UNANNOTATED

Rules of Civil Procedure for the District Courts

ARTICLE 1
Scope of Rules; One Form of Action

1-001. Scope of rules; definitions.

A. **Scope.** These rules govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity except to the extent that the New Mexico Rules of Evidence are inconsistent herewith. Except where these rules explicitly provide otherwise, these rules do not apply where there are contrary statutory provisions concerning special statutory or summary proceedings. These rules shall be subject to the provisions of Rule 23-114 NMRA, the rule governing free process for civil cases. These rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action.

B. **Definitions.** As used in these rules and the civil forms approved for use with these rules:

(1) "defendant" includes a respondent;

(2) "plaintiff" includes a petitioner;

(3) "process" is the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding and includes a:

(a) summons and complaint;

(b) summons and petition;

(c) writ or warrant; and

(d) mandate; and

(4) "service of process" means delivery of a summons or other process in the manner provided by Rule 1-004 NMRA of these rules.

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

D. **Citation form.** These rules shall be cited by set and rule number of the New Mexico Rules Annotated, "NMRA", as in Rule 1-____ NMRA.

[As amended, effective January 1, 1995; March 1, 2005; as amended by Supreme Court Order No. 07-8300-041, effective February 25, 2008; by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012.]

Committee commentary. — The New Mexico Constitution provides that district courts have only such "jurisdiction of special cases and proceeding as may be conferred by law." N.M. Const. Art VI, Sec. 13. As a matter of practice, but not constitutional compulsion, the Supreme Court has deferred to legislative directives concerning procedural matters in special proceedings even if they do not affect the Court's jurisdiction. However, the Supreme Court sometimes adopts procedure rules that are explicitly applicable to statutory procedures for special cases and proceedings. When this occurs, the explicit contrary rule supersedes the statutory procedures. *See Ammerman v. Hubbard Broadcasting Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976) (Procedural statutes do not apply if contradicted by a rule of procedure promulgated by the Supreme Court); NMSA Sec. 38-1-2 ("Practice statutes may be modified or suspended by rules"); NMRA Rule 1-091 ("Adopting Procedural Statutes").

Rule 1-004(A)(1) (service of summons), Rule 1-087 (Contest of Election or Nomination) and Rules 1-071.1 to 1-071.5 (Stream Adjudications) are examples of procedural rules adopted by the New Mexico Supreme Court that supersede contrary statutory provisions dealing with special statutory cases or proceedings.

Special Cases, Proceedings Defined

Special cases and proceedings are "statutory proceedings to enforce rights and remedies created by statute and which were unknown at common law." *In re Forest*, 45 N.M. 204. 207, 113 P.2d 582, 583 (1941); *VanderVossen v. City of Espanola*, 130 N.M. 287, 24 P.3d 319, Par. 15 (Ct. App. 2001).

Special Proceedings

Special proceedings include: Election Contests [*Montoya v. McManus*, 68 N.M. 381, 384, 362 P.2d 771, 773 (1961)]; Probate Proceedings [*In re Estate of Harrington*, 129 N.M. 266, 5 P.3d 1070, 2000 -NMCA- 058, Par. 14]; Zoning Proceedings [*VanderVossen v. City of Española*, 130 N.M. 287, 24 P.3d 319, 2001-NMCA-016, Par. 15]; Workers' Compensation Proceedings [*Holman v. Oriental Refinery*, 75 N.M. 52, 54, 400 P.2d 471, 473 (1965)]; Arbitration Proceedings [*Medina v. Foundation Reserve Ins. Co.*, 123 N.M. 380, 940 P.2d 1175, Par. 10 (N.M. 1997)]; Declaratory Judgment Proceedings [*Smith v. City of Santa Fe*, 142 N.M. 786, 171 P.3d 300, 2007-NMSC-055, Par. 13]; Adoption Proceedings [*In re Doe*, 101 N.M. 34, 37, 677 P.2d 1070, 1073 (Ct. App. 1984)]; Garnishment Proceedings [*Postal Finance Co. v. Sisneros*, 84 N.M. 724, 725, 527 P.2d 785, 786 (1973)]; Stream Adjudications [Rule 1-071.2 NMRA]; Certain Tax Proceedings [*In re Sevilleta de la Joya Grant*, 41 N.M. 305, 68 P.2d 160 (1937) (tax sales); *In re Blatt*, 41 N.M. 269, 67 P.2d 293 (1937) (suit to recover overpayment of taxes); *State v. Rosenwald Bros. Co.*, 23 N.M. 578, 170 P. 42 (1918) (challenge to tax

evaluation)]; and Condemnation Proceedings [*State v. Rosenwald Bros. Co.*, 23 N.M. 578, 170 P. 42 (1918)].

Summary Proceedings

Summary proceedings include direct Contempt, *State v. Ngo*, 130 N.M. 515, 520, 27 P.3d 1002, 1007 (Ct. App. 2001), and Proceedings to Enforce or Quash Subpoenas, *Wilson Corp. v. State ex rel. Udall*, 121 N.M. 677, 916 P.2d 1344, 1996-NMCA-049, Par. 13

Probate Proceedings

Though probate proceedings are "Special Proceedings," *e.g.*, *In re Estate of Harrington*, 2000-NMCA-058, ¶ 15, 129 N.M. 266, 5 P.3d 1070, these rules apply only in district court and do not apply directly to proceedings in probate court. *See* NMSA 1978, § 34-7-13 (rule-making power of probate judges). Moreover, the publication provisions of Rule 1-004 NMRA apply only to service of "process" which is defined as "the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding." Rule 1-004(B)(3). Thus, the Rule 1-004 requirements for, and restrictions on, service by publication apply only to any aspects of probate practice in district court that require service of process as defined in Rule 1-001(B)(3) NMRA. For a discussion of the constitutional limits on the use of publication as a method for giving notice generally in probate proceedings, *see Tulsa Collection Services, Inc. v. Pope*, 485 U.S. 478 (1988).

[Adopted by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012.]

1-002. One form of action.

There shall be one form of action to be known as "civil action".

ARTICLE 2
Commencement of Action; Service of Process, Pleadings, Motions and Orders

1-003. Commencement of action.

A civil action is commenced by filing a complaint with the court. Upon the filing of the complaint, the clerk shall endorse thereon the time, day, month and year that it is filed.

1-003.1. Commencement of action; domestic relations information sheet.

A. **Information sheet.** A domestic relations information sheet substantially in the form approved by the Supreme Court shall be submitted with the petition initiating a domestic relations case, a motion to reopen a closed domestic relations case, and with a party's first responsive pleading in a domestic relations case. A blank copy of the domestic relations information sheet shall be served on the respondent with the summons and petition. Information in the court automated information system which is obtained from the domestic relations information sheet is confidential and shall not be disclosed except that it may be disclosed to:

(1) the parties in the proceeding, unless otherwise ordered by the court;

(2) state and federal agencies required by law to collect the information disclosed; and

(3) court personnel for enforcement, data collection and record keeping purposes.

B. **Legal effect.** Information appearing on the information sheet will have no legal effect in the action.

C. **Failure to comply.** The clerk will file a pleading even if it is submitted without an information sheet or is filed with an information sheet that is incomplete. If a party fails to file or complete an information sheet, the clerk will give written notice to the party of the deficiency. If a party fails to cure the deficiency within thirty (30) days, the court may enter an order which provides for dismissal of the party's claim without prejudice. The clerk shall serve a copy of the court's order of dismissal on all parties.

[Provisionally approved, effective November 1, 1999 until November 1, 2000; approved, effective November 1, 2000; as amended by Supreme Court Order No. 14-8300-011, effective for all cases filed on or after December 31, 2014.]

Committee commentary. — This rule is necessary to implement the use of civil information sheets as may be required for administrative purposes by the courts. This rule is similar to LR-CIV 3.1 of the Local Civil Rules of the United States District Court for the District of New Mexico.

[Amended by Supreme Court Order No. 14-8300-011, effective for all cases filed on or after December 31, 2014.]

1-003.2. Commencement of action; guardianship and conservatorship information sheet.

An information sheet identifying persons entitled to notice and access to court records in a proceeding under Chapter 45, Article 5, Parts 3 or 4 NMSA 1978 shall be submitted by the petitioner upon the filing of a petition to appoint a guardian or

conservator. The information sheet shall be substantially in the form approved by the Supreme Court.

[Approved by Supreme Court Order No. 18-8300-005, effective for all cases filed, or pending but not adjudicated, on or after July 1, 2018.]

Committee commentary. — The information sheet required under this rule, Form 4-992 NMRA, is for administrative use only and is not made part of the record. The purpose of the information sheet is to assist court staff with identifying persons entitled to notice and access to court records under Rule 1-079.1(B)(2) and (C)(2) NMRA prior to the appointment of a guardian or conservator. *See also* NMSA 1978, §§ 45-5-303(K), 45-5-407(N) (providing that a person entitled to notice may access court records of the proceeding and resulting guardianship or conservatorship).

[Approved by Supreme Court Order No. 18-8300-005, effective for all cases filed, or pending but not adjudicated, on or after July 1, 2018.]

1-003.3. Commencement of foreclosure action; certification of pre-filing notice required.

A certification of pre-filing notice, substantially in the form approved by the Supreme Court as Form 4-227 NMRA, shall be submitted with any complaint initiating a foreclosure action. Notwithstanding the provisions of Rule 1-005(F) NMRA, the clerk shall not accept for filing any foreclosure complaint that is not submitted with the certification form required under this rule.

[Approved by Supreme Court Order No. 21-8300-004, effective for all cases pending or filed on or after September 7, 2021.]

1-004. Process.

A. (1) **Scope of rule.** The provisions of this rule govern the issuance and service of process in all civil actions including special statutory proceedings except the provisions for service of process in Rule 1-077.1(E) shall apply in proceedings brought under the Criminal Records Expungement Act, Sections 29-3A-1 to -9 NMSA 1978.

(2) **Summons; issuance.** Upon the filing of the complaint, the clerk shall issue a summons and deliver it to the plaintiff for service. Upon the request of the plaintiff, the clerk shall issue separate or additional summons. Any defendant may waive the issuance or service of summons.

B. **Summons; execution; form.** The summons shall be signed by the clerk, issued under the seal of the court and be directed to the defendant. The summons shall be substantially in the form approved by the Supreme Court and must contain:

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

(2) a direction that the defendant serve a responsive pleading or motion within thirty (30) days after service of the summons and file a copy of the pleading or motion with the court as provided by Rule 1-005 NMRA;

(3) a notice that unless the defendant serves and files a responsive pleading or motion, the plaintiff may apply to the court for the relief demanded in the complaint; and

(4) the name, address and telephone number of the plaintiff's attorney. If the plaintiff is not represented by an attorney, the name, address and telephone number of the plaintiff.

C. **Service of process; return.**

(1) If a summons is to be served, it shall be served together with any other pleading or paper required to be served by this rule. The plaintiff shall furnish the person making service with such copies as are necessary.

(2) Service of process shall be made with reasonable diligence, and the original summons with proof of service shall be filed with the court in accordance with the provisions of Paragraph L of this rule.

D. **Process; by whom served.** Process shall be served as follows:

(1) if the process to be served is a summons and complaint, petition or other paper, service may be made by any person who is over the age of eighteen (18) years and not a party to the action;

(2) if the process to be served is a writ of attachment, writ of replevin or writ of habeas corpus, service may be made by any person not a party to the action over the age of eighteen (18) years designated by the court to perform such service or by the sheriff of the county where the property or person may be found;

(3) if the process to be served is a writ other than a writ specified in Subparagraph (2) of this paragraph, service shall be made as provided by law or order of the court.

E. **Process; how served; generally.**

(1) Process shall be served in a manner reasonably calculated, under all the circumstances, to apprise the defendant of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

(2) Service may be made, subject to the restrictions and requirements of this rule, by the methods authorized by this rule or in the manner provided for by any applicable statute, to the extent that the statute does not conflict with this rule.

(3) Service may be made by mail or commercial courier service provided that the envelope is addressed to the named defendant and further provided that the defendant or a person authorized by appointment, by law or by this rule to accept service of process upon the defendant signs a receipt for the envelope or package containing the summons and complaint, writ or other process. Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this subparagraph. For purposes of this rule "signs" includes the electronic representation of a signature.

F. **Process; personal service upon an individual.**

(1) Personal service of process shall be made upon an individual by delivering a copy of a summons and complaint or other process:

(a) to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service; or

(b) by mail or commercial courier service as provided in Subparagraph (3) of Paragraph E of this rule.

(2) If, after the plaintiff attempts service of process by either of the methods of service provided by Subparagraph (1) of this paragraph, the defendant has not signed for or accepted service, service may be made by delivering a copy of the process to some person residing at the usual place of abode of the defendant who is over the age of fifteen (15) years and mailing by first class mail to the defendant at the defendant's last known mailing address a copy of the process; or

(3) If service is not accomplished in accordance with Subparagraphs (1) and (2), then service of process may be made by delivering a copy of the process at the actual place of business or employment of the defendant to the person apparently in charge thereof and by mailing a copy of the summons and complaint by first class mail to the defendant at the defendant's last known mailing address and at the defendant's actual place of business or employment.

G. **Process; service on corporation or other business entity.**

(1) Service may be made upon:

(a) a domestic or foreign corporation, a limited liability company or an equivalent business entity by serving a copy of the process to an officer, a managing or a general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. If the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant;

(b) a partnership by serving a copy of the process to any general partner;

(c) an unincorporated association which is subject to suit under a common name, by serving a copy of the process to an officer, a managing or general agent or to any other agent authorized by appointment, by law or by this rule to receive service of process. 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.

(2) If a person described in Subparagraph (a), (b) or (c) of this subparagraph refuses to accept the process, tendering service as provided in this paragraph 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.

(3) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

H. **Process; service upon state or political subdivisions.**

(1) Service may be made upon the State of New Mexico or a political subdivision of the state:

(a) in any action in which the state is named a party defendant, by delivering a copy of the process to the governor and to the attorney general;

(b) in any action in which a branch, agency, bureau, department, commission or institution of the state is named a party defendant, by delivering a copy of the process to the head of the branch, agency, bureau, department, commission or institution and to the attorney general;

(c) in any action in which an officer, official, or employee of the state or one of its branches, agencies, bureaus, departments, commissions or institutions is named a party defendant, by delivering a copy of the process to the officer, official or employee and to the attorney general;

(d) in garnishment actions, service of writs of garnishment shall be made on the department of finance and administration, on the attorney general and on the head

of the branch, agency, bureau, department, commission or institution. A copy of the writ of garnishment shall be delivered or served on the defendant employee in the manner and priority provided in Paragraph F of this rule;

(e) service of process on the governor, attorney general, agency, bureau, department, commission or institution may be made either by serving a copy of the process to the governor, attorney general or the chief operating officer of an entity listed in this subparagraph or to the receptionist of the state officer. A cabinet secretary, a department, bureau, agency or commission director or an executive secretary shall be considered as the chief operating officer;

(f) upon any county by serving a copy of the process to the county clerk;

(g) upon a municipal corporation by serving a copy of the process to the city clerk, town clerk or village clerk;

(h) upon a school district or school board by serving a copy of the process to the superintendent of the district;

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

(2) Service may be made on a person or entity described in Subparagraph (1) of this paragraph by mail or commercial courier service in the manner provided in Subparagraph (3) of Paragraph E of this rule.

I. **Process; service upon minor, incompetent person, guardian or fiduciary.**

(1) Service shall be made:

(a) upon a minor, if there is a conservator of the estate or guardian of the minor, by serving a copy of the process to the conservator or guardian in the manner and priority provided in Paragraph F, G or J of this rule as may be appropriate. If no conservator or guardian has been appointed for the minor, service shall be made on the minor by serving a copy of the process on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court.

(b) upon an incompetent person, if there is a conservator of the estate or guardian of the incompetent person, by serving a copy of the process to the conservator or guardian in the manner and priority provided by Paragraph F of this rule. If the incompetent person does not have a conservator or guardian, process may be served on a person designated by the court.

(2) Service upon a personal representative, guardian, conservator, trustee or other fiduciary in the same manner and priority for service as provided in Paragraphs F, G or J of this rule as may be appropriate.

J. **Process; service in manner approved by court.** Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.

K. **Process; service by publication.** Service by publication may be made only pursuant to Paragraph J of this rule. A motion for service by publication shall be substantially in the form approved by the Supreme Court. A copy of the proposed notice to be published shall be attached to the motion. Service by publication shall be made once each week for three consecutive weeks unless the court for good cause shown orders otherwise. Service by publication is complete on the date of the last publication.

(1) Service by publication pursuant to this rule shall be by giving a notice of the pendency of the action in a newspaper of general circulation in the county where the action is pending. Unless a newspaper of general circulation in the county where the action is pending is the newspaper most likely to give the defendant notice of the pendency of the action, the court shall also order that a notice of pendency of the action be published in a newspaper of general circulation in the county which reasonably appears is most likely to give the defendant notice of the action.

(2) The notice of pendency of action shall contain:

(a) the caption of the case, as provided in Rule 1-008.1 NMRA, including a statement which describes the action or relief requested;

(b) the name of the defendant or, if there is more than one defendant, the name of each of the defendants against whom service by publication is sought;

(c) the name, address and telephone number of plaintiff's attorney; and

(d) a statement that a default judgment may be entered if a response is not filed.

(3) If the cause of action involves real property, the notice shall describe the property as follows:

(a) If the property has a street address, the name of the municipality or county address and the street address of the property.

(b) If the property is located in a Spanish or Mexican grant, the name of the grant.

(c) If the property has been subdivided, the subdivision description or if the property has not been subdivided the metes and bounds of the property.

(4) In actions to quiet title or in other proceedings where unknown heirs are parties, notice shall be given to the "unknown heirs of the following named deceased persons" followed by the names of the deceased persons whose unknown heirs are sought to be served. As to parties named in the alternative, the notice shall be given to "the following named defendants by name, if living; if deceased, their unknown heirs" followed by the names of the defendants. As to parties named as "unknown claimants", notice shall be given to the "unknown persons who may claim a lien, interest or title adverse to the plaintiff" followed by the names of the deceased persons whose unknown claimants are sought to be served.

L. **Proof of service of process.** The party obtaining service of process or that party's agent shall promptly file proof of service. When service is made by the sheriff or a deputy sheriff of the county in New Mexico, proof of service shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff of a New Mexico county, proof of service shall be made by affidavit. Proof of service by mail or commercial courier service shall be established by filing with the court a certificate of service which shall include the date of delivery by the post office or commercial courier service and a copy of the defendant's signature receipt. Proof of service by publication shall be by affidavit of publication signed by an officer or agent of the newspaper in which the notice of the pendency of the action was published. Failure to make proof of service shall not affect the validity of service.

M. **Service of process in the United States, but outside of state.** Whenever the jurisdiction of the court over the defendant is not dependent upon service of the process within the State of New Mexico, service may be made outside the State as provided by this rule.

N. **Service of process in a foreign country.** Service upon an individual, corporation, limited liability company, partnership, unincorporated association that is subject to suit under a common name, or equivalent legal entities may be effected in a place not within the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(b) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by the laws of the United States or the law of the foreign country, in the same manner and priority as provided for in Paragraph F, G or J of this rule as may be appropriate.

[As amended, effective January 1, 1987; October 1, 1998; March 1, 2005; as amended by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012; as provisionally amended by Supreme Court Order No. 21-8300-033, effective for all cases pending or filed on or after January 28, 2022.]

Committee commentary.

Introduction

New Mexico Rule 1-004 has its origins in an act of the first Legislature of the State of New Mexico. 1912 N.M. Laws Ch. 26. When the New Mexico Supreme Court revamped the rules of civil procedure in 1942, 46 N.M. xix-lxxxiv (1942), largely using the 1938 Federal Rules as a model, the provisions of New Mexico Rule 4 continued to reflect some aspects of the service of process provisions of the former New Mexico provisions. Since then piecemeal amendments have occurred but there has been no previous attempt to restructure Rule 1-004 NMRA in light of evolving principles of due process and modern means of communication. The 2004 amendment to Rule 1-004 seeks to accomplish this goal.

Scope of Rule; Rule 1-004(A)(1)

Generally, statutory provisions are inapplicable if those provisions purport to set procedural requirements that contradict the Rules of Civil Procedure. *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). Rule 1-001(A) creates an exception to *Ammerman*, extending deference to the procedural requirements set by the legislature in special proceedings that would not exist but for creation by the legislature. The root of the Rule 1-001(A) exception for special statutory proceedings is the provision in the New Mexico Constitution giving the district courts "such jurisdiction of special cases and proceedings as may be conferred by law." N.M. Const., art. VI, § 13. The Rule 1-001(A) exception for special statutory proceedings is a prudential exception generally applied to statutory provisions that affect procedural rules even though the statutory provisions do not deal with jurisdictional matters. The Supreme Court, though, has ultimate authority over all procedural rules and thus can supersede by rule a non-jurisdictional statutory procedure in special statutory and summary proceedings. Rule 1-004(A)(1) is an exercise of that authority.

Rule 1-004 was amended in 2005 to bring New Mexico's service of process procedure in line with evolving principles of due process. Questions have arisen whether the 2005 amendments to Rule 1-004 apply in special statutory proceedings where the statute provides lesser notice requirements than Rule 1-004. *See, e.g.*, NMSA 1978, § 45-1-401 (provision of the Probate Code permitting notice by publication without court order and only requiring two weekly notices); and NMSA 1978, § 42A-1-14 (Eminent Domain Code provision providing for service by mail and by publication in manners inconsistent with Rule 1-004).

The committee is of the view that, since Rule 1-004 requirements derive from constitutional due process requirements, new subparagraph (A)(1) clarifies that the requirements of Rule 1-004 must be satisfied to validly serve a person or give them notice of the pendency of special statutory proceedings as well as civil actions.

Summons; issuance; Rule 1-004(A)(2)

"Plaintiff" includes "Petitioner" and "Defendant" includes "Respondent". *See* Rule 1-001(B)(1) and (2). The "Complaint" referred to in Rule 1-004(A) includes "Petition". *See* Rule 1-001(B)(3).

Rule 1-004(A) previously provided that the clerk shall "forthwith" issue a summons upon filing of the complaint. The word is omitted from the 2004 Amendment because it was redundant; the rule already provides that the clerk "shall" issue a summons "[u]pon the filing of the complaint".

Rule 1-004(A) previously provided that separate or additional summons may be issued "against any defendants". Because it may be necessary to serve a summons on persons not formally denominated as a defendant, for example, upon a third-party defendant under Rule 1-014 NMRA, the rule has been modified to eliminate the implication that additional summonses may issue only against defendants.

The committee considered but did not provide that a person other than the plaintiff or petitioner could request issuance of a summons.

Summons; execution; form; Rule 1-004(B)

Rule 1-011 NMRA requires that all "paper" shall contain the telephone number of the attorney or the pro-se litigant. Except for the provision requiring that the summons include the telephone number as well as the name and address of the plaintiff's attorney or the pro se plaintiff, only technical changes have been made in this section.

A form summons approved by the New Mexico Supreme Court may be found at 4-206 NMRA.

Service of Process; return; Rule 1-004(C)

"Process" is defined in Rule 1-001(B)(3) NMRA.

Sometimes a summons is not served in conjunction with the pleading instituting an action. For example, writs, warrants and mandates are not accompanied by a summons. *See* Rule 1-001(B)(3)(c) and (d) NMRA. Rule 1-004(C)(1) acknowledges that service of process sometimes does not include the service of a summons.

Rule 1-004(C)(2) is new. Unlike Federal Rule 4(m), which contains a specific time limit within which service of the summons and complaint ordinarily must be made, Rule 1-004(C)(2) provides only that service shall be made "with reasonable diligence". This reflects the standard established in New Mexico case law. *E.g., Romero v. Bachicha*, 2001 NMCA-048 Par. 23-25, 130 N.M. 610, 616, 28 P.3d 1151, 1157.

Process; by whom served; Rule 1-004(D)

Rule 1-004(D) formerly provided that process could be served by a sheriff of the county where the defendant could be found, or by any person over the age of eighteen and not a party to the action. Because the latter category necessarily includes the sheriff of a county, the reference to service by the sheriff has been omitted.

Rule 1-004(D)(2) carries over, unchanged, former Rule 1-004(D)(2).

Rule 1-004(D)(3) is new. It provides a means for determining who shall serve process when the process is a writ other than those mentioned in Rule 1-004(D)(2).

Process; how served; generally; Rule 1-004(E)

Rule 1-004(E)(1) makes explicit in the rule the general test for constitutionally-adequate service of process established in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections".).

Rule 1-004(E)(2) accepts the premise that matters of procedure are for the judiciary to determine but that legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978. The section thus provides that service of process shall be made in accordance with Rule 1-004 NMRA, or in accordance with applicable statutes but shall not be accomplished by a means authorized by a statute that conflicts with Rule 1-004.

Rule 1-004(E)(3) provides a much-simplified method of service by mail. It is no longer necessary that the defendant open the mailed packet containing the summons and complaint and then voluntarily choose to accept service by returning a signed Receipt of Service of Summons and Complaint as formerly was required. Instead, service is accomplished when the summons and complaint are mailed to the named defendant in

a manner that calls for the recipient to sign a receipt upon receiving the envelope containing the summons and complaint and the defendant-recipient or a person authorized by appointment or by law to accept service of process on behalf of the defendant signs the receipt upon receiving the mailed envelope or package.

Service by mail need not be at the home address or usual place of abode of the defendant. Service is complete when the receipt is signed.

This section also provides the same mechanism for service of the summons and complaint when a "commercial courier service" is utilized instead of the mails. The phrase, though not entirely self-explanatory, has been used in this context by other states without apparent problems. *See, e.g.*, Kansas Rules of Civil Procedure, KSA 60-303 (c)(1); Utah Rules of Civil Procedure 4(d)(2)(A)and (B). The Advisory Committee Note to Utah Rule 4 provides that "[t]he term ‘commercial courier service’ refers to businesses that provide for the delivery of documents. Examples of ‘commercial courier service’ include Federal Express and United Parcel Service". The committee endorses the definition provided in the Utah Advisory Committee Note.

In this context, "signs" and "signed" is equivalent to "signature" which "means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law". Rule 1-011 NMRA.

Process; personal service upon an individual; Rule 1-004(F)

In General. The 2004 Amendment makes substantial changes in Rule 1-004(F). The "post and mail" method found in the former rule has been eliminated. A provision for service at the place of work of the defendant has been added. The provision for mail service has been simplified and the rule now authorizes the use of commercial courier services as well as mail for service of process. A hierarchy of methods of service has been established. In some cases, a listed method of service cannot be used until other methods of service are attempted unsuccessfully.

Rule 1-004(F)(1)(a). This subparagraph remains the same as in the former Rule.

Rule 1-004(F)(1)(b). This subparagraph authorizes service by mail or commercial courier service as provided in Rule 1-004(E)(3).

Rule 1-004(F)(2). The means of service provided in this section may only be used if there first was an attempt to serve process "by either of the methods of service provided by Subparagraph (1) of this paragraph". This means that the person serving process need only attempt one of the two methods-personal service or mail/commercial courier service before using the alternative provided in this subparagraph.

This provision allows service to a person over the age of 15 who resides at the usual place of abode of the defendant. This is the same procedure as that formerly provided in Rule 1-004(F)(1) before the 2004 amendment. The former rule, however, required

only delivery of the summons and complaint to such a person for service to be valid. The 2004 amendment provides that service is not accomplished until, in addition, the person serving the summons and complaint mails a copy of the summons and complaint to the defendant at the defendant's last known mailing address. This provision allows service to a person over the age of 15 who resides at the usual place of abode of the defendant. This is the same procedure as that formerly provided in Rule 1-004(F)(1) before the 2004 amendment. The former rule, however, required only delivery of the summons and complaint to such a person for service to be valid. The 2004 amendment provides that service is not accomplished until, in addition, the person serving the summons and complaint mails a copy of the summons and complaint to the defendant at the defendant's last known mailing address. This mailing address will often, but not always, be the usual place of abode of the defendant. The cost of mailing is minimal and increases the likelihood that the defendant will get actual, timely notice of the institution of the action.

Rule 1-004(F)(1) formerly provided that if no qualified person was at the usual place of abode to accept service of process, service could be made by posting process at the abode and then mailing a copy of the process to the last known mailing address. This alternative method of service has been omitted in the 2004 amendment.

Rule 1-004(F)(3) is new. It may be used only when service of process has been attempted, unsuccessfully, in accordance with Rule 1-004(F)(1) and Rule 1-004(F)(2). Rule 1-004(F)(3) provides that service may be made by delivering a copy of the summons and complaint to the person apparently in charge of the actual place of business of the defendant and mailing a copy of the summons and complaint to the defendant both at the defendant's last known mailing address and also the defendant's actual place of business.

Colorado, R.C.P. 4(e)(2), Oregon, R.C.P. 7(d)(2)(c) and New York, N.Y. CPLR Sec. 308(2), also provide for work place service of process. The Fair Debt and Collection Practices Act, 15 U.S.C. Sec. 1692 ff, contains a provision allowing service of process at the workplace of the defendant by "any person while serving or attempting to serve legal process in connection with judicial enforcement of any debt". 15 U.S.C. Sec. 1692(a)(6)(D).

Process; Service on corporation or other business entity; Rule 1-004(G)

In addition to providing for service of process on corporations, Rule 1-004(G)(1) now includes limited liability companies as well as any "equivalent business entity" to a corporation or limited liability company. Courts should construe that phrase to assure that Rule 1-004 provides appropriate guidance about proper service of process upon legislatively-created variations on the traditional corporation.

The substance of the former provisions concerning service of process on partnerships and unincorporated associations have been carried over unchanged in Rule 1-004(G)(1)(b) and (c) of the 2004 amendment.

Process; Service upon state and political subdivisions; Rule 1-004(H)

Subparagraphs (a), (b), (c), (d) and (e) or Rule 1-004(H)(1) are substantively the same as former Rule 1-004(F) (3) and (4). They are derived from and do not vary materially from Section 38-1-7 NMSA 1978.

Subparagraphs (f), (g) and (i) are substantively the same as former Rule 1-004(F)(4), (5) and (6).

Subparagraph (h), dealing with service of process on a school district or school board is new. Former Rule 1-004 provided no guidance on the proper manner of service to such entities.

Rule 1-004(H)(2) allows service of process to the persons designated in Rule 1-004(H)(1) by means of mail or commercial courier service as provided in Rule 1-004(E)(3).

Process; Service upon minor, incapacitated person or conservator; Rule 1-004(I)

Subparagraph 1; Service on minors. The provision for service on a guardian or conservator is carried over from former Rule 1-004(F)(7) except that such service now may be in any manner provided in Paragraph F, G, or L as appropriate, rather than, as formerly, only "by delivering a copy -- to the conservator or guardian".

The provision for service upon person or persons having legal authority over a minor who does not have a guardian or conservator is new as is the provision requiring resort to the court to formulate a method of service where the minor has no guardian, conservator or person with legal authority over the minor.

Subparagraph 2; Service on incompetent persons. Rule 1-004(F)(7) formerly used the phrase "incapacitated person" to describe the party for whom a special means of service of process was appropriate. Rule 1-017(C) uses the phrase "incompetent persons" and this subparagraph adopts the language of Rule 1-017 NMRA for consistency. *See* Rule 10-104(L) NMRA (defining an "incompetent" person).

The provision for service on a guardian or conservator is carried over from former Rule 1-004(F)(7) except that such service now may be in any manner provided in Paragraph F, G or L as appropriate, rather than, as formerly, only "by delivering a copy . . . to the conservator or guardian".

The provision requiring resort to the court to formulate a method of service where the incompetent person has no guardian or conservator is new. Former Rule 1-004(F)(8) provided that if no conservator or guardian had been appointed for an incapacitated person, service upon the incapacitated person would suffice. This provided inadequate assurance that the incapacitated person would have a meaningful opportunity to defend the action. To remedy this, this subparagraph requires the court to fashion a

constitutionally-adequate means of service upon the incapacitated person not represented by a guardian or conservator.

