Rules of Criminal Procedure for the Magistrate Courts

Article 1

General Provisions

6-101. Scope and title.

A.

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

B.

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

C.

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

D.

Citation form. These rules shall be cited by set and rule numbers, as in SCRA 1986, Rule 6-

[As amended, effective January 1, 1987.]

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law § 1 et seq. 22 C.J.S. Criminal Law § 1 et seq.

6-102. Conduct of court proceedings.

A.

Judicial proceedings. Judicial proceedings should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice. The taking of photographs in the courtroom during the progress of judicial proceedings or during any recess thereof and the transmitting or sound recording of such proceedings for broadcasting by radio or television introduce extraneous influences which tend to have a detrimental psychological effect on the participants and to divert them from the proper objectives of the trial; and no such action shall be done or permitted except 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.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Exclusion of public from state criminal trial in order to preserve confidentiality of undercover witness, 54 A.L.R.4th 1156.
Exclusion of public from state criminal trial in order to prevent disturbance by spectators or defendant, 55 A.L.R.4th 1170.
Exclusion of public from state criminal trial in order to avoid intimidation of witness, 55 A.L.R.4th 1196.

6-103. Rules and forms.

A.

Rules. Each magistrate court or division thereof may from time to time make and amend rules governing its practice not inconsistent with law, these rules or regulations prescribed by the administrative office of the courts. Such rules may relate to office hours and procedures, to the performance of clerical duties by clerical assistants and to other procedures for effecting a just, speedy and inexpensive determination of causes pending before such court. Proposed rules or amendments shall be submitted to the director of the administration office of the courts and shall not become effective until approved by him.

B.

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

[As amended, effective January 1, 1987.]

6-104. Time.

A.

Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any magistrate 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 under Rule 6-506 or for taking an appeal under Rule 6-703.

C.

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

D.

Additional time after service by mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a

notice or other paper upon him and the notice or paper is served upon him by mail, three (3) days shall be added to the prescribed period.

Court's jurisdiction not limited by time limits specified for preliminary examination. - Nothing in either the district court rules or the magistrate court rules limits the jurisdiction of the magistrate court to the time limits specified in Rule 6-202; rather, they specifically grant limited jurisdiction to the magistrate court beyond the time limits prescribed in Rule 6-202. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

Rescheduling to allow judge to attend judicial conference is permissible enlargement. - Where a preliminary hearing scheduled by the magistrate court within the 20-day [now 60-day] period of Rule 6-202 is rescheduled upon motion of the magistrate judge to permit the judge's attendance at a judicial conference, that constitutes good cause and permissible enlargement of time under Paragraph B of this rule. State v. Tollardo, 99 N.M. 115, 654 P.2d 568 (Ct. App. 1982).

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

6-105. Designation of judge.

A.

Assignment of cases. The magistrate before whom the case is to be tried shall be designated at the time the complaint is filed.

B.

Procedure for replacing a magistrate who has been excused.

(1)

In magistrate districts which have presiding magistrates as defined in Section 35-1-37 NMSA 1978. Upon receipt of a notice of excusal, the magistrate or clerk of the magistrate 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 magistrate in the district to try the cause, the presiding magistrate of the district shall, by random selection, designate another magistrate to try the cause. If all magistrates 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 magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused magistrate and to the designated magistrate.

(2)

In magistrate districts which do not have presiding magistrates as defined in Section 35-1-37 NMSA 1978, upon excusal, the parties or their counsel may, by agreement, designate another magistrate of the same or an adjoining magistrate district to conduct any further proceeding in the cause. If the excused magistrate has not received notice of such an agreement within five (5) days after the date the notice of excusal is filed, the excused magistrate shall, within ten (10) days after the date the notice of excusal was filed, certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused magistrate, and to the designated magistrate.

C.

Procedure for replacing a recused magistrate.

(1)

In magistrate districts which have presiding magistrates as defined in Section 35-1-37 NMSA 1978, if the magistrate recuses himself from sitting in the action, the magistrate or clerk of the magistrate 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 magistrate in the district to try the cause, the presiding magistrate of the district shall, by random selection, designate another magistrate to try the cause. If all magistrates in the district have been excused or have recused themselves, within ten (10) days after the date of the filing of the last notice of excusal or recusal, the presiding magistrate shall certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the excused or recused magistrate and to the designated magistrate.

(2)

In magistrate districts which do not have presiding magistrates as defined in Section 35-1-37 NMSA 1978, upon recusal of the magistrate, the parties or their counsel may, by agreement, designate another magistrate of the same or an adjoining magistrate district to conduct any further proceeding in the cause. If the recused magistrate has not received notice of such an agreement within ten (10) days after the the [sic] date the notice of recusal is filed, the recused magistrate shall, within ten (10) days after the date the notice of recusal was filed, certify that fact by letter to the district court of the county in which the action is pending and the district court shall designate another magistrate to conduct any further proceedings. The district court shall send notice of its designation to the parties or their counsel, to the recused magistrate, and to the designated

magistrate.

D.

Subsequent proceedings. After the designation, the excused or recused magistrate shall within (10) days, send to the designated magistrate a copy of all proceedings in the action. Upon designation of a new magistrate, all proceedings shall continue to be conducted in the original magistrate district. The clerk of the magistrate court of the original magistrate district shall continue to be responsible for the court file and shall perform such further duties as may be required. The designated magistrate may not be excused by either party except for causes set out in Article 6, Section 18 of the Constitution of New Mexico.

[As amended, effective September 1, 1989.]

Cross-references. - As to disqualification of magistrate, see 35-3-7 NMSA 1978. For form on statement of disqualification, see Form 4-103. For form on certification of disqualification or recusal, see Form 4-102.

The 1989 amendment, effective for cases filed in the magistrate courts on and after September 1, 1989, rewrote this rule to the extent that a detailed analysis would be impracticable.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 46 Am. Jur. 2d Judges §§ 86, 248 to 261.
Interlocutory ruling or order of one judge as binding on another in same case, 132 A.L.R. 14.
Requiring successor judge to journalize finding or decision of predecessor, 4 A.L.R.2d 584.
Power of successor judge taking office during termtime to vacate, etc., judgment entered by his predecessor, 11 A.L.R.2d 1117.
Receipt of verdict in civil case in absence of trial judge, 20 A.L.R.2d 281.
Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor, 22 A.L.R.3d 922.
Disqualification of original trial judge to sit on retrial after reversal or mistrial, 60 A.L.R.3d 176.
Disqualification of judge, justice of the peace or similar judicial officer for pecuniary interest in fines, forfeitures or fees payable by litigants, 72 A.L.R.3d 375.
48A C.J.S. Judges §§ 162 to 185.

6-106. Excusal; recusal; disability.

A.

Excusal; procedure. Whenever a party to any criminal action or proceeding of any kind files a notice of excusal the magistrate's jurisdiction over the cause terminates

immediately. The statement is effective only if filed no later than fifteen (15) days after the defendant is arraigned.

B.

