Rules of Civil Procedure for the Metropolitan Courts

Article 1

General Provisions

3-101. Scope and title.

A.

Scope. These rules shall govern the procedure in civil actions in all metropolitan courts.

B.

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

C.

Title. These rules shall be known as the Rules of Civil Procedure for the Metropolitan Courts.

D.

Citation form. These rules shall be cited by set and rule numbers, as in SCRA 1986, Rule 3-

[As amended, effective January 1, 1987.]

COMPILER'S ANNOTATIONS

Am. Jur. 2d, A.L.R. and C.J.S. references. - 20 Am. Jur. 2d Courts §§ 30, 64 et seq.

21 C.J.S. Courts §§ 238 et seq., 278.

3-102. 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.

3-103. Rules and forms.

A.

Rules. The metropolitan court may from time to time make and amend rules governing its practice not inconsistent with these rules or other rules of the supreme court. Any rule promulgated by the metropolitan court shall not become effective until such rule is approved by the supreme court.

B.

Forms. Forms used in the metropolitan courts shall be substantially in the form approved by the supreme court.

[As amended, effective January 1, 1987.]

3-104. Time.

A.

Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of metropolitan 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 so computed 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 thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

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

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

C.

For motions; 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.

3-105. Designation of judge.

A.

Procedure for replacing a judge who has been excused. Upon receipt of a notice of excusal, the judge or clerk of the court shall give written notice to the parties to the action. Upon failure of counsel for all parties to file a stipulation within five (5) days of the filing of a notice of excusal naming another metropolitan court judge in the district to try the cause, the presiding metropolitan court judge of the district shall, by random selection, designate another metropolitan court judge to try the cause. If all metropolitan court judges in the district have been excused or have recused themselves, within ten (10) days after the filing of the last notice of excusal or recusal, the presiding judge of the metropolitan court shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another judge to

conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel and to the metropolitan court.

B.

Procedure for replacing a recused judge. Upon the filing of a certificate of recusal, the judge or clerk of the court shall give written notice to the parties to the action. Upon failure of counsel for all parties to file a stipulation within ten (10) days after the filing of the certificate of recusal naming another metropolitan court judge in the district to try the cause, the presiding metropolitan court judge of the district shall, by random selection, designate another metropolitan court judge to try the cause. If all metropolitan court judges in the district have been excused or have recused themselves, within ten (10) days after the filing of the last notice of excusal or recusal, the presiding judge of the metropolitan court shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another judge to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel and to the metropolitan court.

C.

Subsequent proceedings. After the designation, the excused judge shall forthwith send to the designated judge a copy of all proceedings in the action. Upon designation of a new judge, all proceedings shall continue to be conducted in the original metropolitan court district. The clerk of the metropolitan court shall continue to be responsible for the court file and shall perform such further duties as may be required. The designated judge may not be disqualified by either party except for causes set out in Article 6, Section 18 of the Constitution of New Mexico.

[As amended, effective May 1, 1986, May 1, 1987, October 1, 1987, and September 1, 1989.]

COMPILER'S ANNOTATIONS

Cross-references. - For forms on disqualification or recusal, see Civil Form 4-101 et seq.

The first 1987 amendment substituted "ten (10) days" for "five (5) days" in the second sentence in Paragraph A.

The second 1987 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1987, in Paragraph A, inserted "or a notice of recusal" in the second sentence and substituted "If all metropolitan court judges in the district have been excused or have recused themselves" for "In the event that all metropolitan judges in

the district are excused" in the third sentence; and, in Paragraph B, inserted "or recusal" in the first sentence and "or recused" in the second sentence.

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, rewrote this rule to the extent that a detailed comparison would be impracticable, to provide for one procedure upon the excusal or recusal of all metropolitan court judges.

3-106. Excusal; recusal; disability.

A.

Excusal; procedure. Whenever a party to any civil action or proceeding of any kind files a notice of excusal, the judge's jurisdiction over the cause terminates immediately. The notice of excusal is effective only if filed no later than fifteen (15) days after the date that the answer is filed. In a restitution case, the notice must be filed within five (5) days of service.

B.

Extent of excuse. No party shall excuse more than one judge.

C.

Provisional notice of peremptory election to excuse. If a party has excused a judge as provided herein, any party who has not excused one judge and who wishes to excuse any other judge who could be assigned to preside over the trial must, within ten (10) days of the clerk's written notice, file a provisional notice of peremptory excusal with the clerk of the court, naming the judge to be excused.

D.

Recusal; procedure. Whenever the 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 recuse himself from sitting in the action by giving notice to all parties. Upon recusal, another metropolitan court judge shall be designated by the presiding judge of the court to conduct any further proceedings in the action.

E.

Failure to recuse. If a party believes that one or more of the conditions in Paragraph D of this rule exists, he may file a notice of excusal naming the condition or conditions, and the metropolitan court judge shall thereupon proceed in accordance with Rule 3-105. If the metropolitan court judge fails or refuses to recognize the excusal, any party may certify that fact by letter to the district court of the county in which the action is

pending. The district court shall make such investigation as it deems warranted and enter an order in the action, either prohibiting the metropolitan court judge from proceeding further and designating another or striking the excusal statement as ineffective or groundless.

F.

Disability of metropolitan court judge. If by reason of absence, death, sickness or other cause, the metropolitan court judge before whom the cause is pending is unable or unavailable to perform his duties, the case may be assigned by the presiding judge to any judge regularly sitting in or assigned to the court.

[As amended, effective May 1, 1986, July 1, 1988, and September 1, 1989.]

COMPILER'S ANNOTATIONS

Cross-references. - For forms on disqualification or recusal, see Civil Form 4-101 et seq.

The 1988 amendment, effective for cases filed in the metropolitan courts on or after July 1, 1988, deleted the first sentence in Paragraph B which read "No judge may be excused from hearing arraignment or bond proceedings".

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, in Paragraph A, substituted "notice of excusal" for "statement of excusal" in the first sentence, in the second sentence, substituted "The notice of excusal" for "The statement" and deleted "in a civil action" from the end, and, in the third sentence, substituted "restitution case" for "petition for restitution" and "the notice" for "the statement"; in Paragraph C, substituted "notice of peremptory excusal" for "notice of election to excuse"; in Paragraph D, deleted the Subparagraph (1) designation, deleted the former third sentence, which read "If all metropolitan judges have been disqualified or have recused themselves, the case shall be transferred to the district court", and deleted former Subparagraph (2), relating to use of a judge pro tempore in certain cases where all metropolitan court judges are disqualified; in Paragraph E, substituted "a notice of excusal" for "a statement to that effect" and "shall thereupon proceed in accordance with Rule 3-105" for "shall thereupon recuse himself"; in Paragraph F, substituted "other cause" for "other disability"; and deleted former Paragraph G, relating to prohibition of costs or fees.