Subparagraph 3; Service on fiduciaries. This provision is carried over from former Rule 1-004(F)(9). Fiduciaries may be served in the same manner as individuals and business entities who are defendants.

Service in manner approved by court; Rule 1-004(J)

This provision is carried over, unchanged, from former Rule 1-004(L). The goal of service of process is to achieve actual notice by means that are reasonable under the circumstances. Rule 1-004(E)(1). The specific methods of service authorized in Rule 1-004 provide standard methods by which this can be accomplished, but there are myriad specific circumstances in which ad-hoc determination of the most appropriate means for serving process is called for. This rule provides broad authority for the court to fashion a constitutionally-adequate method of service under any circumstances.

Where service can be accomplished pursuant to Rule 1-004(F)(G)(H) or (I), there will seldom be need for resort to Rule 1-004(K). Where the court orders service by publication, the court should consider, pursuant to this Paragraph, whether supplemental means of service should accompany notice by publication. Where no method of service specifically provided for by Rule 1-004 is likely to satisfy or achieve the goal of actual notice, this Paragraph authorizes the court to create a method of service suited to the circumstances of the particular facts presented.

Service by publication; Rule 1-004(K)

This paragraph requires that no service by publication take place without a prior court order authorizing service by publication. This is a significant modification of prior practice in situations where statutes authorized publication without prior court approval. *See, e.g.*, Section 42-2-7(B) NMSA 1978 (authorizing service by publication in condemnation proceeding "[i]f the name or residence of any owner be unknown"); Section 45-1-401 NMSA 1978 (authorizing service by publication in probate proceedings under some circumstances and providing that the court for good cause can provide a different manner of service). Publication notice is seldom likely to achieve actual notice and thus its use should be monitored carefully by the courts. The Supreme Court is authorized to modify statutes providing for notice by publication by requiring prior court approval for service by publication. Legislation affecting procedure is valid unless and until contradicted by a rule of procedure promulgated by the Supreme Court. Rule 1-091 NMRA; Section 38-1-2 NMSA 1978. This paragraph also provides the required content of the notice to be published, the frequency of publication and the place of publication. Omitted from the 2004 amendment is the former provision (Rule 1-004(H)(3)) requiring that publication be "in some newspaper published in the county where the cause is pending" and providing for publication in a newspaper of general circulation in the county only when "no newspaper [was] published in the county". Publication now always will include publication in a paper of general circulation in the

county where the action is pending whether or not the newspaper is published in that county. Where appropriate to the goal of achieving actual notice, the court is free to require, in addition, that publication also be in a newspaper not of general circulation that is published in the county where the cause is pending.

Where the court determines that actual notice by publication is more likely to be achieved by publishing the notice elsewhere, the court must provide for additional published notice in the county that the court deems such notice is most likely to achieve the goal of actual notice to the defendant.

Former Rule 1-004(H)(7), dealing with the required content of repeated publications due to misnomers in the initial publication, has been omitted. The court that orders additional publication will craft an appropriate order concerning its content.

Former Rule 1-004(I) calling for publication to be accompanied by mail notice to persons whose residence is known has been omitted. The court that orders publication has the obligation to fashion means of service reasonably calculated to provide actual notice, Rule 1-004(E)(1), and thus can provide for mailed notice to accompany service of process by publication where reasonable. *See* Rule 1-004(J).

Proof of service; Rule 1-004(L)

The person obtaining service of process rather than the person serving process is now responsible for filing proof of service.

The means of proof of service when service is accomplished by mail or commercial courier service pursuant to Rule 1-004(F)(1)(b) and when service is made by publication pursuant to Rule 1-004(J) or (K) are provided in those paragraphs.

Service outside the state but in the United States; Rule 1-004(M)

This provision replaces former Rule 1-004(J) (Service of summons outside of state equivalent to publication). Where, as in the case of long arm jurisdiction pursuant to Section 38-1-16 NMSA 1978, service of process can be made outside of New Mexico, this rule requires that service be accomplished in the manner and priority provided in this rule. The Committee considered but rejected a proposal that the method of service need not meet the requirements of this rule so long as it met the requirements for service of process in the place where service occurred.

Service in a foreign country; Rule 1-004(N)

Service in foreign countries is sometimes subject to treaties or other international agreements. This rule, adopted from Federal Rule 4(f) and Rule 4(h)(2) takes into account the special considerations required by international law.

[Approved, March 1, 2005; as amended by Supreme Court Order No. 11-8300-050, effective for cases filed on or after February 6, 2012.]

1-004.1. Guardianship and conservatorship proceedings; process.

A. **Scope; notice of hearing and rights; issuance.**

(1) ***Scope.*** The provisions of this rule govern the issuance and service of process in proceedings to appoint a guardian or conservator under Chapter 45, Article 5, Parts 3 and 4 NMSA 1978. The provisions of this rule shall not apply to proceedings to appoint a temporary guardian or conservator under Sections 45-5-310 or 45-5-408 NMSA 1978.

(2) ***Notice of hearing and rights; issuance.*** Within five (5) days of the filing of a petition to appoint a guardian or conservator, the court shall set a hearing on the petition and issue a notice of hearing and rights of the alleged incapacitated person. The hearing on the petition shall be set for no sooner than sixty (60) days after the filing of the petition. The notice shall be in lieu of a summons. The court shall deliver the notice to the petitioner for service upon the alleged incapacitated person and interested persons entitled to notice of the proceeding under Chapter 45, Article 5, Parts 3 and 4 NMSA 1978.

B. **Form of notice.** The notice issued under Subparagraph (A)(2) of this rule shall be substantially in the form approved by the Supreme Court as provided in Form 4-999 NMRA.

C. **Service of process on alleged incapacitated person.** The notice shall be served together with the petition on the alleged incapacitated person as provided in this paragraph. The court shall not grant the petition if process is not served personally on the alleged incapacitated person as provided in Subparagraph 3 of this paragraph.

(1) ***Timing of service.*** Process shall be served on the alleged incapacitated person within eleven (11) days of the issuance of the notice.

(2) ***By whom served.*** Service may be made by the guardian ad litem or by any person who is over the age of eighteen (18) years and not a party or interested person to the proceeding.

(3) ***How served; exclusive method of service.*** Process shall be served personally on the alleged incapacitated person by delivering a copy of the notice and petition to the alleged incapacitated person; or if the alleged incapacitated person refuses to accept service, by leaving the process at the location where the alleged incapacitated person has been found; and if the alleged incapacitated person refuses to receive such copies or permit them to be left, such action shall constitute valid service. No other method of service shall constitute effective service of process on an alleged incapacitated person.

(4) ***Proof of service of process on the alleged incapacitated person.*** The petitioner or the petitioner's agent shall promptly file with the court proof of service on the alleged incapacitated person. Proof of service shall be made by affidavit or written statement affirmed under penalty of perjury under the laws of the State of New Mexico as provided in Rule 1-011 NMRA.

D. **Service on interested persons.** The notice shall be served together with the petition on all interested persons named in the petition and entitled to notice under Chapter 45, Article 5, Parts 3 and 4 NMSA 1978.

(1) ***Timing.*** Service of the notice and petition shall be made on interested persons within eleven (11) days of service on the alleged incapacitated person.

(2) ***How served on interested persons.*** Service and proof of service on interested persons shall be effective if made in accordance with Rule 1-005 NMRA.

E. **Service of process on minor.** In a proceeding to appoint a conservator of a minor under Chapter 45, Article 5, Part 4 NMSA 1978, service of process shall be made in accordance with Paragraph C of this rule, provided that such process shall be served personally on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court.

[Adopted by Supreme Court Order No. 19-8300-001, effective for all cases filed on or after January 14, 2019; as amended by Supreme Court Order No. 20-8300-012, effective December 31, 2020.]

1-005. Service and filing of pleadings and other papers.

A. **Service; when required.** Except as otherwise provided in these rules, every written order, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of settlement, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 1-004 NMRA.

B. **Service; how made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing a copy to the attorney or party at the attorney's or party's last known address. Service by mail is complete upon mailing.

C. **Definitions.** As used in this rule:

(1) "Delivering a copy" means:

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

(b) sending a copy by facsimile or electronic transmission when permitted by Rule 1-005.1 NMRA or Rule 1-005.2 NMRA;

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

(d) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing there; or

(e) leaving it at a location designated by the court for serving papers on attorneys, if the following requirements are met:

(i) the court, in its discretion, chooses to provide such a location; and

(ii) service by this method has been authorized by the attorney, or by the attorney's firm, organization, or agency on behalf of the attorney.

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

D. **Service; numerous defendants.** In any action in which there is an unusually large number of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

E. **Filing by a party; certificate of service.** All papers after the complaint required to be served upon a party, together with a certificate of service indicating the date and method of service, shall be filed with the court within a reasonable time after service, except that the following papers shall not be filed unless on order of the court or for use in the proceeding:

(1) summonses without completed returns;

(2) subpoenas;

(3) returns of subpoenas;

(4) interrogatories;

(5) answers or objections to interrogatories;

(6) requests for production of documents;

(7) responses to requests for production of documents;

(8) requests for admissions;

(9) responses to requests for admissions;

(10) depositions;

(11) briefs or memoranda of authorities on unopposed motions;

(12) offers of settlement when made; and

(13) mandatory and supplemental disclosures served under Rule 1-123 NMRA.

Except for the papers described in Subparagraphs (1), (10), and (11) of this paragraph, counsel shall file a certificate of service with the court within a reasonable time after service, indicating the date and method of service of any paper not filed with the court.

F. **Filing with the court defined.** The filing of papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. “Filing” shall include filing a facsimile copy or filing an electronic copy as may be permitted under Rule 1-005.1 NMRA or Rule 1-005.2 NMRA. If a party has filed a paper using electronic or facsimile transmission, that party shall not subsequently submit a duplicate paper copy to the court. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

G. **Filing and service by the court.** Unless otherwise ordered by the court, the court shall serve all written court orders and notices of hearing on the parties. The court may file papers before serving them on the parties. For papers served by the court, the certificate of service need not indicate the method of service. For purposes of Rule 1-006(C) NMRA, papers served by the court shall be deemed served by mail, regardless of the actual manner of service, unless the court’s certificate of service unambiguously states otherwise. The court may, in its discretion, serve papers in accordance with the method described in Subparagraph (C)(1)(e) of this rule.

H. **Filing and service by an inmate.** The following provisions apply to documents filed and served by an inmate confined to an institution:

(1) If an institution has a system designed for legal mail, the inmate shall use that internal mail system to receive the benefit of this rule.

(2) The document is timely filed if deposited in the institution's internal mail system within the time permitted for filing.

(3) Whenever service of a document on a party is permitted by mail, the document is deemed mailed when deposited in the institution's internal mail system addressed to the parties on whom the document is served.

(4) The date of filing or mailing may be shown by a written statement, made under penalty of perjury, showing the date when the document was deposited in the institution's internal mail system.

(5) A written statement under Subparagraph (4) of this paragraph establishes a presumption that the document was filed or mailed on the date indicated in the written statement. The presumption may be rebutted by documentary or other evidence.

(6) Whenever an act must be done within a prescribed period after a document has been filed or served under this paragraph, that period shall begin to run on the date the document is received by the party.

[As amended, effective August 1, 1988; January 1, 1998; January 3, 2005; as amended by Supreme Court Order No. 06-8300-020, effective December 18, 2006; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

1-005.1. Service and filing of pleadings and other papers by facsimile.

A. **Facsimile copies permitted to be filed.** Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each judicial district shall designate one or more telephone numbers to receive fax filings.

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

C. **Paper size and quality.** No facsimile copy shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule 1-100 NMRA.

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

(1) a fee is not required to file the pleading or paper;

(2) only one copy of the pleading or paper is required to be filed;

(3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and

(4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

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

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

G. **Service by facsimile.** Any document required to be served by Paragraph A of Rule 1-005 NMRA may be served on a party or attorney by facsimile transmission if the party or attorney has:

(1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;

(2) a letterhead with a facsimile telephone number; or

(3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

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

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

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

[Approved, effective January 1, 1999; as amended, effective August 1, 2000; January 3, 2005.]

1-005.2. Electronic service and filing of pleadings and other papers.

A. **Definitions.** As used in these rules

(1) "electronic transmission" means the transfer of data from computer to computer other than by facsimile transmission;

(2) "document" includes the electronic representation of pleadings and other papers; and

(3) "EFS" means the electronic filing system approved by the Supreme Court for use by the district courts to file and serve documents by electronic transmission in civil actions.

B. **Electronic filing authorized; registration by attorneys required.**

(1) A district court may, by local rule approved by the Supreme Court, implement the mandatory filing of documents by electronic transmission in accordance with this rule through the EFS by parties represented by attorneys. Self-represented parties are prohibited from electronically filing documents and shall continue to file documents through traditional methods. Parties represented by attorneys shall file documents by electronic transmission even if another party to the action is self-represented or is exempt from electronic filing under Paragraph M of this rule. For purposes of this rule, unless a local rule approved by the Supreme Court provides otherwise, “civil actions” does not include domestic relations actions in which the New Mexico Child Support Enforcement Division is a party or participant, domestic violence actions, actions sealed under Rule 1-079 NMRA, habeas corpus actions, or any proceeding filed under the Children’s Court Rules.

(2) Unless exempted under Paragraph M of this rule, attorneys required to file documents by electronic transmission shall register with the EFS through the district court’s web site. Every registered attorney shall provide a valid, working, and regularly

checked email address for the EFS. The court shall not be responsible for inoperable email addresses or unread email sent from the EFS.

C. **Service by electronic transmission.** Any document required to be served by Rule 1-005(A) NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail or if the attorney for the party to be served has registered with the court's EFS. Documents filed by electronic transmission under Paragraph A of this rule may be served by an attorney through the court's EFS, or an attorney may elect to serve documents through other methods authorized by this rule, Rule 1-005 NMRA, or Rule 1-005.1 NMRA. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic transmission, a party served by electronic transmission notifies the sender of the electronic transmission that the pleading or paper cannot be read, the pleading or paper shall be served by any other method authorized by Rule 1-005 NMRA designated by the party to be served. The court may serve any document by electronic transmission to an attorney who has registered with the EFS under this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Format of documents; protected personal identifier information; EFS user guide.** All documents filed by electronic transmission shall be formatted in accordance with the Rules of Civil Procedure for the District Courts and shall comply with all procedures for protected personal identifier information under Rule 1-079 NMRA. The district court may make available a user guide to provide guidance with the technical operation of the EFS. In the event of any conflicts between these rules and the user guide, the rules shall control.

E. **Electronic services fee.**

(1) In addition to any other filing fees required by law, parties required to file electronically shall pay an electronic services fee of eight dollars ($8.00) per electronic transmission of one or more documents filed in any single case.

(2) Parties electing to serve a document previously filed through the EFS may do so without charge.

(3) Parties electing to both file and serve documents through the EFS shall pay an electronic services fee of twelve dollars ($12.00) per electronic transmission of one or more documents simultaneously filed and served on one or more persons or entities in any single case.

(4) The provisions of this paragraph shall not apply to those entities listed in Section 34-6-40(C) NMSA 1978 and to civil legal service providers as defined by Rule 15-301.2(A)(2) NMRA.

F. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed only a single electronic transmission of the document is necessary. If an attorney files or serves multiple documents in a case by a single electronic transmission, the applicable electronic services fee under Paragraph E of this rule shall be charged only once regardless of the number of documents filed or parties served.

G. **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. If electronic transmission of a document is received before midnight on the day preceding the next business day of the court it will be considered filed on the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative. For purposes of electronic filing only, the date and time that the filer submits the electronic filing envelope will serve as the filing date and time for purposes of meeting statute of limitations or any other filing deadlines, notwithstanding rejection of the attempted filing or its placement into an error queue for additional processing.

H. **Signatures.**

(1) All electronically filed documents shall be deemed to contain the filing attorney's signature pursuant to Rule 1-011 NMRA. Attorneys filing electronically thereby certify that required signatures or approvals have been obtained before filing the document. The full, printed name of each person signing a paper document shall appear in the electronic version of the document.

(2) If a document filed by electronic transmission contains a signature block from an original paper document containing a signature, the signature in the electronic document may represent the original signature in the following ways:

(a) by scanning or other electronic reproduction of the signature; or

(b) by typing in the signature line the notation "/s/" followed by the name of the person who signed the original document.

(3) All electronically filed documents signed by the court shall be scanned or otherwise electronically produced so that the judge's original signature is shown.

I. **Demand for original; electronic conversion of paper documents.**

(1) Original paper documents filed or served electronically, including original signatures, shall be maintained by the attorney filing the document and shall be made available, upon reasonable notice, for inspection by other parties or the court. If an original paper document is filed by electronic transmission, the electronic version of the document shall conform to the original paper document. Attorneys shall retain original paper documents until final disposition of the case and the conclusion of all appeals.

(2) For cases in which electronic filing is mandatory, if an attorney who is exempt under Paragraph M of this rule or a self-represented party files a paper document with the court, the clerk shall convert such document into electronic format for filing. The filing date shall be the date on which the paper document was filed even if the document is electronically converted and filed at a later date. The clerk shall retain such paper documents as long as required by applicable statutes and court rules.

J. **Electronic file stamp and confirmation receipt; effect.** The clerk of the court's endorsement of an electronically filed document shall have the same force and effect as a manually affixed file stamp. When a document is filed through the EFS, it shall have the same force and effect as a paper document and a confirmation receipt shall be issued by the system that includes the following information:

(1) the case name and docket number;

(2) the date and time of filing as defined under Paragraph G of this rule;

(3) the document title;

(4) the name of the EFS service provider;

(5) the email address of the person or entity filing the document; and

(6) the page count of the filed document.

K. **Conformed copies.** Upon request of a party, the clerk shall stamp additional paper copies provided by the party of any pleading filed by electronic transmission. A file-stamped copy of a document filed by electronic transmission can be obtained through the court's EFS. Certified copies of a document may be obtained from the clerk's office.

L. **Proposed documents submitted to the court.** Unless a local rule approved by the Supreme Court provides otherwise, this paragraph governs the submission of proposed documents to the court.

(1) Except for documents listed in Subparagraph (4) of this paragraph, a document that a party proposes for issuance by the court shall be transmitted by electronic mail to an email address designated by the court for that purpose. A judge may direct the party to submit a hard copy of the proposed document in addition to, or in lieu of, the electronic copy. The court's user guide shall give notice of the email addresses to be used for purposes of this paragraph. The user guide also may set forth the text to be included in the subject-line and body of the email.

(2) Except for documents listed in Subparagraph (4) of this paragraph, proposed documents shall not be electronically filed by the party's attorney in the EFS. Any party who submits proposed documents by email under this paragraph shall not

engage in ex parte communications in the email and shall serve a copy of the email and attached proposed documents on all other parties to the action.

(3) Documents issued by the clerk under this rule shall be sent to the requesting party by email or through the EFS as appropriate, and the requesting party is responsible for electronically filing the document in the EFS if necessary and serving it on the parties as appropriate. Any document issued by a judge under this rule will be electronically filed by the court in the EFS and served on the parties as required by these rules.

(4) The following proposed documents that a party submits for issuance by the court, known as “issuance documents”, shall be submitted through the court’s EFS:

(a) certificate as to the state of the record;

(b) issuance of summons;

(c) letters of guardianship or conservatorship;

(d) letters of testamentary or administration;

(e) notice of pendency;

(f) notice of suit;

(g) subpoena;

(h) transcript of judgment;

(i) writ of execution; and

(j) writ of garnishment.

M. **Requests for exemptions from local rules establishing mandatory electronic filing systems.**

(1) An attorney may file a petition with the Supreme Court requesting an exemption, for good cause shown, from any mandatory electronic filing system that may be established by this rule and any district court local rules. The petition shall set forth the specific facts offered to establish good cause for an exemption. No docket fee shall be charged for filing a petition with the Supreme Court under this subparagraph.

(2) Upon a showing of good cause, the Supreme Court may issue an order granting an exemption from the mandatory electronic filing requirements of this rule and any local rules. An exemption granted under this subparagraph remains in effect

statewide for one (1) year from the date of the order and may be renewed by filing another petition in accordance with Subparagraph (1) of this paragraph.

(3) An attorney granted an exemption under this paragraph may file documents in paper format with the district court and shall not be charged an electronic filing fee under this rule or local rule for doing so. When filing paper documents under an exemption granted under this paragraph, the attorney shall attach to the document a copy of the Supreme Court exemption order. The district court clerk shall scan the attorney's paper document into the electronic filing system including the attached Supreme Court exemption order. No fee shall be charged for scanning the document. The attorney remains responsible for serving the document in accordance with these rules and shall include a copy of the Supreme Court exemption order with the document that is served.

(4) An attorney who receives an exemption under this paragraph may nevertheless file documents electronically in any district court that accepts such filings without seeking leave of the Supreme Court provided that the attorney complies with all requirements under this rule, complies with all applicable local rules for the district court's electronic filing system, and pays any applicable electronic filing fees. By doing so, the attorney does not waive the right to exercise any exemption granted under this paragraph for future filings.

N. **Technical difficulties.** Substantive rights of the parties shall not be affected when the EFS is not operating through no fault of the filing attorney.

[Approved, effective July 1, 1997; as amended, effective March 8, 1999; August 1, 2000; January 3, 2005; as amended by Supreme Court Order No. 06-8300-027, effective January 15, 2007; by Supreme Court Order No. 11-8300-035, effective for all cases filed or pending on or after September 1, 2011; by Supreme Court Order No. 11-8300-046, effective for all documents electronically filed on, after, or before November 21, 2011; by Supreme Court Order No. 13-8300-001, effective January 29, 2013; as amended by Supreme Court Order No. 14-8300-024, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 15-8300-002, effective for all cases pending or filed on or after July 1, 2015; as amended by Supreme Court Order No. 16-8300-039, effective for all cases pending or filed on or after January 1, 2017.]

1-006. Time.

A. **Computing time.** This rule applies in computing any time period specified in these rules, in any local rule or court order, or in any statute, unless another Supreme Court rule of procedure contains time computation provisions that expressly supersede this rule.

(1) ***Period stated in days or a longer unit; eleven (11) days or more*.** When the period is stated as eleven (11) days or a longer unit of time,

(a) exclude the day of the event that triggers the period;

(b) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(c) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) ***Period stated in days or a longer unit; ten (10) days or less*.**

(a) When the period is stated in days but the number of days is ten (10) days or less,

(i) exclude the day of the event that triggers the period;

(ii) exclude intermediate Saturdays, Sundays, and legal holidays; and

(iii) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(b) This subparagraph shall not apply to any statutory notice that is required to be given prior to the filing of an action.

(3) ***Period stated in hours*.** When the period is stated in hours,

(a) begin counting immediately on the occurrence of the event that triggers the period;

(b) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(c) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(4) ***Unavailability of the court for filing*.** If the court is closed or is unavailable for filing at any time that the court is regularly open,

(a) on the last day for filing under Subparagraphs (A)(1) or (A)(2) of this rule, then the time for filing is extended to the first day that the court is open and available for filing that is not a Saturday, Sunday, or legal holiday; or

(b) during the last hour for filing under Subparagraph (A)(3) of this rule, then the time for filing is extended to the same time on the first day that the court is open and available for filing that is not a Saturday, Sunday, or legal holiday.

(5) ***"Last day" defined*.** Unless a different time is set by a court order, the last day ends

(a) for electronic filing, at midnight; and

(b) for filing by other means, when the court is scheduled to close.

(6) ***"Next day" defined*.** The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(7) ***"Legal holiday" defined*.** "Legal holiday" means the day that the following are observed by the judiciary:

(a) New Year's Day, Martin Luther King Jr.'s Birthday, Presidents' Day (traditionally observed on the day after Thanksgiving), Memorial Day, Juneteenth, Independence Day, Labor Day, Indigenous Peoples Day, Veterans' Day, Thanksgiving Day, or Christmas Day; and

(b) any other day observed as a holiday by the judiciary.

B. **Extending time.**

(1) ***In General*.** When an act may or must be done within a specified time, the court may, for cause shown, extend the time

(a) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(b) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) ***Exceptions*.** A court shall not extend the time to act under Rules 1-050, 1-052, 1-059, 1-060, 1-062, or 12-201 NMRA, except to the extent and under the conditions stated in those rules.

C. **Additional time after certain kinds of service.** When a party may or must act within a specified time after service and service is made by mail, facsimile, or by deposit at a location designated for an attorney at a court facility under Rule 1-005(C)(1)(e) NMRA, three (3) days are added after the period would otherwise expire under Paragraph A. Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three (3) days. If the third day is a Saturday, Sunday, or legal

holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday.

D. **Public posting of regular court hours.** The court shall publicly post the hours that it is regularly open.

[As amended, effective January 1, 1987; August 1, 1989; January 1, 1995; as amended by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. S-1-RCR-2023-00046, effective for all cases pending or filed on or after December 31, 2024.]

Committee commentary. — In 2014, the Joint Committee on Rules of Procedure amended the time computation rules, including Rules 1-006, 2-104, 3-104, 5,104, 6-104, 7-104, 8-104, 10-107, and 12-308 NMRA, and restyled the rules to more closely resemble the federal rules of procedure. *See* Fed. R. Civ. Pro. 6; Fed. R. Crim. Pro. 45.

The method for computing time periods of ten days or less set forth in Subparagraph (A)(2) of this rule does not apply to any statutory notice that must be given prior to the filing of an action. For example, several provisions of the Uniform Owner-Resident Relations Act require such notice. *See, e.g.*, NMSA 1978, § 47-8-33(D) (requiring the landlord to give the tenant three days notice prior to terminating a rental agreement for failure to pay rent).

Subparagraph (A)(4) of this rule contemplates that the court may be closed or unavailable for filing due to weather, technological problems, or other circumstances. A person relying on Subparagraph (A)(4) to extend the time for filing a paper should be prepared to demonstrate or affirm that the court was closed or unavailable for filing at the time that the paper was due to be filed under Subparagraph (A)(1), (A)(2), or (A)(3).

[Adopted by Supreme Court Order No. 14-8300-016, effective for all cases pending or filed on or after December 31, 2014.]

ARTICLE 3
Pleadings and Motions

1-007. Pleadings allowed; form of motions.

A. **Pleadings.** There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim denominated as such; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 1-014 NMRA; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

B. **Motions and other papers.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

C. **Demurrers, pleas, etc., abolished.** Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.

1-007.1. Motions; how presented.

A. **Requirement of written motion.** All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought.

B. **Unopposed motions.** The movant shall determine whether a motion will be opposed. If the motion will not be opposed, an order approved by all parties shall accompany the motion.

C. **Opposed motions.** The motion shall recite that the movant requested the concurrence of all parties or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from all parties unless the motion is a:

(1) motion to dismiss;

(2) motion for new trial;

(3) motion for judgment as a matter of law;

(4) motion for summary judgment;

(5) motion for relief from a final judgment, order or proceeding pursuant to Paragraph B of Rule 1-060 NMRA.

Notwithstanding the provisions of any other rule, the movant may file with any opposed motion a brief or supporting points with citations or authorities. If the motion requires consideration of facts not of record, the movant shall file copies of all affidavits, depositions or other documentary evidence to be presented in support of the motion. Motions to amend pleadings shall have attached the proposed pleading. A motion for judgment on the pleadings presenting matters outside the pleading shall comply with Rule 1-056 NMRA. A motion for new trial shall comply with Rule 1-059 NMRA.

D. **Response.** Unless otherwise specifically provided in these rules, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. If a party fails to file a response within the prescribed time period the court may rule with or without a hearing.

E. **Separate counter-motions and cross-motions required.** Responses to motions shall be made separately from any counter-motions or cross-motions.

F. **Reply brief.** Any reply brief shall be filed within fifteen (15) days after service of any written response.

G. **Request for hearing.** A request for hearing shall be filed at the time an opposed motion is filed. The request for hearing shall be substantially in the form approved by the Supreme Court.

H. **Notice of completion of briefing.** At the expiration of all response times under this rule, the movant or any party shall file a notice of completion of briefing. The notice alerts the judge that the motion is ready for decision.

[As amended, effective December 4, 2000; March 15, 2005; as amended by Supreme Court Order No. 08-8300-032, effective November 17, 2008; as amended by Supreme Court Order No. 19-8300-017, effective for all cases pending or filed on or after December 31, 2019.]

Committee commentary. — If a party does not respond to a motion within fifteen days as required by Paragraph D of this rule, the moving party may submit a proposed order to the judge or the judge sua sponte may enter an appropriate order. Although the specific provisions of Rule 1-058(C) NMRA are not applicable, if a party submits a proposed order to the court, a copy of the proposed order must be served on all other parties. *See* Rule 1-005 NMRA of these rules, Rules 16-303 and 16-305 of the Rules of Professional Conduct and Rule 21-300 NMRA of the Code of Judicial Conduct. After assuring the non-responding party has received notice of the proposed order, the judge may enter an appropriate order.

The notice of completion of briefing required under Paragraph H of this rule shall be filed upon the expiration of the applicable deadline for filing responses and replies under Paragraphs D or F of the rule. The Judicial Districts may adopt local rules to incorporate additional filing requirements to coincide with the filing of the notice of completion of briefing. *See, e.g.,* LR13-404(A) NMRA (adopting motion package procedure). The district court may defer ruling on the request for hearing until the court receives the notice of completion of briefing. After the court announces its decision, the court shall comply with the requirements of Rule 1-058 NMRA.

[As amended by Supreme Court Order No. 08-8300-032, effective November 17, 2008.]

1-007.2. Time limit for filing motion to compel arbitration.

A party seeking to compel arbitration of one or more claims shall file and serve on the other parties a motion to compel arbitration no later than ten (10) days after service of the answer or service of the last pleading directed to such claims.

[Adopted by Supreme Court Order No. 16-8300-023, effective for all cases pending or filed on or after December 31, 2016.]

1-008. General rules of pleading.

A. **Claims for relief.** A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain:

(1) proper allegations of venue, provided the name of the county stated in the complaint shall be taken to be the venue intended by the plaintiff and it shall not be necessary to state a venue in the body of the complaint or in any subsequent pleading;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for judgment for the relief to which the pleader claims to be entitled to receive. Relief in the alternative or of several different types may be demanded. Unless it is a necessary allegation of the complaint, the complaint shall not contain an allegation for damages in any specific monetary amount.

B. **Defenses; form of denials.** A party shall state in short and plain terms the party's defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make the pleader's denials as specific denials of designated averments or paragraphs, or the pleader may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, including averments of the grounds upon which the court's jurisdiction depends, the pleader may do so by general denial subject to the obligations set forth in Rule 1-011 NMRA.

C. **Affirmative defenses.** In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations,

waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

D. **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

E. **Pleading to be concise and direct; consistency.**

(1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternatively or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 1-011 NMRA.

F. **Construction of pleadings.** All pleadings shall be so construed as to do substantial justice.

[Approved, effective August 1, 1942; as amended, June 13, 1973; as amended by Supreme Court Order No. 07-8300-016, effective August 1, 2007.]

1-008.1. Pleadings and papers; captions.

Pleadings and papers filed in the district courts shall have a caption or heading which shall briefly include:

A. the name of the court as follows:

"State of New Mexico

County of _____

_____ Judicial District";

B. the names of the parties; and

C. a title which describes the cause of action or relief requested. The title of a pleading or paper shall have no legal effect in the action.

[Approved, effective March 1, 2000.]

1-009. Pleading special matters.

A. **Capacity.** It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party, except to the extent required to show the jurisdiction of the court. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or be sued in a representative capacity, that party shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

B. **Fraud, mistake, and condition of the mind.** In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

C. **Conditions precedent.** In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

D. **Official document or act.** In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

E. **Judgment.** In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board or officer, it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it.

F. **Time and place.** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

G. **Special damage.** When items of special damage are claimed, they shall be specifically stated.

H. **Statutes.** It shall not be necessary in any pleading to set forth any statute, public or private or any special matter thereof, but it shall be sufficient for the party to allege that the act was done by authority of the statute, or contrary to the provisions of the statute, naming the subject matter of the statute, or referring thereto in some general term with convenient certainty.