Extent of excuse. No judge may be excused from hearing arraignment or bond proceedings. Any excusal of a judge scheduled to hear a preliminary hearing must be filed at least four (4) days prior to the hearing. 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 magistrate 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 magistrate shall be designated 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, the party may file a notice of excusal, naming the condition or conditions, and the magistrate shall thereupon proceed in accordance with Rule 6-105. If in any case of disqualification the magistrate fails or refuses to recognize the disqualification, 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 magistrate from proceeding further and designating another or striking the notice of excusal as ineffective or groundless.

F.

Disability of magistrate. If by reason of absence, death, sickness or other cause, the magistrate before whom the cause is pending is unable or unavailable to perform his duties, either party may certify that fact by letter to the district court of the county in which the action is pending. The district court may make such investigation as it deems warranted and, if it finds that the magistrate is in fact disabled or unavailable, shall thereupon designate another magistrate of the county or, if none is available, of any

other county to preside over the cause. The designated magistrate shall take such action as may be necessary to obtain the files in the cause, and all proceedings shall continue to be conducted in the original magistrate district.

G.

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

[As amended, effective January 1, 1987, July 1, 1988 and September 1, 1989.]

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, in Paragraph A substituted "criminal action" for "civil action" in the first sentence, substituted the present second sentence for the former second sentence which read "The statement is effective only if filed no later than fifteen (15) days after the date that the answer is filed in a civil action or no later than fifteen (15) days after the defendant is arraigned in a criminal action", and deleted the former third sentence which read "In a restitution case, the statement must be filed within five (5) days of service"; and, in Paragraph E, substituted "Rule 6-105" for "Paragraph B of these rules" in the first sentence and deleted "under Paragraph B of Rule 6-105 or under this paragraph" following "If in any case of disqualification" near the beginning of the second sentence.

The 1989 amendment, effective for cases filed in the magistrate courts on and after September 1, 1989, in Paragraph A, substituted "files a notice of excusal the magistrate's jurisdiction" for "files a statement of excusal the magistrate jurisdiction" in the first sentence; in Paragraph B, substituted "arraignment or bond proceedings" for "arraignment proceedings or setting bond" in the first sentence; in Paragraph C, substituted "notice of peremptory excusal" for "notice of election to excuse"; in Paragraph D, deleted "in the manner provided by Paragraph B of Rule 6-105 of these rules for cases of disqualification" from the end; in Paragraph E, substituted "the party may file a notice of excusal" for "he may file a statement to that effect" in the first sentence and "notice of excusal" for "disqualification statement" in the last sentence; added present Paragraph G; and deleted former Paragraph G, relating to prohibition of costs or fees.

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

6-107. Entry of appearance.

A.

Written entry of appearance. Whenever counsel undertakes to represent a defendant in any criminal action, he will file a written entry of appearance in the cause, unless he has been appointed by written order of the court. For the purpose of this rule, the filing of any pleading signed by counsel constitutes an entry of appearance.

B.

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

6-108. Non-attorney prosecutions.

A.

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

B.

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

C.

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

D.

Special prosecutor. Nothing in this rule shall be construed to allow an attorney licensed to practice law in this state to prosecute a case for any party without first having been

duly appointed as a special prosecutor by the district attorney for the judicial district in which the court is located.

E.

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

[As amended, effective March 15, 1986 and July 1, 1988.]

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, added present Paragraph B and redesignated the subsequent paragraphs accordingly; in Paragraph C, inserted "government employees appearing on behalf of a governmental entity as provided in Paragraph B" near the beginning of the first sentence and deleted "In non-jury trials, and" from the beginning of the second sentence; and in Paragraph D, substituted "an attorney licensed to practice law in this state" for "a private attorney".

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

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

A.

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

B.

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

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

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

C.

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 692 to 700, 901 to 935.
Voluntary absence of accused when sentence is pronounced, 6 A.L.R.2d 997.
23A C.J.S. Criminal Law §§ 1161 to 1167.

6-110. Withdrawn.

Compiler's notes. - Pursuant to a court order dated April 24, 1989, this rule is withdrawn effective for cases filed in the magistrate courts on or after September 1, 1989.

6-111. Contempt.

A magistrate has jurisdiction to punish for contempt only 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 his court. No person shall be punished for contempt of the magistrate court until given an opportunity to be heard in his defense. Any person found in contempt may be ordered to pay a fine not exceeding two hundred and fifty dollars ($250) or may be imprisoned not more than thirty (30) days, or in the discretion of the magistrate, may be ordered both to pay such fine and be imprisoned. Any person found guilty of contempt may appeal to the district court pursuant to the rules of procedure governing criminal actions in the magistrate court.

Six-day sentence upheld. - Defendant's six-day sentence by the metropolitan court for criminal contempt upon failure to pay fines or do community service in lieu of the fines was not in excess of the court's authority. State v. Jones, 105 N.M. 465, 734 P.2d 243 (Ct. App. 1987).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Interference with enforcement of judgment in criminal or juvenile delinquent case as contempt, 8 A.L.R.3d 657.
Publication or broadcast, during course of trial, of matter prejudicial to criminal defendant as contempt, 33 A.L.R.3d 1116.

Attorney's refusal to accept appointment to defend indigent, or to proceed in such defense, as contempt, 36 A.L.R.3d 1221.
Refusal to answer questions before state grand jury as direct contempt of court, 69 A.L.R.3d 501.

Article 2

Initiation of Proceedings

6-201. Commencement of action.

A.

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

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

(2) a uniform traffic citation issued by a full-time, salaried police officer, if permitted by law.

B.

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

C.

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

D.

Arrest followed by complaint. When a peace officer makes an arrest without warrant, he shall take the arrested person to the nearest available magistrate court without unnecessary delay. In such cases, a complaint shall be filed forthwith by the peace officer and a copy given to the defendant at or before the time he is brought before the magistrate.

I. General Consideration.
II. How Commenced.

I. General Consideration.

Cross-references. - For criminal complaint form, see Form 9-201.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law § 410.
Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.
22 C.J.S. Criminal Law § 324 et seq.

II. How Commenced.

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

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

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

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

6-202. Preliminary examination.

A.

Subpoena of witnesses. If the court determines that a preliminary examination must be conducted, subpoenas shall be issued for any witnesses required by the district attorney

or the defendant. The witnesses shall be examined in the defendant's presence and may be cross-examined.

B.

Record of hearing. Upon request, a record shall be made of the preliminary examination. If requested, the record shall be filed with the clerk of the district court within ten (10) days after it is requested or within ten (10) days after the district attorney notifies the magistrate court of the filing of the information, whichever date is later. If a duplicate of the taped record is not requested within sixty (60) days following the date of the preliminary examination, or within sixty (60) days after the expiration date of an order extending the time for the filing of an information, whichever is later, the record may be disposed of by the magistrate court.

C.

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

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

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

D.

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

E.

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

Cross-references. - For form on notice of preliminary examination and certificate of mailing, see Form 9-206. For form on bind-over order, see Form 9-207.