3-107. Pro se and attorney appearance.

A.

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

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

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

B.

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

(1) if the party is brought into the suit by a writ of garnishment or attachment, and such party is a partnership, by one of its general partners;

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

(3) if the action is brought pursuant to the provisions of the Uniform Owner-Resident Relations Act [47-8-1 to 47-8-51 NMSA 1978] and the appearance is by:

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

(b) a licensed real estate agent authorized by such owner; or

(c) the person authorized to manage the premises;

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

(5) if the party is a general partnership which meets all of the following qualifications:

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

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

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

(6) if the party is a governmental entity and the appearance is by an employee of the governmental entity authorized by the entity to institute or cause to be instituted an

action on behalf of the governmental entity.

C.

Attorney appearance. A party may appear, prosecute, defend and appeal any proceeding by an attorney.

D.

Applicability. A collection agency may not file a suit unless the collection agency appears by a licensed attorney-at-law.

[As amended, effective July 1, 1987 and July 1, 1988.]

COMPILER'S ANNOTATIONS

The 1987 amendment inserted "by an individual" in the heading for Paragraph A; redesignated former Paragraphs A(2) and (3) as present Paragraphs B(1) and B(2); added Paragraphs A(2) and B(3) to B(5); and, in Paragraph D, deleted the former first sentence, which read "The provisions of Paragraph A of this rule shall not apply to collection agencies" and deleted "nor proceed in any action" following "may not file a suit" in the second sentence.

The 1988 amendment, effective for cases filed in the metropolitan courts on or after July 1, 1988, added Subparagraph B(6).

3-108. Withdrawal or substitution of attorneys.

A.

Withdrawal or substitution of counsel. No attorney or firm who has appeared in a cause may withdraw from it without written consent of the metropolitan court, filed with the clerk. Such consent may be conditioned upon substitution of other counsel or the filing by a party of an address at which service may be made upon him, with proof of service thereof on all other parties, or otherwise. Notice of withdrawal or substitution of counsel shall be given to all parties either by withdrawing counsel or by substituted counsel and proof of service filed with the clerk.

B.

Attorney failure to act. If an attorney ceases to act in a cause for a reason other than withdrawal or consent, upon motion of any party, the court may require the taking of

such steps as it may be advised to insure that the cause will proceed with promptness and dispatch.

3-109. Record.

A.

Definition; broadcast or reproduction. Unless a specific meaning is indicated, as used in these rules "record" shall mean:

(1) a statement of facts and proceedings stipulated to by the parties or

(2) any audio recording. No broadcast or reproduction of any recording shall be made for any person other than an official of the court without the express written consent of the court. At his own expense, a party may cause a record to be made.

B.

Timing of request. Unless a shorter period is permitted by the court, at any time not less than ten (10) days prior to the commencement of the hearing, a party may request a copy of the record of any hearing by filing with the court a written request for a copy of the record of the hearing.

C.

Costs. The court may reproduce a copy of any tape of the proceedings for any party to the proceedings upon the payment of such amount as may be established by the administrative office of the courts, which shall reasonably represent the cost of the tape, for each duplicate tape requested.

Committee commentary. - The inclusion of stenographic notes which must be transcribed in the definition of "record" found in the Magistrate and Municipal Court Rules has been deleted from this rule in order to eliminate the need for court reporters in the metropolitan court. The requirement that approval be given by the supreme court for mechanical, electrical or other recording, including a videotape recording, has been deleted since it is contemplated that this will be the means of making the record most often used. By adopting this rule, the supreme court has approved the means stated in the rule.

3-110. Contempt.

A.

Jurisdiction. A metropolitan 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 defendant;

(2) by a summons; or

(3) by a bench warrant.

The defendant 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.

Committee commentary. - Section 35-3-9 NMSA 1978 provides statutory authority to magistrates to punish for contempt. The statute limits the jurisdiction of the magistrate to punish for disorderly behavior or breach of the peace tending to interrupt or disturb a judicial proceeding in progress before the magistrate or for disobedience of any lawful order or process of the magistrate court. The statute requires a hearing in all instances and limits the punishment to $25.00 or imprisonment for three days, or both. A right of appeal to the district court is provided in the same manner as in other criminal actions. It would thus appear that the legislature intended that the magistrate's power to punish for contempt would be limited to criminal contempt where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders. State ex rel. Bliss v. Greenwood, 63 N.M. 156, 315 P.2d 223 (1957).

There is no magistrate court rule or statute which is similar to Rule 5-114 of the Rules of Criminal Procedure for the District Courts granting the court authority to hold an attorney in contempt of court if he willfully fails to comply with the criminal rules. However, there is no indication that Section 35-3-9, supra, is not intended to include attorneys as well as others who may fail to observe the requirements of the statute.

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

Rule 3-110 limits the jurisdiction of the metropolitan judge to punish for criminal contempt and follows the basic authority granted by Section 35-3-9, supra, and the present Rule 6-111 of the Rules of Criminal Procedure for the Magistrate Courts. However, the punishment is expanded to the limit of the court's jurisdiction. There being no prohibition in either the statute or magistrate rule against summary proceedings, the rule contemplates summary proceedings in those limited situations where the contemptuous conduct occurred in the actual presence of the court. Under such circumstances, if the contempt is of such a kind that it will necessitate immediate action in order to maintain the dignity and authority of the court, then the court can act summarily. Ex parte Terry, 128 U.S. 289, 9 S. Ct. 77, 32 L. Ed. 405 (1888). In State v. Sanchez, 89 N.M. 673, 556 P.2d 359 (Ct. App. 1976), the court upheld a trial judge having found a defense witness in contempt for failure to answer questions on cross examination and that such conduct in the presence of the court could be punished by the court's contempt power in a summary proceeding.

Notice and hearing. When the contempt takes place outside the presence of the court, the contemnor must be given notice before punishment may be imposed. Cooke v. United States, 267 U.S. 517, 45 S. Ct. 390, 69 L. Ed. 767 (1925); In re Fullen, 17 N.M. 394, 128 P. 64 (1913); Wollen v. State, 86 N.M. 1, 518 P.2d 960 (1974); State v. Diamond, 94 N.M. 118, 607 P.2d 656 (Ct. App. 1980).

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

Personal service on the alleged contemnor is required to be effective as notice in a criminal contempt proceeding. Service on the alleged contemnor's attorney is sufficient if the contempt is civil. Lindsey v. Martinez, 90 N.M. 737, 568 P.2d 263 (Ct. App. 1977); Roybal v. Martinez, 92 N.M. 630, 593 P.2d 71 (Ct. App. 1979). The rule as drafted provided for notice and hearing when the contempt is not punished summarily.