I. **Copy to be served.** When any instrument of writing on which the action or defense is founded is referred to in the pleadings, the original or a copy of the instrument shall be served with the pleading, if within the power or control of the party wishing to use the same. A copy of the instrument of writing need not be filed with the district court.

J. **Consumer debt claims.**

(1) **Definition.** The pleading of a party, acting in the ordinary course of business, whose cause of action is to collect a debt arising out of a transaction in which the money, property, insurance, or services which are the subject of the original transaction are primarily for personal, family, or household purposes, other than loans secured by real property, shall comply with Rule 1-009(J)(2), Rule 1-017(E), and Form 4-226 NMRA.

(2) **Copy to be served and filed.** When any instrument of writing on which a consumer debt claim is founded is referred to or relied on in the pleadings, the original or a copy of the instrument shall be served with the pleading and filed with the court unless otherwise excused by the court on a showing of good cause.

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Paragraph J of this rule was added in 2016 to provide additional protections to consumers in consumer debt collection cases. Rules 1-017(E), 1-055(B), and 1-060(B)(6) NMRA were also amended, and Form 4-226 NMRA created, for the same purpose. After consulting with the New Mexico Attorney General's Office Consumer Protection Division and creditor and debtor rights representatives, and researching concerns identified by the Federal Trade Commission in its report issued in July of 2010, "*Repairing a Broken System: Protecting Consumers in Debt Collection Litigation and Arbitration*," the Committee concluded, and the Court agreed, that amendments to the rules are necessary to alleviate systemic problems and abuses that currently exist in the litigation of consumer debt cases. These include pleadings and judgments based on insufficient or unreliable evidence, "robo-signing" of affidavits by those with no personal knowledge of the debt at issue, creditors suing and obtaining judgments on time-barred debts, and an alarmingly high percentage of default judgments (often caused in part by a lack of sufficient detail in the complaint for a self-represented defendant to determine the nature of the claim and its validity).

For an interpretation of the phrase, "acting in the ordinary course of business," *see Wilson v. Mass. Mut. Life Ins. Co.*, 2004-NMCA-051, ¶ 32, 135 N.M. 506, 90 P.3d 525, *overruled on other grounds by Schultz ex rel. Schultz v. Pojoaque Tribal Police Dep't*, 2010-NMSC-034, 148 N.M. 692, 242 P.3d 259 (interpreting course of business as "business practice that is routine, regular, usual, or normally done"). Medical bills, subject to relevant Health Insurance Portability and Accountability Act (HIPAA)

regulations, and student loans, are considered consumer debt claims for the purposes of this rule; foreclosure actions are not.

[Adopted by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017.]

1-010. Form of pleadings.

A. **Caption; names of parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number, and a designation as in Paragraph A of Rule 1-007 NMRA. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

B. **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

C. **Adoption by reference; exhibits.** Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

[Approved, effective August 1, 1942; as amended, effective January 1, 1987; August 1, 1989; as amended by Supreme Court Order No. 07-8300-016, effective August 1, 2007.]

1-011. Signing of pleadings, motions, and other papers; sanctions; unsworn affirmations under penalty of perjury.

A. **Signing of pleadings, motions, and other papers; sanctions.** Every pleading, motion, and other paper of a party represented by an attorney, shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address and telephone number. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion, or other paper is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or other paper had not been served. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed

promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action. Similar action may be taken if scandalous or indecent matter is inserted. A "signature" means an original signature, a copy of an original signature, a computer generated signature, or any other signature otherwise authorized by law.

B. **Unsworn affirmations under penalty of perjury.** Except as provided in Rule 1-120 NMRA, any written statement in a pleading, paper, or other document that is not notarized shall have the same effect in a court proceeding as a notarized written statement, provided that the statement includes the following:

(1) the date that the statement was given;

(2) the signature of the person who gave the statement; and

(3) a written affirmation under penalty of perjury under the laws of the State of New Mexico that the statement is true and correct.

[As amended, effective January 1, 1995; March 1, 2005; as amended by Supreme Court Order No. 07-8300-040, effective February 25, 2008; by Supreme Court Order No. 08-8300-022, effective September 12, 2008; as amended by Supreme Court Order No. 14-8300-023, effective for all pleadings and papers filed on or after December 31, 2014; as amended by Supreme Court Order No. 15-8300-024, effective for all pleadings and papers filed after November 18, 2015.]

Committee commentary. — New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. *See* Section 14-15-4 NMSA 1978.

Committee commentary for 2008 and 2014 amendments. — Rule 1-011 NMRA was amended in 2008 to permit self-affirmation in lieu of notarization of any written sworn statement required or permitted under the Rules of Civil Procedure for the District Courts. The 2008 amendment, however, did not permit self-affirmation of a statement that must be sworn under statute. *See, e.g.*, NMSA 1978, § 40-4-6 (providing that a petition for dissolution of marriage "must be verified by the affidavit of the petitioner"). The 2014 amendment removed that limitation. *See Miller & Assocs., Inc. v. Rainwater*, 1985-NMSC-001, ¶¶ 6-8, 102 N.M. 170, 692 P.2d 1390 (holding that NMSA 1978, Section 38-7-1, which requires the denial of an account to be "under oath, in writing, and filed as a part of the pleadings before trial," is "merely a rule of procedure" and therefore is unconstitutional under *Ammerman v. Hubbard Broadcasting, Inc.*, 1976-NMSC-031, 89 N.M. 307, 551 P.2d 1354). Thus, notarization is no longer required for any written statement in a court proceeding, including a declaration, verification, certificate, oath, affirmation, acknowledgment, or affidavit, as long as the statement is affirmed under penalty of perjury in accordance with Paragraph B of this rule. *Accord* NMSA 1978, § 30-25-1(A) (2009) ("Perjury consists of making a false statement under oath, affirmation *or penalty of perjury*, material to the issue or matter involved in the

course of any judicial, administrative, legislative or other official proceeding or matter, knowing such statement to be untrue." (emphasis added)).

Although Paragraph B permits self-affirmation of documents in lieu of notarization, the rule is not intended to alter any statutory requirements that may exist for notarizing documents to be filed with other governmental agencies. Moreover, nothing in the 2008 or 2014 amendments prohibit a person from using a notary, and many of the Civil Forms for use in the district courts still include the option for notarization. The amendments simply provide an alternative method for providing written sworn statements that may be permitted or required under rule or statute.

[As amended by Supreme Court Order No. 14-8300-023, effective December 31, 2014.]

1-012. Defenses and objections; when and how presented; by pleading or motion; motion for judgment on the pleadings.

A. **When presented.** A defendant shall serve his answer within thirty (30) days after the service of the summons and complaint upon him. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within thirty (30) days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within thirty (30) days after service of the answer, or, if a reply is ordered by the court, within thirty (30) days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

(1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten (10) days after the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ten (10) days after the service of the more definite statement.

B. **How presented.** Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a party under Rule 1-019 NMRA.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense in Subparagraph (6) of this paragraph to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1-056 NMRA, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 1-056 NMRA. Motions shall be prepared and submitted in the manner required by Rule 1-007.1 NMRA.

C. **Motion for judgment on the pleadings.** After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 1-056 NMRA, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 1-056 NMRA.

D. **Preliminary hearings.** The defenses specifically enumerated in Subparagraphs (1) to (7) in Paragraph B of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in Paragraph C of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

E. **Motion for more definite statement.** If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten (10) days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

F. **Motion to strike.** Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty (30) days after the service of the pleading upon him or upon the court's own

initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

G. **Consolidation of defenses in motion.** A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in Subparagraph (2) of Paragraph H of this rule on any of the grounds there stated.

H. **Waiver or preservation of certain defenses.**

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process or insufficiency of service of process is waived:

(a) if omitted from a motion in the circumstances described in Paragraph G of this rule; or

(b) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 1-015 NMRA to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 1-019 NMRA and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 1-007 NMRA, or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestions of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

[As amended, effective August 1, 1989.]

1-013. Counterclaim and cross-claim.

A. **Compulsory counterclaims.** A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if:

(1) at the time the action was commenced the claim was the subject of another pending action; or

(2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

B. **Permissive counterclaims.** A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

C. **Counterclaim exceeding opposing claim.** A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

D. **Counterclaim against the state.** These rules shall not be construed to enlarge beyond the limits fixed by law the right to assert counterclaims or to claim credits against the state or an officer or agency thereof.

E. **Counterclaim maturing or acquired after pleading.** A claim which either matured or was acquired by the pleader after serving his pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

F. **Omitted counterclaim.** When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, he may by leave of court set up the counterclaim by amendment.

G. **Cross-claim against coparty.** A pleading may state as a cross-claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

H. **Additional parties may be brought in.** When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court shall order them to be brought in as parties as provided in these rules, if jurisdiction of them can be obtained and their joinder will not deprive the court of jurisdiction of the action.

I. **Separate trials; separate judgments.** If the court orders separate trial as provided in Paragraph B of Rule 1-042 NMRA, judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Paragraph B of Rule 1-054 NMRA, when the court has jurisdiction so to do, even if the claims of the opposing party have been dismissed or otherwise disposed of.

1-014. Third-party practice.

A. **When defendant may bring in third party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than ten (10) days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 1-012 NMRA and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 1-013 NMRA. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 1-012 NMRA and his counterclaims and cross-claims as provided in Rule 1-013 NMRA. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

B. **When plaintiff may bring in third party.** When a counterclaim is asserted against a plaintiff, he may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

1-015. Amended and supplemental pleadings.

A. **Amendments.** A party may amend its pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed on the trial calendar, the party may amend it at any time within twenty (20) days after it is served. Otherwise a party may amend its pleading only by leave of court or by written consent of the adverse party, and leave shall be freely given when justice requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten (10) days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

B. **Amendments to conform to the evidence.** When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made on motion of any party at any time, even after judgment; but failure to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court

may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of the evidence would prejudice it in maintaining its action or defense on the merits. The court may grant a continuance to enable the objecting party to meet the evidence.

C. **Relation back of amendments.**

(1) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

(2) When a party files a motion to amend a pleading prior to the running of the statute of limitations, changing the party against whom a claim is asserted, a ruling granting the motion relates back to the date the motion was filed if the motion was accompanied by a proposed amended pleading naming the new party.

(3) When a party files a motion to amend a pleading after the statute of limitations has run, changing the party against whom a claim is asserted, a ruling granting the motion relates back to the date of the original pleading if Paragraph (C)(1) of this rule is satisfied and, within the period provided by Rule 1-004(C)(2) NMRA for serving process, the party to be brought in by amendment

(a) has received such notice of the institution of the action that it will not be prejudiced in maintaining its defense on the merits; and

(b) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against it.

D. **Supplemental pleadings.** On motion of a party, the court may, on reasonable notice and on terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

E. **All matters set forth in one pleading.** In every complaint, answer, or reply, amendatory or supplemental, the party shall set forth in one entire pleading all matters which, by the rules of pleading, may be set forth in the pleading, and which may be necessary to the proper determination of the action or defense.

[As amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. —

2017 amendment

Introduction – Revisions to Rule 1-015(C) NMRA

Rule 1-015(C) NMRA is divided into three sections. Paragraph (C)(1) reiterates the first sentence of prior Paragraph C and remains unchanged. Paragraph (C)(2) addresses an issue raised in *Snow v. Warren Power & Mach., Inc.*, 2015-NMSC-026, 354 P.3d 1285. Paragraph (C)(3) modifies prior Paragraph C by amending language in the rule to make it consistent with the Court's holding in *Galion v. Conmaco Int'l, Inc.*, 1983-NMSC-006, 99 N.M. 403, 658 P.2d 1130.

Both new Paragraphs (C)(2) and (C)(3) maintain the current language of prior Paragraph C making the rules applicable to an amendment "changing the party against whom a claim is asserted." New Mexico has broadly construed this language. *See Romero v. Ole Tires, Inc.*, 1984-NMCA-092, ¶ 14, 101 N.M. 759, 688 P.2d 1263 ("The word 'changing' should be given a liberal construction, so that amendments adding or dropping parties as well as amendments that substitute parties fall within the Rule."); *Romero v. Bachicha*, 2001-NMCA-048, ¶ 12, 130 N.M. 610, 28 P.3d 1151 ("Rule 1-015(C) clearly encompasses the amendment of pleadings to correct misnomers.").

New Paragraph (C)(2)

In *Snow*, 2015-NMSC-026, ¶ 33, the Court ruled that when a party filed a motion to add a new defendant shortly before the statute of limitations ran and the motion was granted after the statute of limitations ran, the motion was deemed to be granted on the date the motion was filed if the motion was accompanied by the proposed amended complaint. *See* Rule 1-007.1(C) NMRA (requiring the proposed pleading to be attached to the motion to amend the pleading). The Court did not impose a requirement that the person sought to be added as a defendant be notified of the proposal to amend the pleadings before the amended complaint is filed. *Snow*, 2015-NMSC-026, ¶¶ 35-36. The Court requested the Rules of Civil Procedure for the District Courts Committee consider whether to amend Rule 1-015 NMRA in light of its opinion. *Id.* ¶ 38.

The Court adopted the Committee's recommendation for a new Paragraph (C)(2), which incorporates the Court's holding in *Snow* by providing that motions to change a party granted in such factual situations may relate back to the date of the timely filing of the motion to change the party. The rule incorporates the Court's requirement in *Snow* and Rule 1-007.1(C) NMRA that the proposed amended pleading must accompany the motion to amend, and the existing Paragraph C requirement that to relate back, amended pleadings must arise out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. *See* Paragraph (C)(1).

In *Snow*, the Court asked the Committee to consider whether a rule provision setting the specific time for serving the amended complaint on the new party should be adopted. The Court adopted the Committee's recommendation that no specific time for accomplishing service should be set by rule. Instead, service must be "made with due

diligence" as currently required in all cases by Rule 1-004(C)(2) NMRA. *See Prieto v. Home Educ. Livelihood Program*, 1980-NMCA-114, ¶ 12, 94 N.M. 738, 616 P.2d 1123 (providing that the court should exercise its inherent power and discretion to dismiss the complaint if the plaintiff does not exercise diligence in effectuating service). The possibility that plaintiff's delay in serving the amended complaint may lead to dismissal provides adequate incentive for prompt service of the amended complaint upon the new defendant.

New Paragraph (C)(3)

Prior Paragraph C provided that the defendant to be brought in by amendment after the statute of limitations had run must have received listed notice "within the period provided for commencing the action against him." Because "[a] party must . . . file the amended complaint within the period allowed under the statute of limitations," *Snow*, 2015-NMSC-026, ¶ 18, the rule seemed to require that the new defendant receive the listed notice before the date that the statute of limitations ran.

In *Galion*, 1983-NMSC-006, ¶ 6, the Court noted that in all cases, service of process may be made on a defendant after the statute of limitations has expired if the complaint was filed before the statute of limitations ran and if plaintiff exercises due diligence when serving process thereafter. *See Prieto*, 1980-NMCA-114, ¶ 12. The Court ruled that an amendment changing the defendant similarly should relate back "as long as service of process was effected within the reasonable time allowed under the rules of civil procedure even though the limitations period had expired." *Galion*, 1983-NMSC-006, ¶ 12.

Paragraph (C)(3) amends the language of former Paragraph C to conform to the holding in *Galion*. *See also* F.R.C.P. 15(c)(1)(C) (containing similar language). The amendment is not intended to modify the *Galion* Court's ruling limiting *Galion* to cases involving a close relationship between the named defendant and the new defendant. *See Galion*, 1983-NMSC-006, ¶ 12.

[Adopted by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017.]

1-016. Pretrial conferences; scheduling; management.

A. **Pretrial conferences; objectives.** In any action the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation; and

(5) facilitating the settlement of the case.

B. **Scheduling and planning.** Except in categories of actions exempted by local district court rule as inappropriate, the judge may, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time:

(1) to join other parties and to amend the pleadings;

(2) to file and hear motions; and

(3) to complete discovery.

The scheduling order shall also include:

(4) provisions for disclosure or discovery of electronically stored information;

(5) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production;

(6) the date or dates for conferences before trial and a final pretrial conference;

(7) a trial date not later than eighteen (18) months after the date the scheduling order is filed; and

(8) any other matters appropriate in the circumstances of the case.

The pretrial scheduling order shall be filed as soon as practicable but in no event more than one hundred twenty (120) days after filing of the complaint. A scheduling order shall not be modified except by order of the court upon a showing of good cause.

If a pretrial scheduling order is not entered, the court shall set the case for trial in a timely manner, but no later than eighteen (18) months after the filing of the complaint.

For good cause shown, the court may extend the time for commencement for trial beyond the time standards set forth in this paragraph or may modify the scheduling order.

C. **Subjects to be discussed at pretrial conferences.** The participants at any conference under this rule may consider and take action with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a master;

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems;

(11) the limitation of the number of expert witnesses; and

(12) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants reasonably anticipate may be discussed.

D. **Final pretrial conference.** Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

E. **Pretrial orders.** After any pretrial conference is held pursuant to this rule, an order shall be entered reciting any action taken. This order shall control the subsequent

course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

F. **Sanctions.** If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the court's own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Subparagraphs (b), (c) or (d) of Subparagraph (2), of Paragraph B of Rule 1-037. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing him or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

[As amended, effective January 1, 1990; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee commentary for 2009 amendments. — *See* the 2009 committee commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

ARTICLE 4
Parties

1-017. Parties plaintiff and defendant; capacity.

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

B. **Wrongful death actions; personal representative.** An action for wrongful death brought under Section 41-2-1 NMSA 1978 shall be brought by the personal representative appointed by the district court for that purpose under Section 41-2-3 NMSA 1978. A petition to appoint a personal representative may be brought before the wrongful death action is filed or with the wrongful death action itself.

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

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

E. **Consumer debt claims.**

(1) Collection agencies may take assignments of claims in their own names as real parties in interest for the purpose of billing and collection and bringing suit in their own names; provided that no suit authorized by this section may be instituted on behalf of a collection agency in any court unless the collection agency appears by a licensed attorney-at-law; and further provided that the collection agency must plead specific facts in its initial pleading demonstrating that it is the real party in interest.

(2) In any consumer debt claim in which the party seeking relief alleges entitlement to enforce the debt but is not the original creditor, the party must file an affidavit establishing the chain of title or assignment of the debt from the original creditor to and including the party seeking relief. The affidavit must be based on personal knowledge, setting forth those facts as would be admissible in evidence, showing affirmatively that the affiant is competent to testify to the matters stated in the affidavit. An affidavit based on a review of the business records of the party or any other person or entity in the chain of title must establish from personal knowledge compliance with the requirements of Rule 11-803(6)(a)-(c) NMRA, or demonstrate reliance on an attached certification complying with Rule 11-902(11) or (12) NMRA. The business records must be attached to the affidavit or certification.

[As amended, effective January 1, 1997; as amended by Supreme Court Order No. 14-8300-010, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. —

2014 amendment

NMSA 1978, Section 41-2-3 provides that an action for wrongful death brought under NMSA 1978, Section 41-2-1 “shall be brought by and in the name of the personal

representative of the deceased person." The Court of Appeals has ruled that the personal representative referenced in Section 41-2-3 is distinguishable from the personal representative of the estate of the deceased as defined in the Probate Code. *See In re Estate of Sumler*, 2003-NMCA-030, ¶ 8, 133 N.M. 319, 62 P.3d 776 ("[I]t is improper to equate a personal representative under the Wrongful Death Act with a personal representative as defined by the Probate Code."). To maintain the distinction between a traditional personal representative and one appointed to maintain a wrongful death action, Paragraph B now provides that only a personal representative appointed by the district court may bring a wrongful death action. A personal representative as defined by the Probate Code may seek appointment from the district court under Section 41-2-3 as the personal representative for the purpose of filing and maintaining a wrongful death action under Section 41-2-1.

Paragraph B also provides that the person seeking to become the personal representative may petition the court for appointment either before the filing of the wrongful death action or in the wrongful death action itself. *See In re Estate of Sumler*, 2003-NMCA-030, ¶ 10 n.1 ("[W]e see no reason why a petition for appointment of a Section 41-2-3 personal representative may not be brought with the wrongful death action itself, assuming that all necessary parties are subject to joinder in the forum where the wrongful death action is brought." (internal citations omitted)). Failure to appoint a personal representative before the filing of a wrongful death action is not a jurisdictional defect and, under proper circumstances, may be accomplished after the action is filed. *See Chavez v. Regents of University of New Mexico*, 1985-NMSC-114, 103 N.M. 606, 711 P.2d 883.

2016 amendment

Paragraph E of this rule provides additional protections to consumers in consumer debt collection cases. *See* Comment to Rule 1-009 NMRA. Paragraph (E)(2)'s affidavit requirements derive from Rule 1-056(E) NMRA. A proper affidavit can support the introduction of business records. *See Nader v. Blair*, 549 F.3d 953, 963 (4th Cir. 2008) (stating that "employees who are familiar with the record-keeping practices of a business are qualified to speak from personal knowledge that particular documents are admissible business records, and affidavits sworn by such employees constitute appropriate summary judgment evidence."). In like manner, an affidavit from the "custodian or another qualified witness" or "a certification that complies with Rule 11-902(11) or (12) NMRA" that demonstrates compliance with Rule 11-803(6) NMRA suffice, if the business records accompany the affidavit or certification.

The business records exception allows the records themselves to be admissible but not simply statements about the purported contents of the records. *See State v. Cofer*, 2011-NMCA-085, ¶ 17, 150 N.M. 483, 261 P.3d 1115 (holding that, based on the plain language of Rule 11-803(F) NMRA (2007) (now Rule 11-803(6) NMRA), "it is clear that the business records exception requires some form of document that satisfies the rule's foundational elements to be offered and admitted into evidence and that testimony alone does not qualify under this exception to the hearsay rule," and concluding that

"testimony regarding the contents of business records, unsupported by the records themselves, by one without personal knowledge of the facts constitutes inadmissible hearsay") (internal quotation marks and citation omitted); *Bank of New York v. Romero*, 2014-NMSC-007, ¶ 33, 320 P.3d 1.

[Adopted by Supreme Court Order No. 14-8300-010, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 17-8300-022, effective for all cases pending or filed on or after December 31, 2017.]

1-018. Joinder of claims and remedies.

A. **Joinder of claims.** The plaintiff in his complaint or in a reply setting forth a counterclaim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 1-019, 1-020 and 1-022 NMRA are satisfied. There may be a like joinder of cross-claims or third-party claims if the requirements of Rules 1-013 and 1-014 NMRA respectively are satisfied.

B. **Joinder of remedies; fraudulent conveyances.** Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a conveyance fraudulent as to him, without first having obtained a judgment establishing the claim for money.

1-019. Joinder of persons needed for just adjudication.

A. **Persons to be joined if feasible.** A person who is subject to service of process shall be joined as a party in the action if:

(1) in his absence complete relief cannot be accorded among those already parties; or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may:

(a) as a practical matter impair or impede his ability to protect that interest; or

(b) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he

should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

B. **Determination by court whenever joinder not feasible.** If a person as described in Subparagraph (1) or (2) of Paragraph A of this rule cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

C. **Pleading reasons for nonjoinder.** A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Subparagraph (1) or (2) of Paragraph A of this rule who are not joined, and the reasons why they are not joined.

D. **Exception of class actions.** This rule is subject to the provisions of Rule 1-023 NMRA.

1-020. Permissive joinder of parties.

A. **Permissive joinder.** All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

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

1-021. Misjoinder and nonjoinder of parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage

of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

1-022. Interpleader.

A. **Who may interplead.** Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of parties permitted in Rule 1-020.

B. **Order to interplead.** Upon the filing of any complaint, cross-claim or counterclaim by way of interpleader pursuant to Paragraph A of this rule, the district court shall take full and complete jurisdiction of the matter or thing in dispute and shall order all who have or claim an interest therein to interplead in said action within the time now by law allowed for plea and answer. Service of a copy of such order shall be made as provided in these rules for service on adverse parties.

C. **Service upon nonresidents.** In any action under the provisions of this rule, where it is made to appear to the satisfaction of the court by affidavit filed in said cause, that any person claiming an interest in or to any property in the custody of said court, is in fact a nonresident of New Mexico, the court shall order service to be made upon such nonresident by publication.

D. **Disposition.** The decree of the district court shall determine the disposition of the matter or thing in dispute and shall be binding upon all parties to the action on whom service has been made.

1-023. Class actions.

A. **Prerequisites to a class action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable;

(2) there are questions of law or fact common to the class;

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

B. **Class actions maintainable.** An action may be maintained as a class action if the prerequisites of Paragraph A of this rule are satisfied, and in addition

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(a) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

(b) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include

(a) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(d) the difficulties likely to be encountered in the management of a class action.

C. **Determination by order whether class action to be maintained; notice; judgment; actions conducted partially as class actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subparagraph may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under Paragraph (B)(3) of this rule, the court shall direct to the members of the class the best notice practicable under the

circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(a) the court will exclude the member from the class if the member so requests by a specified date;

(b) the judgment whether favorable or not, will include all members who do not request exclusion; and

(c) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under Paragraph (B)(1) or (B)(2) of this rule, whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Paragraph (B)(3) of this rule, whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Paragraph (C)(2) of this rule was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate

(a) an action may be brought or maintained as a class action with respect to particular issues; or

(b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

D. **Orders in conduct of actions.** In the conduct of actions to which this rule applies, the court may make appropriate orders

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 1-016 NMRA, and may be altered or amended as may be desirable from time to time.

E. **Dismissal or compromise.** A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in the manner as the court directs.

F. **Appeals.** The Court of Appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within fifteen (15) days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the Court of Appeals so orders.

G. **Residual funds to named organization.**

(1) For purposes of Paragraph (G)(2) of this rule, "residual funds" are

(a) unclaimed funds, including uncashed checks and other unclaimed payments, that remain after payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor’s own funds; or

(b) if it is impossible or economically impractical to distribute the common fund to the class at all, the entire common fund after payment of all approved expenses, litigation costs, attorneys' fees, and other court-approved disbursements or dispositions to implement the relief granted, whether the payments are drawn from a common fund or directly from the judgment debtor’s own funds.

(2) Either in its order entering a judgment or approving a proposed settlement of a class action certified under this rule that establishes a process for identifying and compensating members of the class or by a subsequent order entered when residual funds are determined to exist, the court shall provide for the disbursement of residual funds, if any, to one or more of the following entities:

(a) nonprofit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based;

(b) educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based;

(c) nonprofit organizations that provide legal services to low income persons;

(d) the entity administering the IOLTA fund under Rule 24-109 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico; and

(e) the entity administering the pro hac vice fund under Rule 24-106 NMRA, to support activities and programs that promote access to the civil justice system for low income residents of New Mexico.

(3) Nothing in this paragraph is intended to prevent the parties to a class action from proposing, or the trial court from approving, a settlement that does not create residual funds.

[As amended, effective July 1, 1995; December 4, 2000; as amended by Supreme Court Order No. 11-8300-016, effective May 11, 2011; as amended by Supreme Court Order No. 16-8300-012, effective for all cases pending or filed on or after December 31, 2016.]

1-023.1. Derivative actions by shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share or membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

[As amended, effective July 1, 1995.]

1-024. Intervention.

A. **Intervention of right.** Upon timely application anyone shall be permitted to intervene in an action:

(1) when a statute confers an unconditional right to intervene; or

(2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the

disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

B. **Permissive intervention.** Upon timely application anyone may be permitted to intervene in an action:

(1) when a statute confers a conditional right to intervene; or

(2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action.

In exercising its discretion pursuant to this paragraph the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

C. **Procedure.** A person desiring to intervene pursuant to Paragraph A or B of this rule shall serve a motion to intervene upon the parties as provided in Rule 1-005 NMRA. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

[As amended, effective July 1, 1995.]

1-025. Substitution of parties.

A. **Death.**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 1-005 NMRA and upon persons not parties in the manner provided in Rule 1-004 NMRA for the service of a summons. Unless the motion for substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not

abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

B. **Incompetency.** If a party becomes incompetent, the court upon motion served as provided in Paragraph A of this rule may allow the action to be continued by or against his representative.

C. **Transfer of interest.** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Paragraph A of this rule.

D. **Public officers; death or separation from office.**

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

ARTICLE 5
Depositions and Discovery

1-026. General provisions governing discovery.

A. **Discovery methods.** Parties may obtain discovery by any of the following methods: depositions; interrogatories; requests for production or to enter land; physical and mental examinations and requests for admission.

B. **Scope of discovery.** Unless otherwise limited by the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery of any information, not privileged, which is relevant to the subject matter involved in the pending action. The information sought need not be admissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. A party responding to discovery requests shall provide all non-privileged responsive information then known to the party, subject to the limitations in these rules or as ordered by the court.

(2) Limitations. The court shall limit use of discovery methods set forth in this rule if it determines that:

(a) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(b) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(c) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(3) Witnesses and exhibits. Parties may obtain discovery of the identity of each person expected to be called as a witness at trial, the subject matter of the witness's expected testimony and the substance of the witness's testimony. Parties may also discover the name, address and telephone number of each individual likely to have discoverable information that another party may use to support its claims or defenses as well as the subjects of such information. Parties may obtain a copy of, or a description by category and location of, all documents, electronically stored information, and tangible things that a party may use to support its claims or defenses.

(4) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. For purposes of this paragraph, an application for insurance is not part of an insurance agreement.

(5) Trial preparation materials. Subject to the provisions of Subparagraph (6) of this paragraph, a party may obtain discovery of documents, electronically stored information and tangible things otherwise discoverable under Subparagraph (1) of this paragraph and prepared in anticipation of litigation or for trial by or for another party or that party's representative (including the party's attorney, consultant, surety, indemnitor, insurer or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement that the party made concerning the action or its subject matter. Upon request, a person not a party may obtain without the required showing a statement that the person made concerning the

action or its subject matter. If the request is refused, the person may move for a court order compelling production of the statement. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement is:

(a) a written statement signed, adopted or approved by the person making it, or

(b) a contemporaneous, substantially verbatim recital of an oral statement by a person.

(6) Experts.

(a) A party may through interrogatories and requests for production discover the identity of each person the other party may call as an expert witness at trial, the subject matter on which the expert is expected to testify, and the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. In addition, a party may discover the qualifications of the expert, including a copy of or the name and address of the custodian of any reports prepared by the expert regarding the pending action, a list of all publications authored by the witness within the preceding ten (10) years, and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four (4) years.

(b) A party may depose any person who has been identified as an expert whose opinions may be presented at trial.

(c) A party may discover facts known or opinions held by an expert that another party has retained or specially employed in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 1-035 NMRA or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(d) Unless manifest injustice would result, the party seeking discovery shall pay the expert a reasonable fee related to the deposition or for time spent in responding to discovery under this subparagraph

(7) Claims of privilege or protection of trial preparation materials.

(a) Information withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection pursuant to Subparagraph (5) of this paragraph as trial preparation materials, the party shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(b) Information produced. If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

C. **Protective orders.** Upon motion by any party or interested person for good cause, the court may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense, including one or more of the following:

(1) prohibiting the disclosure or discovery;

(2) limiting the terms or conditions of the disclosure or discovery;

(3) designating the time or place of the disclosure or discovery;

(4) directing the method of discovery including a method different than the party seeking discovery selected;

(5) barring or limiting inquiry into certain matters;

(6) directing that discovery be conducted with no one present except persons designated by the court;

(7) sealing disclosures, responses or deposition transcripts;

(8) authorizing, prohibiting or limiting the discovery of a trade secret or other confidential research, development or commercial information; and

(9) directing that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may order that any party or person provide or permit discovery. The provisions of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

A motion filed pursuant to Paragraph C of this rule shall set forth or attach a copy of the discovery request at issue.

D. **Sequence and timing of discovery.** Unless the court for good cause orders otherwise, methods of discovery may be used in any sequence, and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery. A party responding to discovery requests may not refuse to provide responsive information on grounds that discovery is continuing or that future scheduling deadlines exist such as those for exchange of trial witness and exhibits lists.

