the municipality if the municipality has authorized the officer or employee to institute or cause to be instituted an action on behalf of the governmental entity.

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

D. **Special prosecutor.** Nothing in this rule shall be construed to allow a private attorney to prosecute a case for any party without first having been duly appointed as a special prosecutor by the city attorney for the municipality in which the court is located.

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

[Adopted, effective July 1, 1988.]

ANNOTATIONS

Effective dates. - Pursuant to a court order dated May 26, 1988, this rule is effective for cases filed in the municipal courts on or after July 1, 1988.

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

ARTICLE 2
INITIATION OF PROCEEDINGS

Rule

8-201. Commencement of action.

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

(1) a complaint consisting of a signed statement containing the facts, common name of the offense charged, and where applicable, a specific section number of the municipal ordinance or New Mexico Statutes Annotated, 1978 Compilation, which contains the offense;

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

(3) a citation complying with the provisions of Section 31-1-6 NMSA 1978.

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

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

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

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

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

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

[As amended, effective September 1, 1990; November 1, 1991.]

ANNOTATIONS

Cross-references. - For criminal complaint, see Criminal Form 9-202.

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, rewrote Paragraphs A and E to the extent that a detailed analysis would be impracticable.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Actions §§ 83, 86 to 90, 98.

1A C.J.S. Actions § 237 et seq.

8-202. Probable cause determination.

A. **General rule.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the person has not been released upon some conditions of release. The probable cause determination shall be made by a municipal court judge promptly, but in any event within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant whichever occurs earlier.

B. **Conduct of determination.** The determination of whether there is probable cause shall be nonadversarial and may be held in the absence of the defendant and of

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

C. **Probable cause determination; conclusion.** If the court finds that there is no probable cause to believe that the defendant has committed an offense, the court shall dismiss the complaint without prejudice and order the immediate release of the defendant. If the court finds probable cause that the defendant committed an offense, the court shall review the conditions of release. If no conditions of release have been set and the offense is a bailable offense, the court shall set conditions of release in accordance with Rule 8-401. If the court finds that there is probable cause the court shall make such finding in writing.

[As amended, effective September 1, 1990; November 1, 1991.]

ANNOTATIONS

Cross-references. - For probable cause determination, see Form 9-207A.

For form on affidavit for arrest warrant, see Form 9-209.

For form on affidavit for bench warrant, see Form 9-211.

For statement of probable cause, see Form 9-215.

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 5 Am. Jur. 2d Arrest §§ 24, 32.

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

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

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

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

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

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

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

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

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

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

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

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

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

A. **Issuance.** Upon the docketing of any action, the court may issue an arrest warrant or summons. No warrant or summons shall issue except upon a sworn statement of the facts showing probable cause that an offense has been committed. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. Before ruling on a request for a warrant, the court may require the affiant to

appear personally and may examine under oath the affiant and any witnesses produced by the affiant, provided that such additional evidence shall be reduced to writing and supported by oath or affirmation.

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

ANNOTATIONS

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

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

8-204. Service of summons.

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

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

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

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

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

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

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

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

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

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

G. **Summons; service by mail.** A summons and complaint may be served upon any defendant by the clerk of the court, the judge or the prosecutor mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served. If a defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may:

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

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

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

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

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

is available, service may be made by delivering a copy of the process or other papers to be served at the principal office or place of business during regular business hours to the person in charge thereof.

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

I. **Return.** If service is made by mail pursuant to Paragraph G of this rule, return shall be made by the defendant appearing as required by the summons. If service is by personal service pursuant to Paragraph H of this rule, the person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. When service is made by a full-time law enforcement officer, proof thereof shall be by certificate; and when made by a person other than a full-time law enforcement officer, proof thereof shall be made by affidavit. Where service within the state includes mailing, the return shall state the date and place of mailing.

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

[As amended, effective January 1, 1990.]

ANNOTATIONS

Cross-references. - For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, see Form 9-208.

For form on motion for production, see Form 9-409.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

72 C.J.S. Process § 26 et seq.

8-205. Arrest warrants.

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

campus security officer or an Indian tribal or pueblo law enforcement officer. Upon arrest, the defendant shall be brought before the court without unnecessary delay.

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

C. **Return.** The arresting officer shall make a return to the court which issued the warrant and notify immediately all law enforcement agencies previously advised of the issuance of the warrant for arrest that the defendant has been arrested.

ANNOTATIONS

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

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

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

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

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

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

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

22 C.J.S. Criminal Law §§ 334 to 339.

8-206. Bench warrants.

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

B. **Execution and return.** A bench warrant shall be executed and return thereon made in the same manner as an arrest warrant issued pursuant to Rule 8-205 of these rules.

ANNOTATIONS

Cross-references. - For form on affidavit for bench warrant, see Form 9-211.

For forms on bench warrant and return, see Form 9-212.

"Personal knowledge" exception. - The "personal knowledge" exception to the affidavit requirement appears to recognize that there is no point in the municipal judge's executing an affidavit when the judge has personal knowledge of facts constituting probable cause. State v. Pinela, 310 N.M. 627, 830 P.2d 179 (Ct. App. 1992).