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

Preliminary examination deemed critical stage of proceedings. - The preliminary examination, from the arraignment of the defendant until the end of the examination, is a critical stage in criminal proceedings because a defendant needs the advice and assistance of counsel at the time of his arraignment, the entry of plea and his announcement as to whether he desires or waives a preliminary examination, and because he needs the assistance of counsel in cross-examining the state's witnesses at the preliminary examination. Pearce v. Cox, 354 F.2d 884 (10th Cir. 1965), cert. denied, 384 U.S. 976, 86 S. Ct. 1869, 16 L. Ed. 2d 685, 384 U.S. 977, 86 S. Ct. 1871, 16 L. Ed. 2d 686 (1966) (decided under former law).

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

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

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

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

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

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 411 to 420, 424 to 432.
Civil liability of witness in action under 42 USCS § 1983 for deprivation of civil rights, based on testimony given at pretrial criminal proceeding, 94 A.L.R. Fed. 892.
22 C.J.S. Criminal Law § 340 et seq.

6-203. Probable cause determination.

A.

General rule. In all cases within magistrate court trial jurisdiction, persons taken into custody without a warrant and not released upon some conditions of release, shall be afforded a determination of probable cause.

B.

Time of determination. The determination shall be made within a reasonable time, but in any event within five (5) days after custody commences.

C.

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

appearance of one or more witnesses might lead to a finding that there is no probable cause.

D.

Conclusion. If the court finds probable cause to believe that the defendant has committed an offense, the defendant may be detained or released on conditions of release; otherwise the defendant shall be released immediately.

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 411 to 432. 22 C.J.S. Criminal Law § 339.

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

A.

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

B.

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

C.

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

[As amended, effective July 1, 1988.]

Cross-references. - For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, see Form 9-208. For form of affidavit for arrest warrant, see Form 9-209.

The 1988 amendment, effective for cases filed in the magistrate courts on or after July 1, 1988, designated the former last sentence in Paragraph A as present Paragraph B, adding the heading "Preference for summons"; redesignated former Paragraph B as present Paragraph C, substituting "Form" for "Warrant" as the heading; deleted the former Paragraph C designation and heading of "Summons", so as to include former Paragraph C as the last two sentences in present Paragraph C; deleted "court administrator and the" following "approved by the" in the last sentence in Paragraph C; and deleted former Paragraph D, regarding basis for warrant.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 408 to 410, 421, 422.
Pretrial preventive detention by state court, 75 A.L.R.3d 956.
22 C.J.S. Criminal Law § 334 et seq.

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

A.

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

B.

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

C.

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

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

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

(3) the name and address of the prosecuting attorney, if any, otherwise the address of the law enforcement entity filing the complaint;

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

D.

Summons; time to appear. Service shall be made at least ten (10) days before the defendant is required to appear. If service is made by mail an additional three (3) days shall be added pursuant to Rule 6-104. Service by mail is complete upon mailing.

E.

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

F.

Summons; by whom served. In criminal actions any process may be served by the sheriff of the county where the defendant may be found, or by any other person who is over the age of eighteen (18) years and not a party to the action.

G.

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

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

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

Paragraph H of this rule.

H.

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

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

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

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

I.

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

of mailing.

J.

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

[As amended, effective January 1, 1990.]

Cross-references. - For service of process in civil actions, see Rule 2-202. For forms on criminal summons, certificate of mailing, certificate of service and affidavit of service by other person making service, see Form 9-208. For form of affidavit for bench warrant, see Form 9-211. For forms on bench warrant and return, see Form 9-212.

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

Service of process by constables. - Constables may serve criminal process in any county within this state but are restricted in accepting process for service to those justice of the peace (now magistrate) courts in their respective counties; to that process authorized to be accepted by any city or town officer within the constables' county; and, possibly upon the occurrence of those specific circumstances provided for in 41-1-7, 1953 Comp. (now repealed). 1963-64 Op. Att'y Gen. No. 64-65 (decision rendered under former law).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 659, 861. 22 C.J.S. Criminal Law § 334 et seq.

6-206. Arrest warrants.

A.

To whom directed. Whenever a warrant is issued in a criminal action, it shall be directed to a full-time salaried state or county law enforcement officer, a municipal police officer, a campus security officer or an Indian tribal or pueblo law enforcement officer. Upon arrest the defendant shall be brought before the court without unnecessary delay.

B.

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

C.

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

D.

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

Cross-references. - For forms on warrant for arrest and return where defendant is found, see Form 9-210. For forms on bench warrant and return, see Form 9-212.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 408 to 410, 421, 422.
22 C.J.S. Criminal Law § 334 et seq.

6-207. Bench warrants.

A.

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

B.

Execution and return. A bench warrant shall be executed and return thereon made in the same manner as an arrest warrant.

Cross-references. - For form on affidavit for bench warrant, see Form 9-211. For forms on bench warrant and return, see Form 9-212.

6-208. Search warrants.

A.

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

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

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

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

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

B.

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

C.

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

D.

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

or shall leave the copies of the affidavit for search warrant, the search warrant and inventory at the place from which the property was taken.

E.

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

F.

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

Cross-references. - For form of affidavit for search warrant, see Form 9-213. For forms on search warrant, authorization for nighttime search and return and inventory, see Form 9-214. For notice of trial form, see Form 9-501. For application for inspectorial search order, see Form 9-801. For forms on inspection order and return, see Form 9-802.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 68 Am. Jur. 2d Searches and Seizures §§ 35 to 83.
Use of electronic sensing device to detect shoplifting as unconstitutional search and seizure, 10 A.L.R.4th 376.
Seizure of books, documents, or other papers under search warrant not describing such items, 54 A.L.R.4th 391.
79 C.J.S. Searches and Seizures §§ 63 to 84.

6-209. 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; however, nothing herein shall be construed to require that a plea pursuant to Rule 6-302 of these rules be in writing.

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.

D.

Filing with the court defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the judge or clerk of the court.

E.

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

F.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 773, 1009. Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.
22 C.J.S. Criminal Law § 324 et seq.

Article 3

Pleadings and Motions

6-301. General rules of pleading.

A.

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

B.

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

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

6-302. Pleas allowed; motions.

A.

Pleadings. In actions within magistrate trial jurisdiction, the pleadings shall consist of the complaint and the plea. The plea shall be one of the following: guilty, not guilty, not guilty by reason of insanity and nolo contendere. No other pleas or pleadings shall be permitted. Defenses and objections not raised by the plea shall be asserted in the form of motions to dismiss or for appropriate relief. In actions not within magistrate trial jurisdiction, no plea shall be entered.

B.

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

[As amended, effective January 1, 1987.]

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 443 to 511.
Propriety and prejudicial effect of showing, in criminal case, withdrawn guilty plea, 86 A.L.R.2d 326.
22 C.J.S. Criminal Law § 355 et seq.

6-303. Amendment of complaints.

A.

Defects, errors and omissions. A complaint shall not be deemed invalid, nor shall the trial, judgment or other proceedings thereon be stayed, arrested or in any manner affected, because of any defect, error, omission, imperfection or repugnancy therein which does not prejudice the substantial rights of the defendant upon the merits. The court may at any time prior to a verdict cause the complaint to be amended in respect to any such defect, error, omission or repugnancy if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

B.

Surplusage. Any unnecessary allegation contained in a complaint may be disregarded as surplusage.

C.

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

D.

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

[As amended, effective January 1, 1987.]

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law § 420.
22 C.J.S. Criminal Law § 324 et seq.