E. **Supplementation of responses.** A duty to supplement responses may be imposed by order of the court, agreement of the parties or at any time prior to trial through new requests for supplementation of prior responses. In addition, a party has a duty to seasonably supplement or amend a prior response to an interrogatory, request for production, or request for admission if a party learns that the response is materially incomplete or incorrect and if additional or corrective information has not otherwise been made known to the parties during the discovery process or in writing.

F. **Discovery conference.** At any time the court may direct the attorneys for the parties to appear for a discovery conference. The court shall also conduct a discovery conference upon motion by any party, unless the court determines that good cause exists not to conduct such a conference.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. Upon request of a party or when good cause otherwise exists, the court shall establish deadlines for identifying expert witnesses and conducting discovery related to expert testimony. An order may be altered or amended for good cause or by stipulation of the parties with court approval.

The court may combine the discovery conference with a pretrial conference authorized by Rule 1-016 NMRA.

[As amended, effective October 15, 1986; August 1, 1989; January 1, 1998; May 1, 2002; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee commentary for 2009 amendments. — The 2009 amendments to Rule 1-026 NMRA consist of numerous changes as described below.

Stylistic and Grammatical Changes

The stylistic and grammatical changes to Rule 1-026 are numerous. Unless otherwise noted below, these changes were not intended to impact the substantive provisions of Rule 1-026.

Discovery Methods. The new language in Rule 1-026(A) is more concise. The provisions for requests for production or to enter land apply to both Rule 1-034, which

has to do with such discovery requests made upon parties, as well as Rule 1-045, which has to do with such discovery via a subpoena to non-parties.

Scope of Discovery. The amendments consolidate the prior language in Rule 1-026(B)(1) to express the well-established standard for liberal pretrial discovery. *E.g., Marchiondo v. Brown,* 98 N.M. 394, 649 P.2d 462 (1982). The parties may obtain discovery of any information not privileged which is relevant to the subject matter involved in the pending litigation. The amendment retains the provision that the information sought need not be admissible at trial if the information appears to be reasonably calculated to lead to the discovery of admissible evidence. The rule further explains that parties responding to discovery requests seeking such information must provide responsive information then known to the party and may not delay discovery of such information simply because discovery is not complete or future pretrial deadlines may exist.

Witnesses and Exhibits. This paragraph explicitly provides for discovery related to witnesses, documents, electronically stored information, and tangible things. One of the principal purposes of these provisions is to facilitate early discovery of necessary pretrial information to focus later discovery. Early identification of potential witnesses and exhibits should expedite the litigation process.

Insurance information. Although Rule 1-026(B)(4) does not include an insurance application as part of an insurance agreement, such applications may be discoverable when reasonably calculated to lead to the discovery of admissible evidence. The revisions to Rule 1-026(B)(4) are not intended to change existing law governing the admissibility of information concerning insurance agreements. The Rules of Evidence continue to control the admissibility of insurance information.

Expert Discovery. Rule 1-026(B)(4) concerns discovery of experts. The previous rule required a court order for taking a deposition of an expert, a procedure not uniformly followed. The rule now provides for requests for production and interrogatories as well as depositions of experts without court order.

Privilege Issues. These revisions consist mostly of stylistic changes. It is desirable that a party comply with the provisions of Rule 1-026(B)(7)(a) by producing a privilege log of any information being withheld from discovery on the grounds of privilege. The provisions in Rule 1-026(B)(7)(b) are new. They are modeled after amendments to the Federal Rules of Civil Procedure adopted with provisions for the discovery of electronically-stored information as explained in more detail below.

Protective Orders. The amendments consist essentially of stylistic changes with one notable exception. The rule previously provided that a party or other person could seek a protective order from the court in which the action is pending or, alternatively, on matters relating to a deposition, from a court in the district where the deposition is to be taken. The provision applicable “to the district where the deposition is to be taken” is a vestige from the adoption of portions of the federal rule, which envisions discovery

outside the federal district of the pending action. The federal rule has a nationwide application. New Mexico has a much smaller geographic area, and consequently, the committee felt that the burdens imposed by requiring parties or non-parties to seek a protective order in the district court where the action is filed did not outweigh the judicial economy and consistency of having that particular court decide the issue.

Supplementation. The amendments to Paragraph E concern a party's duty to supplement and amend discovery responses. The rule does not require supplementation or amendment if the additional or corrective information has otherwise been made known to the parties during the discovery process or in writing. The amendment does not otherwise significantly change the substantive requirements of the existing rule; it is intended to restate those requirements more concisely.

Discovery Conferences. The revisions streamline the procedures applicable to discovery conferences and eliminate provisions that litigants were not typically following in routine practice. The rule provides parties the opportunity to have the court enter scheduling deadlines related to expert witnesses.

Discovery of Electronically Stored Information. In September, 2005, the Committee on Rules of Practice and Procedure proposed amendments to the Federal Rules of Civil Procedure. The committee found that discovery of electronically stored information "raises markedly different issues from conventional discovery of paper records" and that existing discovery rules "provide inadequate guidance to litigants, judges, and lawyers in determining discovery rights and obligations in particular cases." *September 2005 Report of the Committee on Rules of Practice and Procedure.* The advisory committee submitted proposed amendments to Federal Rules 16, 26, 33, 34, 37, 45 and Form 35 to address these problems. The proposals were adopted and went into effect in the federal courts in December, 2006.

The New Mexico Rules of Civil Procedure for the District Courts Committee reviewed these new federal rules and the advisory committee's accompanying commentary. With three substantive changes and additional minor editing changes, the committee recommended that New Mexico amend Rules 1-016, 1-026, 1-033, 1-034, 1-037 and 1-045 of the New Mexico Rules of Civil Procedure for the District Courts to incorporate the new federal rules concerning discovery of electronically stored information.

One recommended change occurs in Rule 1-026(B)(7)(b) NMRA, which deals with the assertion of privilege or other protection for information already produced by a party. Both Federal Rule 26(b)(5)(B) and Rule 1-026(B)(7)(b) provide that the party who is notified that the party has received information subject to the claim of privilege or protection must sequester it and not use it until the claim is resolved. Federal Rule 26(b)(5)(B) provides that the party in possession of the disputed information "may promptly present the information to the court under seal for a determination of the claim." Because New Mexico law provides that documents are sealed only after a motion to seal has been made and granted, *see, e.g., Thomas v. Thomas*, 1999-NMCA-135, 128 N.M. 177, 991 P.2d 7 (Ct. App. 1999) (noting that a party sought a protective

order to seal the district court record of the proceedings); LR2-111 NMRA [withdrawn] ("... a court may seal a file or other record upon a party's written motion or the court's own motion, and showing of good cause."), New Mexico Rule 1-026(B)(7)(b) provides instead: "By motion, a receiving party may promptly present the information to the court for in camera review and determination of the claim." The committee does not intend that the adoption of Rule 1-026(B)(7) will otherwise affect the burdens of production and persuasion that apply when claims of privilege are made. *See* Rule 1-026(B)(7)(a)); *see also Pina v. Espinoza*, 2001-NMCA-055, 130 N.M. 661, 29 P.3d 1062.

The second change is the omission from the amendments to New Mexico Rule 1-037 of that portion of the 2006 amendment that added Rule 37(f) to the Federal Rule. Federal Rule 37(f) provides:

(f) **Electronically Stored Information.** Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

The committee is of the view that nothing in the nature of discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules.

The third change is the omission of a provision in Federal Rule 26(b)(2)(B), which provides:

(B) **Specific Limitations on Electronically Stored Information.** A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

The committee is of the view that the discovery of electronically stored information should be subject to the same provisions in these rules for motions to compel discovery and motions for protective orders that currently govern the discovery of non-electronic information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

1-027. Depositions before action or pending appeal.

A. **Before action.**

(1) A person who desires to perpetuate his own testimony or that of another person regarding any matter that may be cognizable in any court may file a verified petition in the district court in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show:

(a) that the petitioner expects to be a party to an action cognizable in a court but is presently unable to bring it or cause it to be brought;

(b) the subject matter of the expected action and his interest therein;

(c) the facts which he desires to establish by the proposed testimony and his reasons for desiring to perpetuate it;

(d) the names or a description of the persons he expects will be adverse parties and their addresses so far as known; and

(e) the names and addresses of the persons to be examined and the substance of the testimony which he expects to elicit from each; and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least twenty (20) days before the date of hearing the notice shall be served either within or without the state in the manner provided in Rule 1-004 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise and shall appoint, for persons not served in the manner provided in Rule 1-004 NMRA, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Paragraph C of Rule 1-017 NMRA apply.

(3) If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules, and the court may make orders of the character provided for by Rules 1-034 and 1-035. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) If a deposition to perpetuate testimony is taken under these rules, it may be used in any action involving the same subject matter subsequently brought, in accordance with the provisions of Rule 1-032 NMRA.

B. **Pending appeal.** If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show:

(1) the names and addresses of persons to be examined and the substance of the testimony which he expects to elicit from each; and

(2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 1-034 and 1-035, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

C. **Perpetuation by action.** This rule does not limit the power of a court to entertain an action to perpetuate testimony.

1-028. Persons before whom depositions may be taken.

A. **Within the United States.** Depositions shall be taken before an officer authorized to administer oaths by the laws of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony.

B. **In foreign countries.** In a foreign country, depositions may be taken:

(1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States;

(2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony; or

(3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission

and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

C. **Disqualification for interest.** Subject to Rule 1-029 NMRA, no deposition shall be taken before a person who is a relative or employee or attorney or counsel of any of the parties, or is a relative or employee of such attorney or counsel, or is financially interested in the action.

[As amended, effective February 1, 2001.]

1-029. Stipulations regarding discovery procedure.

Unless the court orders otherwise, or previous orders of the court conflict, the parties may by written stipulation:

A. provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions; and

B. modify the procedures provided by these rules for other methods of discovery.

1-030. Depositions upon oral examination.

A. **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The parties shall confer in good faith regarding the date, time and place of each deposition to be taken. A party serving a notice of deposition shall make a good faith effort to avoid scheduling conflicts of parties, witnesses and counsel. Leave of court, granted with or without notice, shall be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty (30) days after service of the summons and complaint upon any defendant or service made under Paragraph F of Rule 1-004 NMRA, except that leave is not required

(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

(2) if the notice

(a) states that the person to be examined will be unavailable for examination or is about to go out of the state and will be unavailable for examination in the state

unless the person's deposition is taken before expiration of the thirty (30) day period; and

(b) sets forth facts to support the statement.

If a party shows that, when the party was served with notice under this subparagraph, the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

The attendance of witnesses may be compelled by subpoena as provided in Rule 1-045 NMRA. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

B. **Notice of examination: general requirements; special notice; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.**

(1) A party desiring to take the deposition of any person upon oral examination shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 1-028 NMRA and shall begin with a statement on the record by the officer that includes

(a) the officer's name and business address;

(b) the date, time and place of the deposition;

(c) the name of the deponent;

(d) the administration of the oath or affirmation to the deponent; and

(e) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 1-034 NMRA for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 1-034 NMRA shall apply to the request.

(6) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(7) A deposition may be taken by telephone or other remote electronic means.

C. **Examination and cross-examination; record of examination; oath; objections.** Examination and cross-examination of witnesses may proceed as permitted at the trial under the New Mexico Rules of Evidence, except Rules 11-103 and 11-615 NMRA. The examination shall commence at the time and place specified in the notice or within thirty (30) minutes after the time specified. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. If the deposition is to be stenographically recorded, the court reporter shall administer the oath or affirmation to the deponent. The testimony shall be taken stenographically or recorded by any other method authorized by Subparagraph (2) of Paragraph B of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but

the examination shall proceed, with the testimony being taken subject to the objections. Any party who shows a document to the witness during examination shall provide a copy to all other parties before the deposition begins or when the document is shown to the witness. The officer may go off the record only with the agreement of all parties, which shall not be unreasonably withheld. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

D. **Objections; duration; motion to terminate or limit examination.**

(1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Objections to form or foundation may be made only by stating "objection -- form", or "objection -- foundation". No specification of the defect in the form or foundation of the question or the answer shall be stated unless requested by the party propounding the question. Argumentative interruptions shall not be permitted. When a question is pending, or a document has been presented to the deponent, no one may interrupt the deposition until the answer is given, except when necessary to preserve a privilege, to enforce a limitation directed by the court or to present a motion under Subparagraph (2) of this paragraph.

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than an expert witness is limited to one day and lasting no more than seven (7) hours on the record. The court must allow additional time consistent with Subparagraph (2) of Paragraph B of Rule 1-026 NMRA if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Paragraph C of Rule 1-026 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of this rule apply to depositions being taken for use outside New Mexico. The provisions of Subparagraph (4) of Paragraph A of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

E. **Review by witness; changes; signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a

statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Subparagraph (1) of Paragraph F of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

F. **Certification and delivery by officer; exhibits; copies.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition and exhibits in an envelope or package with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering or deterioration. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and attached to and returned with the deposition. Documents and things produced for inspection may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may

(a) offer copies to be marked for identification and attached to the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if attached to the deposition. Any party may move for an order that the original be attached to the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

G. **Failure to attend or to serve subpoena; expenses; notice of non-appearance.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(3) If a motion for protective order and notice of non-appearance are filed and actual notice of the non-appearance is given to all parties at least three (3) days before the scheduled deposition, then the failure of a deponent or managing agent or a party to appear at the time and place designated shall not be considered a willful failure to appear within the meaning of Paragraph D of Rule 1-037 NMRA or contemptible conduct under Paragraph E of Rule 1-045 NMRA, unless the court finds that the motion is frivolous or for dilatory purposes.

H. **Final disposition of depositions.** After a judgment in a civil action becomes final, or the case is otherwise finally closed, the original deposition may be destroyed.

[As amended, effective October 15, 1986; August 1, 1988; January 1, 1999; May 1, 2002; November 1, 2002; February 16, 2004; as amended by Supreme Court Order No. 06-8300-007, effective May 1, 2006; by Supreme Court Order No. 11-8300-052, effective for cases filed or pending on or after February 17, 2012.]

Committee commentary. — Paragraph E requires a deponent to sign a statement reciting any changes that the deponent makes to a deposition transcript and the reasons for those changes. The signed statement is then attached to the deposition transcript by the court reporter. Electronic transmission of documents is increasingly common, which raises the question of whether a facsimile of an original signed statement from a deponent is sufficient to meet the requirements of Paragraph E. The Committee believes that any electronically transmitted form of an original signed statement of a deponent meets the Rule's requirements. If a dispute arises regarding the authenticity of a signature to a signed statement, the burden of establishing the signature's authenticity is on the proponent of the electronically transmitted form of the original signed statement. *Cf., e.g.*, Rule 11-1003 NMRA ("A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity. . . .").

Rule 1-030(C) NMRA provides that examination and cross-examination of witnesses may proceed as permitted at trial under the New Mexico Rules of Evidence, "except Rules 11-103 and 11-615 NMRA." The reference to Rule 11-615 NMRA addresses whether other potential deponents can attend a deposition. Rule 1-030(C) NMRA provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 1-026(C)(6) NMRA when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. Rule 1-030(C)

NMRA addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

[Adopted by Supreme Court Order No. 14-8300-010, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. 20-8300-005, effective for all cases pending or filed on or after December 31, 2020.]

1-030.1. Audiotaped and videotaped depositions.

A. **Definition; "stenographic recording".** As used in these rules, "stenographic recording" or "stenographically recorded" shall mean reporting by simultaneous verbatim reporting.

B. **Copies.** At the request of any party to the proceeding or the deponent, a party who notices an audiotape or videotape deposition shall promptly:

(1) permit any other party or the deponent to review a copy of the audiotape or videotape and the original exhibits, if any; and

(2) furnish a copy of the audiotape or videotape in the format in which it was recorded to the requesting party on receipt of payment of the reasonable cost of making the copy.

C. **Audio-video deposition requirements.** If a proceeding is to be recorded by audiotape or videotape, unless the court otherwise orders or the parties otherwise stipulate:

(1) it shall be recorded in accordance with Paragraph B of Rule 1-030 NMRA;

(2) each witness, attorney and other person attending the deposition shall be identified on tape or on camera at the commencement of the deposition. Only the deponent and demonstrative materials used during the deposition will be videotaped;

(3) unless physically incapacitated, the deponent shall be seated at a table or in a witness box except when reviewing or presenting demonstrative materials for which a change in position is needed. To the extent practicable, the deposition will be conducted in a neutral setting, against a solid background, with appropriate lighting. Lighting, camera angle, lens setting and field of view will be changed only as necessary to record accurately the natural body movements of the deponent or to portray exhibits and materials used during the deposition. At both audiotaped and videotaped depositions, sound levels will be altered only as necessary to record satisfactorily the voices of counsel and the deponent;

(4) the officer conducting the deposition may only go off the record with the agreement of the parties, which shall not be unreasonably withheld. When the parties

go off the record, the audio or video operator will state on the tape "going off the record, the time is _____". At this point no audio or video recording shall be made. When going back on the record, the operator will state on the tape "going back on the record, the time is _____";

(5) if the length of a deposition requires the use of more than one tape, the end of each tape and the beginning of each succeeding tape shall be announced on the audiotape or videotape;

(6) the audio or video operator shall use a counter on the recording equipment and shall prepare a log, cross-referenced to counter numbers, that identifies the positions on the tape: at which examination by different counsel begins and ends; at which exhibits are identified; and at which any interruption of continuous tape recording occurs, whether for recesses, "off the record" discussions, mechanical failure or otherwise;

(7) at the conclusion of the deposition, a statement shall be made on the audiotape or videotape that the deposition is ended. The operator shall mark as "original" and consecutively number each tape;

(8) the original audio or video recording may not be edited or altered. Copies of the audiotape or videotape may be redacted as may be appropriate for use in court.

D. **Approval of audiotaped or videotaped deposition.** If there is no stenographic transcription of the deposition, the attorney or self-represented party in possession of the audiotape or videotape promptly shall provide a copy of the tape to the deponent, unless the deponent and all parties attending the deposition have agreed on the record to waive review, correction and certification by the deponent. Within thirty (30) days after receipt of the audiotape or videotape, if there are changes in form or substance, the deponent shall sign a statement reciting such changes and the reasons given by the deponent for making them. If the deponent fails to provide a timely signed statement, no changes may later be made to the deposition.

E. **Use in court proceedings.** A party desiring to use an audiotaped or videotaped deposition pursuant to Rule 1-032 NMRA shall be responsible for having available appropriate playback equipment and an operator.

[Approved, effective February 16, 2004; as amended by Supreme Court Order No. 06-8300-007, effective May 1, 2006.]

Committee commentary. —

Comment A. In general.

The 2006 amendment added "the officer conducting the deposition may only go off the record with the agreement of the parties, which shall not be unreasonably withheld" to

Subparagraph (4) of Paragraph C. A similar provision was added to Paragraph C of Rule 1-030 NMRA. *See* Rule 1-028 NMRA for officers before whom a deposition may be taken.

In 1999, Rule 1-030 NMRA was amended to permit parties to audiotape or videotape depositions without prior permission of the court, unless the court ordered otherwise on motion of a party opposed to recordation by audio or video means.

Experience with the 1999 rule brought problems to light. First, there were no standards for assuring that audio or visual machine operators would accurately record the deposition. Second, other rules dealing with deposition procedures, such as the provision allowing the deponent to review and make corrections of the official record of the deposition, proved cumbersome when applied to audiotaped or videotaped depositions.

In conjunction with changes made in other rules, Rule 1-030.1 NMRA improves the administration of the use of video and audiotaped depositions in court proceedings. Rule 1-030.1(C) establishes standard procedures for conducting audiotaped and videotaped depositions unless the parties agree otherwise or the court orders otherwise. Rule 1-030.1(D) specifies the procedure for providing copies and for securing approval of depositions when an audiotaped or videotaped deposition is taken. Finally, Rule 1-032(C) NMRA provides for the method of presentation of audiotaped or videotaped depositions in court proceedings.

Comment B. Audiotaped and videotaped depositions.

A party need not get prior court approval in order to audiotape or videotape a deposition. The party noticing a deposition is required to designate in the notice the method by which the deposition is to be taken. Rule 1-030(B)(2) NMRA.

Comment C. Simultaneous verbatim reporting of audiotaped or videotaped depositions.

There are no existing provisions for licensing and certifying persons who operate audiotape and videotape equipment to record depositions. (Only certified court monitors of "in-court" proceedings are currently regulated and certified. *See* Rule 22-201 NMRA). Until regulations assuring competence of audio and video operators and the accuracy of the audio or video record exists, accuracy can best be assured by requiring compliance with the requirements set forth in Rules 1-030(C) and 1-030.1(C) NMRA and supplemental court orders, if any.

Comment D. Cost of recording depositions.

The party taking the deposition will be responsible for payment of the cost of the deposition in the format specified in the notice. Rule 1-030(B)(2) NMRA. If another party designates another method to record the testimony, the additional record will be made

at that party's expense unless otherwise ordered by the court. *See* Rule 1-030(B)(3) NMRA.

Comment E. Procedures and requirements for recording audio or video depositions.

Because audio and video depositions can take place without prior court approval, there is a need to set general standards for conducting such depositions. Rule 1-030.1(C) does this. The court may, on motion, modify these standards or add to them.

Comment F. Approval of audiotaped or videotaped depositions.

While the original audiotapes or videotapes cannot be physically altered, Rule 1-030.1(C)(8) NMRA, the deponent may review the recording and, in a separate writing, note substantive or formal changes in the recorded testimony and the reasons therefor. Rule 1-030.1(D) NMRA. If a stenographic recording was made by a certified court reporter, a statement reciting changes to the stenographic recording should be made pursuant to Rule 1-030(E) NMRA.

1-031. Depositions on written questions.

A. **Serving questions; notice.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 1-045 NMRA. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating:

(1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs; and

(2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Subparagraph (6) of Paragraph B of Rule 1-030 NMRA.

Within thirty (30) days after the notice and written questions are served, a party may serve cross-questions upon all other parties. Within ten (10) days after being served with cross-questions, a party may serve redirect questions upon all other parties. Within ten (10) days after being served with redirect questions, a party may serve recross-questions upon all other parties. The court may for cause shown enlarge or shorten the time.

B. **Officer to take responses and prepare record.** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Paragraphs C, E and F of Rule 1-030 NMRA, to take the testimony of the witness in response to the questions and to prepare, certify and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

C. **Notice of filing.** When the deposition is filed, the party taking it shall promptly give notice thereof to all other parties.

1-032. Use of depositions in court proceedings.

A. **Use of depositions.** At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof, in accordance with any of the following provisions:

(1) any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any other purpose permitted by the Rules of Evidence;

(2) the deposition of a party or of anyone who at the time of taking the deposition was an officer, director or managing agent, or a person designated under Subparagraph (6) of Paragraph B of Rule 1-030 NMRA or Subparagraph A of Rule 1-031 NMRA to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party may be used by an adverse party for any purpose;

(3) the deposition of a witness, whether or not a party, may be used by any party for any purpose upon stipulation of the parties or if the court finds:

(a) that the witness is dead;

(b) that the witness is at a greater distance than one hundred (100) miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition;

(c) that the witness is one hundred miles or less from the place of trial or hearing, if an order was entered prior to the deposition permitting the use of the deposition at trial and the notice of deposition sets forth that the proponent intended to use the deposition at trial;

(d) that the witness is unable to attend or testify because of age, illness, infirmity or imprisonment;

(e) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(f) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court, to allow the deposition to be used;

(4) if only part of a deposition is offered in evidence by a party, an adverse party may require the offeror to introduce any other part which ought in fairness to be considered with the part introduced, and any party may introduce any other parts.

Substitution of parties pursuant to Rule 1-025 NMRA does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or of any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the New Mexico Rules of Evidence.

B. **Objections to admissibility.** Subject to the provisions of Paragraph B of Rule 1-028 NMRA and Subparagraph (3) of Paragraph D of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

C. **Form of presentation.** Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

D. **Effect of errors and irregularities in depositions.**

(1) **As to notice.** All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice and filed in the action.

(2) **As to disqualification of officer.** Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence. Such objections should be served on the party giving notice and filed in the action.

(3) **As to taking of deposition.**

(a) Objections to the competency of a witness or to the competency, relevancy or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(b) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation or in the conduct of parties and errors of any kind which might be obviated, removed or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(c) Objections to the form of written questions submitted under Rule 1-031 NMRA are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within five (5) days after service of the last questions authorized.

(4) **As to completion and return of deposition.** Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the officer under Rules 1-030 NMRA and 1-031 NMRA are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

[As amended, effective October 15, 1986; February 16, 2004; January 20, 2005.]

1-033. Interrogatories to parties.

A. **Number.** Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding fifty (50) in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Subparagraph (2) of Paragraph B of Rule 1-026 NMRA.

B. **Service.** Interrogatories may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. In cases involving multiple parties, the party serving interrogatories shall serve notice upon all parties who have appeared in the action that interrogatories have been served. A party propounding the interrogatories shall, upon request of any party, furnish to such party a copy of the interrogatories, answers and objections, if any.

C. **Answers and objections.**

(1) Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within thirty (30) days after the service of the interrogatories, except that a defendant may serve answers or objections within forty-five (45) days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or agreed to in writing by the parties subject to Rule 1-029 NMRA.

(4) All grounds for an objection to an interrogatory shall be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(5) The party submitting the interrogatories may move for an order under Rule 1-037 NMRA with respect to any objection to or other failure to answer an interrogatory.

D. **Scope; use at trial.** Interrogatories may relate to any matters which can be inquired into under Paragraph B of Rule 1-026 NMRA, and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time.

E. **Option to produce business records.** Where the answer to an interrogatory may be derived or ascertained from the business records, including the electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

[As amended, effective January 1, 2002; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee commentary for 2009 amendments. —

See the 2009 committee commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

1-034. Production of documents and things and entry on land for inspection and other purposes.

A. **Scope.** Any party may serve on any other party a request:

(1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, copy, test, or sample any designated documents, electronically stored information, or any tangible things, which constitute or contain matters within the scope of Rule 1-026 NMRA, and which are in the possession, custody, or control of the party on whom the request is served; or

(2) to permit entry on designated land or other property in the possession or control of the party on whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation on the property, within the scope of Rule 1-026 NMRA.

B. **Procedure.** The request may, without leave of court, be served on the plaintiff after commencement of the action and on any other party with or after service of the summons and complaint on that party. The request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party on whom the request is served shall serve a written response within thirty (30) days after service of the request, but a defendant may serve a response within forty-five (45) days after service of the summons and complaint on that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted in its entirety as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating the specific reasons for objection. If objection is made to part of an item or category, the part shall be specified. If objection is made to the requested form or forms for producing electronically stored information, or if no form was specified in the request, the responding party must state the form or forms it intends to use. The responding party shall state whether the response includes all responsive materials. If the responding party withholds any responsive materials based on an objection, the objection shall clearly describe with reasonable particularity what materials are being withheld for each objection. The party submitting the request may move for an order under Rule 1-037

NMRA with respect to any objection to, or other failure to respond to all or any part of the request, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders,

(1) a party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request;

(2) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(3) a party need not produce the same electronically stored information in more than one form.

C. **Persons not parties.** A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 1-045 NMRA.

[As amended, effective January 1, 1998; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 21-8300-024, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary for 2009 amendments. — *See* the 2009 committee commentary to Rule 1-026 NMRA for additional information.

Committee commentary for 2021 amendments. — The 2021 amendments to Rule 1-034(B) require the responding party "state whether the response includes all responsive materials," and, if it does not, the responding party "clearly describe with reasonable particularity what materials are being withheld for each objection." The purpose of this amendment is to disincentivize, if not eliminate, obfuscation of the existence, volume, or nature of documents withheld from a production, or the basis for doing so, through the interposition of objections. The default response to a request for production is the production of responsive materials. While withholding documents pursuant to objections is often legitimate, failure to divulge that material documents have been withheld, failure to identify what materials have been disclosed, and failure to clearly state the reasons for withholding materials is not.

The "reasonable particularity" standard mirrors the standard for a proper request for production under Rule 1-034(B) NMRA and is likewise flexible and circumstance dependent. Parties seeking the production or inspection of documents within the scope of discovery "must set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity." Rule 1-034(B). In this context, a discovery request "should be sufficiently definite and limited in scope that it can be said to 'apprise a person of ordinary intelligence what documents

are required and [to enable] the court . . . to ascertain whether the requested documents have been produced.'" *Regan-Touhy v. Walgreen Co.*, 526 F.3d 641, 649-50 (10th Cir. 2008) (alterations in original) (citing Wright & Miller, 8A Federal Practice and Procedure § 2211, at 415).

"Requests which are worded too broadly or are too all inclusive of a general topic function like a giant broom, sweeping everything in their path, useful or not." *Audiotext Commc'ns v. U.S. Telecom, Inc.*, No. CIV. A. 94-2395-GTV, 1995 WL 18759, at *1 (D. Kan. Jan. 17, 1995). They "require the respondent either to guess or move through mental gymnastics which are unreasonably time-consuming and burdensome to determine which of many pieces of paper may conceivably contain some detail, either obvious or hidden, within the scope of the request." *Benavidez v. New Mexico Dep't of Transportation*, No. CV 12-919 MV/ACT, 2013 WL 12330028, at *6 (D.N.M. May 20, 2013) (internal quotation marks and citation omitted). Such requests are objectionable as overly broad. *Id.*; *Taylor v. Grisham*, No. 1:20-CV-00267-JB-JHR, 2020 WL 6449159, *3 (D.N.M. Nov. 3, 2020); *see also Marquez v. Frank Larrabee and Larrabee, Inc.*, 2016-NMCA-087, ¶ 12, 382 P.3d 968 (stating that the New Mexico Rules of Civil Procedure are modeled after the Federal Rules of Civil Procedure and holding that where the state rule closely tracks its federal counterpart, the federal construction of the federal rule is persuasive authority for construction of the corresponding state rule).

Reasonable shortcomings in the initial objections can permissibly be rectified during the parties' good faith efforts to resolve disputed discovery issues leading up to the filing of a motion to compel as required by Rule 1-037(A)(4) NMRA. However, as a component of these good faith efforts, the responding party is expected, upon request, to describe the selection and production methodologies used, including both the initial search for potentially responsive documents—*e.g.*, the search terms used, the places or accounts searched and those not searched, the individuals consulted in the search, and why each of the foregoing was selected—and any subsequent culling of documents from those initially returned subject to that search. The expectation is that, at a minimum, parties to discovery will answer each other's questions during their good faith discussions, including, for example, that the requesting party will answer inquiries from the responding party about the relevance and proportionality of the requested documents, and that the responding party will answer questions about the legal bases of the objections, the factual burdens that would be imposed by the requested search(es), and the nature and volume of those documents withheld with at least as much robustness as they intend to include in their submissions to the Court during the briefing or hearing on any subsequent motion to compel.

The purpose of this amendment is not to place additional substantive discovery burdens on the responding party. For example, the amendment does not require the conducting of an initial, objectionably burdensome search for responsive documents. *See* Rule 1-026(E) NMRA (implicitly acknowledging that there will be times when a party performs a reasonable search but does not uncover all responsive materials, thereby demonstrating that there are legitimate limits to a party's obligation in performing an initial search). Nor does the amendment require the disclosure of details about

responsive documents when the details themselves can be validly withheld subject to the objection in question; and, more generally, it does not require any action by the responding party that would effectively moot the lawful purpose for the objection. This amendment also does not seek to punish the imposition of even those objections that the Court ultimately overrules. It merely requires more detail and openness from the objections themselves.

For example, an objection to the burdensomeness of a request for all documents referring to a given individual or subject matter and created in the past ten (10) years might be validly supported by a statement that the party only retains documents for five (5) years, that the party keeps thirteen (13) filing cabinets of hardcopy documents in a centralized location and that those documents are not electronically searchable, and that the party has employed thirty (30) individuals in that time period who each maintain their own emails. The response might then be augmented with an offer to conduct a search the email accounts of the five (5) employees with the most involvement in the subject matter for emails containing certain specified search terms (as opposed to an individualized review of each email for responsiveness). If the same request is objected to on the basis of overbreadth—*i.e.*, that not every document referring to the individual is relevant to the action—then it might be necessary to state that a specified number of documents were withheld after an individualized review because those documents, while mentioning the individual or subject matter in question, dealt exclusively with, for example, the setting up of the requested individual's retirement account, or a collection of documents or discussion of the requested subject matter that arose in a context that renders that collection or discussion wholly irrelevant to the instant action in a way that the responding party can articulate in its objection. The amended rule does not, however, allow a blanket assertion of these two (2) objections, and perhaps a litany of others, followed by a statement that an unspecified number of documents is being withheld of the basis of the collective objections.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 21-8300-024, effective for all cases pending or filed on or after December 31, 2021.]