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

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

See Reporter's Addendum to Rules of Criminal Procedure for the District Courts on contempt of court.

COMPILER'S ANNOTATIONS

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

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

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

Article 2

Commencement of Action

3-201. Commencement of action.

A.

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

B.

Nature of claim. Metropolitan judges have jurisdiction in all cases as may be provided by law.

C.

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

COMPILER'S ANNOTATIONS

Cross-references. - For form on civil complaint, see Civil Form 4-201.

3-202. Summons.

A.

Summons; Issuance. Upon receipt of a complaint and payment of the docket fee, the clerk shall docket the action, issue a summons and deliver it to the plaintiff or the plaintiff's attorney, who shall be responsible for prompt service of the summons and a copy of the complaint. Upon the request of the plaintiff, separate or additional summons shall issue against any defendants. Any defendant may waive the issuance or service of summons.

B.

Summons; execution; form. The summons shall be signed by the clerk, be directed to the defendant, and must contain:

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

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

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

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

C.

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

D.

Summons; by whom served. In civil actions any process may be served by the sheriff of the county where the metropolitan court is located if the defendant may be found therein, or by any other person who is over the age of eighteen (18) years and not a party to the action, except for writs of attachment and writs of replevin, which shall be served by the sheriff or by any person not a party to the action over the age of eighteen (18) years who may be designated by the court to perform such service or by the sheriff of the county where the property or person may be found.

E.

Summons; service by mail. A summons and complaint may be served within the metropolitan court district upon a defendant of any class referred to in Subparagraph (1) or (2) of Paragraph F of this rule by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two (2) copies of a notice and acknowledgement conforming with the form approved by the supreme court and a return envelope, postage prepaid, addressed to the court. If no acknowledgement of service under this subdivision of this rule is received by the court within twenty (20) days after the date of mailing plus three (3) days as provided by Rule 3-104, service of such summons and complaint shall be made by a person authorized by Paragraph D of this rule, in the manner prescribed by Paragraph F of this rule. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return to the court within twenty (20) days after mailing the notice and acknowledgement of receipt of summons.

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

F.

Summons; how served. Personal service may be made within the metropolitan district as follows:

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

(2) upon a domestic or foreign corporation by delivering a copy of the summons and of the complaint to an officer, a managing or a general agent, or to any other agent

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

(3) upon the State of New Mexico:

(a) in garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head of the branch, agency, bureau, department, commission or institution. A copy of the writ of garnishment shall be delivered or mailed by registered or certified mail to the defendant employee.

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

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

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

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

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

copy of the summons and of the complaint shall be delivered to such representative, in addition to serving the minor as herein provided;

(8) upon an incapacitated person, whenever there shall be a conservator of the estate or guardian of the person of such incapacitated person, by delivering a copy of the summons and of the complaint to the conservator or guardian. Service of process so made shall be considered as service upon the ward. In all other cases process shall be served upon the ward in the same manner as upon competent persons; or

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

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

G.

Return. If service is made by mail pursuant to Paragraph E of this rule, return shall be made by the defendant filing with the court the Notice and Receipt of Summons and Complaint. If service is by personal service pursuant to Paragraph F of this rule, the person serving the process shall make proof of service thereof to the court promptly and in any event within the time during which the person served must respond to the process. When service is made by the sheriff or a deputy sheriff, proof thereof shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff, proof thereof shall be made by affidavit. Where service within the state includes mailing, the return shall state the date and place of mailing. Failure to make proof of service shall not affect the validity of service.

H.

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

I.

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

J.

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

K.

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

[As amended, effective January 1, 1990, and July 1, 1990.]

COMPILER'S ANNOTATIONS

Cross-references. - For forms on civil summons and return, see Civil Form 4-204.

The 1989 amendment, effective for cases filed in the metropolitan courts on or after January 1, 1990, rewrote this rule to the extent that a detailed analysis would be impracticable, so as to make it consistent with Rule 1-004, the district court service of process rule.

Compiler's notes. - The reference to Subparagraph (1) or (2) of Paragraph C in Subparagraph (9) of Paragraph F of this rule is incorrect. The apparent intended reference is to Subparagraph (1) or (2) of Paragraph F.

3-203. Service and filing of papers.

A.

When required. Unless the 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. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons.

B.

How made. When service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party himself is ordered by the court. 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 judge or clerk of the court who shall place it in the court file. "Delivery of 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 be 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; or leaving it in a mail depository authorized by the attorney to be served. 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.

C.

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. 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.

D.

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. The certificate or affidavit shall be filed with the clerk of the court or endorsed on the pleading, motion or other paper required to be served.

E.

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.

F.

Filing of motions. Whenever, by these rules, 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.

Article 3

Pleadings and Motions

3-301. Pleadings allowed; form of motions.

A.

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

B.

Third-party practice. Any defending party may cause a summons and complaint to be served upon a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by filing a third-party complaint. The third-party plaintiff need not obtain leave to make service if he files the third-party complaint not later than ten (10) days after he serves his original answer. The third-party defendant shall respond to the third-party complaint in the same manner as if it were an original proceeding. Notwithstanding the provisions of any other rule, failure to file a third-party complaint shall not constitute a waiver or forfeiture of any party's rights or claims, nor shall such failure preclude the joinder of separate causes of action, as may otherwise be provided for in these rules.

C.

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

D.

Motions. Written motions are not allowed except when permitted by these rules or required by the nature of the proceedings.

E.

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

F.

Signing of pleadings. The signature of a party or his attorney on a pleading constitutes a certificate by him that he has read it, that to the best of his knowledge, information and belief there is good ground to support it, and that it is not interposed for delay. If a pleading is signed with intent to defeat the purpose of this rule, it may be stricken as

false and the action may proceed as though it had not been filed.

[As amended, effective October 1, 1987.]

COMPILER'S ANNOTATIONS

The 1987 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1987, added the last sentence in Paragraph A, substituted "the provisions of any other rule" for "anything provided for herein" and "in these rules" for "herein" in the last sentence in Paragraph B, added Paragraph C, and redesignated former Paragraphs C, D, and E as present Paragraphs D, E, and F.

3-302. Defenses; answer.

A.

Answer; when filed. The defendant shall file his answer on or before the appearance date stated in the summons.

B.

Defenses; how presented. The answer shall describe in concise and simple language the reasons why the defendant denies the claim of the plaintiff, and any defenses he may have to the claim of the plaintiff. Defenses shall be raised in the answer. A party may file a motion to have the answer clarified or explained. On the filing of such motion, the judge may, in his discretion, require a more explicit answer or order a pretrial conference to clarify the issues.

C.

Permissive counterclaim or setoff. If the defendant possesses a claim or claims against the plaintiff at the time the action is begun, they may be asserted in the answer as a counterclaim or setoff. The facts and circumstances giving rise to the claim or claims shall be briefly described.