6-304. Motions.

A.

Subject matter. Any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised by motion.

B.

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

C.

Suppression of evidence. In cases within the trial court's jurisdiction:

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

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

D.

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

[As amended, effective January 1, 1987.]

Am. Jur. 2d, A.L.R. and C.J.S. references. - Admissibility of evidence discovered in search of defendant's property or residence authorized by defendant's adult relative other than spouse - state cases, 4 A.L.R.4th 196.
Admissibility of evidence discovered in search of defendant's property or residence authorized by one, other than relative, who is cotenant or common resident with defendant - state cases, 4 A.L.R.4th 1050.

6-305. Unnecessary allegations.

A.

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

(1) time of the commission of offense;

(2) place of the commission of offense;

(3) means by which the offense was committed;

(4) value or price of any property;

(5) ownership of property;

(6) intent with which an act was done;

(7) description of any place or thing;

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

(9) the specific degree of the offense charged;

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

(11) any other similar allegation.

B.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 409, 410, 422.
Right of accused to bill of particulars, 5 A.L.R.2d 444.
22 C.J.S. Criminal Law § 331.

6-306. Joinder; consolidation; severance.

A.

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

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

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

B.

Joinder of defendants. Two or more defendants shall initially be joined in the same complaint:

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

(2) when all of the defendants are charged with conspiracy and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy;

(3) when, even if conspiracy is not charged and not all of the defendants are charged in each count, the several offenses charged:

(i) were part of a common scheme or plan; or

(ii) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of others.

C.

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

amended complaint.

D.

Consolidation of offenses. The magistrate may order two or more complaints against a single defendant to be tried or heard on preliminary examination together if the offenses could have been joined in a single complaint. The magistrate shall initially consolidate the trials or preliminary examinations of two or more defendants if the offenses charged are based on the same or related acts.

E.

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

Article 4

Release Provisions

6-401. Bail.

A.

Right to bail. Pending trial, any person bailable under Article 2, Section 13 of the New Mexico Constitution, at his first appearance before a court, shall be ordered released pending trial on his personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, unless the court determines, in the exercise of its discretion, that such release will not reasonably assure the appearance of the person as required. When such a determination is made, the court shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the person in custody of a designated person or organization agreeing to supervise the person;

(2) place restrictions on the travel, association or place of abode of the person during the period of release;

(3) require the execution of an appearance bond in a specified amount and the deposit with the clerk of the court, in cash, of a percentage of the amount of the bail set, such deposit to be returned as provided in this rule;

(4) require the execution of an appearance bond and bail bond in a specified amount and the filing with the court of an affidavit by an unpaid surety describing the real property which is jusitification for the bond;

(5) require the execution of a bail bond with sufficient sureties, or the deposit of cash in lieu thereof; or

(6) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours or that the person report at specified intervals to a probation officer, law enforcement officer or other person designated by the court.

B.

Factors to be considered in determining conditions of release. In determining which conditions of release will reasonably assure appearance, the court shall, on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, length of residence in the community and record of prior convictions, if any; any indication that the defendant is an alcoholic or addicted to drugs; the defendant's record of appearance at court proceedings or of flight to avoid prosecution.

C.

Additional conditions; conditions to assure orderly administration of justice. After a hearing and upon a showing that there exists a danger that the defendant will commit a serious crime, will seek to intimidate witnesses or will otherwise unlawfully interfere with the orderly administration of justice, the court, upon release of the defendant or any time thereafter, may enter an order:

(1) prohibiting the defendant from possessing any dangerous weapon; or

(2) imposing any other condition necessary to assure the orderly administration of justice. If additional conditions are imposed, the court shall state in the record the reasons for the imposition of such additional conditions. If the court, after a hearing pursuant to this paragraph, enters an order imposing additional conditions to assure the orderly administration of justice, the defendant shall be entitled, upon application, to a review of such conditions pursuant to Paragraph E of this rule and may petition the district court for review pursuant to Paragraph H of this rule.

D.

Explanation of conditions by court. A court authorizing the release of a person under this rule shall issue an appropriate order containing a statement of the conditions imposed, if any, shall inform such person of the penalties applicable to violation of the conditions of his release and shall advise such person that a warrant for his arrest will be issued immediately upon any such violation.

E.

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

F.

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

G.

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

H.

Petition to district court. A person charged with an offense which is not within magistrate court trial jurisidiciton and who has not been bound over to the district court may file a petition at any time after his arrest with the clerk of the district court for release pursuant to this rule. Jurisdiction of the magistrate court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of

the petition, the district court may proceed in accordance with Paragraph I of Rule 5-401 of the Rules of Criminal Procedure for the District Courts. Any condition imposed by the magistrate court shall continue in effect pending determination of conditions of release by the district court. If, after forty-eight (48) hours from the time the petition is filed, the district court has not taken any action on the petition, the court shall be deemed, at that time, to have continued any condition imposed by the magistrate court.

I.

Release from custody by designee. The provisions of Paragraphs A, B and D of this rule shall, upon arrest, be carried out by a responsible person designated by the court. If a person has not been released by the designee, he shall forthwith be brought before the magistrate who shall enter an order prescribing conditions of release in accordance with this rule.

J.

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

K.

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

L.

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

[As amended, effective August 1, 1987, and October 1, 1987.]

Cross-references. - For form on record of responses to questions at release hearing, see Form 9-301. For form on release order, see Form 9-302. For form on appearance bond, see Form 9-303. For forms on bail bond and justification of sureties, see Form 9-304.

The first 1987 amendment, effective for cases filed in the magistrate courts on or after August 1, 1987, in Paragraph A, substituted "the person" for "him" in Paragraph (1), deleted "on a form which has been approved by the supreme court" following "appearance bond" in Paragraph (3), added Paragraph (4), redesignated former Paragraphs (4) and (5) as present Paragraphs (5) and (6), and deleted "on a form which has been approved by the supreme court" following "bail bond" in Paragraph (5), substituted "release of the defendant" for "the defendant's release" in Paragraph C, deleted former Paragraph J, relating to justification of sureties, added present Paragraphs J through L, redesignated former Paragraphs K through M as Paragraphs

M through O, deleted "the court administrator and" preceding "the Supreme Court" in Subsection N, and inserted "or constitutional" in Subsection O.

The second 1987 amendment, effective for cases filed in the magistrate courts on or after October 1, 1987, in Paragraph A(4) substituted "affidavit by an unpaid surety" for "affidavit by the surety"; deleted former Paragraphs J, K, and L, relating to exoneration of bond, property bond, and bail bond, respectively; and redesignated former Paragraphs M, N, and O as present Paragraphs J, K, and L, respectively.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 8 Am. Jur. 2d Bail and Recognizance §§ 23 to 41.
Mandamus to compel judge or other officer to grant accused bail or to accept proffered sureties, 23 A.L.R.2d 803.
Appealability of order relating to forfeiture of bail, 78 A.L.R.2d 1180.
Burden of proof, where bail is sought before judgment but after indictment in capital case, as to whether proof is evident or the presumption great, 89 A.L.R.2d 355.
8 C.J.S. Bail § 1 et seq.