1-035. Physical and mental examination of persons.

A. **Order for examination.** When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in the party's custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions and scope of the examination and the person or persons by whom it is to be made.

B. **Report of examining physician.**

(1) If requested by the party against whom an order is made under Paragraph A of this rule or the person examined, the party causing the examination to be made shall deliver to the requesting party a copy of a detailed written report of the examiner setting out the examiner's findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party shows that the party is unable to obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if an examiner fails or refuses to make a report the court may exclude the examiner's testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege the party may have in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine the party in respect of the same mental or physical condition.

(3) This paragraph applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This paragraph does not preclude discovery of a report of an examiner or the taking of a deposition of the examiner in accordance with the provisions of any other rule.

[As amended, effective January 1, 1995.]

1-036. Requests for admissions.

A. **Request for admission.** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Paragraph B of Rule 1-026 NMRA set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within thirty (30) days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of forty-five (45) days after service of the summons and complaint upon him. If objection is made, the reasons therefor shall be stated. The answer shall

specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Paragraph C of Rule 1-037 NMRA, deny the matter or set forth reasons why he cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Subparagraph (4) of Paragraph A of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

B. **Effect of admission.** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 1-016 NMRA governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

1-037. Failure to make discovery; sanctions.

A. **Motion for order compelling discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) An application for an order to a deponent who is not a party but whose deposition is being taken within the state or for an order to a party may be made to the court where the action is pending. If a deposition is being taken outside the state, whether of a party or a nonparty, this shall not preclude the seeking of appropriate relief in the jurisdiction where the deposition is being taken.

(2) If a deponent fails to answer a question propounded or submitted under Rule 1-030 NMRA or Rule 1-031 NMRA, or a corporation or other entity fails to make a

designation under Rule 1-030 NMRA or Rule 1-031 NMRA, or a party fails to answer an interrogatory submitted under Rule 1-033 NMRA, or if a party, in response to a request for inspection submitted under Rule 1-034 NMRA, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 1-026 NMRA.

(3) For purposes of this paragraph an evasive or incomplete answer is to be treated as a failure to answer.

(4) If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Any motion filed pursuant to this paragraph shall state that counsel has made a good faith effort to resolve the issue with opposing counsel prior to filing a motion to compel discovery. A motion filed pursuant to this paragraph shall set forth or have attached the interrogatory or the request for production or admission, and any response thereto.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the moving party or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

B. **Failure to comply with order.**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by a court with jurisdiction, the failure may be considered a contempt of that court.

(2) If a party or an officer, director or managing agent of a party or a person designated under Rule 1-030 NMRA or Rule 1-031 NMRA to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Paragraph A of this rule or Rule 1-035 NMRA, or if a party fails to obey an order under Rule 1-026 NMRA, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(c) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(d) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(e) where a party has failed to comply with an order under Rule 1-035 NMRA requiring that party to produce another for examination, such orders as are listed in Subparagraphs (a), (b) and (c) of Subparagraph (2) of this paragraph, unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

C. **Expenses on failure to admit.** If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 1-036 NMRA, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that:

(1) the request was held objectionable pursuant to Rule 1-036 NMRA;

(2) the admission sought was of no substantial importance;

(3) the party failing to admit had reasonable grounds to believe that the party might prevail on the matter; or

(4) there was another good reason for the failure to admit.

D. **Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection.** If a party or an officer, director or managing agent of a party or a person designated under Rule 1-030 NMRA or Rule 1-031 NMRA to testify on behalf of a party fails:

(1) to appear before the officer who is to take the deposition, after being served with a proper notice;

(2) to serve answers or objections to interrogatories submitted under Rule 1-033 NMRA, after proper service of the interrogatories; or

(3) to serve a written response to a request for inspection submitted under Rule 1-034 NMRA, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Subparagraphs (a), (b) and (c) of Subparagraph (2) of Paragraph B of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this paragraph may not be excused on the grounds that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 1-026 NMRA.

[As amended, effective October 15, 1986; August 1, 1988; August 1, 1989; January 1, 1998; as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

Committee commentary for 2009 amendments. —

A number of amendments to the Rules of Civil Procedure for the District Courts were approved in 2009 to incorporate provisions from the Federal Rules of Civil Procedure addressing the discovery of electronically stored information. *See* the 2009 committee commentary to Rule 1-026 NMRA for additional information. However, one difference between the New Mexico and federal rules pertaining to electronic discovery is the omission of that portion of Federal Rule 37(f) commonly referred to as the “safe harbor” provision, which provides:

(f) Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored

information lost as a result of the routine, good-faith operation of an electronic information system.

The committee is of the view that nothing in the nature of the discovery of electronically stored information requires curtailment of the existing discretion of the district court to determine an appropriate sanction for violation of discovery rules. But even without inclusion of the federal "safe harbor" provision, the committee is of the view that New Mexico's civil discovery rules should not treat the routine, good-faith purging of electronic files any differently than the good-faith, routine destruction of paper files according to an established records retention schedule. The destruction of electronic information pursuant to the routine, good-faith operation of an electronic information system is, of course, something the district court can take into account when considering a request for discovery sanctions. However, regardless of the form of information sought within the context of discovery, a bad faith approach to discovery warrants the imposition of sanctions. *See United Nuclear Corp. v. General Atomic Co.,* 96 N.M. 155, 241, 629 P.2d 231, 317 (1980)("When a party has displayed a willful, bad faith approach to discovery, it is not only proper, but imperative, that severe sanctions be imposed to preserve the integrity of the judicial process and the due process rights of the other litigants."). Indeed, even under the federal safe harbor provision, one may be sanctioned for the bad faith destruction of electronically stored information.

[Adopted by Supreme Court Order No. 09-8300-007, effective May 15, 2009.]

ARTICLE 6
Trials

1-038. Jury trial in civil actions.

A. **Jury demand.** In civil actions any party may demand a trial by jury of any issue triable of right by serving upon the other parties a demand therefor in writing after the commencement of the action and not later than ten (10) days after service of the last pleading directed to such issue, and filing the demand as required by Paragraph D of Rule 1-005 NMRA.

B. **Jury; twelve-person or six-person juries.**

(1) A jury of either six persons or twelve persons may be demanded.

(2) Unless a party, in the party's demand for trial by jury, specifically demands trial by a jury of twelve persons, the party shall be deemed to have consented to trial by a jury of six persons under the conditions and provisions hereinafter set out.

(3) If any party initially demands a six-person jury, any other party may demand a twelve-person jury by serving upon the other party or parties a demand therefor in writing after the commencement of the action and not later than ten (10) days

after service of a six-person jury demand or after service of the last pleading directed to such issue, whichever is later.

C. **Payment of jury fees.** Any party initially demanding a jury of six persons shall, at the time of filing of the jury demand, deposit with the clerk of the court a non-refundable jury fee of one hundred fifty dollar ($150.00), and after the first day of trial shall deposit one hundred fifty dollar ($150.00) additional upon commencement of court on each subsequent day the attendance of the jury is required for the trial. Any party initially demanding a jury of twelve persons shall, at the time of filing the jury demand, deposit with the clerk of the court a non-refundable jury fee of three hundred dollars ($300.00), and after the first day of trial, shall deposit three hundred dollars ($300.00) additional upon commencement of court upon each subsequent day the attendance of the jury is required for the trial. If a jury of six persons has been initially demanded and another party subsequently files a demand for a jury of twelve persons, each party shall deposit with the clerk of the court for and on account of jury fees the sum of one hundred fifty dollar ($150.00) and each party shall deposit one hundred fifty dollar ($150.00) additional upon commencement of court upon each subsequent day the attendance of the jury is required for the trial.

D. **Waiver.** Trial by jury is waived by:

(1) failing to file and serve a demand as required by this rule;

(2) failing to make a jury fee deposit as required by this rule;

(3) failing to appear at trial;

(4) filing a waiver of jury trial; or

(5) oral consent, in open court, entered in the record. A demand for trial by jury may not be withdrawn without the consent of the parties.

E. **Challenges in civil cases.** The court shall permit the parties to a case to express in the record of trial any challenge to a juror for cause. The court shall rule upon the challenge and may excuse any juror for good cause. Challenges for good cause and peremptory challenges will be made outside the hearing of the jury. The party making a challenge will not be announced or disclosed to the jury panel but each challenge will be recorded by the clerk. The opposing parties will alternately exercise peremptory challenges. In cases tried before a jury of six, each party may challenge three jurors peremptorily. In cases tried before a jury of twelve, each party may challenge five jurors peremptorily. When there are two or more parties defendant, or parties plaintiff, they will exercise their peremptory challenges jointly and if all cannot agree on a challenge desired by one party on a side, that challenge shall not be permitted. However, if the relief sought by or against the parties on the same side of a civil case differs, or if their interests are diverse, or if cross-claims are to be tried, the court shall allow each such party on that side of the suit three peremptory challenges if the case is to be tried before

a jury of six or five peremptory challenges if the case is to be tried before a jury of twelve.

F. **Six-member jury; majority verdict.** In civil cases tried to a jury of six persons, when the jury, or as many as five of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict; if upon such inquiry or polling, more than one of the jurors disagree thereto, the jury must be sent out again but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

G. **Majority verdict in civil causes tried before a jury of twelve.** In civil causes tried before a jury of twelve, when the jury, or as many as ten of them, have agreed upon a verdict, they must be conducted into court, their names called by the clerk, and the verdict rendered by their foreperson; the verdict must be in writing, signed by the foreperson and must be read by the clerk to the jury, and the inquiry made whether it is their verdict. Either party may require the jury to be polled, which is done by the court or clerk, asking each juror if it is the juror's verdict; if upon such inquiry or polling more than two of the jurors disagree thereto, the jury must be sent out again but if no such disagreement be expressed, the verdict is complete and the jury discharged from the case.

H. **Costs.** Jury fees paid by a party shall be taxed as a part of the costs of the case against the party losing the case.

I. **Stipulation to jury.** Notwithstanding any other provisions of this rule, if a six-person jury has been demanded and no other party has made a timely demand for a jury of twelve persons, all parties may, by unanimous agreement, file a stipulation to trial by a jury of twelve persons. Such stipulation shall be filed no later than thirty (30) days prior to the commencement of trial. In such a case, the jury fee shall be divided pro rata among all the parties.

J. **Dismissal of party demanding jury or withdrawal of jury demand.** When any party who has demanded a jury has been dismissed from a lawsuit or withdraws the party's jury demand prior to the commencement of trial, the district court shall apportion the payment of the jury fee among the remaining parties who desire the matter be tried to a jury as shall be fair and just under the circumstances. Nothing contained in this rule shall require the district court to apportion any amount of the jury fee against any particular party.

K. **Non-refundable jury fees.** Jury fees may not be refunded by the clerk, but shall be deposited in the manner provided by law.

[As amended, effective August 1, 1989; August 27, 1999; February 1, 2001; as amended by Supreme Court Order No. 08-8300-034, effective December 15, 2008.]

1-039. Trial by jury or by the court.

A. **By the court.** All issues not set for trial to a jury as provided in Rule 1-038 shall be tried by the court; but notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues.

B. **Advisory jury and trial by consent.** In all actions not triable of right by a jury the court upon motion or of its own initiative may try any issue with an advisory jury; or the court, with the consent of both parties, may order a trial with a jury whose verdict has the same effect as if trial by jury had been a matter of right.

1-040. Assignment of cases for trial and order of trial.

A. **Assignment for trial.** The district courts shall set cases for trial in accordance with the provisions of Rule 1-016. For purposes of these rules, a case is set for trial if the case is set on a trailing calendar, provided that no trailing calendar shall include any case the trial of which is unlikely to commence within two (2) weeks after the first case scheduled for trial on such calendar.

B. **Certificate of readiness.** Unless a pretrial scheduling order is entered, any party may submit a request for trial on the merits stating that the case is ready for trial and the amount of time needed for the trial of the case. Any party who does not agree that the case is ready for trial shall, within ten (10) days from the service of the request for trial, file a response setting forth why the case is not ready for trial and when such case will be ready for trial. The district court shall give reasonable notice of the dates, times and places of settings by mail to counsel of record and parties appearing pro se.

C. **Order of trial.** The order of proceeding in trials, unless otherwise directed by the court, shall be as follows:

(1) selection and qualification of a jury, if required;

(2) opening statements, subject to the right to defer as hereinafter set out. The first opening statement shall be made by the party having the burden of first proceeding with the introduction of evidence. The opening statement by any other party may be deferred until immediately before the party is to proceed with the introduction of that party's evidence and, unless so deferred, opening statements by other parties shall be made in such order as the court shall direct;

(3) introduction of evidence. The order of introduction of evidence on any issue normally shall be first, evidence in chief of the party having the burden of proceeding, second, evidence in response, and third, rebuttal evidence. The court may,

in its discretion, permit any party to introduce additional evidence. With permission of the court witnesses may be called and evidence introduced out of order. Only one counsel on a side may examine or cross-examine the same witness unless otherwise ordered by the court;

(4) instructions to the jury in causes tried before a jury;

(5) argument;

(6) motions for directed verdict, mistrial and the like shall be made and argued in the absence of the jury.

[As amended, effective January 1, 1990.]

1-041. Dismissal of actions.

A. **Voluntary dismissal; effect thereof.**

(1) Subject to the provisions of Paragraph E of Rule 1-023 NMRA and of any statute, an action may be dismissed by the plaintiff without order of the court:

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

(b) by filing a stipulation of dismissal signed by all parties who have appeared generally in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed an action based on or including the same claim.

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

B. **Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and

render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 1-052 NMRA. Unless the court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 1-019 NMRA, operates as an adjudication upon the merits.

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

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

E. **Dismissal of action with and without prejudice.**

(1) Any party may move to dismiss the action, or any counterclaim, cross-claim or third-party claim with prejudice if the party asserting the claim has failed to take any significant action to bring such claim to trial or other final disposition within two (2) years from the filing of such action or claim. An action or claim shall not be dismissed if the party opposing the motion is in compliance with an order entered pursuant to Rule 1-016 NMRA or with any written stipulation approved by the court.

(2) Unless a pretrial scheduling order has been entered pursuant to Rule 1-016 NMRA, the court on its own motion or upon the motion of a party may dismiss without prejudice the action or any counterclaim, cross-claim or third party claim if the party filing the action or asserting the claim has failed to take any significant action in connection with the action or claim within the previous one hundred and eighty (180) days. A copy of the order of dismissal shall be forthwith mailed by the court to all parties of record in the case. Within thirty (30) days after service of the order of dismissal, any party may move for reinstatement of the case. Upon good cause shown, the court shall reinstate the case and shall enter a pretrial scheduling order pursuant to Rule 1-016 NMRA. At least twice during each calendar year, the court shall review all actions governed by this paragraph.

F. **Applicability.** This rule shall apply to all civil cases filed in the district court, including civil cases appealed from the metropolitan or magistrate courts. This rule shall not apply to:

(1) guardianship, receivership, trusteeship or conservatorship cases;

(2) proceedings commenced pursuant to the Mental Health and Developmental Disabilities Code [43-1-1 NMSA 1978];

(3) proceedings commenced pursuant to the provisions of the Probate Code [45-1-101 NMSA 1978]; or

(4) proceedings commenced pursuant to the Children's Code [32A-1-1 NMSA 1978].

[As amended, effective January 1, 1990; April 1, 2002.]

1-042. Consolidation; separate trials.

A. **Consolidation.** When actions involving a common question of law or fact are pending within a judicial district, the court may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

B. **Separate trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues, always preserving the right of trial by jury given to any party as a constitutional right.

[As amended by Supreme Court Order No. 12-8300-023, effective for all cases filed or pending on or after January 7, 2013.]

1-043. Evidence.

A. **Taking of testimony.** In all trials the testimony of witnesses shall be taken orally in open court unless otherwise provided by these or other rules.

B. **When testimony at another trial can be used.** The testimony of any witness taken in any court, state or federal, in this state may be used in any subsequent trial or hearing of the same issued between the same parties in the following cases:

(1) when the witness is dead or insane;

(2) when the witness is a nonresident of this state;

(3) when after diligent effort the whereabouts of witnesses cannot be ascertained.

This rule is not intended to be exclusive and nothing herein contained shall be construed to require the courts to exclude evidence admissible under the New Mexico Rules of Evidence.

C. **Evidence on motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

1-044. Judicial notice and determination of foreign law.

A. **Judicial notice.** The courts of New Mexico shall take judicial notice of the following facts:

(1) the true significance of all English words and phrases and of all legal expressions;

(2) whatever is established by law;

(3) public and private official acts of the legislative, executive and judicial departments of the United States, and the laws of the several states and territories of the United States, and the interpretation thereof by the highest courts of appellate jurisdiction of such states and territories;

(4) the seals of all the courts of this state, the United States and the courts of record of the various states of the United States and its territories;

(5) the accession to office, seals and the official signatures under seal of the officers of government in the legislative, executive and judicial departments of the United States and of the several states and territories thereof;

(6) the existing title, national flag and seal of every state or sovereign recognized by the executive power of the United States;

(7) the seals of notaries public;

(8) the laws of nature, the result of time and the geographic divisions and political history of the world.

In all cases the court may resort for its aid to appropriate books or documents of reference.

This rule is not intended to be exclusive and nothing herein contained shall be construed to limit or restrict the courts from taking judicial notice under the New Mexico Rules of Evidence or existing practice.

B. **Determination of foreign law.** A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the New Mexico Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

1-045. Subpoena.

A. **Form; issuance.**

(1) Every subpoena shall

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

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

(c) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated documents, electronically stored information, or tangible things in the possession, custody, or control of that person, or to permit inspection of premises, at a time and place therein specified; and

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

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

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

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. **Service; place of examination.**

(1) A subpoena may be served any place within the state.

(2) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena on a person named therein shall be made by delivering a copy thereof to that person or as provided in Rule 1-004(E)(3) NMRA, and, if that person’s attendance is commanded

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

(b) for all persons not described in Subparagraph (2)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Section 10-8-4(A) NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by Section 10-8-4(D) NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 1-005 NMRA.

(3) A person may be required to attend a deposition within one hundred (100) miles of where that person resides, is employed, or transacts business in person, or at any other place as is fixed by an order of the court.

(4) A person may be required to attend a hearing or trial at any place within the state.

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

(6) A subpoena may be issued within this state in an action pending outside the state under Rule 1-045.1 NMRA upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

(7) A subpoena may be served in an action pending in this state on a person in another state or country in the manner provided by law or rule of the other state or country.

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

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

(2) ***Subpoena of materials or inspection of premises.***

(a) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, documents, or tangible things, or inspection of premises

(i) need not appear in person at the place of production, inspection, copying, testing, or sampling unless commanded to appear for deposition, hearing, or trial;

(ii) absent a court order, shall not respond to the subpoena prior to the expiration of fourteen (14) days after the date of service of the subpoena;

(iii) if a written objection is served or a motion to quash the subpoena is filed, shall not respond to the subpoena until ordered by the court;

(iv) may condition the preparation of any copies upon payment in advance of the reasonable cost of inspection and copying.

(b) Subject to Subparagraph (D)(2) of this rule

(i) a person commanded to produce and permit inspection, copying, testing, or sampling or a person who has a legal interest in or the legal right to possession of the designated material or premises may serve a written objection on all parties to the lawsuit or file a motion to quash the subpoena with the court;

(ii) any party who objects to the subpoena shall, within fourteen (14) days after service of the subpoena, serve on the person served with the subpoena and all parties written objection to or a motion to quash inspection, copying, testing, or sampling of any or all of the designated materials or inspection of the premises.

(iii) If objection is served on the party serving the subpoena or a motion to quash is filed with the court and served on the parties, the party serving the subpoena shall not be entitled to inspect, copy, test, or sample the materials or inspect the premises except under an order of the court by which the subpoena was issued. The court may award costs and attorney fees against a party or person for serving written objections or filing a motion to quash which lacks substantial merit.

(3)

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

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed, or regularly transacts business in person, except that, subject to the provisions of Subparagraph (3)(b)(iii) of this paragraph, that person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held;

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(b) If a subpoena

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

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

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. **Duties in responding to subpoena.**

(1)

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

(b) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(c) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(d) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may order discovery from those sources if the requesting party shows good cause, considering the limitations of Rule 1-026(B)(3) NMRA. The court may specify the conditions for the discovery.

(2)

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

(b) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. By motion, a receiving party may promptly present the information to the court for in camera review and a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served on that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided in Subparagraph (C)(3)(a)(ii) of this rule.

F. **Duties to make copies available.** A party receiving documents under subpoena shall make them available for copying by other parties.

[As amended, effective January 1, 1987; August 1, 1989; January 1, 1998; November 1, 2002, as amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 09-8300-018, effective August 7, 2009; as amended by Supreme Court Order No. 20-8300-005, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary for 2002 amendment. —

Formerly, pre-trial production of documents or tangible items in the possession or control of a nonparty could only be obtained by a subpoena issued in conjunction with a notice of deposition of the person in possession of the documents.

In 1991, the federal rule was amended to allow pretrial subpoenas of documents or tangible items without the necessity of noticing and scheduling a simultaneous deposition. In 1997, the New Mexico Supreme Court similarly amended Rule 1-045 NMRA.

As amended in 1991, the federal rule required that "[p]rior notice" of any commanded production shall be served on each party, Fed.R. Civ. P. 45(b)(1). "The purpose of the notice provision is to afford other parties an opportunity to object to the production. . . ." Fed. R. Civ. P. 45 Committee Comment.

The 1997 amendment of Rule 1-045 NMRA provided for notice to all parties "[p]rior to or at the same time" as service of the subpoena. Rule 1-045(B)(2)(b) NMRA. As demonstrated in *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.2d 682, cert. denied 23 P.3d 929, the New Mexico rule could be construed to permit a party to hand deliver a subpoena for documents and simultaneously mail notice to other parties with the possible result that the nonparty might comply with the subpoena before other parties received notice of its contents and had an opportunity to object to its contents under Rule 1-045(C)(2)(b) NMRA.

The 2002 amendment to Rule 1-045(C)(2) NMRA solves this problem by providing a fourteen (14) day period before responding to assure that "a person who has a legal interest in or the legal right to possession of the designated material or premises" or any party will have an opportunity to object to the subpoena before the witness responds.

The federal rule, requiring "[p]rior notice" is ambiguous, though it has been construed to require "reasonable notice" prior to service of the subpoena. *Biocore Medical Techs., Inc. v. Khosrowshahi*, 181 F.R.D. 660, 667 (D. Kan. 1998). The committee considered but rejected this construction, preferring to set a specific time that will assure prior notice, while also recognizing the possibility that a court might reduce the time under appropriate circumstances.

1997 Amendment of Rule 1-045

1. Introduction

The New Mexico Rules of Civil Procedure for the District Courts were based upon the Federal Rules of Civil Procedure. Although the New Mexico rules diverge from the Federal Rules when appropriate, the committee regularly reviews New Mexico's Rules of Civil Procedure for the District Courts when the Federal Rules are modified. Federal Rule 45 - Subpoenas - underwent significant change as a result of amendments that went into effect in December 1991 and was further modified by amendments effective in December 1995. The committee's reevaluation of Rule 1-045 NMRA in light of the

changes in the federal rule prompted amendments to Rule 1-045 NMRA and the adoption of Rule 1-045 NMRA in its current form.

2. Overview

Rule 1-045 NMRA formerly contained different provisions for subpoenas for attendance at trial or hearing and for attendance at a deposition. The existing rule follows the model of the current federal rule which generally eliminates that distinction. Rule 1-045 NMRA formerly had the effect of barring parties from obtaining items such as documents or inspecting premises except in conjunction with a subpoena setting a deposition of a witness. The existing rule follows the current federal rule which allows subpoenas for production of items or inspection of premises from non-parties without the necessity of scheduling and conducting a deposition at the same time. The rule provides procedural protections to assure advance notice to parties that a party has issued a subpoena for production or inspection.

The rule provides for statewide service of both trial and hearing subpoenas and deposition and production subpoenas. Rule 1-045(B)(1) NMRA.

Formerly, Rule 1-045 NMRA placed significant geographic limitations upon the place that depositions might be conducted in the absence of a court order. Some of those limitations depended upon the place of service of the subpoena. The rule eliminates the significance of the place of service of the subpoena as a factor in setting the place of deposition and modifies but does not eliminate other limitations in the former rule.

Rule 1-045 NMRA formerly authorized only the district court clerk to issue subpoenas. The existing rule follows the current federal rule which allows a party's attorney to issue subpoenas in the name of the court.

3. Who may issue subpoenas

Formerly, Rule 1-045 NMRA required that the clerk issue and sign all subpoenas. Following the model of the current federal rule, Rule 1-045 now authorizes an attorney for a party to issue and sign subpoenas in the attorney's capacity as an officer of the court. Any attorney authorized to practice law in New Mexico who is serving as attorney to a party may issue trial and hearing subpoenas as well as deposition and production and inspection subpoenas.

The clerk continues to have power to issue subpoenas. A clerk's subpoena will be of particular use to a party who is not represented by counsel. The clerk of the court for the district in which the matter is pending is the appropriate person to issue subpoenas for service anywhere in the state.

4. Form and content of subpoenas

A subpoena may (1) command a person to attend at trial or attend a hearing, (2) command a person to appear for a deposition, (3) command a person to permit inspection of premises, (4) command a person to produce items at trial or a hearing, or (5) command a person to produce items for discovery or inspection prior to trial. A subpoena to produce items or permit inspection may, but need not, also command the person to attend a trial, hearing or deposition. Thus, Rule 1-045 NMRA now permits a party to subpoena items or obtain inspection without simultaneously scheduling a deposition.

Following the model of the current federal rule, subpoenas no longer need to contain the seal of the court. They must, however, now contain the civil action number of the case for which the subpoena is issued. Rule 1-045(A)(1)(d) NMRA now provides that subpoenas shall be substantially in the form approved by the Supreme Court and the Court has approved forms consistent with the requirements of Rule 1-045 NMRA. *See* Civil Form 4-505 NMRA.

5. Service of subpoenas

Rule 1-045 NMRA now explicitly authorizes service of process anywhere in the state. When a person is beyond the subpoena power of the New Mexico District Court, Rule 1-045 NMRA provides that the party to the New Mexico proceeding who seeks to subpoena items, conduct inspection, or conduct a deposition in another state shall do so in the manner provided by law or rule of the other state. *See, e.g.*, Mass. Gen. Laws Ann. 123A Sec. 11 (West 1985) ("Discovery Within Commonwealth for Proceedings Outside Commonwealth").

As in former Rule 1-045 NMRA, service of the subpoena normally must be accompanied by the tender of designated per diem expenses and mileage except in situations provided for in Rule 1-045(B)(2)(a) NMRA and when subpoenas are issued in behalf of the state, a state officer, or a state agency. The rule now specifically requires that the full per diem be tendered even if the party believes that the required attendance will not take an entire day. Where attendance is required for more than one day, the full per diem for each additional day must be paid prior to the commencement of proceedings each day.

Rule 1-045(B)(2) NMRA formerly provided that the failure to tender required per diem expense and mileage fees did not invalidate the subpoena but merely justified the imposition of appropriate sanctions. That provision has been omitted from Rule 1-045 NMRA. The committee intends that henceforth the failure to tender required expense and mileage fees shall invalidate the subpoena and justify non-compliance with the subpoena's command. The burden of compliance rests upon the person on whose behalf the subpoena is served.

Because Rule 1-045 NMRA already provided for service by any person not a party who is at least eighteen (18) years old, specific references to the authority of sheriffs and

deputies to serve subpoenas was superfluous and has been omitted in this rule. This modification follows the model of the current federal rule.

6. Notice of service of subpoena

Whenever a party schedules a deposition (whether or not a subpoena is issued compelling attendance at the deposition), Rule 1-030(B)(1) NMRA requires that notice of the deposition be sent to each party. When a subpoena for production or inspection is served in conjunction with the notice of deposition, the party seeking production at the deposition must also send notice of the issuance of the subpoena to each party along with the notice of the deposition. *Id*.

Because Rule 1-045 NMRA formerly required that subpoenas for pre-trial production or inspection could only be issued in conjunction with the taking of a deposition, the notice requirement of Rule 1-030(B)(1) NMRA effectively assured that all parties would receive notice of every pre-trial attempt by a party to compel production and inspection against a non-party. Rule 1-045 NMRA now authorizes issuance of a subpoena for pre-trial production without the necessity of a simultaneous deposition, Rule 1-045(A)(1)(d) NMRA, with the result that the notice requirement in Rule 1-030(B)(1) NMRA no longer assures that all parties will receive notice of pre-trial production and subpoenas. To fill this notice gap, Rule 1-045(B)(2) NMRA now requires that prior to or simultaneously with the service of pre-trial inspection or production subpoenas the party on whose behalf the subpoena is served must give notice to all parties in the lawsuit in the manner required by Rule 1-005 NMRA. This provision follows the model of the current federal rule.

7. Place of attendance or production

Service of a subpoena may be made anywhere in the state. Rule 1-045(B)(1) NMRA. As was the case under former Rule 1-045 NMRA, if the subpoena commands attendance at a trial or a hearing, the person served with the subpoena must appear as commanded anywhere in the state. Rule 1-045(B)(4) NMRA.

Rule 1-045 NMRA modifies the former rule concerning the place in which a deposition of a subpoenaed witness may be scheduled. The rule formerly contained separate provisions for the place of depositions, depending upon whether the person subpoenaed was a resident of the judicial district in which the deposition was to be taken. In the case of nonresidents of the judicial district, the former rule focused on the place of service, and required that the deposition be held within forty (40) miles of the place of service of the subpoena unless the court ordered otherwise.

Rule 1-045 NMRA eliminates the distinction between residents and nonresidents of the judicial district and does not take into account the place of service in setting the proper place for the deposition. Instead, Rule 1-045 NMRA provides that all persons may be required to attend a deposition only within one hundred (100) miles of the place of their

residence, their place of employment or where they transact business unless another place is fixed by order of the court. Rule 1-045(B)(3) NMRA.

If a person declines to honor a subpoena that is inconsistent with the geographical limitations of this rule, the person cannot be held in contempt for failure to attend the deposition unless the court entered an order compelling attendance at that place. Rule 1-045(E) NMRA.

8. Proof of service of subpoena

The Supreme Court has approved a form for proof of service of a subpoena. *See* Civil Form 4-505 NMRA. When proof of service of the subpoena must be filed under Rule 1-005(D) NMRA, Rule 1-045(B)(5) NMRA requires that the form of the proof of service be in substantial compliance with the approved form.

9. Duty to avoid misuse of subpoena authority

For the first time, Rule 1-045 NMRA imposes an explicit duty on parties and attorneys responsible for subpoenas to take reasonable steps to avoid undue burden or expense on persons subject to the subpoenas. Rule 1-045(C)(1) NMRA. The court may sanction parties or attorneys who violate this rule with appropriate sanctions including imposition of an order to pay the witness lost earnings and attorney fees. Id.

10. Subpoenas for production or inspection

Subpoenas for production of tangible items or inspection of premises now may issue without the necessity for setting a deposition at the same time. Rule 1-045(A)(1)(d) NMRA. When a subpoena for production or inspection is issued, the party responsible for the issuance of the subpoena must provide timely notice to all parties of the issuance of the subpoena. Rule 1-045(B)(2) NMRA.

The rule formerly provided only that the subpoenaed person “produce” the items. The rule now requires that the person “produce and permit inspection and copying” of the books, documents, or tangible items. Rule 1-045(A)(1)(d) NMRA.