Municipal judge had sufficient "personal knowledge" to support the bench warrant from his review of the information on the unsworn affidavit from the clerk's office. State v. Pinela, 310 N.M. 627, 830 P.2d 179 (Ct. App. 1992).

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

8-207. Search warrants.

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

(1) property which has been obtained or is possessed in a manner which constitutes a violation of a municipal ordinance;

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

(3) property which would be material evidence in a prosecution for a violation of a municipal ordinance; or

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

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

appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time.

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

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

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

F. **Probable cause.** As used in this rule, "probable cause" shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses produced by the affiant, provided that such additional evidence shall be reduced to writing, supported by oath or affirmation and served with the warrant.

ANNOTATIONS

Cross-references. - For form on affidavit for search warrant, see Form 9-213.

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

For application for inspectorial search order, see Form 9-801.

For forms on inspection order and return, see Form 9-802.

Citizen-informer rule. - In order to apply the citizen-informer rule, the affidavit must affirmatively set forth circumstances which would allow a neutral magistrate to

determine the informant's status as a citizen-informer. State v. Hernandez, 111 N.M. 226, 804 P.2d 417 (Ct. App. 1990).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Searches and Seizures §§ 60 to 153.

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

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

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

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

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

What constitutes compliance with knock-and-announce rule in search of private premises - state cases, 70 A.L.R.3d 217.

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

79 C.J.S. Searches and Seizures §§ 63 to 84.

8-208. Service and filing of papers.

A. **When required.** Unless the municipal court otherwise orders, every pleading subsequent to the complaint, every order not entered in open court, every written motion unless it is one as to which a hearing ex parte is authorized, and every written notice, demand and similar paper shall be served on each party; however, nothing herein shall be construed to require that a plea pursuant to Rule 8-302 of these rules be in writing.

B. **How made.** When a party is represented by an attorney, service shall be made upon the attorney unless service upon the party himself is ordered by the court.

C. **Method of service.** Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of the court or the judge if there is no clerk, who shall place it in the court file. "Delivering a copy" within this rule shall mean:

handing it to the attorney or to the party; or leaving it at his office with his secretary or other person in charge; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his usual place of abode with some person of his family above fifteen (15) years of age and informing such person of the contents thereof except that if no such person be found willing to accept a copy, posting the copy in the most public part of the person's abode; or, leaving it in a mail depository authorized by the attorney to be served.

D. **Service by mail.** Service by mail shall be deemed complete upon mailing. "Mailing" shall include deposit in an outgoing mail container which is maintained in the usual and ordinary course of business of the serving attorney.

E. **Filing.** All original papers, copies of which are required to be served upon parties, must be filed with the court either before service or immediately thereafter.

F. **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 or the judge if there is no clerk. When papers are filed with the court, the date of filing and the identity of the person receiving the papers shall be noted thereon and the papers placed in the court file.

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

H. **Notice.** A party giving notice shall provide sufficient information to give actual notice of the event and shall communicate such notice to the attorney for the party to be given notice or to the party himself if he has no attorney. Except as otherwise ordered by the court, notice may be by any method accepted in the usual course of business.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pleading §§ 350, 351.

71 C.J.S. Pleading §§ 407 to 415.

ARTICLE 3
PLEADINGS AND MOTIONS

Rule

8-301. General rules of pleading.

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

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

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

ANNOTATIONS

Cross-references. - For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, see Form 9-208.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pleading §§ 1, 53, 54.

71 C.J.S. Pleading §§ 5, 9.

8-302. Pleas allowed.

A. **Pleas allowed.** The plea shall be one of the following: guilty, not guilty, not guilty by reason of insanity or nolo contendere. No other pleas shall be permitted. A plea of not guilty or not guilty by reason of insanity shall not operate as a waiver of any defense or objection. If the defendant pleads not guilty by reason of insanity, the municipal court shall transfer the action to the district court pursuant to Rule 8-507 of these rules.

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

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

8-303. Amendment of complaints and citations.

A. **Defects, errors and omissions.** A complaint shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, because of any defect, error, omission, imperfection or repugnancy therein which does not prejudice the substantial rights of the defendant upon the merits. The court may at any time prior to a verdict cause the complaint to be amended in respect to any such defect, error, omission, imperfection or repugnancy or to charge a different offense.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pleading §§ 306 to 338.

71 C.J.S. Pleading §§ 275 to 322.

8-304. Motions.

A. **Subject matter.** In all actions, any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion.

B. **How made.** Motions may be made orally or in writing, unless the court directs they be in writing.

C. **Suppression of evidence.**

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

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

D. **Notice and hearing.** No motion shall be decided without a hearing following prior notice to all parties.

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

ANNOTATIONS

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

8-305. Unnecessary allegations.