6-401A. Bail; unpaid surety.

Any bond authorized by Subparagraph 4 of Paragraph A of Rule 6-401 shall be signed by the owner(s) of the real property as surety for the bond. The affidavit must contain a description of the property by which the surety proposes to justify the bond and the encumbrances thereon, the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged and a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety.

[Effective October 1, 1987.]

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the magistrate courts on or after October 1, 1987.

6-401B. Bail bonds; justification of compensated sureties.

A.

Justification of sureties. Any bond authorized by Subparagraph (5) of Paragraph A of Rule 6-401 shall be signed by a bail bondsman, as surety, who is licensed under the Bail Bondsmen Licensing Law [Article 51, Chapter 59A NMSA 1978] and who has timely paid all outstanding default judgments on forfeited surety bonds. A bail bondsman licensed as a limited surety agent shall file proof of appointment by an insurer by power

of attorney with the bond.

B.

Property bondsman. A bail bondsman or solicitor licensed as a property bondsman must pledge or assign real or personal property owned by the property bondsman as security for the bail bond. A licensed property bondsman must file, in each court in which he posts bonds, proof of ownership of the property used as security for the bonds and an assignment in favor of the court, such as an irrevocable letter of credit, deed of trust or other similar instrument as well as a copy of his license. The bondsman must attach to the bond a current list of all outstanding bonds, encumbrances and claims against the property each time a bond is posted, using the court approved form. No single property bond can exceed the amount of real or personal property pledged. The aggregate amount of all property bonds by the surety cannot exceed ten times the amount pledged. Any collateral, security or indemnity given to the bondsman by the principal must be reasonable in relation to the amount of the bond and must be returned to the principal and the lien extinguished upon exoneration on the bond. If the collateral is in the form of cash or a negotiable security, it shall not exceed the amount of the bond and no other collateral may be taken by the bondsman. If the collateral is a mortgage on real property, the mortgage may not exceed one hundred and fifty (150%) percent of the amount of the bond. If the collateral is a lien on a vehicle or other personal property, it may not exceed one hundred and fifty (150%) percent of the bond. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium authorized by the superintendent of insurance.

[Effective October 1, 1987.]

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the magistrate courts on or after October 1, 1987.

6-402. Release.

A.

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

B.

Release pending sentence, appeal and new trial. A person released pending or during trial shall continue on release pending the imposition of sentence or pending final disposition of any appeal or any new trial under the same terms and conditions as

previously imposed, unless the surety has been released or the court has determined that other terms and conditions or termination of release are necessary to assure:

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

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

C.

Release after sentencing. After imposition of a judgment and sentence, the court, upon motion of the defendant, shall establish conditions of release pending appeal or a motion for new trial. The court may utilize the criteria listed in Paragraph B of Rule 6-401 and may also consider the fact of defendant's conviction and the length of sentence imposed. In the event the court requires a bail bond in the amount greater than the amount established for release pending trial, and the surety has not been discharged by order of the court, a new bond need be furnished only for the additional amount. In the event the court requires a bail bond in the same amount as that established for release pending trial, the bond previously furnished shall continue pending appeal or disposition of a motion for a new trial, unless the surety has been discharged by order of the court.

D.

Person in custody. Nothing in this rule shall be construed to prevent the court from releasing pursuant to Rule 6-401 a person not released prior to or during trial.

Am. Jur. 2d, A.L.R. and C.J.S. references. - State court's power to place defendant on probation without imposition of sentence, 56 A.L.R.3d 932.
Inherent power of court to suspend for indefinite period execution of sentence in whole or in part, 73 A.L.R.3d 474.
Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release, 78 A.L.R.3d 780.

6-403. Revocation of release.

A.

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

(1) impose any of the conditions authorized under Paragraph A of Rule 6-401;

(2) after a hearing pursuant to Paragraph C of Rule 6-401, impose any of the conditions authorized under Paragraph C of Rule 6-401 to assure the orderly administration of justice; or

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

B.

Review of additional conditions. If pursuant to Subparagraph (1) of Paragraph A of this rule, conditions authorized by Paragraph A of Rule 6-401 are imposed:

(1) a person for whom such new conditions are imposed and who after twenty-four (24) hours from the time of the imposition of the new conditions continues to be detained as a result of his inability to meet the new conditions of release; or

(2) a person ordered released on a condition which requires that he return to custody after specified hours shall be entitled, upon application, to a review of such conditions pursuant to Paragraph E of Rule 6-401.

C.

Record of review. If the court after a hearing pursuant to Subparagraph (2) or (3) of Paragraph A of this rule, enters an order imposing new conditions, the defendant shall be entitled, upon application, to a review of such conditions pursuant to Paragraph E of Rule 6-401, provided that, in such review, the court shall consider the record of any hearing held pursuant to this rule and any additional evidence the court may permit.

D.

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 567, 568. 22 C.J.S. Criminal Law § 352.

6-404, 6-405. Reserved.

6-406. Bail bonds; exoneration; forfeiture.

A.

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

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

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

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

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

B.

Surrender of an offender by a paid surety. A person who is released upon execution of a bail bond by a paid surety may be arrested by the paid surety if the court has revoked the defendant's conditions of release pursuant to Rule 6-403 or if the court has declared a forfeiture of the bond pursuant to the provisions of this rule. If the paid surety delivers the defendant to the court prior to the entry of a judgment of default on the bond, the court may absolve the bondsman of responsibility to pay all or part of the bond.

C.

Forfeiture. If there is a breach of condition of a bond, the court may declare a forfeiture of the bail. If a forfeiture has been declared, the court shall hold a hearing on the forfeiture prior to entering a judgment of default on the bond. A hearing on the forfeiture shall be held thirty (30) or more days after service of the Notice of Forfeiture and Order to Show Cause on the clerk of the court in the manner provided by Rule 6-407.

D.

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

E.

Default judgment; execution. If, after a hearing, the forfeiture is not set aside, a default judgment on the bond shall be entered by the court. If the default judgment is not paid within ten (10) days after it is filed and served on the surety in the manner provided by Rule 6-407, execution may issue thereon. Notwithstanding any provision of law, no other refund of the bail bond shall be allowed.

[Effective October 1, 1987.]

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the magistrate courts on or after October 1, 1987.

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

6-407. Bail bonds; notice.

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

[Effective October 1, 1987.]

Effective dates. - Pursuant to a supreme court order dated September 9, 1987, this rule is effective for cases filed in the magistrate courts on or after October 1, 1987.

Article 5

Arraignment and Preparation for Trial

6-501. Arraignment or first appearance.

A.

Explanation of rights. Upon the first appearance of the defendant before the magistrate in response to a summons or warrant or following arrest, the magistrate shall inform the defendant of the following:

(1) the offense charged;

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

(3) the right to bail;

(4) the right, if any, to trial by jury;

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

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

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

(8) the right, if any, to a preliminary examination. The magistrate shall then allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B.

Offense within magistrate trial jurisdiction. If the offense charged is within magistrate trial jurisdiction, the magistrate shall thereafter require the defendant to plead to the complaint, pursuant to Rule 6-302, and if the defendant refuses to answer, a plea of not guilty must be entered. If the defendant pleads "not guilty by reason of insanity" or if an issue is raised as to the mental competency of the defendant to stand trial, the action shall be transferred to the district court and the magistrate shall bind the defendant over to the district court. If the defendant pleads "not guilty", the action shall be set for trial as soon as possible.