The rule formerly provided that the subpoena must identify the items subject to the subpoena with reasonable particularity. The committee has eliminated this explicit requirement in deference to its preference to model Rule 1-045 NMRA after the federal rule, but believes that the requirement that the items be “designated,” Rule 1-045(A)(1)(c) NMRA, incorporates the former requirement of reasonable particularity in the description of the items sought. The former rule also explicitly limited the scope of subpoenaed items to those within the scope of discovery permitted by Rule 1-026(B) NMRA. The committee has eliminated this explicit limitation also in deference to its preference to model Rule 1-045 NMRA after the federal rule, but assumes that specific references to protection for trade secrets, expert opinions, and the like, now found in Rule 1-045(C)(3)(b) NMRA, which are rooted in Rule 1-026 NMRA, suffice to indicate

that the subpoena of items continues to be subject to the limitations of discovery in Rule 1-026 NMRA.

The person who receives a subpoena to produce items or permit inspection of premises need not appear in person at the designated time and place unless that person is also commanded in the subpoena to appear for a deposition, trial, or hearing. Rule 1-045(C)(2) NMRA.

The person who receives a subpoena to produce items or permit inspection of premises must do so unless the person or a party serves timely (*see* Rule 1-045(C)(2)(b) NMRA) objections on all parties or files a motion to quash. This modifies the federal rule by requiring service on all parties.

If no objections are served, the person responding shall produce the documents either as they are kept in the ordinary course of business or labeled and organized to correspond with the categories of the demand. Rule 1-045(D)(1) NMRA.

If timely objections are served, the subpoenaed person need not comply with the subpoena unless and until the person seeking the subpoenaed items obtains a court order compelling the production. Rule 1-045(C)(2)(b) NMRA. Alternatively, the person who opposes compliance with the subpoena and serves timely notice of objections may file a timely motion seeking to quash or modify the subpoena. Rule 1-045(C)(3)(a) NMRA.

Rule 1-045 NMRA now lists grounds for seeking an order of protection from a subpoena, Rule 1-045(C)(3) NMRA, and provides guidelines for the court to use in ruling on motions to quash or modify a subpoena. Id. These new provisions follow the current federal rule.

11. Taking a deposition in New Mexico for an action pending outside New Mexico

A New Mexico statute authorizes New Mexico courts to order the deposition of persons found in this state for use in conjunction with legal proceedings outside New Mexico. *See* NMSA 1978, §§ 38-8-1 to -3. Rule 1-045(B)(6) NMRA makes reference to new Rule 1-045.1 NMRA, which authorizes the issuance of subpoenas for depositions and other discovery in New Mexico for an action pending outside of New Mexico.

Committee commentary for 2007 amendment. —

See the 2007 committee commentary to Rule 1-026 NMRA for additional information.

Committee commentary for 2009 amendment. —

See the 2009 committee commentary to Rule 1-026 NMRA for additional information.

[As amended by Supreme Court Order No. 09-8300-007, effective May 15, 2009; as amended by Supreme Court Order No. 09-8300-018, effective August 7, 2009; as amended by Supreme Court Order No. 20-8300-005, effective for all cases pending or filed on or after December 31, 2020.]

1-045.1. Interstate subpoenas.

A. **Definitions.** As used in this rule:

(1) "foreign jurisdiction" means a state other than this state;

(2) "foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction;

(3) "person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity;

(4) "state" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States;

(5) "subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(a) attend and give testimony at a deposition;

(b) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person, or

(c) permit inspection of premises under the control of the person.

B. **Issuance of subpoena.**

(1) To request issuance of a subpoena under this paragraph, a party must submit a foreign subpoena to the clerk of the district court where the discovery is sought to be conducted in New Mexico. A request for issuance of a subpoena under this rule does not constitute an appearance in the courts of this state.

(2) When a party submits a foreign subpoena to a clerk of court in this state, the clerk shall promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(3) A subpoena under Subparagraph (2) must:

(a) incorporate the terms used in the foreign subpoena; and

(b) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

C. **Service of subpoena.** A subpoena issued by a clerk under Paragraph B of this rule must be served in compliance with Rule 1-045 NMRA.

D. **Deposition, production, and inspection.** Rule 1-045 NMRA applies to subpoenas issued under Paragraph B of this rule.

E. **Application to court.** An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a clerk of court under Paragraph B of this rule must comply with the rules and statutes of this state and be submitted to the court in the district in which discovery is to be conducted.

[Adopted by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

Committee commentary. — This rule was adapted from the Uniform Interstate Depositions and Discovery Act. See the comment to the uniform act for additional information.

[Adopted by Supreme Court Order No. 09-8300-018, effective August 7, 2009.]

1-046. Preserving questions for review.

Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and his grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made the absence of an objection does not thereafter prejudice him. It shall not be necessary to file a motion for a new trial in order to preserve for review errors called to the attention of the trial court under this rule.

This rule applies to all causes, whether tried before a jury or to the court without a jury.

1-047. Jurors.

A. **Examination of jurors.** The court may permit the parties or their attorneys to conduct the examination of prospective jurors or may itself conduct the examination. In the latter event the court shall permit the parties or their attorneys to supplement the examination by such further inquiry as it deems proper or shall itself submit to the prospective jurors such additional questions of the parties or their attorneys as it deems proper.

B. **Alternate jurors.** In any civil case, the court may direct that not more than six (6) jurors in addition to the regular jury be called and empaneled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to one (1) peremptory challenge in addition to those otherwise allowed by law if one (1) or two (2) alternate jurors are to be empaneled, two (2) peremptory challenges if three (3) or four (4) alternate jurors are to be empaneled, and three (3) peremptory challenges if five (5) or six (6) alternate jurors are to be empaneled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by law shall not be used against an alternate juror.

C. **Juror qualification and questionnaire forms; retention schedule; certification of compliance with privacy requirements.** Prior to the examination of prospective jurors under this rule, the court shall require each prospective juror to complete a juror qualification and questionnaire forms as approved by the Supreme Court, which shall be subject to the following protections:

(1) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be kept confidential unless ordered unsealed under the provisions in Rule 1-079 NMRA;

(2) All completed juror qualification and questionnaire forms, including any electronic copies, in the possession of the court, attorneys, parties, and any other individual or entity shall be destroyed according to the following deadlines:

(a) All copies in the possession of the court shall be destroyed ninety (90) days after expiration of the term of service of the juror or prospective juror unless an order has been entered directing their retention for a longer period of time; and

(b) All copies in the possession of the attorneys, parties, and any other individual or entity shall be destroyed within one hundred twenty (120) days after final disposition of the proceeding for which the juror or prospective juror was called unless permitted by written order of the court to retain the copies for a longer period of time, in which case the court’s order shall set the deadline for destruction of those copies; and

(3) On or before the destruction deadline required under this rule, all attorneys and parties shall file a certification under oath in a form approved by the Supreme Court that they have complied with the confidentiality and destruction requirements set forth in this paragraph.

D. **Supplemental questionnaires.** The court may order prospective jurors to complete supplemental questionnaires. Unless otherwise ordered by the court, the party requesting supplemental questionnaires shall be required to pay the actual costs of producing and mailing the supplemental questionnaires. The confidentiality and destruction protections in Subparagraphs (C)(1), (2), and (3) of this rule shall apply to any supplemental questionnaires ordered under this paragraph.

[As amended by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

Committee commentary. — Paragraph C of this rule was added to clarify the procedure for using and retaining juror qualification and questionnaire forms. In cases where an issue may be raised on appeal concerning jury selection or a particular juror, the appellant may consider filing a motion in the district court within ninety (90) days of the jury verdict to request an order requiring the retention of the juror qualification and questionnaire forms for inclusion in the record proper filed in the appellate court. Paragraph C of this rule supersedes administrative regulations concerning the retention of juror qualification and questionnaire forms.

[Adopted by Supreme Court Order No. 13-8300-042, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 18-8300-008, effective December 31, 2018.]

1-048. Juries of fewer than twelve; stipulation.

Notwithstanding the provisions of Rule 1-038 NMRA, the parties may stipulate that the jury shall consist of any number fewer than twelve or that a verdict or finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

[As amended, effective December 3, 2001.]

Committee commentary. — When a party makes a general demand for a jury trial, a six person jury normally will be assembled, five of whom must agree on a verdict. Rule 1-038(B)(2) NMRA; Rule 1-038(B) NMRA. If any party properly makes a request for a twelve person jury, a twelve person jury will be assembled, ten of whom must agree on a verdict. Rule 1-038(B)(2) and (B)(3); Rule 1-038(G) NMRA.

This rule allows the parties to agree to a jury of any number fewer than twelve as well as allowing them to agree that a binding verdict may be returned by any number of jurors above a majority. Normally parties will vary from six or twelve person juries only when these standard sized juries have been selected but the number of jurors and alternates is reduced below twelve or six during the course of the proceeding. When this happens, a question will arise concerning the number of jurors needed for a binding verdict. If the parties stipulate to an eleven person jury without also modifying the number of jurors who must agree on a verdict, the requirement of ten jurors will continue

in effect. In like manner, if the parties stipulate to use a five person jury instead of a six person jury, all five jurors must agree on a verdict unless the parties also agreed to accept as binding the verdict of fewer than five jurors.

Parties who stipulate to a jury of fewer than eleven or fewer than five necessarily also have to stipulate to the number of jurors who must agree in order to render a binding verdict.

Often, alternate jurors are not needed to fill vacancies in the jury. Normally they are discharged from jury service when the jury retires to deliberate. Nothing in this rule prevents the parties from stipulating that alternate jurors may participate fully in the deliberations and the decision of the jury, so long as the parties also stipulate as to the number of jurors (including the alternates) required to return a valid verdict.

1-049. Special verdicts and interrogatories.

A. **Special verdicts.** The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

B. **General verdict accompanied by answer to interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, appropriate judgment upon the verdict and answers shall be entered. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

1-050. Judgment as a matter of law in jury trials; alternative motion for new trial; conditional rulings.

A. **Judgment as a matter of law.**

(1) If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may

(a) resolve the issue against the party; and

(b) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

B. **Renewing the motion after trial; alternative motion for a new trial.** If the court does not grant a motion for judgment as a matter of law made under Paragraph A of this rule, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than thirty (30) days after the entry of judgment or - if the motion addresses a jury issue not decided by a verdict - no later than thirty (30) days after the jury was discharged. The movant may alternatively request a new trial or join a motion for a new trial under Rule 1-059 NMRA. In ruling on a renewed motion, the court may,

(1) if a verdict was returned,

(a) allow the judgment to stand;

(b) order a new trial; or

(c) direct entry of judgment as a matter of law; or

(2) if no verdict was returned,

(a) order a new trial; or

(b) direct entry of judgment as a matter of law.

C. **Granting renewed motion for judgment as a matter of law; conditional rulings; new trial motion.**

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) Any motion for a new trial under Rule 1-059 NMRA by a party against whom judgment as a matter of law is rendered shall be filed no later than thirty (30) days after entry of the judgment.

D. **Denial of motion for judgment as a matter of law.** If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

[As amended, effective September 27, 1999; as amended by Supreme Court Order No. 07-8300-001, effective March 15, 2007; as amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Section 39-1-1 NMSA 1978, adopted in 1897, provides that a trial court in some cases has continuing jurisdiction over its judgments for thirty (30) days after their entry. *See, e.g., Laffoon v.Galles Motor Co.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969). Rather than have a ten (10)-day time requirement for filing most post-judgment motions but a thirty (30)-day time frame for filing motions under Section 39-1-1 NMSA 1978, the 2013 amendments extend the time for filing all post-trial motions, including renewed motions for judgment as a matter of law, to thirty (30) days from entry of the final judgment. The decision to extend the time to thirty (30) days rather than to limit Section 39-1-1 NMSA 1978 motions to ten (10) days was made because the prior ten (10)-day requirement often left insufficient time for parties to research, formulate, and prepare post-judgment motions. In addition, the choice of thirty (30) days makes it unnecessary to determine whether the provision in Section 39-1-1 NMSA 1978 for extended post-judgment jurisdiction of the district court is consistent with the principle of separation of powers between the legislature and the judiciary. *See* Rule 1-091 NMRA; *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). The intent and effect of the 2013 amendment to Rule 1-050(B) and (C)(2) NMRA is to expand the time for filing those motions to thirty (30) days from entry of the judgment.

Motions are no longer deemed denied if not ruled upon for thirty (30) days after submission. Rule 1-054.1 NMRA. *See* the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information. Instead, Rule 1-054.1 NMRA directs district courts to enter an order within sixty (60) days of submission. *Id.* Normally, the party filing a post-judgment motion has to await entry of an order from the district court ruling on the motion before filing an effective notice of appeal because where a timely Rule 1-050(B) or (C) NMRA motion has been filed, the time for filing a notice of appeal runs from the date of entry of an order that expressly disposes of the motion. *See Dickens v. Laurel Healthcare*, LLC, 2009-NMCA-122, ¶ 4, 147 N.M. 303, 222 P.3d 675 (notice of appeal filed prior to ruling on pending Rule 1-059(E) NMRA motion is premature and time for filing notice of appeal does not begin to run until order is entered resolving Rule 1-059(E) NMRA motion). A party who makes a timely Rule 1-050(B) or (C) NMRA motion may thereafter prefer to forgo an express ruling on the motion and, instead, start the appellate process. Appellate Rule 12-201(D)(3) NMRA provides that a Rule 1-050(B) or (C) NMRA movant may file a notice of withdrawal of the motion, thus affecting the time for filing a notice of appeal as provided in Rule 12-201(D)(3) NMRA.

The effect of the withdrawal of a renewed motion for a judgment as a matter of law on the ability of the party to assert on appeal that the evidence was legally insufficient to support the verdict is not free from doubt. The United States Supreme Court has ruled that, in federal court, a renewed motion for a judgment as a matter of law is a necessary prerequisite to appellate review of the sufficiency of the evidence to support a verdict. *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-01 (2006). In dictum, the New Mexico Supreme Court has not required that there be a ruling on a motion for judgment n.o.v. (now a renewed motion for judgment as a matter of law). *See Romero v. Mervyn's*, 109 N.M. 249, 253 n.2, 784 P.2d 992, 996 n.2 (1989) (requiring "a motion for a directed verdict, objection to instructions, or a motion for j.n.o.v." (emphasis added)).

Under Rule 12-201(D)(4) NMRA, a timely filed notice of appeal does not divest the district court of jurisdiction to dispose of any timely filed motion under Rules 1-050, 1-052, or 1-059 NMRA, or a Rule 1-060 NMRA motion filed within thirty (30) days after the filing of a judgment. The notice of appeal becomes effective when the last such motion is disposed of expressly by an order of the district court, is automatically denied, or is withdrawn.

[Adopted by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

1-051. Instructions to juries.

A. **Type of instruction.** The trial judge shall instruct the jury in the language of the Uniform Jury Instructions on the applicable rules of law and leave to counsel the application of such rules to the facts according to their respective contentions.

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

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

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

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

F. **Instruction by the court.** Whenever the court determines that the jury should be instructed on a subject, the instruction given on that subject shall be brief, impartial and free from hypothesized facts. If there is a UJI Civil on that subject, it shall be given.

G. **Preparation and request for instructions.** Any party may move the court to give instructions on any point of law arising in the cause. At any time before or during the trial, the court may direct counsel to prepare designated instructions. The attorneys for the parties shall confer in good faith prior to the settling of instructions by the court and shall prepare a single set of instructions upon which the parties agree. Such instructions as well as instructions tendered by the parties shall be in writing and shall consist of an original to be used by the court in instructing the jury, adequate copies for the parties, and one (1) copy for filing in the case on which the judge shall note "given" or "refused" as to each instruction requested. Copies of instructions tendered by the parties shall indicate who tendered them. All copies of instructions shall also contain a notation "UJI Civil No. _____" or "Not in UJI Civil" as appropriate. (The instructions which go to the jury room shall contain no notations.)

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

I. **Error in instructions; preservation.** For the preservation of any error in the charge, objection must be made to any instruction given, whether in UJI Civil or not; or,

in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury. Reasonable opportunity shall be afforded counsel so to object or tender instructions.

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

[As amended, effective January 1, 1987; August 27, 1999.]

1-052. Nonjury trials; findings and conclusions.

A. **Findings and conclusions; when required.** In a case tried by the court without a jury, or by the court with an advisory jury, the court shall enter findings of fact and conclusions of law when a party makes a timely request. Findings of fact and conclusions of law are unnecessary in decisions on motions under Rules 1-012, 1-050, or 1-056 NMRA or any other motion except as provided in Paragraph B of Rule 1-041 NMRA.

B. **Request to enter findings and conclusions.** Unless otherwise ordered by the court, no later than ten (10) days after the court announces its decision, a party may request the court to enter findings of fact and conclusions of law by filing the party's requested findings of fact and conclusions of law.

C. **Amended or supplemental findings and conclusions; withdrawal of request for findings.** A party who filed requested findings of fact and conclusions of law prior to the trial, may file amended or supplemental findings and conclusions or may withdraw the request for findings and conclusions within ten (10) days after the court announces its decision.

D. **Motion to amend.** Upon motion of a party filed not later than thirty (30) days after entry of judgment, the court may amend its findings or conclusions or make additional findings and conclusions and may amend the judgment accordingly.

[As amended, effective January 1, 1987; February 1, 2001; as amended by Supreme Court Order No. 06-8300-017, effective August 21, 2006; as amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

Committee commentary. —

1. **In general.**

Prior to the February 1, 2001 revisions, Rule 1-052 NMRA provided procedures which were cumbersome, unnecessarily detailed and confusing. The February 1, 2001 revision simplifies the process of rendering a decision in nonjury trials while preserving

the portions of the existing rule which seek to assure that the court's decision will be clear and correct.

The February 1, 2001 revision eliminates the confusing distinction between evidentiary and ultimate facts. The court is no longer required to mark as "Refused" all proposed findings that are not included in the court's decision. It requires that the court enter findings and conclusions upon request of a party. Finally, former Paragraph A of Rule 1-052 NMRA, relating to waiver of trial by jury, has been rewritten and is now found in Paragraph D of Rule 1-038 NMRA, jury trial in civil actions.

Section 39-1-1 NMSA 1978, adopted in 1897, provides that a trial court in some cases has continuing jurisdiction over its judgments for thirty (30) days after their entry. *See, e.g., Laffoon v. Galles Motor Co.*, 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969). Rather than have a ten (10)-day time requirement for filing most post-judgment motions but a thirty (30)-day time frame for filing motions under Section 39-1-1 NMSA 1978, the 2013 amendments extend the time for filing all post-trial motions, including Rule 1-052 NMRA motions to amend or add findings and conclusions after entry of judgment, to thirty (30) days from entry of the final judgment. The decision to extend the time to thirty (30) days rather than to limit Section 39-1-1 NMSA 1978 motions to ten (10) days was made because the prior ten (10)-day requirement often left insufficient time for parties to research, formulate, and prepare post-judgment motions. In addition, the choice of thirty (30) days makes it unnecessary to determine whether the provision in Section 39-1-1 NMSA 1978 for extended post-judgment jurisdiction of the district court is consistent with the principle of separation of powers between the legislature and the judiciary. *See* Rule 1-091 NMRA; Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976). The intent and effect of the 2013 amendment to Rule 1-052(D) NMRA is to expand the time for filing those motions to thirty (30) days from entry of the judgment.

Motions are no longer deemed denied if not ruled upon for thirty (30) days after submission. Rule 1-054.1 NMRA. *See* the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information. Instead, Rule 1-054.1 NMRA directs district courts to enter an order within sixty (60) days of submission. *Id.* Normally, the party filing a post-judgment motion has to await entry of an order from the district court ruling on the motion before filing an effective notice of appeal because where a timely Rule 1-052(D) NMRA motion has been filed, the time for filing a notice of appeal runs from the date of entry of an order that expressly disposes of the motion. *See Dickens v. Laurel Healthcare, LLC*, 2009-NMCA-122, ¶ 4, 147 N.M. 303, 222 P.3d 675 (notice of appeal filed prior to ruling on pending Rule 1-059(E) NMRA motion is premature and time for filing notice of appeal does not begin to run until order is entered resolving Rule 1-059(E) NMRA motion). A party who makes a timely Rule 1-052(D) NMRA motion may thereafter prefer to forgo an express ruling on the motion and, instead, start the appellate process. Appellate Rule 12-201(D)(3) NMRA provides that a Rule 1-052(D) NMRA movant may file a notice of withdrawal of the motion, thus affecting the time for filing a notice of appeal as provided in Rule 12-201(D)(3) NMRA.

Under Rule 12-201(D)(4) NMRA, a timely filed notice of appeal does not divest the district court of jurisdiction to dispose of any timely filed motion under Rules 1-050, 1-052, or 1-059 NMRA, or a Rule 1-060 NMRA motion filed within thirty (30) days after the filing of a judgment. The notice of appeal becomes effective when the last such motion is disposed of expressly by an order of the district court, is automatically denied, or is withdrawn.

2. **Findings and conclusions; when required.**

The February 1, 2001 revision requires a party to tender findings and conclusions in a timely manner in order to assure that the court will enter findings and conclusions. A party who complies with this requirement by tendering findings and conclusions at an early stage in the proceedings may subsequently waive findings and conclusions pursuant to Paragraph C of this rule.

3. **Preservation of error on appeal.**

Former Rule 1-052 NMRA lacked clarity as to the proper means for preserving error for appeal concerning the findings and conclusions. Compare former Rule 1-052(F) NMRA with former Rule 1-052(B)(2) NMRA; *see Cockrell v. Cockrell*, 117 N.M. 321, 871 P.2d 977 (1994). The revision omits reference to “preservation of error” as this is a matter for the appellate rules. *See* Rules 12-208(E), 12-213(A)(4), and 12-216 NMRA; *cf. Martinez v. Martinez*, 101 N.M. 88, 93, 678 P.2d 1163, 1168 (1984) (dicta); *Blea v. Sandoval*, 107 N.M. 554, 556, 761 P.2d 432, 434 (Ct. App. 1988) (dicta).

[As amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

1-053. Masters.

A. **Appointment and compensation.** The court in which any action is pending may appoint a special master therein. As used in these rules the word "master" includes a referee, an auditor and an examiner. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain his report as security for his compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

B. **Reference.** A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

C. **Powers.** The order of reference to the master may specify or limit his powers and may direct him to report only upon particular issues or to do or perform particular acts or to receive and report evidence only and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order. He may require the production before him of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents and writings applicable thereto. He may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may himself examine them and may call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Rule 1-043 NMRA for a court sitting without a jury.

D. **Proceedings.**

(1) When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within twenty (20) days after the date of the order of reference and shall notify the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make his report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his discretion, adjourn the proceedings to a future day, giving notice to the absent party of the adjournment.

(2) The parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 1-045 NMRA. If without adequate excuse a witness fails to appear or give evidence, he may be punished by the district judge as for a contempt and be subjected to the consequences, penalties and remedies provided in Rules 1-037 and 1-045.

(3) When matters of accounting are in issue before the master, he may prescribe the form in which the accounts shall be submitted and in any proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as he directs.

E. **Report.**

(1) The master shall prepare a report upon the matters submitted to him by the order of reference and, if required to make findings of fact and conclusions of law, he shall set them forth in the report. He shall file the report with the clerk of the court and unless waived by the parties he shall file with it a transcript or other authorized recording of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within ten (10) days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Paragraph C of Rule 1-006 NMRA. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) In an action to be tried by a jury the master shall make his report as in nonjury actions. His findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury; provided that either party may attack such findings in the same manner and upon the same grounds as in nonjury cases, and also subject to the ruling of the court upon any objections in point of law which may be made to the report. If no objections are made to the findings of the master, then they may be introduced in evidence without submission to the trial court for approval.

(4) The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) Before filing his report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

F. **Special masters, commissioners and referees; substitution.** Upon application of an interested party, and after notice if directed by the court, showing that a special master, commissioner or referee theretofore appointed is unable for any reason to continue in the performance of his prescribed duties, the court may appoint another as successor. Unless the court shall otherwise order, such successor shall take the proceedings as he finds them, and carry the same on to completion, with all powers of the original master. Without further or other notice, such successor may conduct any sale, notice of which may have been published in the name of such original master.

1-053.1. Domestic violence special commissioners; duties.

A. **Appointment.** Domestic violence special commissioners shall be at-will positions subject to the New Mexico Judicial Branch Policies for At-will Employees. Consistent with the authority set forth in this rule, domestic violence special commissioners may

perform those duties assigned by the chief judge of the district in domestic violence proceedings.

B. **Qualifications.** Any person appointed to serve as a special commissioner under this rule shall

(1) be a lawyer licensed to practice law in New Mexico with at least three (3) years of experience in the practice of law; and

(2) be knowledgeable in the area of domestic relations and domestic violence matters.

C. **Duties.** A domestic violence special commissioner shall perform the following duties in carrying out the provisions of the Family Violence Protection Act, Sections 40-13-1 to -13 NMSA 1978:

(1) review petitions for orders of protection and motions to enforce, modify, or terminate orders of protection;

(2) if deemed necessary, interview petitioners, provided that any interview shall be on the record;

(3) conduct hearings on the merits of petitions for orders of protection and motions to enforce, modify, or terminate orders of protection; and

(4) prepare recommendations, in the form, if any, approved by the Supreme Court, for review and final approval by the district court regarding petitions for orders of protection and motions to enforce, modify, or terminate orders of protection.

D. **Removal.** On motion of any party for good cause shown, or on the court's own motion, the district court may remove the domestic violence special commissioner from acting in a proceeding.

E. **Authority.** The domestic violence special commissioner's recommendations shall not become effective until reviewed and adopted as an order of the court.

F. **Recommendations.**

(1) ***Recommendations concerning ex parte orders.*** After conducting the necessary review, the domestic violence special commissioner shall promptly submit to the district court recommendations concerning the entry of an *ex parte* temporary order of protection. The district court judge shall immediately review the recommendations and shall determine whether to immediately enter an order consistent with the recommendations, to enter a different order, to request the commissioner to conduct further proceedings, or to request the commissioner to make additional findings and conclusions. Unless otherwise ordered by the court, an *ex parte* order of protection

signed by the court shall remain in effect, in accordance with the provisions of Section 40-13-4 NMSA 1978, until the court enters a final order ruling on the petition for an order of protection.

(2) ***Recommendations.*** At the conclusion of the proceedings, the domestic violence special commissioner shall submit to the district court for review and approval the commissioner's recommendations, including proposed findings and conclusions, and shall serve each of the parties with a copy together with a notice that specific objections may be filed within fourteen (14) days after service of the recommendations.

G. **Objections.** Any party may file timely objections to the domestic violence special commissioner's recommendations. The party filing objections shall promptly serve them on other parties. Objections must specifically identify the following:

(1) the specific portions of the recommendations to which the party objects;

(2) a summary of the evidence presented at the hearing conducted by the commissioner;

(3) the specific findings of fact made by the commissioner to which the party objects; and

(4) the specific errors made by the commissioner in applying the substantive and/or procedural law to the commissioner's findings of fact.

H. **District court proceedings.** After receipt of the recommendations of the domestic violence special commissioner, the district court judge shall observe the following procedure:

(1) The district court judge shall immediately review the recommendations of the domestic violence special commissioner and determine whether to immediately adopt the recommendations. The district court judge shall set aside the decision only if the decision is found to be

(a) arbitrary, capricious, or an abuse of discretion;

(b) not supported by substantial evidence in the record as a whole; or

(c) otherwise not in accordance with law.

(2) If a party files timely, specific objections to the recommendations as set forth in Paragraph G of this rule, the district court judge shall conduct an independent review appropriate and sufficient to resolve the objections. The review shall consist of a review of the record presented to the special commissioner.

(a) The review does not require an in-person hearing before the district court judge.

(b) If the district court judge finds that the objections to the recommendations are not specifically stated as set forth in Paragraph G of this rule, the district court judge may issue a general denial of the objections.

(3) The district court judge may adopt the recommendations, modify them, reject them in whole or in part, receive further evidence, or remand them to the domestic violence special commissioner with instructions.

(4) After reviewing any objections, the district court judge shall enter a final order. When required by Rule 1-052 NMRA, the district court judge also shall enter findings of fact and conclusions of law.

I. **Limitations on private practice.** Full-time domestic violence special commissioners shall devote full time to their duties under the Family Violence Protection Act and shall not engage in the private practice of law or in any employment, occupation, or business interfering with or inconsistent with the discharge of their duties. Part-time domestic violence special commissioners may engage in the private practice of law so long as in the discretion of the appointing judge it does not interfere with nor is inconsistent with the discharge of their duties as domestic violence special commissioners and subject to applicable Code of Judicial Conduct provisions, as stated in Paragraph J of this rule.

J. **Code of Judicial Conduct.** A domestic violence special commissioner is required to conform to all applicable provisions of the Code of Judicial Conduct.

[Adopted, effective October 18, 1996; as amended by Supreme Court Order No. 06-8300-019, effective October 16, 2006; as amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 22-8300-019, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary for 2006 amendment. —

Authority

Former Paragraph C of Rule 1-053.1 NMRA has been amended to make clear the permissible scope of the domestic violence special commissioner's duties. Those duties include not only the review of petitions and the conducting of hearings for requests for all orders of protection, *see, e.g.*, Form 4-961 NMRA (Petition for order of protection from domestic abuse), Form 4-962A NMRA (Counter-petition for order of protection), Form 4-972 NMRA (Petition for emergency order of protection), and related proceedings, *see, e.g.*, Form 4-961B NMRA (Request for order to omit address and phone number of petitioner), but also for motions to enforce, modify, or terminate orders

of protection. *See* Form 4-968 NMRA (Application to modify, terminate, or renew the order of protection).

The requirement in Rule 1-053.1(C) NMRA that interviews with the petitioner be conducted on the record is taken from NMSA 1978, Section 40-13-10(A)(2) (2005).

Form of recommendations

Rule 1-053.1(C)(4) NMRA reflects current practice by providing that where court-approved forms are available, the domestic violence special commissioner will use the forms in preparing recommendations for the court. *See* Forms 4-961 to 4-974 NMRA.

See relevant Committee comments to Rule 1-053.2 NMRA for discussion of other provisions in the 2006 amendments to Rule 1-053.1 NMRA.

Committee commentary for 2017 amendment. —

The Committee notes that Rule 1-053.1(J) NMRA was amended to remove incorrect references to the Code of Judicial Conduct and clarify that domestic violence special commissioners are required to conform to all applicable Code of Judicial Conduct provisions. *See* Rule 21-004(C) NMRA.

[As amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 22-8300-019, effective for all cases pending or filed on or after December 31, 2022.]

1-053.2. Domestic relations hearing officers; duties.

A. **Appointment.** Domestic relations hearing officers shall be at-will positions subject to the New Mexico Judicial Branch Policies for At-will Employees. Consistent with the authority set forth in this rule, domestic relations hearing officers may perform those duties assigned by the judges of the district in domestic relations proceedings.

B. **Qualifications.** Any person appointed to serve as a domestic relations hearing officer shall have the same qualifications as provided in Section 40-4B-4 NMSA 1978 for a child support hearing officer.

C. **Duties.** A domestic relations hearing officer may perform the following duties in domestic relations proceedings:

(1) review petitions for indigency;

(2) conduct hearings on all petitions and motions, both before and after entry of the decree;

(3) in a child support enforcement division case, carry out the statutory duties of a child support hearing officer;

(4) carry out the statutory duties of a domestic violence special commissioner and utilize the procedures as set forth in Rule 1-053.1 NMRA;

(5) assist the court in carrying out the purposes of the Domestic Relations Mediation Act, Sections 40-12-1 to -6 NMSA 1978; and

(6) prepare recommendations for review and final approval by the district court.

D. **Removal.** On motion of any party for good cause shown, or on the court's own motion, the district court may remove the domestic relations hearing officer from acting in a proceeding.

E. **Authority.** The domestic relations hearing officer's recommendations shall not become effective until reviewed and adopted as an order of the court.

F. **Recommendations.** Within thirty (30) days after the conclusion of the proceedings, the domestic relations hearing officer shall file and submit to the district court for review and approval the hearing officer's recommendations, including proposed findings and conclusions, and shall serve each of the parties with a copy together with a notice that specific objections may be filed within fourteen (14) days after service of the recommendations.