D.

Nature of claim and amount claimed. The nature of the defendant's claim or claims and the total sum claimed shall comply with applicable law. A claim which exceeds the jurisdiction of the metropolitan court shall be amended by the defendant prior to trial to conform to the court's jurisdiction or shall be dismissed without prejudice.

E.

Compulsory counterclaim. There shall be no compulsory counterclaim.

COMPILER'S ANNOTATIONS

Cross-references. - For form on answer to civil complaint, see Civil Form 4-301.

3-303. Judgment on the pleadings.

A.

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

B.

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

C.

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

3-304. Amended and supplemental pleadings.

Upon request of either party, the judge may permit him to file an amended pleading, or to amend by interlineation, at any stage of the proceeding and upon such terms as may be just. Permission to amend a pleading shall be freely granted if trial of the action on its merits will be advanced. Continuances to meet new matter asserted by way of amended or supplemental pleadings shall be granted if necessary to avoid surprise or other prejudice to the opposing party.

COMPILER'S ANNOTATIONS

Granting of a continuance rests within the sound discretion of the trial court, and the denial of a continuance will be reversed only upon a showing of a clear abuse of discretion. Bombach v. Battershell, 105 N.M. 625, 735 P.2d 1131 (1987).

3-305. Dismissal of actions.

A.

Voluntary dismissal. A claim may be dismissed by the plaintiff by filing a notice of dismissal at any time before filing of the answer. A claim may also be dismissed by the plaintiff, or by the defendant asserting a counterclaim, by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice. The notice or stipulation shall be presented to the metropolitan court judge before filing, who shall endorse thereon an order that the action, claim or counterclaim, as the case may be, is dismissed.

B.

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

COMPILER'S ANNOTATIONS

Cross-references. - For form on stipulation of dismissal, see Civil Form 4-304.

For form on notice of dismissal of complaint, see Civil Form 4-305.

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

3-306. Pretrial conference.

At any time after the filing of a complaint, with or without the filing of a motion, the judge may order the parties to appear before him to clarify the pleadings and to consider such other matters as may aid in the disposition of the case.

COMPILER'S ANNOTATIONS

Cross-references. - For form on notice of pretrial conference, see Civil Form 4-307.

Article 4

Parties

3-401. Parties; capacity.

A.

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

B.

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

C.

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

3-402. Notice of trial; joint or separate trials.

A.

Notice of trial. After the answer has been filed, the judge shall set a date for trial of the action. The judge or the clerk shall issue a written notice of trial announcing the time, day and place thereof, file the original and send copies to all parties not in default.

B.

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

C.

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

3-403. Substitution of parties.

A.

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

B.

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

Article 5

Discovery and Pretrial Matters

3-501. Discovery.

A.

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

B.

Further discovery. If both parties are represented by counsel, the judge may, for good cause shown, order further discovery as permitted by the Rules of Civil Procedure.

COMPILER'S ANNOTATIONS

Cross-references. - For form on motion for production, see Civil Form 4-501.

For form on order for production, see Civil Form 4-502.

3-502. Subpoenas.

A.

For attendance of witnesses. Every subpoena shall be issued by the metropolitan 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, day 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 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.

Service. A subpoena may be served by any full-time, salaried law-enforcement officer of the metropolitan district or any other person who is not a party in the case and is over 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 metropolitan district and by tendering to him fees for one (1) day's attendance and the mileage allowed by law, if payment of such fee and mileage is demanded at the time of service of the subpoena. When the subpoena is issued on behalf of the state or a political subdivision or an officer or agent thereof, fees and mileage need not be tendered.

E.

Service by mail. Service of a 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 metropolitan court from which the subpoena was issued. The metropolitan judge shall not hold any person in contempt of the metropolitan 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 delivery of the subpoena or that a subpoena was personally served on the person in accordance with Paragraph D of this rule.

COMPILER'S ANNOTATIONS

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

Article 6

Trial

3-601. Conduct of trials.

A.

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

B.

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

C.

Oath of witness. The judge shall administer an oath or affirmation to each witness, substantially in the following form: "You do solemnly swear (or affirm) that the testimony you give is the truth, the whole truth and nothing but the truth under penalty of perjury."

3-602. Jury trial.

A.

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

B.

Demand. Either party to an action may demand trial by jury. The demand shall be made in the complaint if made by the plaintiff and in the answer if made by the defendant, and there shall be forthwith collected from the demanding party the jury fee established by law.

C.

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

3-603. Jurors.

A.

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

B.

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

C.

Peremptory challenges. Each party shall be entitled to one peremptory challenge. If peremptory challenges are exercised, the judge shall excuse those jurors challenged.

D.

Selection of jury.

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

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

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

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

E.

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

F.

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

[As amended, effective September 1, 1989.]

COMPILER'S ANNOTATIONS

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

3-604. Trial by jury.

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

3-605. Instructions to juries.

A.

Duty to instruct. The court shall instruct the jury regarding the law applicable to the facts in the cause unless such instructions be waived by the parties.

B.

Admonitions to jury on conduct. After a jury has been sworn to try a case, but before opening statements or the presentation of any testimony, the court must read the applicable portions of UJI Civil 13-106 to the jury. The instruction or appropriate portions thereof may be repeated to the jury before any recess of the trial if in the discretion of the judge it is desirable to do so. At the close of the case when the jury is instructed, UJI Civil 13-106 shall not be reread to the jury but applicable portions thereof shall be included with other instructions sent to the jury room.

C.

Use. Whenever New Mexico Uniform Jury Instructions Civil contains an instruction applicable in the case and the court determines that the jury should be instructed on the subject, the UJI Civil shall be used unless under the facts or circumstances of the particular case the published UJI Civil is erroneous or otherwise improper, and the court so finds and states of record its reasons.

D.

Certain instructions not to be given. When in UJI Civil it is stated that no instructions should be given on any particular subject matter, such direction shall be followed unless under the facts or circumstances of the particular case an instruction on the subject is necessary, and the court so finds and states of record its reason.

E.

Instruction when no applicable UJI Civil. Whenever the court determines the jury should be instructed on a subject and no applicable instruction on the subject is found in UJI Civil, the instruction given on that subject shall be brief, impartial and free from hypothesized facts.

F.

Preparation and request for instructions. Any party may move the court to give instructions on any point of law arising in the cause. At any time before or during the trial, the court may direct counsel to prepare designated instructions. Such instructions as well as instructions tendered by the parties shall be in writing and shall consist of an original to be used by the court in instructing the jury, adequate copies for the parties and one copy for filing in the case on which the judge shall note "given" or "refused" as to each instruction requested. Copies of instructions tendered by the parties shall indicate who tendered them. All copies of instructions shall also contain a notation "UJI Civil No. . . . . ." or "Not in UJI Civil" as appropriate. (The instructions which go to the jury room shall contain no notations.)