C.

Offense not within magistrate trial jurisdiction. If the offense charged is not within magistrate trial jurisdiction and if the defendant waives preliminary examination, the magistrate shall bind the defendant over to the district court. If the defendant does not waive preliminary examination and the offense is one for which it is required, the magistrate shall proceed to conduct such an examination in accordance with Rule 6-202 of these rules.

D.

Bail. If the defendant has not been released by the magistrate or his designee, and if the offense charged is a bailable offense, the magistrate shall enter an order prescribing conditions of release in accordance with Rule 6-401 of these rules.

E.

Waiver of arraignment. An arraignment may be waived, with the consent of the court, by the defendant filing a written plea of not guilty prior to or at the time set for arraignment. An entry of a plea of not guilty shall be substantially in the form approved by the supreme court.

F.

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

are met:

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

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

G.

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

[As amended, effective March 1, 1987 and October 1, 1987.]

Cross-references. - As to explanation of right to, and opportunity to consult with, public defender, see 31-15-12 NMSA 1978. For waiver of counsel form, see Form 9-401. For form on transfer order, see Form 9-404.

The first 1987 amendment, effective for cases filed in the magistrate courts on or after March 1, 1987, added Paragraph F.

The second 1987 amendment, effective for cases filed in the magistrate courts on or after October 1, 1987, in Paragraph F, deleted "arraignment or" preceding "first appearance" in the introductory paragraph and deleted former Paragraph (3) which read "no plea is entered by the court except a plea of not guilty"; and added Paragraph G.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 632, 635, 825.
Necessity of proving venue or territorial jurisdiction of criminal offense beyond reasonable doubt, 67 A.L.R.3d 988.

6-502. Plea agreements.

A.

Pleas. A defendant charged with a non-traffic criminal offense or any of the following traffic offenses: driving while intoxicated, driving while under the influence of drugs, reckless driving, and driving on a suspended or revoked license, may plead as follows:

(1) guilty;

(2) not guilty; or

(3) no contest, subject to the approval of the court.

B.

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

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

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

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

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

C.

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

D.

Plea agreement procedure.

(1) The government or its agent and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the government or its agent will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

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

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

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

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

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

E.

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

[As amended, effective May 1, 1986; as amended, effective January 1, 1987.]

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

6-503. Disposition without hearing.

A.

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

B.

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

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

6-504. Discovery.

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

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

6-505. Pretrial conference.

At any time after the filing of a complaint or citation, the magistrate may, with or without the filing of a motion, 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. The court may issue subpoenas for the attendance of witnesses at the request of a party.

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 411 to 432. 22 C.J.S. Criminal Law § 340 et seq.

6-506. Dismissal of actions.

A.

Voluntary dismissal. A complaint or a count therein may be dismissed by the prosecution by filing a notice of dismissal at any time before trial. Unless otherwise stated in the notice, the dismissal is without prejudice. The notice shall be presented to the magistrate before filing, and he shall endorse thereon an order that the action or count is dismissed.

B.

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

Cross-references. - For form on order dismissing criminal complaint with prejudice, see Form 9-414. For form of notice of dismissal of criminal complaint, see Form 9-415.

This rule does not conflict with 35-3-4 NMSA 1978 by extending the dispositive powers of magistrates to cover felony charges. State v. Mann, 94 N.M. 276, 609 P.2d 723 (1980).

Words "any criminal charge" should be taken to mean any criminal charge within the magistrate court's jurisdiction; felony charges may only be dismissed with prejudice by the district court for failure to abide by the rules and by the applicable statutes of limitation of that court. State v. Mann, 94 N.M. 276, 609 P.2d 723 (1980).

Magistrate's dismissal of felony charge deemed not acquittal. - The rules governing criminal actions in magistrate courts are inapplicable in cases over which the magistrate is without trial jurisdiction. Thus, since the magistrate had no jurisdiction to try the felony charges, the power to acquit was lacking and his dismissal of the complaint was not an acquittal. State v. Peavler, 87 N.M. 443, 535 P.2d 650 (Ct. App.), rev'd on other grounds, 88 N.M. 125, 537 P.2d 1387 (1975); State v. Mann, 94 N.M. 276, 609 P.2d 723 (1980); State v. Mayberry, 94 N.M. 278, 609 P.2d 725 (1980).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 513, 516, 517, 663, 868 to 871, 874.
When is federal court justified, under Rule 48(a) of the Federal Rules of Criminal Procedure, in denying government leave to dismiss criminal charges, 48 A.L.R. Fed.

635.
22 C.J.S. Criminal Law § 333.

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

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

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

Article 6

Trials

6-601. Conduct of trials.

A.

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

B.

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

C.

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

D.

Record. A party may cause a record, as defined in Rule 6-110, to be made of the proceeding at the expense of that party.

Compiler's notes. - Rule 6-110, referred to in Paragraph D, was withdrawn effective for cases filed in the magistrate courts on or after September 1, 1989.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 23A C.J.S. Criminal Law § 1145 et seq.

6-602. Jury trial.

A.

Petty misdemeanor offense. If the offense charged is a petty misdemeanor, either party to the action may demand a trial by jury. The demand shall be made:

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

(2) in writing to the court within ten (10) days after the time of entering a plea.

If demand is not made as provided in this paragraph, trial by jury is deemed waived.

B.

Misdemeanor offense. If the offense is a misdemeanor, the case shall be tried by jury unless the defendant waives a jury trial with the approval of the court and the consent of the state.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 672, 677.
Right to trial by jury in criminal prosecution for driving while intoxicated or similar offense, 16 A.L.R.3d 1373.
Right to jury trial under federal constitution where two or more petty offenses, each having penalty of less than six months' imprisonment, have potential aggregate penalty in excess of six months when tried together, 26 A.L.R. Fed. 736.
50 C.J.S. Juries § 9 et seq.

6-603. Trials to juries.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law § 787.
Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.

6-604. Nonjury trials.

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

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

6-605. Jurors.

A.

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

B.

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

C.

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

D.

Selection of jury.

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

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

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

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

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

E.

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

F.

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

[As amended, effective September 1, 1989.]

The 1989 amendment, effective for cases filed in the magistrate courts on or after September 1, 1989, in Subparagraph (2) of Paragraph D, deleted the former "(a)" designation from the beginning and deleted former (b), which read "or (b) the magistrate may draw six slips with the juror's names thereon from the box and these six jurors may be questioned as a group and individually" from the end of the first sentence.

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 679 to 685.
Right of consent to trial of criminal case before less than 12 jurors; and effect of consent upon jurisdiction of court to proceed with less than 12, 70 A.L.R. 279; 105 A.L.R. 1114.
Indoctrination by court of persons summoned for jury service, 89 A.L.R.2d 197.
Validity of jury selection as affected by accused's absence from conducting of procedures for selection and impaneling of final jury panel for specific case, 33 A.L.R.4th 429.
50 C.J.S. Juries § 155 et seq.