G. **Objections.** Any party may file timely objections to the domestic relations hearing officer's recommendations. The party filing objections shall promptly serve them on other parties. Objections must specifically identify the following:

(1) the specific portions of the recommendations to which the party objects;

(2) a summary of the evidence presented at the hearing conducted by the domestic relations hearing officer;

(3) the specific findings of fact made by the domestic relations hearing officer to which the party objects; and

(4) the specific errors made by the domestic relations hearing officer in applying the substantive and/or procedural law to the domestic relations hearing officer's findings of fact.

H. **District court proceedings.** After receipt of the recommendations of the domestic relations hearing officer, the district court judge shall observe the following procedure:

(1) The district court judge shall review the recommendations of the domestic relations hearing officer and determine whether to adopt the recommendations. The district court judge shall set aside the decision only if the decision is found to be

(a) arbitrary, capricious, or an abuse of discretion;

(b) not supported by substantial evidence in the record as a whole; or

(c) otherwise not in accordance with law.

(2) If a party files timely, specific objections to the recommendations as set forth in Paragraph G of this rule, the district court judge shall conduct an independent review appropriate and sufficient to resolve the objections. The review shall consist of a review of the record presented to the hearing officer.

(a) The review does not require an in-person hearing before the district court judge.

(b) If the district court judge finds that the objections to the recommendations are not specifically stated as set forth in Paragraph G of this rule, the district court judge may issue a general denial of the objections.

(3) The district court judge may adopt the recommendations, modify them, reject them in whole or in part, receive further evidence, or remand them to the domestic relations hearing officer with instructions.

(4) After reviewing any objections, the district court judge shall enter a final order. When required by Rule 1-052 NMRA, the district court judge also shall enter findings of fact and conclusions of law.

I. **Child Support Hearing Officer Act.** The court and child support hearing officers acting under the Child Support Hearing Officer Act, Sections 40-4B-1 to -10 NMSA 1978, and domestic relations hearing officers acting under Subparagraph (C)(3) of this rule shall comply with this rule notwithstanding any contrary provision of the Child Support Hearing Officer Act.

J. **Limitations on private practice.** Full-time domestic relations hearing officers shall devote full time to domestic relations matters and shall not engage in the private practice of law or in any employment, occupation, or business interfering with or inconsistent with the discharge of their duties. Part-time domestic relations hearing officers may engage in the private practice of law so long as in the discretion of the appointing judge it does not interfere with nor is inconsistent with the discharge of their duties as domestic relations hearing officers and subject to applicable Code of Judicial Conduct provisions, as stated in Paragraph K of this rule.

K. **Code of Judicial Conduct.** A domestic relations hearing officer is required to conform to all applicable provisions of the Code of Judicial Conduct.

[Adopted, effective January 1, 1998; as amended by Supreme Court Order No. 06-8300-019, effective October 16, 2006; as amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 22-8300-019, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary for 2006 amendment. —

Introduction

Child support hearing officers acting under the Child Support Hearing Officer Act, NMSA 1978, §§ 40-4B-1 to -10 (1988, as amended through 1993), domestic relations hearing officers acting under Rule 1-053.2 NMRA, and domestic violence special commissioners acting under the Family Violence Protection Act, NMSA 1978, §§ 40-13-1 to -8 (1987, as amended through 2019), and Rule 1-053.1 NMRA, assist the court in carrying out its functions in certain domestic relations matters. In *Lujan v. Casados-Lujan*, 2004-NMCA-036, 135 N.M. 285, 87 P.3d 1067, the Court of Appeals considered the appropriate division of responsibility between domestic violence special commissioners and the court. In *Buffington v. McGorty*, 2004-NMCA-092, 136 N.M. 226, 96 P.3d 787, the Court of Appeals addressed comparable issues concerning the constitutional requirements and appropriate procedures that should govern the relationship of the court to child support hearing officers and domestic relations hearing officers.

These amendments and the 2006 amendments to Rule 1-053.1 NMRA respond to the concerns addressed in *Lujan* and *Buffington* and address additional, related matters. To the extent appropriate, given the different but sometimes overlapping tasks assigned to the three different judicial officers, the Committee sought to have the same provisions apply to child support hearing officers, domestic relations hearing officers, and domestic violence special commissioners. For this reason, many of the Committee comments contained here are equally applicable to the 2006 amendments to Rule 1-053.1 NMRA and will not be repeated as Committee comments to that rule.

Child support hearing officers

The Legislature created the position of child support hearing officer. *See* NMSA 1978, § 40-4B-2. The statute provides that the hearing officers follow certain procedures in the course of their duties. *See, e.g.*, NMSA 1978, § 40-4B-7. For two reasons, the Committee recommended that child support hearing officers comply with Rule 1-053.2 NMRA rather than the Child Support Hearing Officer Act when the two conflict. First, under Rule 1-053.2 NMRA domestic relations hearing officers sometimes perform a dual role in the same proceeding, acting both in their regular capacity and as child support hearing officers. *See* Rule 1-053.2(C)(3) NMRA. To assure consistency and

efficiency, the officer should not have to follow different procedures in the same proceeding. Second, some of the procedural provisions of the Child Support Hearing Officer Act are of doubtful validity. *See Buffington*, 2004-NMCA-092. Rule 1-053.2(I) NMRA therefore provides that when a hearing officer acts as a child support hearing officer, whether under authority granted by NMSA 1978, Section 40-4B-4 or by Rule 1-053.2(C)(3) NMRA, the hearing officer shall comply with the procedures set forth in Rule 1-053.2 NMRA where the rule and the Child Support Hearing Officer Act are inconsistent. *See Albuquerque Rape Crisis Ctr. v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 (recognizing that the Supreme Court may exercise power of superintending control to revoke or amend statutory provisions that conflict with the court's procedural rules); *see also* Rule 1-091 NMRA; NMSA 1978, § 38-1-1(A) (1966).

Removal of hearing officer

Each party may exercise a peremptory excusal of the district court judge assigned to a case. *See* Rule 1-088.1 NMRA. There is no equivalent provision for peremptory excusal of a domestic relations hearing officer. In some judicial districts there is only one hearing officer and the use of peremptory challenges would cause undue administrative difficulties. Peremptory challenges also might lead to severely unbalanced workloads where a judicial district has more than one hearing officer. For these reasons, the Committee recommended that peremptory challenges not be available to remove hearing officers. Instead, Rule 1-053.2(D) NMRA provides the court with broad discretion to remove a hearing officer from a case for good cause shown by a party, or on the court's own motion.

Authority of hearing officer

Although the hearing officer performs a critical function within the judiciary, hearing officers are not judges, do not wear robes, and are not addressed as judge or your honor. Nonetheless, hearing officers are required to conform to the Code of Judicial Conduct and are entitled to the respect due all officers of the court as they assist the court in performing its core judicial function. It is a bedrock principle that "[t]he hearing officer assists the district court in determining the factual and legal issues, and the core judicial function is independently performed by the district judge." *Buffington*, 2004-NMCA-092, ¶ 31.

This principle was built into former Rule 1-053.2 NMRA, which provided that "all orders be signed by a district judge before the recommendations of a domestic relations hearing officer become effective." Rule 1-053.2(C) NMRA (now superseded). The 2006 amendment carries forward the rule that hearing officer recommendations are not effective until "adopted as an order of the court," Rule 1-053.2(E) NMRA, and makes explicit what was implicit in the superseded rule: The court must review the recommendations before entering an order. *See* Rule 1-053.2(E) NMRA. This provision is inconsistent with NMSA 1978, Section 40-4B-8(C), which provides that if the court fails to act on the hearing officer's recommendation within fifteen (15) days, the recommendations have the force of a court order even if not considered or signed by

the court. Because child support hearing officers, those acting as child support hearing officers, and the court, now must comply with Rule 1-053.2 NMRA where inconsistent with the Child Support Hearing Officer Act, *see* Rule 1-053.2(I) NMRA, that statutory provision is no longer valid.

Opportunity to object to recommendations of hearing officer

The former version of Rule 1-053.2 NMRA did not provide a means for a party who disagreed with the recommendations of the hearing officer to voice those objections to the judge who was to consider whether to adopt the recommendations. In *Buffington*, 2004-NMCA-092, ¶ 30, the Court of Appeals held that due process requires that a party have a meaningful opportunity to present objections to the court before the court enters an order based on the recommendations. The rule now provides that opportunity.

When the hearing officer presents the recommendations to the judge, the hearing officer must serve the parties with a copy of the recommendations and with a notice informing the parties that they may file objections with the court within fourteen (14) days of service of the recommendations. *See* Rule 1-053.2(F) NMRA; *see also Buffington*, 2004-NMCA-092, ¶ 30 (suggesting that the ten-day time limit under a previous version of Rule 1-053.2(F) NMRA is an adequate time for filing objections).

Objections must be specific

The purpose of the objections is to focus the court's attention on areas of dispute concerning the recommendations. Objections should be sufficiently detailed to accomplish this purpose. General objections to the recommendations as a whole or objections that do not point out the nature of the party's disagreement with the recommendation will not suffice.

Review of recommendations

Unobjected-to recommendations

The court will review the recommendations and make an independent determination whether to adopt them even when no party presents specific objections. If the court agrees with the recommendations it shall enter an order consistent with them. If the court chooses not to adopt the recommendations, the court should consider returning the matter to the hearing officer for further proceedings. The court may instead modify or reject the recommendations and enter a different or contrary order from that recommended. When this is done, the court should consider whether it would be appropriate to give notice to the parties of the court's proposed action and order, thus allowing the parties an opportunity to present objections to the court's proposed order, even though the parties had no objection to the hearing officer's different recommendations. *See Buffington*, 2004-NMCA-092, ¶ 30 (due process requires a right to object to hearing officer's recommendations before adopted by court). If the court does not afford the parties the opportunity to view and object in advance of the entry of

the court's modified or contrary order, a party may file a motion for reconsideration after the order is entered. *See* NMSA 1978, § 39-1-1 (1917); *In re Keeney*, 1995-NMCA-102, ¶ 10, 121 N.M. 58, 908 P.2d 751.

Objected-to recommendations

When the court receives timely, specific objections, "[t]he district court must then hold a hearing on the merits of the issues before the court, including the hearing officer's recommendations and the parties' objections thereto." *Buffington*, 2004-NMCA-092, ¶ 31. Rule 1-053.2(H)(1)(b) NMRA mandates a hearing to consider the recommendations and the objections. The *Buffington* court noted that "[t]he nature of the hearing and review to be conducted by the district court will depend upon the nature of the objections being raised." *Buffington*, 2004-NMCA-092, ¶ 31. Rule 1-053.2(H)(1)(b) NMRA provides this flexibility but creates a presumption that the hearing will consist of a review of the record rather than a de novo proceeding. However, the court has discretion in all cases to determine that a different form of hearing take place, including a de novo proceeding at which evidence is presented anew before the court, or a hearing partly on the record before the hearing officer and partly based on the presentation of new evidence not before the hearing officer. *See id.* The required hearing need not always consist of oral presentations before the court. When appropriate and sufficient to resolve the objections, the court may rely on written presentations of the parties. *See Nat'l Excess Ins. Co. v. Bingham*, 1987-NMCA-109, ¶ 9, 106 N.M. 325, 742 P.2d 537 (noting that summary judgment motions may be resolved without oral argument "when the opposing party has had an adequate opportunity to respond to movant's arguments through the briefing process").

Entry of findings of fact and conclusions of law

As in any case tried without a jury, the court must enter findings of fact and conclusions of law when required to do so under the terms of Rule 1-052 NMRA.

Opportunity to submit objections to report required. — While this rule contains no express provision, due process requires that the parties be given a right to object to the report and recommendations of the hearing officer. *Buffington*, 2004-NMCA-092.

Hearing officers distinguished. — This rule and the Child Support Hearing Officer Act describe both material similarities and material differences between a domestic relations hearing officer and a child support hearing officer. *Buffington*, 2004-NMCA-092.

Committee commentary for 2017 amendment. —

The Committee notes that Rule 1-053.2(K) NMRA was amended to remove incorrect references to the Code of Judicial Conduct and clarify that domestic relations hearing officers are required to conform to all applicable Code of Judicial Conduct provisions. *See* Rule 21-004(C) NMRA.

[As amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. 22-8300-019, effective for all cases pending or filed on or after December 31, 2022.]

1-053.3. Guardians *ad litem*; domestic relations appointments.

A. **Appointment.** In any proceeding when custody of a minor child is contested under Chapter 40, NMSA 1978 the court may appoint a guardian *ad litem* on the court's motion or upon the motion of any party, as set forth in this rule. The guardian *ad litem* serves as an arm of the court and assists the court in discharging its duty to adjudicate the child's best interests.

B. **Order.** The appointment order shall be written in substantial conformity with Form 4-402 NMRA. The order shall specify the guardian *ad litem*'s role, tasks, duties, any limitations, the reasons for the appointment and the duration of the appointment. The order shall authorize communication between the guardian *ad litem* and any mental health professional, medical professional, or other individuals providing services to parents, children, or other parties in the case and shall order the parties and minor children over the age of fourteen (14) to sign any releases requested by the guardian *ad litem*.

C. **Designation.** The guardian *ad litem* appointed under this rule is a "best interests attorney" who shall provide independent services to protect the child's best interests without being bound by the child's or either party's directive or objectives and who shall make findings and recommendations. This rule shall not limit the court's ability to appoint an expert pursuant to Rule 11-706 NMRA or a special master pursuant to Rule 1-053 NMRA.

D. **Prohibited delegation.** In no event shall the court delegate the ultimate determination of the child's best interests, unless the parties have agreed to arbitrate such issues under Section 40-4-7.2 NMSA 1978.

E. **Factors.** In determining whether an appointment will be made, the court may consider relevant factors, including the following:

(1) the wishes of the parents or other parties;

(2) the age of the child;

(3) the contentiousness of the parties or other dynamics affecting the child, including past or present mental health issues of a party or a household member;

(4) the extent to which the appointment will assist the court by providing factual information useful to the court in determining the child's best interest;

(5) the ability of the parties to pay;

(6) the views or concerns expressed by the child;

(7) the requests for extraordinary remedies, including supervised visitation;

(8) a proposed relocation;

(9) the likelihood that the child will be called as a witness or be examined by the court in chambers;

(10) past or present substance abuse, sexual abuse, emotional abuse, or domestic abuse by, or to, a party, the child, or a household member;

(11) disputes as to paternity;

(12) interference, or threatened interference, with custody or parenting time, including abduction;

(13) special physical, educational, or mental health needs of the child;

(14) inappropriate adult influence on, or manipulation of, the child;

(15) the extent to which the litigation process is harmful to the child;

(16) whether the child's needs can be protected through the limitation of the appointment to a specific issue; and

(17) any other relevant factors.

F. **Duties.** The guardian *ad litem* shall have the following duties, in addition to other duties stated in the order:

(1) if the child is age six (6) or older, interviewing the child face-to-face outside the presence of all parties and counsel; interviewing all parties in conformity with Rule 16-402 NMRA and the order appointing the guardian *ad litem*; interviewing any therapist for the child; and interviewing other lay persons, mental health professionals, medical professionals, or other individuals providing services to parents, children, or other parties in the case at the guardian *ad litem*'s or court's discretion. If the child is under the age of six (6), the guardian *ad litem* may interview the child outside the presence of the parties and counsel at the guardian *ad litem*'s discretion;

(2) determining the child's wishes, if appropriate;

(3) protecting the best interests of the child or children in the matter in which the guardian *ad litem* was appointed;

(4) serving a written report of investigation and separate written recommendations to all parties and counsel at least eleven (11) days before the recommendations are filed with the court;

(5) filing the recommendations with the court and providing written notice to the parties of the following:

(a) the deadline for submitting a stipulated order adopting the recommendations as provided in Subparagraph (G)(1) of this rule;

(b) the deadline for filing objections to the recommendations as provided in Subparagraph (G)(2) of this rule;

(c) that a failure to file timely objections shall be deemed a waiver of the right to object; and

(d) if no objections are filed, the court shall, without the necessity of holding a hearing, enter an order adopting the recommendations; and

(6) in the case of an emergency, filing emergency recommendations with the court and requesting a hearing without regard to Subparagraphs (4) and (5) of this Paragraph.

G. **Guardian *ad litem* recommendations.**

(1) If the parties agree to adopt the guardian *ad litem* recommendations, they shall submit a stipulated order adopting the recommendations within eleven (11) days after the recommendations are filed.

(2) If one or both of the parties does not agree to adopt the recommendations, such party may file objections to the recommendations and a request for hearing on the objections within eleven (11) days after the recommendations are filed. Objections must identify the specific portions of the guardian *ad litem*'s recommendations to which the party objects. The court will set a hearing on the objections to be held as soon as practicable after the filing of the objections. If a party files objections to emergency recommendations filed by a guardian *ad litem* under Subparagraph (F)(6) of this rule, the court shall set a hearing to be held within twenty (20) days of the filing of the objections.

(3) A failure to file timely objections to the recommendations of the guardian *ad litem* shall be deemed a waiver of the right to object, and the court shall, without the necessity of a hearing, enter an order adopting the guardian *ad litem*'s recommendations.

H. **Duties to the child.** A guardian *ad litem*, in a manner appropriate to the child's developmental level, shall:

(1) explain the role of the guardian *ad litem* to the child;

(2) inform the child that, in providing assistance to the court, the guardian *ad litem* may use information that the child gives to the guardian *ad litem*;

(3) keep the child informed of the nature and status of the proceeding;

(4) review and accept or decline to accept any proposed stipulation for an order affecting the child and explain to the court the basis for any opposition; and

(5) consider the child's objectives in determining what to recommend.

I. **Privilege; confidentiality.**

(1) ***Communications.*** All communications between the child and the guardian *ad litem* are privileged as provided in Rule 11-503 NMRA.

(2) ***Files.*** Any materials in the guardian *ad litem*'s files that are not privileged under Subparagraph (1) of this paragraph,

(a) are confidential and are not subject to public disclosure; and

(b) are considered trial preparation materials and are subject to discovery only as provided in Rule 1-026(B)(5) NMRA.

(3) ***Who may claim the privilege; waiver.***

(a) The guardian *ad litem* may claim the privilege on behalf of the child.

(b) The guardian *ad litem* may waive the privilege on a limited basis on behalf of the child when necessary to represent the best interests of the child to the court, the child's parents or legal guardian, a mental health provider, a law enforcement agency, or the Children, Youth and Families Department. The guardian *ad litem*'s limited waiver of the privilege for these purposes does not constitute a waiver of the privilege for any matter not specifically disclosed or to any person or agency to whom the information is not specifically disclosed.

(c) The child's parent or legal guardian may not claim the privilege or interfere with the guardian *ad litem*'s assertion or waiver of the privilege.

(4) ***Construction.*** This paragraph shall be construed to protect the best interests of the child.

J. **Presentation of report and recommendations; authority to call witnesses.** The guardian *ad litem* may call and examine witnesses at any hearing at the guardian

ad litem's discretion. The guardian *ad litem* may provide a verbal report and recommendations at any hearing or trial in the matter.

K. **Fees and costs.** The order shall state the guardian *ad litem*'s authorized retainer and hourly rate, provide for itemized monthly statements to the parties, and designate the manner in which the parties bear the fees and costs. Either party or the guardian *ad litem* may request a hearing on the guardian *ad litem* fees and costs.

[Provisionally approved by Supreme Court Order No. 06-8300-018, effective August 21, 2006; as amended by Supreme Court Order No. 07-8300-021, effective August 21, 2007; as amended by Supreme Court Order No. 17-8300-017, effective in all cases pending or filed on or after December 31, 2017.]

Committee commentary. — A guardian *ad litem*'s authority to claim or waive the privilege on behalf of the child under Subparagraph (I)(3) extends to any communication with the child that would be privileged if made by an adult. *See, e.g*., Rule 11-504(C)(2)(d) NMRA (providing that the privilege for communications between a patient and the patient's physician, psychotherapist, or state or nationally licensed mental-health therapist may be claimed by "any other person included in the communication to further the patient's interest").

Paragraph J permits a guardian *ad litem* to call witnesses and to provide a verbal report and recommendations at any hearing or trial in the matter in which the guardian *ad litem* is appointed. Such participation does not implicate Rule 16-307 NMRA, which prohibits a lawyer from acting as an advocate in any proceeding in which the lawyer is likely to be a necessary witness. A guardian *ad litem* is, by definition, a "best interests attorney" who acts as "an arm of the court" and therefore is not an advocate for the purposes of Rule 16-307. If a guardian *ad litem* chooses to provide a verbal report, facts or data relied on by a guardian *ad litem* in forming an opinion in the case need not be admissible for the guardian *ad litem*'s opinion to be admitted. *See* Rule 11-703 NMRA; *Thomas v. Thomas*, 1999-NMCA-135, ¶ 25, 128 N.M. 177, 991 P.2d 7.

Guardian *ad litem* fees and costs under Paragraph K are in the nature of support of the child and therefore are not dischargeable in a bankruptcy proceeding. *See, e.g., In re Miller*, 55 F.3d 1487, 1490 (10th Cir. 1995) ("[D]ebts to a guardian *ad litem*, who is specifically charged with representing the child's best interests . . . can be said to relate just as directly to the support of the child as attorney's fees incurred by the parents in a custody proceeding.") (citing *In re Jones* 9 F.3d 878, 881 (10th Cir. 1993) (holding that attorney's fees in a custody proceeding are not dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5)).

[Adopted by Supreme Court Order No. 17-8300-017, effective for all cases pending or filed on or after December 31, 2017.]

ARTICLE 7
Judgment

1-054. Judgments; costs.

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

B. **Judgment on multiple claims or involving multiple parties.** If an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim, or if multiple parties are involved, the court may direct entry of a final judgment about one or more, but fewer than all, claims or parties, only if the court expressly finds no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not end the action for any of the claims or parties, and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

C. **Demand for judgment.** A judgment by default shall not be different in kind from, or exceed, the amount prayed for in the demand for judgment. Except for a default judgment, each final judgment shall grant the relief sought by the party in whose favor judgment is rendered, even if the party has not demanded the relief in the party's pleadings.

D. **Costs.**

(1) ***Costs other than attorney fees.*** Unless expressly stated either in a statute or in these rules, costs, other than attorney fees, shall be allowed to the prevailing party unless the court otherwise directs; but costs against the state, its officers, and agencies shall be imposed only to the extent permitted by law.

(2) ***Recoverable costs.*** Costs generally are recoverable only as allowed by statute, Supreme Court rule, and case law. The following costs generally are recoverable:

(a) filing fees, including electronic filing and service fees;

(b) fees for service of summonses, subpoenas, writs, and other service of process;

(c) jury fees as provided in Rule 1-038 NMRA;

(d) transcript fees, including those for daily transcripts and transcripts of hearings before or after trial, if requested or approved by the court;

(e) the cost of a deposition:

(i) if any part is used at trial;

(ii) in successful support or defense of a motion for summary judgment under Rule 1-056 NMRA; or

(iii) if the court determines the deposition was reasonably necessary to the litigation;

(f) witness mileage or travel fare and per diem expenses, if the witness testifies at trial or at a deposition, which is deemed reasonable and necessary, and as limited by Sections 38-6-4(A), 39-2-8, 39-2-9, and 39-2-10 NMSA 1978;

(g) expert witness fees for services as provided by Section 38-6-4(B) NMSA 1978 or if the court determines that the expert witness was reasonably necessary to the litigation;

(h) translator fees, if the translated document is admitted into evidence;

(i) reasonable expenses involved in the production of exhibits, which are admitted into evidence;

(j) official certification fees for documents admitted into evidence; and

(k) interpreter fees for judicial proceedings and depositions.

(3) ***Non-recoverable costs.*** Unless specifically authorized by statute, Supreme Court rule, or case law, the following costs generally are not recoverable:

(a) except as provided in Subparagraph (D)(2)(i) of this rule, photocopying and other reproduction expenses;

(b) telephone expenses;

(c) facsimile expenses;

(d) courier service expenses;

(e) attorney mileage, travel fare, and per diem expenses;

(f) paralegal and other support staff expenses;

(g) general office expenses; and

(h) legal research, including computer-assisted research.

(4) ***Procedure for recovery of costs.*** Within fifteen (15) days after filing of the final judgment, the party recovering costs shall file with the clerk of the district court an itemized cost bill, with proof of service, on opposing counsel. Any party failing to file a cost bill within fifteen (15) days after the filing of the final judgment shall be deemed to have waived costs. If no objections are filed within ten (10) days after service of the cost bill, the clerk of the district court shall tax the claimed costs, which are allowable by law. The judge shall settle any objections filed.

E. **Attorney fees.**

(1) Claims for attorney fees and related nontaxable expenses shall be made by motion unless the substantive law governing the action provides for the recovery of the fees as an element of damages to be proved at trial.

(2) Unless otherwise provided by statute or order of the court, the motion must be filed and served no later than fifteen (15) days after entry of judgment; must specify the judgment and the statute or other grounds entitling the moving party to the award; and must state the amount sought and the basis for the amount claimed.

(3) On request of a party or class member, the court shall afford an opportunity for adversary submissions with respect to the motion. The court may determine issues of liability for fees before receiving submissions bearing on issues of evaluation of services for which liability is imposed by the court. A judgment shall be prepared and entered as provided in Rule 1-058 NMRA.

F. **Applicability.** The provisions of this rule do not apply to claims for fees and expenses as sanctions.

[As amended, effective October 1, 1996; December 15, 1999; February 1, 2001; as amended by Supreme Court Order No. 08-8300-011, effective May 23, 2008; as amended by Supreme Court Order No. 16-8300-009, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 21-8300-021, effective for all cases pending or filed on or after December 31, 2021.]

Committee commentary. — After the filing of the final judgment, upon request of the prevailing party, the clerk shall issue a transcript of judgment. Section 39-1-6 NMSA 1978.

1-054.1. Judgments and orders; time limit.

Notwithstanding Section 39-1-1 NMSA 1978, the court shall enter a judgment or order within sixty (60) days after submission. As used in this rule, "submission" is the time when the court takes the matter under advisement.

[Approved, effective December 15, 1999; as amended by Supreme Court Order No. 06-8300-017, effective August 21, 2006.]

Committee commentary. — The chief judge of a judicial district has the power and responsibility to monitor performance of the judges of the judicial district, including compliance with the sixty (60) day time limit for entry of judgments and orders. *See* Rule 23-109(B)(17) NMRA. A separate procedure for monitoring compliance, as found in former Rule 1-054(B), is unnecessary.

Committee commentary for 2006 amendment. — The 2006 amendment, approved by Supreme Court Order No. 06-8300-017, effective August 21, 2006, supersedes the portion of Section 39-1-1 NMSA 1978 providing that many post-judgment motions are deemed automatically denied if not granted within thirty (30) days of filing. As a result of this change, and changes made to Paragraph D of Rule 1-052 and Paragraph D of Rule 1-059, post-judgment motions are subject to the rule that the court shall enter judgments or orders within sixty (60) days of submission. Rule 1-054.1 NMRA. Because there no longer is an automatic denial of post-judgment motions, the time for filing notices of appeal will run "from the entry of an order expressly disposing of the motion". Rule 12-201(D) NMRA (time for filing of notice of appeal runs from date of entry of order expressly disposing of the motion when there is no provision of automatic denial of motion under applicable statute or rule of court).

In 1917, the Legislature provided that the trial court shall have control over its judgments for thirty (30) days after entry. Laws 1917, ch. 15. The statute also provided that if the court did not rule upon timely post-judgment motions within thirty (30) days after filing, the motions were deemed to be denied by operation of law. *Id.* That provision, now contained in Section 39-1-1 NMSA 1978, is superseded by the 2006 amendment.

The scope of Section 39-1-1 NMSA 1978 has never been clear. The statute applies only to non-jury trials, *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 18, 136 N.M. 741, 105 P.3d 294, and the automatic denial portion has been construed to not apply to post-judgment motions made pursuant to Rule 1-060 NMRA. *Wooley v. Wooley*, 75 N.M. 241, 245, 403 P.2d 685, 687-688 (1965). The automatic denial provision has caused confusion, *e.g.*, *Archuleta v. New Mexico State Police*, 108 N.M. 543, 775 P.2d 745 (1989) and, on occasion, possible injustice. *E.g.*, *Beneficial Finance Corp. v. Bradley*, 120 N.M. 228, 900 P.2d 977 (1995) (though Rule 1-059(E) NMRA is silent as to automatic denial while Paragraph D of Rule 1-059 NMRA explicitly provides for automatic denial, Rule 1-059(E) motions for reconsideration are automatically denied after thirty (30) days. As a result, appeal was untimely when notice of appeal was filed shortly after court's order denying motion but more than thirty days from date of automatic denial of motion).

Perhaps to alert litigants to the perils of the automatic denial statutory provision, the Supreme Court incorporated a thirty-day automatic denial provision in Rules 1-052(D) (motion to amend findings and conclusions), Paragraph D of Rule 1-059 NMRA (motion for new trial) and a former version of Rule 1-050 NMRA (motion for directed verdict), but omitted the provision in the Court's 1999 amendment to Rule 1-050. *Valley Bank of Commerce v. Hilburn*, 2005-NMCA-004, ¶ 15, 136 N.M. 741, 105 P.3d 294. The

presence of the automatic denial provision in Paragraph D of Rule 1-059 but not in Paragraph C of Rule 1-050 NMRA has created an apparent anomaly in that a Rule 1-059 motion for new trial is deemed denied after thirty (30) days while the often simultaneously-filed Rule 1-050 motion for a judgment as a matter of law is not. *Id.* at ¶ 16.

The 2006 amendment to Rule 1-054.1 NMRA and the corresponding amendments to Paragraph D of Rule 1-052 and Paragraph D of Rule 1-059 NMRA eliminate the confusion by providing that the automatic denial provision in Section 39-1-1 NMSA 1978 has no application in cases to which the Rules of Civil Procedure for the District Courts apply.

The Supreme Court can supersede the automatic denial provision in Section 39-1-1 NMSA 1978 by promulgating a rule of procedure to the contrary. *Albuquerque Rape Crisis Center v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 ("We have exercised our superintending control under Article VI, Section 3, to revoke or amend a statutory provision when the statutory provision conflicts with an existing court rule . . . or if the provision impairs the essential function of the court."). This superseding power may not extend to legislative provisions properly limiting a court's jurisdiction. *See Lovelace Medical Center v. Mendez*, 111 N.M. 336, 339, 805 P.2d 603, 606 (1991) ("If the statutory provision were *intended* by the legislature to have jurisdictional effect, then presumably we would accord it that effect -- unless we were to hold it unconstitutional...."). The automatic denial portion of Section 39-1-1 NMSA 1978, however, does not purport to affect the jurisdiction of the district court. It is similar to another statute providing for automatic denial of certain orders based on the passage of time, about which the Supreme Court declared "there are good reasons for construing it simply as the legislative adoption of a housekeeping rule to assist the courts with the management of their cases, to have effect unless and until waived by a court in a particular case or modified by a rule of this Court on the same subject." *Id.* at 339, 111 N.M. at 339. Even if Section 39-1-1 NMSA 1978 did purport to limit the jurisdiction of the district court, the statute probably would be unconstitutional. *See In re Arnall*, 94 N.M. 306, 610 P.2d 193 (1980) (constitutional provision granting district courts general jurisdiction precludes legislative attempts to limit jurisdiction of district courts).

These amendments to Rules 1-052, 1-059 and 1-054.1 affect only the Rules of Civil Procedure for the District Courts. Rules applicable to other courts that provide for automatic denial of motions by the passage of time are unaffected by this amendment. *See*, *e.g.*, Paragraph C of Rule 5-614 NMRA (motion for new trial, 30 days); Paragraph B of Rule 5-801 NMRA (motion to modify sentence, 90 days); Paragraph H of Rule 5-802 NMRA (habeas corpus, petition for certiorari, 30 days); Paragraph B of Rule 7-611 NMRA (motion for new trial, 20 days); Paragraph A of Rule 10-120 NMRA (relief from judgment or order, 10 or 30 days); Rule 10-230.1 NMRA (modification of judgment, 90 days); Paragraph C of Rule 12-404 NMRA (motions for rehearing, 20 days unless the court orders otherwise); Paragraph E of Rule 12-501 NMRA (petition for certiorari after habeas corpus petition, 30 days unless otherwise ordered by court). The appropriate

rules committees may consider whether to review whether similar amendments should be made to these rules.