G.

Instructions to be in writing; waiver; to be given before argument and to go to jury. Unless waived, the instructions shall be in writing. Except where instructions, either written or oral, are waived, the judge in all cases shall charge the jury before the argument of counsel. Written instructions shall go to the jury room.

H.

Error in instructions; preservation. For the preservation of any error in the charge, objection must be made to any instruction given, whether in UJI Civil or not; or, in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury. Reasonable opportunity shall be afforded counsel so to object or tender instructions.

I.

Review. All instructions given to the jury or refused, whether UJI Civil or otherwise, are subject to review by appeal or writ of error when the matter is properly preserved and presented.

3-606. Nonjury trials.

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

[As amended, effective May 1, 1986.]

Article 7

Judgment and Appeal

3-701. Judgments; costs.

A.

Definition; form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not contain a recital of pleadings or the record of prior proceedings.

B.

Judgment upon multiple claims or involving multiple parties.

(1) Except as provided in Subparagraph (2) of this paragraph, when more than one claim for relief is presented in an action, whether as a claim or counterclaim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all of the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

(2) When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party or parties and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties.

C.

Entry of judgment. Judgment shall be entered when the court so directs. In all cases where the court has directed entry of judgment, counsel for the prevailing party shall prepare the form of judgment in accordance with the direction of the court and the judge shall promptly settle, approve and sign the form of judgment which shall thereupon be filed in the clerk's office; and the filing of such judgment, signed by the judge, constitutes the entry of such judgment, and no judgment shall be effective for any purpose until the entry of the same, as hereinbefore provided. If the prevailing party is not represented by counsel, the court shall prepare the judgment.

D.

Demand for judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

E.

Costs. Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed as a course to the prevailing party unless the court otherwise directs; but costs against the state, its officers and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one (1) day's notice. On motion served within five (5) days thereafter, the action of the clerk may be reviewed by the court. Expert witness fees for any case shall not exceed three hundred dollars ($300) and are in addition to per diem and mileage provided for by 38-6-4 NMSA 1978.

COMPILER'S ANNOTATIONS

Cross-references. - For form on judgment, see Civil Form 4-701.

3-702. Default.

A.

Entry at time of appearance. If the defendant fails to appear within the time prescribed by Rule 3-202, and if the plaintiff proves by an appropriate return that proper service was made upon the defendant, the court may enter judgment for the plaintiff for the amount due, including interest, costs and other items allowed by law. The court may require evidence as to any fact before entering default judgment.

A copy of the default judgment shall forthwith be mailed by the clerk of the court to each

party against whom judgment has been entered. The clerk shall endorse on the judgment the date of mailing.

B.

At time of trial. Failure to appear at the time and date set for trial shall be grounds for entering a default judgment against the nonappearing party.

C.

Setting aside default. For good cause shown, within thirty (30) days after entry of judgment and if no appeal has been timely taken, the court may set aside a default judgment.

[Effective October 1, 1987.]

COMPILER'S ANNOTATIONS

Cross-references. - For form on default judgment, see Civil Form 4-703.

For form on motion to set aside default judgment, see Civil Form 4-704.

For form on order setting aside default judgment and giving notice of trial date, see Civil Form 4-705.

The 1987 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1987, rewrote this rule to the extent that a detailed comparison is impracticable. For provisions of this rule prior to 1987 amendment, see 1986 Recompilation Pamphlet.

3-703. Summary judgment.

A.

For claimant. A party seeking to recover upon a claim, counterclaim or crossclaim may, at any time after the expiration of twenty (20) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

B.

For defending party. A party against whom a claim, counterclaim or crossclaim is asserted may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

C.

Motion and proceedings thereon. The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. If the adverse party is not represented by counsel, said party may appear at the hearing, be sworn, and make such statements of fact as may be material to the motion. The judgment sought shall be rendered forthwith if the pleadings, together with the affidavits and testimony given by an adverse party not represented by counsel, if any, show that there is no genuine issue as to any material fact and that the moving parties are entitled to judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone, although there is a genuine issue as to the amount of damages.

D.

Case not fully adjudicated on motion. If, on motion under this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel shall, if practical, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

E.

Form of affidavit; further testimony; defense required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matter stated thereon. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by further affidavits or testimony. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of this pleading, but as a response, by affidavits or otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

F.

When affidavits are unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his position, the court may refuse the application for judgment or may order a continuance to allow affidavits to be obtained or discovery to be had or may make such other order as is just.

G.

Affidavits made in bad faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expense which the filing of the affidavit caused such other party to incur, including reasonable attorney's fees; and any offending party or attorney may be adjudged guilty of contempt.

3-704. Relief from judgment or order.

A.

Clerical mistakes. Clerical mistakes in judgments, orders or parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the district court, and thereafter while the appeal is pending may be so corrected with leave of the district court or the appellate court before which the appeal is pending.

B.

Mistakes; inadvertence; excusable neglect; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party;

(3) the judgment is void; or

(4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one (1) year after the judgment, order or proceeding was entered or taken. A motion under this paragraph does not affect the finality of a judgment or suspend its operation.

3-705. Harmless error.

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

COMPILER'S ANNOTATIONS

Technical deficiency in metropolitan court transcript may be harmless. - Where trial court has sufficient information to proceed with the trial, a technical deficiency in transcript of metropolitan court, such as failure to include all pleadings or metropolitan court's final order, does not deprive trial court of power to proceed with the trial. State v. Gallegos, 101 N.M. 526, 685 P.2d 381 (Ct. App. 1984).

3-706. Appeal.

A.

Right of appeal. If a party is aggrieved by the judgment or final order in a civil action, he may appeal to the district court of the county within which the metropolitan court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after entry of the judgment or final order.

B.

Notice of appeal. An appeal from the metropolitan court is taken by:

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

(2) filing with the metropolitan court:

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

(b) a copy of the receipt of payment of the docket fee.

C.

Docketing the appeal. Upon the filing of the notice of appeal and payment of the docket fee, the clerk of the district court shall docket the appeal in the district court. Within five

(5) days after the docketing of the appeal in the district court, the appellant shall:

(1) give notice of the appeal to the clerk of the metropolitan court and to each party to the action or to the attorney for each party who is represented; and

(2) file a certificate in the district court that such notice has been given. No appeal shall be heard unless such certificate is filed with the clerk of the district court.

D.

Transcript of the proceedings. Within ten (10) days after the appellant files a copy of the notice of appeal in the metropolitan court pursuant to Paragraph C of this rule, the metropolitan court shall file with the clerk of the district court a transcript of all proceedings taken in the action in the metropolitan court. The transcript shall include:

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

(2) copy of the complaint and other pleadings;

(3) copy of the judgement or order sought to be reviewed with date of filing noted thereon; and

(4) the record of the hearing in the metropolitan court, if any.