6-606. Subpoenas.

A.

For attendance of witnesses. Every subpoena shall be issued by the magistrate 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.

Personal service. A subpoena may be served by any full-time, salaried law enforcement officer of the magistrate 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 magistrate 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 magistrate court from which the subpoena was issued. The magistrate judge shall not hold any person in contempt of the magistrate 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.

[As amended, effective January 1, 1987.]

Cross-references. - For forms on subpoena, return for completion by sheriff or deputy and return for completion by other person making service, see Form 4-503. For forms on subpoena and certificate of service, see Form 9-503. For form on subpoena to produce document or object, see Form 9-504.

6-607. Blood and breath alcohol test reports.

A.

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

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

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

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

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

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

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

(b) upon request, the calibration testing records for a reasonable period of time

surrounding the defendant's test are made available to the defendant for inspection prior to trial. The defendant may request a copy to be made of the testing records at the defendant's expense.

B.

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

C.

Admissibility of other evidence. Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in a blood or breath alcohol print-out or report or affect the admissibility of any other relevant evidence.

[As amended, effective October 1, 1987.]

Cross-references. - For forms on report of analysis breath and blood alcohol, certificate of receiving clerk, certificate of analyst, certificate of supervisor and certificate of mailing, see Form 9-505.

The 1987 amendment, effective for cases filed in the magistrate courts on or after October 1, 1987, inserted "and breath" in the catchline; in Paragraph A, added "the following evidence is not to be excluded under the hearsay rule, even though the declarant may be available as a witness" in the introductory paragraph, designated a portion of the former introductory paragraph as present Paragraph (1), deleting "is not excluded by the hearsay rule, even though the declarant is available as a witness" following "test sample", redesignated former Paragraphs (1), (2), and (3) as Paragraphs (a), (b), and (c), and added Paragraph (2); rewrote Paragraph B, which read "Proof of mailing, and authentication of the report (except for the portion thereof which is completed by a law enforcement officer) shall be by certificate on the report"; and, in Paragraph C, substituted "a blood or breath alcohol print-out or report" for "such report" and "any other relevant evidence" for "any evidence other than this report".

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 710, 713, 941 to 950.
22A C.J.S. Criminal Law § 760 et seq.

6-608. Controlled substance test and autopsy reports.

A.

Admissibility. In any preliminary hearing a written report of the conduct and results of a laboratory analysis of a controlled substance enumerated in Section 30-31-6 through 30-31-10 NMSA 1978, for determining the presence and quantity or absence of a controlled substance and the circumstances surrounding receipt and custody of the test sample, or a written report of the conduct and results of an autopsy for determining the fact and cause of death and the circumstances surrounding receipt and custody of the decedent, is not excluded by the hearsay rule, even though the declarant is available as a witness, if:

(1) the report is of an analysis conducted by the New Mexico State Police Crime Laboratory or the Office of the Medical Investigator;

(2) the report is regular on its face and is attached to a certification form approved by the supreme court; and

(3) a legible copy of the certification form and report was mailed to the defendant or his counsel at least ten (10) days before the preliminary hearing.

B.

Admissibility of other evidence. Nothing in this rule shall limit the right of a party to call witnesses to testify as to the matters covered in such report, nor affect the admissibility of any evidence other than this report.

[As amended, effective January 1, 1987.]

6-609. Instructions to juries.

A.

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

"Ladies and gentlemen of the jury:

The case will now be submitted to you for decision. Upon retiring to the jury room and before commencing your deliberations you will select one of your members as foreman. You will then determine the facts in the case from the evidence that has been presented here in open court during the trial. From the facts and the law as you understand it you

will decide upon a verdict.

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

The law which the defendant is accused of violating is as follows: (Read statute.) In order to convict the defendant of this offense, you must find him guilty beyond a reasonable doubt. (Applicable instructions from Uniform Jury Instructions (U.J.I.) Criminal may be added here.)

Your verdict must be unanimous. When all of you have agreed upon a verdict, you will return to open court and your foreman will then announce the verdict."

B.

UJI instructions. If requested by a party or on his own motion, and if he deems it appropriate, the magistrate may give the jury any other applicable instructions contained in the New Mexico Uniform Jury Instructions (U.J.I.) Criminal, but no other instructions on the law shall be given.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 75 Am. Jur. 2d Trial §§ 710 to 722.
Duty in instructing jury in criminal prosecution to explain and define offense charged, 169 A.L.R. 315.
Instruction, in prosecution based on abortion, as to limited effect of evidence of commission of similar crimes by accused, 15 A.L.R.2d 1113.
Instructions in prosecution for bribery or accepting bribes as to consideration of evidence tending to show commission of other bribery or acceptance of bribe, 20 A.L.R.2d 1036.
Instruction as to presumption of continuing insanity in criminal case, 27 A.L.R.2d 121.
Instructions as to entrapment to commit offense with respect to narcotics law, 33 A.L.R.2d 902.
Instructions in robbery prosecution limiting effect of evidence of other robberies, 42 A.L.R.2d 885.
Instructions as to entrapment to commit offense against laws regulating sales of liquor, 55 A.L.R.2d 1382.
Duty of trial court to instruct on self-defense, in absence of request by accused, 56 A.L.R.2d 1170.
Effect of failure or refusal of court, in robbery prosecution, to instruct on assault and battery, 58 A.L.R.2d 808.

Right of defendant to complain, on appellate review, of instructions favoring codefendant, 60 A.L.R.2d 524.
Instruction, in prosecution for gambling or gaming offense, as to limited effect of evidence of other acts of gambling, 64 A.L.R.2d 846.
Instructions in prosecution for entrapment as to bribery or offer to bribe, 69 A.L.R.2d 1435.
Instructions as to identification of accused by his voice, 70 A.L.R.2d 1019.
Duty to give cautionary instruction against emotional appeal of photograph of corpse in prosecution for homicide, 73 A.L.R.2d 800.
Instruction as to entrapment with respect to violation of fish and game laws, 75 A.L.R.2d 709.
Necessity and sufficiency of cautionary instructions, in prosecution for rape, as to evidence of other similar offense, 77 A.L.R.2d 855; 2 A.L.R.4th 330.
Instruction as to presumption of deliberation or premeditation from the act of killing, 86 A.L.R.2d 659.
Instructions in prosecution for criminal conspiracy as to gambling, 91 A.L.R.2d 1203.
Additional instruction to jury after submission of felony case, in accused's absence, 94 A.L.R.2d 270.
Instructions as to presumption of deliberation and premeditation from circumstances attending killing, 96 A.L.R.2d 1435.
Unanimity as to punishment in criminal case where jury can recommend lesser penalty, 1 A.L.R.3d 1461.
Duty of court, in absence of specific request, to instruct on subject of alibi, 72 A.L.R.3d 547.
Sympathy to accused as appropriate factor in jury consideration, 72 A.L.R.3d 842.
Necessity of, and prejudicial effect of omitting, cautionary instruction to jury as to accomplice's testimony against defendant in criminal trial, 17 A.L.R. Fed. 249.
23A C.J.S. Criminal Law § 1351 et seq.

6-610. Return of verdict; discharge of jurors.