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

(1) time of the commission of offense;

(2) place of the commission of offense;

(3) means by which the offense was committed;

(4) value or price of any property;

(5) ownership of property;

(6) intent with which an act was done;

(7) description of any place or thing;

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

(9) the specific degree of the offense charged;

(10) exceptions to the offense charged; or

(11) any other similar allegation.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 61A Am. Jur. 2d Pleading §§ 23 to 27, 45, 46.

71 C.J.S. Pleading §§ 6, 26, 36.

8-306. Joinder; consolidation; severance.

A. **Joinder; offenses; defendants.**

(1) Two or more offenses shall be joined in one complaint with each offense stated in a separate count, if the offenses:

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

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

(2) Two or more defendants may, with leave of the court, initially be joined in the same complaint:

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

(b) when, even if not all of the defendants are charged in each count, the several offenses charged: (i) were part of a common scheme or plan; or (ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of others.

(3) Failure to join offenses or defendants as required by this rule shall not be grounds for dismissal of any complaint, and joinder may be effected by filing an amended complaint.

B. **Consolidation; offenses; defendants.**

(1) The court shall order two or more complaints against a single defendant to be tried together if the offenses could have been joined in a single complaint.

(2) The court shall initially consolidate the trials of two or more defendants if the defendants could have been joined in a single complaint under Paragraph A of this rule.

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

[As amended, effective September 1, 1990.]

ANNOTATIONS

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 1 Am. Jur. 2d Actions §§ 104 to 115, 127 to 134, 156 to 161.

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

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

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

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

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

Separate trials in prosecution for criminal conspiracy as to gambling, 91 A.L.R.2d 1201.

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

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

ARTICLE 4
RELEASE PROVISIONS

Rule

8-401. Bail.

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

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

(2) the execution of a bail bond by the defendant or by unpaid sureties in the full amount of the bond and the pledging of real property as required by Rule 8-401A; or

(3) the execution of a bail bond with licensed sureties as provided in Rule 8-401B or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.

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

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

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

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

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

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

(b) the person's family ties;

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

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

(e) the length of residence in the community;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(2) advise the person of:

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

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

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

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

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

F. **Amendment of conditions.** The court ordering the release of a person on any condition specified in this rule may amend its order at any time to increase or reduce the

amount of bail set or impose additional or different conditions of release. If such amendment of the release order results in the detention of the person as a result of his inability to meet such conditions or in the release of the person on a condition requiring him to return to custody after specified hours, the provisions of Paragraph E of this rule shall apply.

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

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

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

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

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

J. **Forms.** Instruments required by this rule shall be substantially in the form approved by the supreme court.

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

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990.]

ANNOTATIONS

Cross-references. - For form on record of responses to questions at release hearing, see Form 9-301.

For form on release order, see Form 9-302.

For form on appearance bond, see Form 9-303.

For forms on bail bond and justification of sureties, see Form 9-304.

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

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

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

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

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

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

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

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

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

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

Right to apply cash bail to payment of fine, 92 A.L.R.2d 1084.

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

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

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

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

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

8 C.J.S. Bail § 2 et seq.

8-401A. Bail; unpaid surety.

Any bond authorized by Subparagraph (2) of Paragraph A of Rule 8-401 shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

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

ANNOTATIONS

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

8-401B. Bail bonds; justification of compensated sureties.

A. **Justification of sureties.** Any bond submitted to the court by a paid surety pursuant to Paragraph A of Rule 8-401 shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law [Article 51, Chapter 59A NMSA 1978] and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power of attorney with the bond. If authorized by law, a paid surety licensed under the Bail Bondsmen Licensing Law may deposit cash with the court in lieu of a surety or property bond, provided that the paid surety executes the appearance bond.

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

C. **Property bond in certain districts.** A real or personal property bond may be executed for the release of a person pursuant to Rule 8-401 in any municipality in which the chief judge of the district court upon concurrence of a majority of the district judges of the district has entered an order finding that the provisions of Paragraph B of this rule will result in the detention of persons otherwise eligible for pretrial release pursuant to

Rule 8-401. If a property bond is submitted by a compensated surety pursuant to this paragraph, the bail bondsman or solicitor must be licensed as a property bondsman and must pledge or assign real or personal property owned by the property bondsman as security for the bail bond. In addition, a licensed property bondsman must file, in each court in which he posts bonds:

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

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

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

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

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

ANNOTATIONS

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

8-402. Release.

A. **Release during trial.** A person released pending trial under Rule 8-401 shall continue on release during trial under the same terms and conditions as previously imposed, unless the court determines that other terms and conditions or termination of

release is necessary to assure the presence of the person during the trial or to assure that the conduct of the person will not obstruct the orderly administration of justice.

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

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

(2) that the conduct of such person will not obstruct the orderly administration of justice.

C. **Release after sentencing.** After imposition of a judgment and sentence, the court, upon motion of the defendant, shall establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Paragraph B of Rule 8-401 and may also consider the fact of defendant's conviction and the length of sentence imposed. If the court requires a bail bond in an amount greater than the amount established for release pending trial and if the surety has not been discharged by order of the court, a new bond need be furnished only for the additional amount. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court.