E.

Stay of proceedings to enforce a judgment.

(1) When an appeal is taken, the appellant may obtain a stay of the proceedings to enforce the judgment by posting a supersedeas bond with the clerk of the metropolitan court. The bond may be given at any time after docketing the appeal. The stay is effective when the supersedeas bond is approved by the metropolitan court and shall continue in effect until final disposition of the appeal. The bond shall be conditioned for the satisfaction of and compliance with the judgment in full, as may be modified by the appellate court, together with costs, attorneys' fees and interest, if any. The bond shall be conditioned upon dismissal of the appeal or affirmance of the judgment. If the judgment is reversed or satisfied, the bond is void. The surety, sureties or collateral securing such bond, and the terms thereof, must be approved by and the amount fixed by the metropolitan court. If a bond secured by personal surety or sureties is tendered, the same may be approved only on notice to the appellee. Each personal surety shall be required to show a net worth of at least double the amount of the bond. When the judgment is for the recovery of money, the amount of the bond shall be such sum as will cover the whole amount of the judgment remaining unsatisfied, together with costs, attorneys' fees and interest, if any. In any event, in determining the sufficiency of the

surety or sureties and the extent to which such surety or sureties shall be liable on the bond, or whether any surety shall be required, the court shall take into consideration the type and value of any collateral which is in, or may be placed in, the custody or control of the court and which has the effect of securing payment of an [and] compliance with such judgment.

(2) When an appeal is taken by the state or an officer or agency thereof, or by direction of any department of the state, or by any political subdivision or institution of the state, or by any municipal corporation, the taking of an appeal shall operate as a stay.

(3) Where an appeal is taken by a fiduciary on behalf of the estate or beneficiary which he represents, the amount of the bond and type of security shall be fixed by the court and, in fixing the same, due regard shall be given to the assets under the control of the fiduciary and any bond given by such fiduciary.

F.

District court review. At any time after appeal is taken the district court may, upon motion and notice, review any action of, or any failure or refusal to act by, the metropolitan court dealing with supersedeas or stay. For purposes of obtaining such review, any party may docket the appeal at any time irrespective of whether the record is filed coincident therewith. If the reviewing court shall modify the terms, conditions or amount of a supersedeas bond, or if it shall determine that the metropolitan court should have allowed supersedeas and failed to do so on proper terms and conditions, it may grant additional time within which to file in the district court a supersedeas bond complying with the standards prescribed in such determination. Any change ordered by the district court shall be certified by the clerk of the district court and filed with the metropolitan court clerk by the party seeking the review.

G.

Rules applicable on appeal. The Rules of Civil Procedure for the District Courts of New Mexico shall apply to and govern the procedure in the district courts on appeal from the metropolitan court.

[As amended, effective September 1, 1989.]

COMPILER'S ANNOTATIONS

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, in Paragraph A, deleted "of the metropolitan court" following "final order" in the first sentence and inserted "The notice of appeal shall be filed with the district court" in the second sentence; in Paragraph B, added the Subparagraph (1) designation, therein substituting "district court" for "metropolitan court", added

Subparagraph (2), and made related stylistic changes; rewrote Paragraph C; added Paragraph D and redesignated former Paragraphs D and E as present Paragraphs E and F; in Paragraph E, added the present Subparagraph (1) designation and redesignated former Subparagraphs (1) and (2) as present Subparagraphs (2) and (3); and added Paragraph G.

3-707. Record on appeal.

A.

Composition. The papers, pleadings and the audio recording, if any, filed in the metropolitan court (the court file) shall constitute the record on appeal.

B.

Transmission. Upon receipt of the notice of appeal, the clerk of the metropolitan court shall number consecutively the pages of the court file and send it to the district court.

C.

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

D.

Exhibits. Upon request of either party or upon the order of the metropolitan or the district court, the clerk of the metropolitan court shall include with the record any exhibits necessary for the appeal.

E.

Return of record. After final determination of the appeal, the clerk of the district court shall return the record and any exhibits to the metropolitan court clerk.

3-708. Tape recordings of proceedings.

A.

Taping of proceedings. Every civil proceeding in the metropolitan court shall be tape recorded if requested by a party no later than three (3) days prior to trial. The tape recording shall be made a part of the record on appeal.

B.

Designation. If evidentiary or factual matters are involved in the appeal, at the time that the notice of appeal is filed, the appellant shall make satisfactory arrangements for payment of the cost of the tape recording of the proceedings and shall file with the district court clerk proof that satisfactory arrangements have been made. Such proof shall be by certificate of the clerk of the metropolitan court.

C.

Taped proceedings. Upon the payment of the fee as approved by the administrative office of the courts for each tape of the proceedings duplicated, the clerk of the metropolitan court shall prepare or have prepared an index log of the taped proceedings. Upon receipt of the notice of appeal, the clerk shall send to the clerk of the district court the original recording of the entire proceeding with the index log and the court file in the proceedings and shall retain a copy until the appeal is completed. After final determination of the appeal, the district court shall return the recording to the metropolitan court clerk for erasure and reuse.

D.

Filing in district court. Upon receipt of the record on appeal, the district court clerk shall serve notice of the filing on all parties and the metropolitan court clerk.

3-709. Appeals; briefs; arguments; mandate.

A.

Briefs. Briefs shall be filed with the district court as follows:

(1) the brief in chief shall be filed and served within thirty (30) days from the date of the filing of the transcript of proceedings;

(2) an answer brief shall be filed and served within thirty (30) days after service of the brief in chief;

(3) a reply brief, if any, shall be filed and served within ten (10) days after service of the answer in brief.

B.

Brief in chief. The brief in chief of the appellant, under appropriate headings and in the order here indicated, shall contain:

(1) a table of contents, with page references, and a table of cases (listing New Mexico decisions alphabetically and then decisions from other jurisdictions alphabetically), statutes and other authorities cited, with references to the pages of the brief where they are cited;

(2) a statement of the issues;

(3) a summary of the proceedings which shall indicate briefly the nature of the case, the course of proceedings, and the disposition in the court below and include a short resume of all facts relevant to the issues presented for review, with appropriate references to the record proper and transcript of proceedings;

(4) an argument which shall contain the contentions of the appellant with respect to each issue presented, with citations to the authorities, statutes and parts of the record and transcript relied on. New Mexico decisions, if any, shall be cited;

(5) a conclusion which shall contain statement of the precise relief sought.

C.

Answer brief. The answer brief of the appellee shall conform to the requirements of Subparagraphs (1) to (5) of Paragraph B of this rule, except that a statement of the issues or of the summary of proceedings shall not be made unless deemed necessary.