A.

Return. The verdict shall be unanimous and signed by the foreman. It shall be returned by the jury to the judge in open court.

B.

Several defendants. If there are two or more defendants, the jury at any time during its deliberations may return a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed. If the jury cannot agree with respect to all, the defendant or defendants as to whom it does not agree may be tried again.

C.

Several counts. If there are two or more counts, the jury may at any time during its deliberations return a verdict or verdicts with respect to a count or counts upon which it has agreed. If the jury cannot agree with respect to all counts, the defendants may be tried again upon the counts on which the jury could not agree.

D.

Conviction of lesser offense. If so instructed, the jury may find the defendant guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein.

E.

Poll of jury. When a verdict is returned and before it is recorded, the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

F.

Irregularity of verdict. No irregularity in the rendition or reception of a verdict of which the parties have been made aware may be raised unless it is raised before the jury is discharged. No irregularity in the recording of a verdict shall affect its validity unless the defendant was in fact prejudiced by such irregularity.

G.

Discharge of jury. After the jury has retired to consider their verdict the court shall discharge the jury from the cause when:

(1) their verdict has been received;

(2) the court finds there is no reasonable probability that the jury can agree upon a verdict; or

(3) some other necessity exists for their discharge. The court may in any event discharge the jury if the parties consent to its discharge.

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 1012 to 1019.
23A C.J.S. Criminal Law § 1395 et seq.

Article 7

Judgment and Appeal

6-701. Judgment; costs.

A.

Judgment. If the defendant is found guilty, a judgment of guilty shall be rendered. If he has been acquitted, a judgment of not guilty shall be rendered. The judgment and sentence shall be rendered in open court and thereafter a written judgment and sentence shall be signed by the judge and filed. The court shall give notice of entry of judgment and sentence in accordance with Paragraph B of Rule 6-209.

B.

Costs. In every case in which there is a conviction, the costs may be adjudged against the defendant.

C.

Fine receipt. Whenever fines or costs are received by a magistrate in any criminal action, he shall complete the criminal fine receipt, require the defendant's acknowledgment of receipt of the form on all copies and deliver the original to the defendant. If the defendant refuses to acknowledge the receipt, the magistrate shall note the circumstances of the refusal on the form and mail the original to the administrative office of the courts. The fine receipt shall be in the form approved by the court administrator and the supreme court.

Cross-references. - For form on judgment and sentence, see Form 9-601. For form on final order on criminal complaint, see Form 9-603. For form on agreement to pay the fine and court costs, see Form 9-605.

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 525 to 534. Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.
24 C.J.S. Criminal Law § 1458 et seq.

6-702. Advising defendant of right to appeal.

At the time of entering a judgment and sentence, the court shall advise the defendant of his right to a new trial in the district court. The court shall also advise the defendant that:

A.

Time limits. His appeal must be filed within fifteen (15) days after entry of the judgment and sentence;

B.

Duty of defendant. He has the duty of obtaining a trial date before the district court within six (6) months of the date of the filing of the notice of appeal; and

C.

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

Cross-references. - For form on judgment and sentence, see Form 9-601. For form on final order on criminal complaint, see Form 9-603. For form on agreement to pay the fine and court costs, see Form 9-605.

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 525 to 534. Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.
24 C.J.S. Criminal Law § 1458 et seq.

6-703. Appeal.

A.

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

B.

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

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

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

C.

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

D.

Docketing the appeal. The clerk of the district court shall collect the docket fee or an appropriate affidavit of indigency for filing an appeal. The magistrate court shall transmit to the district court the order fixing conditions of release and bond, if any, and a transcript of all the proceedings taken in the action to the clerk of the district court within ten (10) days after the filing of the notice of appeal. Upon the filing of the notice of

appeal, the magistrate court shall give notice of the appeal to each party in the action or to the attorney for any party who is represented by an attorney.

E.

Transcript. The transcript shall include:

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

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

(3) any exhibits;

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

(5) the record of the hearing in the magistrate court, if any.

F.

Conditions of release. Pending final determination of the appeal, the defendant shall be entitled to bail at the time of filing notice of appeal. The magistrate court shall establish conditions of release pending appeal sufficient to secure the appearance of the defendant and the judgment of the magistrate court. The magistrate court may utilize the criteria listed in Paragraph B of Rule 6-401, and may also consider the fact of defendant's conviction and the length of sentence imposed. Nothing in this rule shall be construed to prevent the court from releasing a person not released prior to or during trial.

G.

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

H.

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

I.

Disposition; time limitations. The district court shall try the appeal within six (6) months after the filing of the notice of appeal. Any appeal pending in the district court six (6)

months after the filing of the notice of appeal without disposition shall be dismissed and the cause remanded to the magistrate court for enforcement of its judgment.

J.

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

K.

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

[As amended, effective September 1, 1989.]

Cross-references. - For form on notice of appeal, see Form 9-607. For form on title page of transcript of criminal proceedings and certificate, see Form 9-608.

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

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

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

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

Defendants responsible for forwarding transcript. - Even though Paragraph D states that the magistrate court shall transmit a transcript of all proceedings to the district court, this does not relieve defendants who are initiating an appeal of their responsibility to see that a proper transcript is forwarded. State v. Rivera, 92 N.M. 155, 584 P.2d 202 (Ct. App. 1978).

Limited authority of district court upon expiration of six-month period. - Absent a hearing on an appeal from a magistrate court within six months of the date of the notice of appeal, the district court's only authority is to dismiss the appeal and remand the cause to the magistrate court for enforcement of its judgment. State v. Rivera, 92 N.M. 155, 584 P.2d 202 (Ct. App. 1978); State v. Hrabak, 100 N.M. 303, 669 P.2d 1098 (Ct. App. 1983).

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 4 Am. Jur. 2d Appeal and Error §§ 267 to 275.
Amendment, after expiration of time for filing motion for new trial in criminal case, of motion made in due time, 69 A.L.R.3d 933.
24 C.J.S. Criminal Law §§ 1674 et seq.

6-704. Harmless error; clerical mistakes.

A.

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

B.

Clerical mistakes. Clerical mistakes in final orders or other parts of the file and errors therein arising from oversight or omission may be corrected by the magistrate at any time of his own initiative or on the request of any party after such notice to the opposing party, if any, as the magistrate orders. During the pendency of an appeal, such mistakes

may be so corrected before the transcript is filed in the district court, and thereafter while the appeal is pending may be corrected with leave of the district court.

Article 8

Special Proceedings

6-801. Modification of sentence.

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

Cross-references. - For form on judgment and sentence, see Form 9-601. For form on final order on criminal complaint, see Form 9-603. For form on agreement to pay the fine and court costs, see Form 9-605.

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

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

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

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

Am. Jur. 2d, A.L.R. and C.J.S. references. - 21 Am. Jur. 2d Criminal Law §§ 525 to 534.
Propriety and prejudicial effect of trial court's inquiry as to numerical division of jury, 77 A.L.R.3d 769.
24 C.J.S. Criminal Law § 1660 et seq.

6-802. Return of the probation violator.

A.

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

B.

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

C.

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

D.

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

[As amended, effective September 1, 1989.]

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