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

ANNOTATIONS

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

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

8-403. Revocation of release.

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

(1) impose any of the conditions authorized under Rule 8-401; or

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

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

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

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

[Approved effective July 1, 1988; as amended, effective September 1, 1990.]

ANNOTATIONS

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

Effective dates. - Pursuant to a court order dated May 26, 1988, this rule is effective for cases filed in the municipal courts on or after July 1, 1988.

8-404, 8-405. Reserved.

8-406. Bail bonds; exoneration; forfeiture.

A. **Exoneration of bond.** Unless otherwise ordered for good cause, a bond shall be only exonerated if the municipal attorney approves.

B. **Surrender of an offender by a paid surety.** A person who is released upon execution of a bail bond by a paid surety may be arrested by the paid surety if the court has revoked the defendant's conditions of release pursuant to Rule 8-403 or if the court has declared a forfeiture of the bond pursuant to the provisions of this rule. If the paid surety delivers the defendant to the court prior to the entry of a judgment of default on the bond, the court may absolve the bondsman of responsibility to pay all or part of the bond.

C. **Forfeiture.** If there is a breach of condition of a bond, the court may declare a forfeiture of the bail. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Order to Show Cause on the clerk of the court in the manner provided by Rule 8-407.

D. **Setting aside forfeiture.** The court may direct that a forfeiture be set aside in whole or in part upon a showing of good cause why the defendant did not appear as required by the bond or if the defendant is surrendered by the surety into custody prior to the entry of a judgment of default on the bond.

E. **Default judgment; execution.** If, after a hearing, the forfeiture is not set aside, a default judgment on the bond shall be entered by the court. If the default judgment is not paid within ten (10) days after it is filed and served on the surety in the manner provided by Rule 8-407, execution may issue thereon. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

[Effective October 1, 1987.]

8-407. Bail bonds; notice.

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

[Effective October 1, 1987.]

ARTICLE 5
ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule

8-501. Arraignment and first appearance.

A. **Explanation of rights.** Upon the first appearance of the defendant before the municipal court in response to a summons or warrant or following arrest, the municipal judge shall inform the defendant of the following:

(1) the offense charged;

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

(3) the right to bail;

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

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

(6) the right to remain silent, and that any statement made by the defendant may be used against the defendant. The municipal judge shall then allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. **Entry of plea.** The court shall thereafter require the defendant to plead to the complaint, pursuant to Rule 8-302 of these rules.

C. **Bail.** If the defendant has not been released by the court or its designee, the court shall enter an order prescribing conditions of release in accordance with Rule 8-401 of these rules.

D. **Waiver of arraignment.** An arraignment may be waived by the defendant filing a written plea of not guilty no later than forty-eight (48) hours prior to the scheduled arraignment. The waiver must indicate the date and time of arraignment and the name of the arraigning judge. An entry of a plea of not guilty shall be substantially in the form approved by the supreme court.

E. **Audio-visual appearance.** The first appearance of the defendant before the court may be through the use of a two-way audio-video communication if the following conditions are met:

(1) the defendant and the defendant's counsel are together in one room at the time of the first appearance before the court; and

(2) the judge, legal counsel and defendant are able to communicate and see each other through a two-way audio-video system which may also be heard and viewed in the courtroom by members of the public.

F. **Audio-visual arraignment.** The arraignment of the defendant before the court may be through the use of a two-way audio-video communication provided that, prior to entry or acceptance of a plea of guilty, the court assures that the plea is made after a knowing, intelligent waiver by the defendant of the defendant's right to trial. No plea shall be accepted by the court unless the conditions set forth in Subparagraphs (1) and (2) of Paragraph E of this rule are met.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990.]

ANNOTATIONS

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, substituted "and" for "or" in the catchline; rewrote the first sentence of Paragraph D and inserted the present second sentence therein; and in Paragraph F, substituted "the defendant's" for "his" near the end of the first sentence.

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

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

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

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

22 C.J.S. Criminal Law §§ 357 to 364.

8-502. Plea agreements.

A. **Pleas.** A defendant charged with a non-traffic criminal offense or any of the following traffic offenses: driving while intoxicated, driving while under the influence of drugs, reckless driving, and driving on a suspended or revoked license, may plead as follows: (1) guilty; (2) not guilty; or (3) no contest, subject to the approval of the court.

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

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

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

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

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

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

D. **Plea agreement procedure.**

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

other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed it shall be reduced to writing on a form approved by the supreme court, and the court shall require the disclosure of the agreement in open court at the time that the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

(4) If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea and advise the defendant that if he persists in his guilty plea or plea of no contest the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

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

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

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

[As amended, effective May 1, 1986.]

8-503. Disposition without hearing.

A. **General.** The municipal court may establish, by rule, procedures governing disposition of cases without a hearing. Any such rule shall specify the offenses to which the rule applies. Such rule shall not apply to any offense amounting to a breach of the peace or to any other class of offenses specifically excluded from operation of the rule by the court.