D.

Reply brief. The appellant may file a brief in reply to the answer brief. No further briefs may be filed except by leave of court.

E.

Citations. Any consistent method or form which adequately identifies the cited authority and aids the court may be used.

F.

References in briefs. References in the briefs shall be to the pages of the record proper and sequential time or counter numbers of the transcript of proceedings. If reference is made to evidence the admissibility of which is in controversy, reference shall be to the place in the transcript of proceedings at which the evidence was identified, offered, and received or rejected.

G.

Length of briefs. Except by permission of the court, the argument portion of the brief in chief or answer brief shall not exceed eight pages. Except by permission of the court,

reply briefs shall not exceed four pages.

H.

Briefs in cases involving multiple appellants. In cases involving more than one appellant, including cases consolidated for purposes of the appeal, any number of either may join in a single brief and any appellant may adopt by reference any part of the brief of another. Parties may similarly join in reply briefs.

I.

Arguments. Within one hundred and twenty (120) days after the filing of the notice of appeal, the district court shall:

(1) enter an order disposing of the appeal; or

(2) schedule oral arguments. If the district court schedules oral arguments, the appeal shall be disposed of not later than six (6) months after the filing of the notice of appeal.

J.

Disposal of appeal. The district court shall dispose of appeals by entry of an appropriate order disposing of the appeal. The court in its discretion may accompany the order with a formal or memorandum opinion. Opinions shall not be published and shall not be used as precedent in subsequent cases.

K.

Rehearing. Within ten (10) days after entry of an order disposing of the appeal, any party may file a motion for rehearing. The motion shall set forth with particularity the points of law or fact which the movant believes the court has overlooked or misapprehended but shall not contain argument. No response to a motion shall be permitted unless requested by the district court. The motion for rehearing shall be disposed of within fifteen (15) days after it is filed.

L.

Mandate. Process in the form of a mandate, judgment or order may issue at any time after entry of the order disposing of the appeal. Unless otherwise ordered, the mandate, judgment or order will not issue until expiration of ten (10) days after entry of the order, and if timely motion for rehearing is filed, then fifteen (15) days after disposition of such motion for rehearing. Mandate, judgment or order from the district court shall not issue until the time has elapsed for appeal to the court of appeals or supreme court. If an appeal or certiorari is taken to an appellate court, a mandate, judgment or order shall not issue until final disposition of the case.

M.

Remand. The district court mandate shall remand the case to the metropolitan court for enforcement of the district court's judgment.

[As amended, effective September 1, 1989.]

COMPILER'S ANNOTATIONS

The 1989 amendment, effective for cases filed in the metropolitan courts on or after September 1, 1989, in Paragraph A, deleted the first three sentences, which read "Briefs may be submitted by either or both parties to the appeal. Briefs shall be submitted by the parties if the appeal involves an evidentiary or factual issue. Briefs shall be prepared in accordance with the provisions of Paragraph B of this rule", inserted "as follows" near the beginning, added the Subparagraph (1) designation, and added Subparagraphs (2) and (3); and added Paragraph M.

3-710. Appellate review.

Upon the appeal to the district court, no additional evidence shall be heard and the transcript of the proceedings taken in the metropolitan court, the record proper, and findings of fact and conclusions of law, if requested by the parties within ten (10) days of the judgment, order or appeal, shall be the record for review by the district court. It is not necessary to file a motion for a new trial, nor are findings of fact or conclusions of law by the metropolitan court or requested findings of fact and conclusions of law by a party necessary to preserve questions for review. The absence of an objection to a ruling or order at the time it is made shall not prevent it from being raised on appeal. In its review on appeal, the district court may affirm, modify, reverse or set aside the judgment or order from which the appeal is taken.

COMPILER'S ANNOTATIONS

Standard of review one of substantial evidence. - The standard of review to be applied by the district court in an appeal from the metropolitan court to the district court in a civil action is one of substantial evidence to support the finding of the metropolitan court. Johnson v. Southwestern Catering Corp., 99 N.M. 564, 661 P.2d 56 (Ct. App. 1983).

3-711. Appeals from district court.

A.

Timing; procedure. Within fifteen (15) days after entry of an order disposing of the appeal by the district court judge, any aggrieved person may appeal to the New Mexico Supreme Court or Court of Appeals, as authorized by law. Upon appeal to the appropriate appellate court, the New Mexico Rules of Appellate Procedure shall be followed, insofar as they are applicable.

B.

Supersedeas bond. Any supersedeas bond approved by the metropolitan court, or modified by the district court, shall continue in effect pending appeal to the supreme court or court of appeals, unless modified pursuant to Rule 12-207 of the Rules of Appellate Procedure.

3-712. Dismissal of appeal.

A.

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

B.

By motion of the appellee. If the appellant shall fail to comply with these rules, the appellee may file a motion in the district court to dismiss the appeal. The motion shall identify the rule violated. The appellant shall have ten (10) days from the date of service to respond to the motion. The court shall entertain the motion without requiring payment of the docket fee, but the appellant shall not be permitted to respond without payment of the fee.

Article 8

Special Proceedings

3-801. Garnishment and writs of execution.

A.

Issuance of writ. After the filing of the judgment, upon request of the prevailing party, the clerk shall issue writs of execution or garnishment.

B.

Execution procedure. Executions shall be made in the manner provided by law. If any judgment debtor is a natural person, no writ of execution or notice thereof shall be levied upon a commercial bank, savings and loan association, credit union or representative payee (defined by federal law as the person designated to receive social security benefits for another) as a writ of garnishment pursuant to 39-4-3 NMSA 1867 except in compliance with this rule.

C.

Garnishment procedure. After the filing of the judgment, the clerk shall issue a writ of garnishment after the judgment creditor (which phrase includes his attorney, if so represented) has filed with the clerk an appliction for a writ of garnishment which includes the judgment debtor's last known address and an affidavit stating that:

(1) the judgment creditor has a judgment against the judgment debtor, giving the amount of the judgment;

(2) after diligent inquiry to the best of the judgment creditor's knowledge, the judgment debtor has no property in his possession within this state subject to execution to satisfy the judgment;

(3) the named garnishee is indebted to the judgment debtor and that the debt is not exempt from garnishment, or holds personal property belonging to the judgment debtor; and

(4) the named garnishee is or is not a commercial bank, savings and loan association, credit union or representative payee.

D.

Claims of exemption. If the garnishee is a commercial bank, savings and loan association, credit union or representative payee and any judgment debtor is a natural person, on or before the fourth business day following the issuance of the writ of garnishment, the judgment creditor shall mail to each named judgment debtor and to his attorney of record, under separate cover, the application for the writ, writ of garnishment, notice of right to claim exemptions, and two (2) copies of the claim of exemption form, each of which shall be in the official form approved by the supreme court.