B. **Procedure.** An offense shall not be disposed of without a hearing unless the person charged signs an appearance, plea of no contest and waiver of trial. Prior to signing, the person charged shall be informed of the right to trial and that signing will constitute a plea of no contest and will have the effect of a judgment of guilty by the court. Provision may be made for the person charged to enter an appearance and plea no contest and remit the appropriate scheduled penalty to the court by mail. If such provision is made, the charging law enforcement officer will deliver the warnings required under this paragraph, provide a form to the person charged for an entry of appearance and plea of no contest, inform the person charged of the scheduled penalty and provide a business reply envelope addressed to the municipal court.

C. **Definition.** As used in this rule, the term "breach of the peace" includes but is not limited to each of the following:

(1) operation of a motor vehicle while under the influence of intoxicating liquor or a narcotic drug;

(2) reckless driving;

(3) leaving the scene of an accident;

(4) operating a motor vehicle while under suspension, revocation or cancellation of a driver's license; and

(5) any offense or violation of rules or orders of court for which an arrest or bench warrant has been issued.

ANNOTATIONS

Cross-references. - For form on plea of no contest, see Form 9-407.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts §§ 82 to 86.

8-504. Discovery.

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

ANNOTATIONS

Cross-references. - For form on order for production, see Form 9-410.

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

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

Discovery and inspection of fingerprint, palm print, or bare footprint evidence, 28 A.L.R.2d 1133, 45 A.L.R.4th 1178.

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

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

Privilege or immunity as affecting statements of parties or witnesses as subject of pretrial or other disclosure, production, or inspection, 73 A.L.R.2d 84.

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

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

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

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

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

8-505. Pretrial conference.

At any time after the commencement of the action with or without the filing of a motion by a party, the municipal judge may order the parties to appear before the court to clarify the pleadings and to consider such other matters as may aid in the disposition of the case. The court may issue subpoenas for the attendance of witnesses at the request of a party.

ANNOTATIONS

Cross-references. - For form on notice of pretrial conference, see Form 9-411.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21A Am. Jur. 2d Criminal Law §§ 717, 953.

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

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

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

23A C.J.S. Criminal Law §§ 1192 to 1194.

8-506. Dismissal of actions.

A. **Voluntary dismissal.** A complaint or citation or a count therein may be dismissed by the prosecution by filing a notice of dismissal at any time before trial. Unless otherwise stated in the notice, the dismissal is without prejudice. The notice shall be presented, before filing, to the municipal judge who shall endorse thereon that the action or count is dismissed.

B. **Dismissal for failure to prosecute.** Any charge which is pending for six (6) months from the date of the arrest of the defendant or the filing of the complaint or citation against the defendant, whichever occurs latest, without commencement of a trial by the municipal court shall be dismissed with prejudice unless, after a hearing, the municipal judge finds that the defendant was responsible for the failure of the court to commence trial. If a complaint or citation is dismissed pursuant to this paragraph, a charge for the same offense shall not thereafter be filed in any court.

ANNOTATIONS

Cross-references. - For form on order dismissing criminal complaint with prejudice, see Form 9-414.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 512 to 519.

Mandamus to compel a court to reinstate or proceed with the hearing of appeal that it has erroneously dismissed, 4 A.L.R. 655.

Duty to dismiss criminal proceedings on motion of attorney general or prosecuting attorney, pursuant to promise of immunity, 66 A.L.R. 1378.

Power of court to enter nolle prosequi or dismiss prosecution, 69 A.L.R. 240.

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

Power and duty of court as to continuation of action or prosecution upon refusal of city, county, or district attorney to proceed therewith, 103 A.L.R. 1253.

Indictment or information which has been dismissed by prosecuting attorney as susceptible of reinstatement, 112 A.L.R. 386.

Nolle prosequi or discontinuance of prosecution in one court and instituting new prosecution in another court of coordinate jurisdiction, 117 A.L.R. 423.

Original notice of lis pendens as effective upon renewal of litigation after dismissal, reversal, or nonsuit, reserving right to begin 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.

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

Appealability of dismissal of complaint with respect to an additional party, 16 A.L.R.2d 1041.

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

Dismissal of plaintiff's case for want of prosecution as affecting defendant's counterclaim, setoff, or recoupment, or intervenor's claim for affirmative relief, 48 A.L.R.2d 748.

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.

Attorney's authority to dismiss or otherwise terminate action, 56 A.L.R.2d 1290.

Dismissal of appeal or writ of error for want of prosecution as bar to subsequent appeal, 96 A.L.R.2d 312.

Motion to dismiss on ground of obtaining personal service by fraud or trickery, 98 A.L.R.2d 600.

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

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

Power of trial court to dismiss prosecution or direct acquittal on basis of prosecutor's opening statement, 75 A.L.R.3d 649.

Construction, as to terms and conditions, of state statute or rule providing for voluntary dismissal without prejudice upon such terms and conditions as state court deems proper, 34 A.L.R.4th 778.

Application of speedy trial statute to dismissal or other termination of prior indictment or information and bringing of new indictment or information, 39 A.L.R.4th 899.

22 C.J.S. Criminal Law §§ 419 to 424.

8-507. Insanity or incompetency; transfer to district court.

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

ANNOTATIONS

Cross-references. - For form on transfer order, see Form 9-404.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Insanity of accused as affecting right to bail in criminal case, 11 A.L.R.3d 1385.

ARTICLE 6
TRIALS

Rule

8-601. Conduct of trials.

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

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

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

D. **Record.** A party may cause a record, as defined in Rule 8-109, to be made of the proceeding at the expense of that party.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 17 Am. Jur. 2d Continuance § 1 et seq.

Refusal of continuance in criminal trial, asked for on account of occurrences during trial, as abuse of discretion, 5 A.L.R. 914.

Right to continuance to procure witness to alibi, 41 A.L.R. 1530.

Right of attorney to have case continued to protect his compensation, 67 A.L.R. 42.

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

Physical condition or conduct of party, his family, friends, or witnesses during trial, tending to arouse sympathy of jury, as ground for continuance or mistrial, 131 A.L.R. 323.

Right of accused to continuance because of absence of witness who is fugitive from justice, 42 A.L.R.2d 1229.

Continuance of criminal case because of illness or death of counsel, 66 A.L.R.2d 267.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case, 9 A.L.R.3d 1180.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance, 73 A.L.R.3d 725.

8-602. Subpoenas.

A. **For attendance of witnesses.** Every subpoena shall be issued by the municipal judge or clerk of the court, shall state the name of the court and the title of the action and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified.

B. **For production of documentary evidence.** A subpoena may command the person to whom it is directed to produce the books, papers, documents or tangible things designated therein; but, the court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may:

(1) quash or modify the subpoena if it is unreasonable and oppressive; or

(2) condition denial of the motion upon the advancement by the defendant in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents or tangible things.

C. **Issuance.** The municipal judge or clerk may issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

D. **Personal service.** A subpoena may be served by the sheriff, a deputy sheriff, a municipal police officer or any other person who is not a defendant 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 within the county in which the municipality is located.

E. **Service by mail.** Service of subpoena may be made by mail in the manner provided for serving the summons, complaint and form of answer.

F. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the municipal court from which the subpoena was issued. The municipal judge shall not hold any person in contempt of court if service of the subpoena has been made by mail unless there has been presented to the court evidence, in addition to that contained in the return and certificate of the judge or clerk of the court, that the person received the delivery of the subpoena or that a subpoena was personally served on the person in accordance with Paragraph D of this rule.

ANNOTATIONS

Cross-references. - For forms on subpoena and certificate of service, see Form 9-503.

For form on subpoena to produce document or object, see Form 9-504.

8-603. Blood and breath alcohol test reports; controlled substance chemical analysis reports.

A. **Admissibility.** In any prosecution of an offense within the trial jurisdiction of the municipal court, in which prosecution a convicted defendant is entitled to an appeal de novo, the following evidence is not to be excluded under the hearsay rule, even though the declarant may be available as a witness:

(1) a written report of the conduct and results of a chemical analysis of breath or blood for determining blood alcohol concentration and the circumstances surrounding receipt and custody of the test sample if:

(a) the report is of an analysis conducted by a laboratory certified by the scientific laboratory division of the health and environment department [department of health] to perform breath and blood alcohol tests;

(b) the report is on a form approved by the supreme court and is regular on its face; and

(c) a legible copy of the report was mailed to the donor of the sample at least ten (10) days before trial;

(2) a print-out produced by a breath-testing device which performs an analysis of the defendant's breath to determine blood alcohol concentration if:

(a) the law enforcement officer who operated the device is certified to operate the device by the scientific laboratory of the health and environment department [department of health]; and

(b) upon request, the calibration testing records for a reasonable period of time surrounding the defendant's test are made available to the defendant for inspection prior to trial. The defendant may request a copy to be made of the testing records at the defendant's expense.

(3) a written report of the conduct and results of a chemical analysis of a substance to determine if such substance is a controlled substance and the circumstances surrounding receipt and custody of the test sample if:

(a) the report is of an analysis conducted by an authorized agency of the State of New Mexico or any of its political subdivisions, other than a law enforcement agency or agency under the direction and control of a law enforcement agency;

(b) the report is on a form approved by the supreme court and is regular on its face; and

(c) a legible copy of the report was mailed to the donor of the sample at least ten (10) days before trial.

B. **Proof of mailing; authentication.** If the evidence is a written report of the conduct and results of a chemical analysis of breath, blood or controlled substance prepared pursuant to Subparagraph (1) or (3) of Paragraph A of this rule, except for the portion of the report which is completed by the law enforcement officer, proof of mailing and authentication of the report shall be by certificate on the report.

C. **Admissibility of other evidence.** Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in a chemical analysis of a controlled substance or blood or breath alcohol print-out or report or affect the admissibility of any other relevant evidence. (As amended, effective October 1, 1987; October 1, 1991.)