E.

Certificate of mailing. The judgment creditor shall sign and file a certificate of mailing reflecting the date of mailing copies of the documents listed in Paragraph D of this rule to the judgment debtors and their attorneys.

F.

Hearing. Upon receiving a completed claim of exemption form from a judgment debtor, the clerk shall deliver the same to the assigned judge who shall set a hearing on the claim of exemption which shall be held within five (5) business days after the clerk receives the form. If the judge who heard the original suit is unavailable, the presiding judge shall assign the next available judge who shall hold the hearing within five (5) business days of the clerk's receipt of the claim of exemption form. The date and time for the hearing may be advanced upon application of the judgment debtor and for good cause shown. The order advancing the date and time for the hearing may be issued ex parte.

G.

Notice of hearing. The judge or his designee shall give notice to the judgment creditor and the judgment debtor of the date and time for the hearing. The applicant's notice of hearing shall also include a copy of the claim of exemption form as filed by the judgment debtor. The hearing on the claim of exemption shall be held within five (5) business days after the clerk's receipt of the completed claim of exemption form, notwithstanding any other rule to the contrary.

H.

Service of writ with claim of exemption. If the garnishee is a commercial bank, savings and loan association, credit union or representative payee, the judgment creditor shall attach to the writ of garnishment a copy for each judgment debtor of the notice of right to claim exemptions and two (2) copies of the claim of exemption form to be served upon the garnishee. These forms shall be served with the writ of garnishment on the garnishee.

I.

Answer. The garnishee shall answer the writ of garnishment within twenty (20) days of service. The answer shall be in the official form approved by the supreme court.

J.

Judgment. Judgment on the writ of garnishment shall not enter within twenty-five (25) days after the writ is served, unless a hearing on a claim of exemption has been held and an order thereon has been entered prior to the expiration of said twenty-five (25) days. If a claim of exemption form has been filed prior to the entry of judgment on the writ of garnishment, no judgment on the writ of garnishment shall be entered prior to the

hearing on the claim of exemption. Judgment may not enter unless the judgment creditor has certified compliance with Paragraph E of this rule. Judgment on the writ of garnishment shall be in the official form approved by the supreme court. The judgment creditor shall mail a copy of the judgment on the writ of garnishment to the judgment debtor within three (3) business days of its having been filed by the court.

K.

Issuance of transcript. After the filing of the judgment, the clerk shall issue a transcript of judgment upon the request of the prevailing party.

L.

Sheriff's sale. A sale shall be conducted in the manner provided by law for sales on execution from the district court.

M.

Service. A writ of execution and the writ of garnishment issued under Paragraph A, B or C of this rule shall be served wherever the defendant or the garnishee may be found in the State of New Mexico. A writ of garnishment may be served by any person over eighteen (18) years of age who is not a party to the action.

N.

Appeal from judgment. If judgment of the claim of exemption is rendered after expiration of the time for appeal on the main issue in the action, either party aggrieved by the judgment on the claim of exemption may appeal from that judgment to the district court in the same manner as other appeals from final judgments of the metropolitan court are taken. If judgment on the claim of exemption is rendered before judgment on the main issue in the cause, the judgment on the claim of exemption shall be deemed interlocutory and included with any appeal taken on the main issue in the action.

[As amended, effective October 1, 1987.]

COMPILER'S ANNOTATIONS

Cross-references. - For forms on writ of execution and return, see Civil Form 4-801.

The 1987 amendment, effective for cases filed in the metropolitan courts on or after October 1, 1987, rewrote present Paragraph A, which formerly read "After the filing of the judgment, the clerk shall issue writs of execution upon request of the prevailing party", designated the former last two sentences of Paragraph A as present Paragraph B and added the heading, redesignated former Paragraph B as Paragraph C and

inserted "after diligent inquiry to the best of the judgment creditor's knowledge" in Paragraph C(2), and redesignated former Paragraphs C through M as present Paragraphs D through N.

3-802. Exemptions.

A.

How claimed. Exemptions of personal property provided by law apply to all executions in civil actions and to attachment, replevin and forcible entry or detainer. The person entitled to the exemption or his agent or attorney shall claim the exemption by filing, as a part of the action pending in the metropolitan court, a list of the particular property claimed to be exempt and a statement of the grounds for the exemption. The list may be filed at any time after the filing of the complaint, but before the sale of the property or before money garnished is paid to the judgment creditor.

B.

Hearing. Upon the filing of a list of claimed exemptions, the judge shall notify the opposing party that a claim of exemption has been made for the property specified in the list, and notify both parties of a time set for hearing on the claim of exemption. Unless the opposing party consents to the claim of exemption, the judge shall at the time set for hearing receive evidence, determine the issues and enter judgment on the claim of exemption.

C.

Appeal from judgment. If judgment on the claim of exemption is rendered after expiration of the time for appeal on the main issue in the action, either party aggrieved by the judgment on the claim of exemption may appeal from that judgment to the district court in the same manner as other appeals from final judgments of the metropolitan court are taken. If judgment on the claim of exemption is rendered before judgment on the main issue in the cause, the judgment on the claim of exemption shall be deemed interlocutory and included with any appeal taken on the main issue in the action.

[As amended, effective May 1, 1986.]

3-803. Judgment; supplementary proceedings.

A.

Examinations in aid of judgment or execution. When a judgment for the payment of money has been entered by or docketed in the metropolitan court, the judgment creditor or his successor in interest may, in aid of the judgment or execution, examine any

person, including the judgment debtor, touching the property of the judgment debtor and his ability to satisfy such judgment. For the purpose of such examination or examinations, the clerk of the court shall, upon request of the judgment creditor or his successor in interest, issue a subpoena directing the person to be examined to appear before the metropolitan court at a time and place therein stated for such examination. Such subpoena may be served in the same manner as other subpoenas except that it shall be served not less than three (3) days prior to the date therein stated when the examination is to be conducted.

B.

Deposition in lieu of examination. In lieu of such an examination before the court, the judgment creditor or his successor in interest may take the deposition of the person whom he desires to examine, and such deposition may be taken in the manner now or hereafter provided for taking depositions in causes pending in the district court.

C.

Discovery. In further aid of judgment or execution, the judgment creditor or his successor in interest may obtain discovery from any person, including the judgment debtor, in the manner provided in these rules.

D.

Notice of deposition. Where such judgment was obtained by default, notice of taking depositions need not be given to the judgment debtor. In all other cases, notice of taking depositions shall be given to the judgment debtor or his attorney of record, if they or any of them be within the state and their addresses be known to the judgment creditor; otherwise, upon affidavit of the judgment creditor or his attorney stating that the judgment debtor and his attorneys of record are out of state or their whereabouts are unknown, the court may enter an order dispensing with such notice.