ANNOTATIONS

Cross-references. - For report of analysis, breath and blood alcohol, see Form 9-505.

Bracketed material. - The bracketed references to the department of health were inserted by the compiler, as Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the department of health and environment, and enacts a new 9-7-4 NMSA 1978, relating to the department of health, which is defined as including the scientific laboratory. The bracketed material was not enacted by the legislature and is not part of the law.

The 1991 amendment, effective for cases filed in the municipal courts on or after October 1, 1991, added "controlled substance chemical analysis reports" to the catchline; in Paragraph A, rewrote Subparagraph (1)(a) and added Subparagraph (3); in Paragraph B, substituted "breath, blood or controlled substance" for "breath or blood" and inserted "or (3)"; and, in Paragraph C, inserted "chemical analysis of a controlled substance".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 357, 364, 366.

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

Qualification as expert to testify as to findings or results of scientific test to determine alcoholic content of blood, 77 A.L.R.2d 971.

Admissibility in criminal case of evidence that accused refused to take test of intoxication, 26 A.L.R.4th 1112.

Motorist's right to private sobriety test, 45 A.L.R.4th 11.

22A C.J.S. Criminal Law §§ 759, 761 to 769, 852.

ARTICLE 7
JUDGMENT AND APPEAL

Rule

8-701. Judgment.

If the defendant is acquitted, a judgment of not guilty shall be entered. If the defendant is found guilty a written judgment and sentence shall be signed by the municipal judge and filed. When a citation is issued in lieu of a criminal complaint in accordance with Rule 8-201, the back of the citation may serve as the final order or as the judgment and sentence when no jail time is imposed. The municipal court shall give notice of entry of judgment and sentence in accordance with Paragraph H of Rule 8-208.

[As amended, effective October 1, 1992.]

ANNOTATIONS

The 1992 amendment, effective for cases filed in the municipal courts on and after October 1, 1992, added the third sentence.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 525 to 534, 588.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

24 C.J.S. Criminal Law §§ 1458 to 1505.

8-702. Advising defendant of right to appeal.

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

B. **Duty of defendant.** The defendant has the duty of obtaining a trial before the district court within six (6) months of the date of the filing of the notice of appeal. A defendant shall request a trial date at the time of filing the notice of appeal or within fifteen (15) days after the filing of the notice of appeal.

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

[As amended, effective September 1, 1990.]

ANNOTATIONS

The 1990 amendment, effective for cases filed in the municipal courts on or after September 1, 1990, rewrote the introductory paragraph and former Paragraph A to appear as present Paragraph A; in Paragraph B substituted "The defendant" for "He", deleted "date" following "trial" in the first sentence, and added the last sentence; and in Paragraph C substituted "Any appeal which has not been" for "If his appeal is not", deleted "his appeal" preceding "will be dismissed", and substituted "the conviction" for "his conviction".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 525 to 534, 588.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

24 C.J.S. Criminal Law §§ 1680, 1686, 1688.

8-703. Appeal.

A. **Right of appeal by defendant.** A defendant who is aggrieved by any judgment rendered by the municipal court may appeal to the district court of the county within which the municipal court is located within fifteen (15) days after entry of the judgment or final order.

B. **Right of appeal by municipality.** The municipality may appeal to the district court of the county within which the municipal court is located within fifteen (15) days after entry of the judgment of the municipal court holding an ordinance or section thereof invalid or unconstitutional or a complaint or part thereof not legally sufficient. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a municipality in any such appeal.

C. **Notice of appeal.** An appeal from the municipal court is taken by:

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

(2) filing with the municipal court a copy of the notice of appeal which has been endorsed by the clerk of the district court.

D. **Stay.** An appeal from conviction and sentence shall have the effect of a stay of execution of the judgment of the municipal court until final determination of the appeal, subject to the defendant being allowed such credit as may be provided by law for time spent in official confinement while awaiting the outcome of the appeal.

E. **Docketing the appeal.** The clerk of the district court shall collect the docket fee, or an appropriate affidavit of indigency, for filing an appeal. The municipal court shall transmit the order fixing conditions of release and bond, if any, and a transcript of all proceedings taken in the action to the clerk of the district court within ten (10) days after the filing of the notice of appeal. Upon the filing of the notice of appeal, the municipal court shall give notice of the appeal to each party in the action or to the attorney for any party who is represented by an attorney.

F. **Transcript.** The transcript shall include:

(1) title page containing caption of the case in the municipal court and names and mailing addresses of counsel;

(2) all pleadings including any record of proceedings made by the municipal court;

(3) any exhibits; and

(4) the judgment sought to be reviewed with date of filing noted thereon.

G. **Conditions of release.** Pending final determination of the appeal, the defendant shall be entitled to bail at the time of filing notice of appeal. The municipal court shall establish conditions of release pending appeal sufficient to secure the appearance of the defendant and the judgment of the municipal court. The municipal court may utilize the criteria listed in Paragraph B of Rule 8-401, and may also consider the fact of defendant's conviction and the length of sentence imposed. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to or during trial.

H. **Review of terms of release.** If the municipal court has refused release pending appeal or has imposed conditions of release which the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal.

I. **Trial de novo.** All trials upon appeals from the municipal court to the district court shall be de novo and shall be governed by the Rules of Criminal Procedure for the District Courts.

J. **Disposition; time limitations.** The district court shall try the appeal within six (6) months after the filing of the notice of appeal. Any appeal pending in the district court six (6) months after the filing of the notice of appeal without disposition shall be dismissed and the cause remanded to the municipal court for enforcement of its judgment.

K. **Extension of time.** The time limits specified in Paragraph J of this rule may be extended one time for a period not exceeding ninety (90) days upon a showing of good cause to a justice of the supreme court. The party seeking an extension of time beyond the six (6) month appeal limit of Paragraph J of this rule shall, within said six (6) month period, file with the clerk of the supreme court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause and forthwith serve a copy thereof on the opposing party. No other extension of time shall be allowed.

L. **Final order; remand to municipal court.** Upon final disposition of the appeal, the district court shall issue a final order on appeal in substantially the form approved by the supreme court. If a timely appeal is not taken from the final order of the district court, the district court clerk shall remand the case to the municipal court for enforcement of the district court's final order or such other disposition as may be ordered by the district court. If no appeal is taken the final order shall serve as the mandate.

[As amended, effective September 1, 1989; September 1, 1990.]

ANNOTATIONS

Cross-references. - For form on notice of appeal, see Form 9-607.

For form on title page of transcript of criminal proceedings and certificate, see Form 9-608.

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

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

Trial commenced beyond time limit not barred. - A trial in the district court commenced beyond the time limit is not a jurisdictional bar. Rather, the beneficiary of the rule has to raise the issue in order to reap the benefits of the rule. Village of Ruidoso v. Rush, 97 N.M. 733, 643 P.2d 297 (Ct. App. 1982).

And court must uphold agreement not to raise bar of time limitation. - It is unfair in the due process sense for the district court to negate the prosecutor's agreement not to assert the six-month rule under Subdivisions (j) and (k) (now Paragraphs J and K). Village of Ruidoso v. Rush, 97 N.M. 733, 643 P.2d 297 (Ct. App. 1982).

A defendant is not entitled to a trial de novo on direct contempt charges which took place before a municipal court. City of Bernalillo v. Aragon, 100 N.M. 547, 673 P.2d 831 (Ct. App. 1983).

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error § 1 et seq.

24 C.J.S. Criminal Law § 1660 et seq.

8-704. Harmless error; clerical mistakes.

A. **Harmless error.** Error in either the admission or the exclusion of evidence and error or defect in any ruling, order, act or omission by the court or by any of the parties is not grounds for granting a new trial or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take any such action appears to the court inconsistent with substantial justice.

B. **Clerical mistakes.** Clerical mistakes in final orders or other parts of the file and errors therein arising from oversight or omission may be corrected by the municipal

court at any time on its own initiative or on the request of any party after such notice to the opposing party, if any, as the court 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 corrected with leave of the district court.

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law § 586; 58 Am. Jur. 2d New Trial § 31.

ARTICLE 8
SPECIAL PROCEEDINGS

Rule

8-801. Modification of sentence.

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

ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 525 to 534, 588.

Court's right, in imposing sentence, to hear evidence of, or to consider, other offenses committed by defendant, 96 A.L.R.2d 768.

24 C.J.S. Criminal Law §§ 1544 to 1548.

8-802. Return of the probation violator.

A. **Probation; violation of probation.** The court shall have the power to suspend or defer a sentence and impose conditions of probation during the period of suspension or deferral. If probation has been imposed, upon receipt of a sworn affidavit alleging a violation of said probation, the court shall issue a criminal summons to appear and answer to the charge of violation of said probation.

B. **Issuance of warrants.** The court shall issue a warrant for the arrest of the defendant when a summons cannot be served, when the defendant fails to appear, or for other good cause shown.

C. **Imposition of sentence.** If, upon a hearing, the violation is established with such reasonable certainty as to satisfy the conscience of the court, the court may continue or revoke the probation, and may require the probationer to serve the balance of the sentence imposed or any lesser sentence. If the defendant was serving a suspended sentence, credit must be given for the time served while on suspension.

D. **Appeals.** The decision of the court to revoke probation may be appealed to the district court as otherwise provided in these rules. The only issue the district court will address on appeal will be the propriety of the revocation of probation. The district court shall not modify the sentence of the municipal court.

[As amended, effective September 1, 1989.]

ANNOTATIONS

The 1989 amendment, effective for cases filed in the municipal courts on or after September 1, 1989, substituted the present second sentence of Paragraph C for the former second sentence, which read "Credit must be given for the time served on probation".

Crediting of time served on probation. - A reading of Subsections B and C of 31-21-15 NMSA 1978, together, indicates that all time served on probation shall be credited unless the defendant is a fugitive. State v. Kenneman, 98 N.M. 794, 653 P.2d 170 (Ct. App. 1982).