1-054.2. Judgments in foreclosure actions; certification concerning the absence of loss mitigation negotiations required.

As a precondition to the entry of judgment of foreclosure by the district court, the plaintiff shall file a certification, substantially in the form approved by the Supreme Court as Form 4-712 NMRA, concerning the absence of loss mitigation negotiations with the borrower.

[Approved by Supreme Court Order No. 21-8300-004, effective for all cases pending or filed on or after September 7, 2021; as amended by Supreme Court Order No. 22-8300-010, effective for all cases pending or filed on or after May 23, 2022.]

1-055. Default.

A. **Entry.** When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

B. **Judgment.** Judgment by default may be entered as follows: in all cases the party entitled to a judgment by default shall apply to the court for judgment by default; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared in the action. If the party against whom judgment by default is sought has appeared in the action, the party (or, if appearing by representative, the party's representative) shall be served with written notice of the application for judgment at least three (3) days prior to the hearing on the application; provided, however, that the filing of an appearance and disclaimer of interest shall not be construed as requiring the service of written notice of application for judgment under the terms of this rule. In cases controlled by Rule 1-009(J) NMRA, prior to entry of default judgment the court shall determine that the party seeking relief has stated a claim on which relief can be granted, has complied with Rules 1-009(J)(2) and 1-017(E) NMRA, and has substantially complied with the requirements of Form 4-226 NMRA. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct those hearings or order those references as it deems necessary and proper and shall accord a right of trial by jury to the parties entitled thereto.

C. **Setting aside default.** For good cause shown, the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 1-060 NMRA.

D. **Plaintiffs, counterclaimants, cross-claimants.** The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 1-054(C) NMRA.

E. **Limitations.** No judgment by default shall be entered against the state or an officer or agency of the state or against a party in any case based on a negotiable instrument, unless the original negotiable instrument is filed with the court and merged with the judgment, or where the damages claimed are unliquidated unless the claimant establishes the claimant's claim or right to relief by evidence satisfactory to the court.

[As amended, effective August 27, 1999; as amended by Supreme Court Order 16-8300-031, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Paragraph B of this rule was revised in 2016 to provide additional protections to consumers in consumer debt collection cases. *See* Comment to Rule 1-009 NMRA. Paragraph B references Rule 1-009(J)(2) NMRA, under which, if the party seeking relief in a consumer debt claim has not served and filed with the district court the instrument of writing on which the party's claim is based, the district court shall not enter a default judgment without the court's finding of the party's good cause failure to do so. For cases involving a negotiable instrument which is not part of a consumer debt claim, Paragraph E of this rule requires that the original negotiable instrument be filed with the court unless the party seeking default judgment provides sufficient alternative evidence to demonstrate the party's right to relief.

[As adopted by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 19-8300-017, effective for all cases pending or filed on or after December 31, 2019.]

1-056. Summary judgment.

A. **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

B. **For defending party.** A party against whom a claim, counterclaim or cross-claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment as to all or any part thereof.

C. **Grounds for motion.** The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

If alternative grounds for summary judgment have been presented to the court, the order granting or denying the motion for summary judgment shall specify the grounds upon which the order is based.

D. **Time; procedure.**

(1) Motions for summary judgment will not be considered unless filed within a reasonable time prior to the date of trial to allow sufficient time for the opposing party to file a response and affidavits, depositions or other documentary evidence and to permit the court reasonable time to dispose of the motion.

(2) The moving party shall submit to the court a written memorandum containing a short, concise statement of the reasons in support of the motion with a list of authorities relied upon. A party opposing the motion shall, within fifteen (15) days after service of the motion, submit to the court a written memorandum containing a short, concise statement of the reasons in opposition to the motion with authorities. The moving party may, within fifteen (15) days after the service of such memorandum, submit a written reply memorandum.

The memorandum in support of the motion shall set out a concise statement of all of the material facts as to which the moving party contends no genuine issue exists. The facts shall be numbered and shall refer with particularity to those portions of the record upon which the moving party relies.

A memorandum in opposition to the motion shall contain a concise statement of the material facts as to which the party contends a genuine issue does exist. Each fact in dispute shall be numbered, shall refer with particularity to those portions of the record upon which the opposing party relies, and shall state the number of the moving party's fact that is disputed. All material facts set forth in the statement of the moving party shall be deemed admitted unless specifically controverted.

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

F. **When affidavits are unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts

essential to justify his position, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

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

[As amended, effective August 1, 1989.]

1-057. Declaratory judgments.

A. **Procedure.** The procedure for obtaining a declaratory judgment shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 1-038 and 1-039 NMRA. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

B. **Procedure when state a party.** In all actions where the State of New Mexico is a party, the summons to be issued, together with a copy of the complaint or petition thereto attached, shall be personally served upon the governor and the attorney general of the State of New Mexico. The state shall thereupon be required to answer or plead to the complaint or petition and serve copy thereof within twenty (20) days after service upon the last served of the two officials above named.

1-058. Orders and judgments; preparation and entry.

A. **Preparation of orders and judgments.** Upon announcement of the court's decision in any matter the court shall:

(1) allow counsel a reasonable time, fixed by the court, within which to submit the requested form of order or judgment;

(2) designate the counsel who shall be responsible for preparation of the order or judgment and fix the time within which it is to be submitted; or

(3) prepare its own form of order or judgment.

B. **Time limit.** If no satisfactory form of order or judgment has been submitted within the time fixed by the court, the court shall take such steps as it may deem proper to have an appropriate form of order or judgment entered promptly.

C. **Examination by counsel.** In all events, before the court signs any order or judgment, counsel shall be afforded a reasonable opportunity to examine the same and make suggestions or objections.

D. **Filing.** Upon the signing of any order or judgment it shall be filed promptly in the clerk's office and such filing constitutes entry thereof.

1-059. New trials; motions directed against the judgment.

A. **Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

B. **Time for motion.** A motion for a new trial shall be filed not later than thirty (30) days after the entry of the judgment.

C. **Time for serving affidavits.** When a motion for new trial is based upon affidavits they shall be served with the motion. The opposing party has fifteen (15) days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty (20) days either by the court for good cause shown or by the parties by written stipulation. The court may permit reply affidavits.

D. **On initiative of court.** Not later than ten (10) days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

E. **Motion to alter, amend, or reconsider a final judgment.** A motion to alter, amend, or reconsider a final judgment shall be filed not later than thirty (30) days after entry of the judgment.

[As amended, effective January 1, 1987 and effective August 1, 1989; as amended by Supreme Court Order No. 06-8300-017, effective August 21, 2006; as amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Motions to “reconsider” final judgments are frequent, but there was no rule providing for them. Rule 1-059(E) NMRA now authorizes such a motion, and sets a time limit for its use. Motions addressed to the validity of a judgment provide a time limit in which to bring the motion. With the exception of Rule 1-060

NMRA, the time limit had been ten (10) days. *See* Rule 1-059(B) NMRA (motion for a new trial); Rule 1-050(B) NMRA (renewed motion for judgment as a matter of law); Rule 1-052(D) NMRA (motion to amend or add findings and conclusions); Rule 1-059(E) NMRA (motion to alter or amend judgment). The trial court cannot extend the time for bringing these motions. Rule 1-006(B) NMRA.

On occasion, parties have filed a motion to reconsider after these motions were denied, requiring the court to consider the motion and then enter an additional order, thereby arguably extending the time for filing a notice of appeal until the motion to reconsider denial of the earlier motion was itself denied. The 2013 amendment to Rule 1-059 NMRA ends this practice by requiring that any motion to reconsider a judgment must be filed within thirty (30) days of entry of the judgment that is the subject of the motion. As a result, after a Rule 1-050(B) NMRA motion, a Rule 1-052(D) NMRA motion, or a Rule 1-059(A) or (E) NMRA motion is made and denied, a motion to reconsider those rulings is not available and the time for appeal cannot be extended by filing a motion to reconsider. If, however, one of those motions is granted and a new judgment is entered, a party may then make a motion to reconsider the newly entered judgment. Court rulings or orders that are not final for the purpose of appeal continue to be "subject to revision at any time before the entry of judgment adjudicating all claims." Rule 1-054(B)(1) NMRA; *see Melnick v. State Farm Mutual Automobile Ins. Co.*, 106 N.M. 726, 728, 749 P.2d 1105, 1107 (1988).

Section 39-1-1 NMSA 1978, adopted in 1897, provides that a trial court in some cases has continuing jurisdiction over its judgments for thirty (30) days after their entry. *See, e.g., Laffoon v. Galles Motor Co.,* 80 N.M. 1, 450 P.2d 439 (Ct. App. 1969). Rather than have a ten (10) day time requirement for filing most post-judgment motions but a thirty (30) day time frame for filing motions under Section 39-1-1 NMSA 1978, the 2013 amendments extend the time for filing all post-trial motions to thirty (30) days from entry of the final judgment. The decision to extend the time to thirty (30) days for all motions rather than to limit Section 39-1-1 NMSA 1978 motions to ten (10) days was made because the prior ten (10) day requirement often left insufficient time for parties to research, formulate, and prepare post-judgment motions. In addition, the choice of thirty (30) days makes it unnecessary to determine whether the provision in Section 39-1-1 NMSA 1978 for extended post-judgment jurisdiction of the district court is consistent with the principle of separation of powers between the legislature and the judiciary. *See* Rule 1-091 NMRA; *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976). The intent and effect of the 2013 amendments to Rule 1-059(B) and (E) NMRA, Rule L-050(B) NMRA, and Rule 1-052(E) NMRA is to expand the time for filing all motions challenging an entered judgment to thirty (30) days from entry of judgment with the exception of motions made pursuant to Rule 1-060 NMRA, which have separate, longer time limits.

Motions are no longer deemed denied if not ruled upon for thirty (30) days after submission. Rule 1-054.1 NMRA. *See* the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information. Instead, Rule 1-054.1 NMRA directs district courts to enter an order within sixty (60) days of submission. Id.

Normally, the party filing a post-judgment motion has to await entry of an order from the district court ruling on the motion before filing an effective notice of appeal because where a timely Rule 1-059(A) or (E) NMRA motion has been filed, the time for filing a notice of appeal runs from the date of entry of an order that expressly disposes of the motion. *Dickens v. Laurel Healthcare*, LLC, 2009-NMCA-122, ¶ 4, 147 N.M. 303, 222 P.3d 675 (notice of appeal filed prior to ruling on pending Rule 1-059(E) NMRA motion is premature and time for filing notice of appeal does not begin to run until order is entered resolving Rule 1-059(E) NMRA motion). A party who makes a timely Rule 1-059 (A) or (E) NMRA motion, or a motion pursuant to Section 39-1-1 NMSA 1978, may thereafter prefer to forgo an express ruling on the motion, *see* Rule 12-216(A) NMRA ("[N]or is it necessary to file a motion for a new trial to preserve questions for review."), and, instead, start the appellate process. Appellate Rule 12-201(D)(3) NMRA provides that a Rule 1-059 NMRA movant may file a notice of withdrawal of the motion, thus affecting the time for filing a notice of appeal as provided in Rule 12-201(D)(3) NMRA.

Under Rule 12-201 (D)(4) NMRA, a timely filed notice of appeal does not divest the district court of jurisdiction to dispose of any timely filed motion under Rules 1-050, 1-052, or 1-059 NMRA, or a Rule 1-060 NMRA motion filed within thirty (30) days after the filing of a judgment. The notice of appeal becomes effective when the last such motion is disposed of expressly by an order of the district court, is automatically denied, or is withdrawn.

Rule 1-059 NMRA formerly provided that the moving party "serve" a Rule 1-059 NMRA motion within the time provided by the rule. To make this rule consistent with Rule 1-050 NMRA, Rule 1-052 NMRA, and Section 39-1-1 NMSA 1978, Rule 1-059 NMRA now provides that the motion must be "filed" within thirty (30) days. *See* Rule 1-050 NMRA (requiring "filing" within time set by rule); Rule 1-052(D) NMRA (formerly requiring that motion be "filed" within time set by rule but now requiring that motion be "filed" by deadline); Section 39-1-1 NMSA 1978 (requiring motion to be "filed" within time period set by statute).

See the Committee Commentary for 2006 Amendment to Rule 1-054.1 NMRA for additional information.

[As amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013.]

1-060. Relief from judgment or order.

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

B. **Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.** On motion and on such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order, or proceeding for the following reasons:

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

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 1-059 NMRA;

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

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment, including failure of a party who was subject to the provisions of Rule 1-009(J) NMRA to comply with Rules 1-009(J)(2) and 1-017(E) NMRA, and to substantially comply with Form 4-226 NMRA. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one (1) year after the judgment, order, or proceeding was entered or taken. A motion under this paragraph does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the proceeding for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[As amended by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017.]

Committee commentary. — Under Rule 12-201(D)(4) NMRA, a timely filed notice of appeal does not divest the district court of jurisdiction to dispose of any timely filed motion under Rules 1-050, 1-052, or 1-059 NMRA, or a Rule 1-060 NMRA motion filed within thirty (30) days after the filing of a judgment. The notice of appeal becomes effective when the last such motion is disposed of expressly by an order of the district court, is automatically denied, or is withdrawn.

2016 amendment

Deutsche Bank Nat'l Trust Co. v. Johnston, 2016-NMSC-013, ¶ 34, 369 P.3d 1046 provides that a judgment "is not *voidable* under Rule 1-060(B) [NMRA] due to a lack of prudential standing." (Emphasis added). The amendment to Rule 1-060(B)(6) provides a ground for relief in consumer debt litigation separate from the relief from voidable judgments under Rule 1-060(B)(4).

Rule 1-060(B)(6) now provides that non-compliance with the requirements of Rule 1-009(J)(2) NMRA or Rule 1-017(E) NMRA or the failure to have substantially complied with Form 4-226 NMRA can provide a basis for granting relief from a judgment entered in a case controlled by Rule 1-009(J). The addition of this language provides a ground for relief but does not compel the district court to grant relief in every case in which the movant shows non-compliance with these consumer debt provisions. In addition to the requirement of Rule 1-060(B)(6) that the movant file the motion within a reasonable time, the movant must also demonstrate that it has a meritorious defense. *See Rodriguez v. Conant*, 1987-NMSC-040, ¶ 18, 105 N.M. 746, 737 P.2d 527. When these requirements are met, the court may exercise discretion to determine whether intervening equities or other considerations outweigh the desire "that the ultimate result will address the true merits and substantial justice will be done." *Phelps Dodge Corp. v. Guerra*, 1978-NMSC-053, ¶¶ 15, 20, 21, 92 N.M. 47, 582 P.2d 819.

In contrast, a Rule 1-060(B)(4) motion to void the judgment can be brought at any time, does not permit the trial court to exercise discretion to deny the motion, *Classen v. Classen*, 1995-NMCA-022, ¶¶ 10, 13, 119 N.M. 582, 893 P.2d 478, and does not require proof of a meritorious defense. *Peralta v. Heights Med. Ctr., Inc*., 485 U.S. 80, 86-87, 108 S. Ct. 896, 900, 99 L. Ed. 2d 75 (1988).

[Adopted by Supreme Court Order No. 13-8300-032, effective in all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 16-8300-031, effective for all cases pending or filed on or after July 1, 2017.]

1-061. Harmless error.

No error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

1-062. Stay of proceeding to enforce a judgment.

A. **Stay; in general.** Except as provided in these rules, execution may issue upon a judgment and proceedings may be taken for its enforcement upon the entry thereof unless otherwise ordered by the court. Unless otherwise ordered by the court, an interlocutory or final judgment in an action for an injunction or in a receivership action shall not be stayed during the period of its entry and until an appeal is taken or during

the pendency of an appeal. The provisions of Paragraph C of this rule govern the suspending, modifying, restoring or granting of an injunction during the pendency of an appeal.

B. **Stay on motion for new trial or for judgment.** In its discretion and on such conditions for the security of the adverse party as are proper, the court may stay the execution of or any proceedings to enforce a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment made pursuant to Rule 1-059 NMRA, or of a motion for relief from a judgment or order made pursuant to Rule 1-060 NMRA, or of a motion for judgment in accordance with a motion for a directed verdict pursuant to Rule 1-050 NMRA, or of a motion for amendment to the findings or for additional findings made pursuant to Paragraph D of Rule 1-052 NMRA.

C. **Injunction and certain special proceedings.** When an appeal is taken from an interlocutory or final judgment granting, dissolving or denying an injunction, the court in its discretion may suspend, modify, restore or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party. In all actions of contested elections, mandamus, removal of public officers, quo warranto or prohibition, it shall be discretionary with the court rendering judgment to allow a supersedeas of the judgment, and if the appeal is allowed to operate as a supersedeas it shall be upon such terms and conditions as the court deems proper.

D. **Stay upon appeal.** When an appeal is taken, the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in Paragraphs A and C of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the district court. The bond shall be conditioned for the satisfaction of and compliance with the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award. The surety, sureties or collateral securing such bond, and the terms thereof, must be approved by and the amount fixed by the district court. If a bond secured by personal surety or sureties is tendered, the same may be approved only on notice to the appellee. Each personal surety shall be required to show a net worth at least double the amount of the bond. When the judgment is for the recovery of money, the amount of the bond shall be such sum as will cover the whole amount of the judgment remaining unsatisfied, plus costs, interest and damages for delay. In any event, in determining the sufficiency of the surety and the extent to which such surety shall be liable on the bond, or whether any surety shall be required, the court shall take into consideration the type and value of any collateral which is in, or may be placed in, the custody or control of the court and which has the effect of securing payment of and compliance with such judgment.

E. **Stay in special instances.** When an appeal is taken by the state or an officer or agency thereof, or by direction of any department of the state, or by any political subdivision or institution of the state, or by any municipal corporation, the taking of an appeal shall, except as provided in Paragraphs A and C of this rule, operate as a stay.

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

G. **Writs of error.** Upon allowance of a writ of error, the district court which adjudged or determined the cause shall, unless the Supreme Court or the justice thereof issuing the writ shall otherwise order, have the same powers, authority and duties with reference to the supersedeas and stay as in the case of an appeal. The time within which supersedeas bond may be filed shall be the same as in the case of appeals, and shall run from the date the writ of error is allowed in lieu of the date notice of appeal is filed. The authority of the district court to extend such time shall be the same, and subject to the same limitations, as in case of appeal.

H. **Stay of judgment as to multiple claims or multiple parties.** When final judgment has been entered under the conditions stated in Paragraph B of Rule 1-054 NMRA, the court may stay enforcement of that judgment until the entering of a subsequent judgment or judgments and may prescribe such conditions as are necessary to secure the benefit thereof to the party in whose favor the judgment is entered.

[As amended, effective August 1, 1989; January 1, 1996; as amended by Supreme Court Order No. 08-8300-032, effective November 17, 2008.]

1-063. Inability of a judge to proceed.

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness.

[As amended, effective January 1, 1995.]

ARTICLE 8
Provisional and Final Remedies and Special Proceedings

1-064. Seizure of person or property.

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state.

1-065. Writs issued by district courts.

A. **Execution, possession and attachment.** Writs of execution, writs of possession issued pursuant to Section 42-4-12 NMSA 1978 and writs of attachment directed to land or an interest in land (other than rents, issues and profits thereof) may be issued by the clerk of the district court in proper cases without endorsement of approval of the district judge.

B. **Approval.** All writs issued by the district courts other than those enumerated in Paragraph A of this rule and Rules 1-065.1 and 1-065.2 NMRA may be issued only upon the express written approval of the district judge endorsed on the writ. All writs shall be signed by the clerk or deputy clerk of the district court and shall bear the court seal. In instances where written approval of the district judge is required, the procedure set out in Paragraphs C through I of this rule shall be followed.

C. **Application.** Application for the writ shall be by verified petition filed with the district court accompanied by the proposed form of writ with a copy of the petition appended as an exhibit.

D. **Contents.** The petition shall set forth the following:

(1) a statement of the facts showing venue and jurisdiction of the court in which the writ is sought, and the right or standing of the filing party;

(2) if the respondent is a public officer, board or tribunal purporting to act in the discharge of official duties, the names of the real parties in interest;

(3) the grounds upon which the petition is based and the facts required by the substantive law for issuance of the writ, stated in concise form; and

(4) a concise statement of the relief sought.

E. **Form.** The writ shall be in lieu of summons. The form of writ shall be in the name of the State of New Mexico, shall contain the caption of the case, the name and address of petitioner's attorney, if any, otherwise petitioner's address, shall direct the respondent or respondents to serve and file a responsive pleading within a time specified in the writ, and, if a date for hearing is set, the date, time and place when hearing will be held. The writ shall further state in concise form the relief sought, but other matters set forth in the petition, copy of which is annexed to the writ, need not be included in the writ. If the date for service of a responsive pleading and the date for hearing are the same, the writ shall so state. No peremptory writ shall be issued unless a date, not later than ten (10) days

after its issuance, is set for a hearing at which it may be challenged, and any hearing date so fixed may be advanced upon motion of any respondent.

F. **Responsive pleading; hearing.** The date set in the writ for responsive pleading or hearing shall be not earlier than seven (7) days following date of issuing the writ unless, from the verified petition or affidavit filed with the petition, the court shall determine that unreasonable loss or hardship is likely to result unless an earlier date is set, in which event determination of the court specifying the particular loss or hardship must be set forth in the writ.

G. **Seizure of property.** Prejudgment writs of attachment may be issued upon application of a party pursuant to Sections 42-9-1 through 42-9-39 NMSA 1978. No prejudgment writ may be issued directing the immediate seizure, sequestration or attachment of personal property, tangible or intangible, and no peremptory writ may be issued, without written or oral notice to the adverse party unless:

(1) it clearly appears from specific facts shown by affidavit or the verified petition that immediate and irreparable injury, loss or damage will result to the petitioner before the adverse party can be heard in opposition;

(2) if the party is a natural person, notice of a right to claim exemptions has been given in accordance with Paragraph J of this rule; and

(3) the petitioner's attorney certifies to the court in writing the efforts, if any, that have been made to give notice and the reasons supporting the petitioner's claims that notice should not be required. Further, no such writ may be issued except upon the giving of security, in amount and form satisfactory to the court, for the payment of such costs and damages as may be incurred or suffered by the adverse party; provided, however, that for good cause shown and to be recited in the writ, the court may waive the furnishing of security unless the same is otherwise required by law.

H. **Service.** Service of a copy of the writ, with copy of the petition annexed, shall be made upon all adverse parties forthwith. For purposes of this paragraph the term "adverse parties" shall include the real parties in interest required to be named in the petition pursuant to Subparagraph (2) of Paragraph D of this rule.

I. **Defenses; service.** In cases where the date set for serving a responsive pleading or for hearing is less than thirty (30) days after service all defenses, including those otherwise available by motion, shall be included in one single pleading and, if service by mail is utilized, service shall not be deemed complete until three (3) days after mailing. In all other cases the rules generally applicable to pleadings and service thereof shall govern.

J. **Exemptions; how claimed.** Exemptions of personal property provided by Sections 42-10-1 to 42-10-7 NMSA 1978 also apply to attachment proceedings. If the party is a natural person, notice of a right to claim exemptions shall be given. A claim of

exemption may be filed and served in the same manner and time as required in execution proceedings. The petitioner may dispute the claimed exemption in the same manner and time provided for a dispute on a claim of exemption in an execution proceeding. If the petitioner disputes the claimed exemption, the court shall proceed in the manner provided for hearings on claims of exemptions in execution proceedings.

[As amended, effective January 1, 1996.]

1-065.1. Writs of execution.

A. **Issuance of writs of execution.** Unless the judgment has been stayed, on the filing of a timely application, the clerk of the court shall issue a writ of execution for seizure of property to satisfy a judgment on an underlying dispute:

(1) if the judgment debtor is not a natural person, at any time after the filing of the judgment; or

(2) if the judgment debtor is a natural person:

(a) on filing of either a certificate by an attorney for the judgment creditor or an affidavit by the judgment creditor stating that:

(i) the judgment creditor served the judgment debtor with a notice of right to claim exemptions as required by this rule; and

(ii) the judgment debtor has not filed a claim of exemption for the property to be seized and sold as provided by this rule;

(b) on entry of an order finding that the property to be seized and sold is not exempt from execution; or

(c) on filing of a waiver of the right to claim a statutory exemption from execution. The judgment debtor's written waiver shall specifically describe the property that may be seized and sold to satisfy the debt.

B. **Service of notice of right to claim exemptions from execution.** If the judgment debtor is a natural person, no later than ten (10) days before the date of seizure of property to be sold under a writ of execution, the judgment creditor shall serve on each judgment debtor a notice of right to claim exemptions and a claim of exemption form in the following manner:

(1) if the judgment debtor has entered an appearance in the proceeding, service shall be made and proof of service filed with the court in the manner provided by Rule 1-005 NMRA;

(2) if the judgment debtor has not entered an appearance in the proceeding, service shall be made and return of service filed in the same manner as provided by Rule 1-004 NMRA for service of the summons and complaint; or

(3) if service cannot be made on the judgment debtor under Subparagraphs (1) or (2) of this Paragraph, service shall be made on the judgment debtor in a manner reasonably calculated to ensure actual notice of the right to claim exemptions.

C. **Claim of exemptions from execution.** Within ten (10) days after service of a notice of right to claim exemptions, a judgment debtor who is a natural person may claim a statutory exemption by filing a claim of exemption form with the court.

D. **Service of claim of exemption.** At the time of filing of the claim of exemption, the judgment debtor shall serve a copy of the claim of exemption on the judgment creditor under Rule 1-005 NMRA.

E. **Failure to file claim of exemption.** If the judgment debtor fails to file a claim of exemption within ten (10) days after service of the notice of the right to claim exemptions, the judgment debtor shall be deemed to have waived the right to claim an exemption. Notwithstanding the foregoing, for actions filed on or after July 1, 2023, it shall not be necessary for a judgment debtor to assert an exemption to the first two thousand four hundred dollars ($2,400.00) held in a depository or investment account. Nor shall any failure to assert a claim of exemption constitute waiver of any protections for Unemployment Compensation under Section 51-1-37 NMSA 1978.

F. **Dispute of claimed exemption.** Within ten (10) days after service of a claim of exemption on the judgment creditor under Paragraph D of this rule, the judgment creditor may dispute any claimed exemption and request a hearing. If the judgment creditor does not dispute a claimed exemption, the property shall be exempt and the judgment creditor may proceed against any other property as provided in Paragraph A of this rule. If the judgment creditor files a notice of dispute and request for hearing, the judgment creditor shall at the time of filing of the notice serve a copy on the judgment debtor.

G. **Notice of hearing on dispute.** If the judgment creditor files a notice of dispute and request for hearing, the court shall promptly give notice of the date and time of the hearing to the parties.

H. **Hearing on disputed claim of exemptions.** Within ten (10) days after the filing of a notice of dispute and request for hearing, the court shall hold a hearing on the disputed claim. At the hearing the court may determine the merits of the dispute or may postpone decision pending such discovery as may be required to determine the status of the property.

I. **Issuance and executions of writ.** A writ of execution issued under Paragraph A of this rule shall be served by the sheriff within sixty (60) days from the date issued. If

an execution is not served within that time, on request of the judgment creditor, a second or subsequent writ shall be issued by the clerk. A writ of execution issued under this rule may be served in the manner provided by law.

J. **Sheriff's sale.** A sale shall be conducted in the manner provided by law.

K. **Form of writs, notices and claim of exemptions.** Applications for writs of execution, writs of execution, answers, notices of right to claim exemptions, claims of exemptions, notices of dispute of claimed exemptions and request for hearing, and judgments shall be substantially in the form approved by the Supreme Court.

[Withdrawn and new rule adopted, effective January 1, 1996; as amended by Supreme Court Order No. S-1-RCR-2024-00107, effective for all cases pending or filed on or after December 31, 2024.]

Committee commentary. — Applications for writs of garnishment or execution are timely if filed "within seven years after the rendition or revival of the judgment" in the case. NMSA 1978, Section 39-1-20 (1971). But no writ of garnishment or execution may issue "after fourteen years from the date of the original judgment upon which it is founded." NMSA 1978, Section 37-1-2 (2021).

[Adopted by Supreme Court Order No. S-1-RCR-2024-00107, effective for all cases pending or filed on or after December 31, 2024.]

1-065.2. Garnishment.

A. **Garnishment procedure.** After the filing of the judgment on the underlying dispute and on timely application of the judgment creditor, the clerk of the court shall issue a writ of garnishment.

B. **Service of writ of garnishment.** A writ of garnishment issued under this rule shall be served by the judgment creditor on the garnishee wherever the garnishee may be found in the State of New Mexico. The writ shall be served and return of service filed in the same manner as provided by Rule 1-004 NMRA for service of the summons and complaint. At the same time as the writ of garnishment is served on the garnishee, a copy of the writ of garnishment shall be sent to the judgment debtor's last known address, and, if counsel remains of record in the proceeding, to the last known address of the judgment debtor's counsel. A separate certificate of service shall be filed by the judgment creditor indicating transmission of the writ on the judgment debtor.

C. **Service of additional forms on garnishee.** In addition to the writ, the following forms shall be served by the judgment creditor on the garnishee:

(1) a copy of the application for writ of garnishment and the writ of garnishment; and

(2) unless the garnishment is for wages, a copy of the notice of right to claim exemptions and a copy of the claim of exemption form; and

(3) a copy of the answer by garnishee form approved by the New Mexico Supreme Court.

D. **Answer by garnishee.** The garnishee shall answer the writ of garnishment within twenty (20) days of service as required by Section 35-12-4 NMSA 1978.

E. **Appearance by garnishee.** A garnishee may appear in person in any garnishment proceeding. If the garnishee is a partnership, the garnishee may appear by one of its general partners. If the garnishee is a corporation, an officer, director, or general manager of the corporation may answer the writ; however, any other appearance shall be through an attorney representing the garnishee corporation. The court shall award reasonable attorney fees and costs to the garnishee.

F. **Service on judgment debtor by garnishee.** On or before the fourth business day after service of the writ of garnishment, the garnishee shall mail or otherwise deliver to each named judgment debtor or to the judgment debtor's attorney of record a copy of the forms served on the garnishee by the judgment creditor under Paragraph C of this rule.

G. **Exemption from garnishment.** A judgment debtor who is a natural person:

(1) shall receive an exemption from garnishment of wages to the extent provided by law; and

(2) may claim a statutory exemption from garnishment other than wages by filing with the court a claim of exemption within ten (10) days after service by the garnishee of notice of the right to claim exemptions.

H. **Service of the claim of exemption.** The judgment debtor shall serve a copy of the completed and signed claim of exemption form on the judgment creditor and the garnishee in the manner provided by Rule 1-005 NMRA.

I. **Failure to file claim of exemption other than wages.** If the judgment debtor fails to file a claim of exemption within ten (10) days after service of the notice of the right to claim exemptions, the judgment debtor shall be deemed to have waived the right to claim a statutory exemption other than wages. Notwithstanding the foregoing, for actions filed on or after July 1, 2023, it shall not be necessary for a judgment debtor to assert an exemption to the first two thousand four hundred dollars ($2,400.00) held in a depository or investment account. Nor shall any failure to assert a claim of exemption constitute waiver of any protections for Unemployment Compensation under Section 51-1-37 NMSA 1978.

J. **Notice of dispute.** Within ten (10) days after service on the judgment creditor of a claim of exemption, the judgment creditor may dispute any claimed exemption by filing a notice of dispute and request for hearing with the court. If the judgment creditor fails to file the notice of dispute and request for hearing within the time permitted, the judgment debtor's claim of exemption is granted. If the judgment creditor files a notice of dispute, the judgment creditor shall at the time of filing of the notice serve a copy of the notice of dispute and request for hearing on the judgment debtor.

K. **Notice of hearing on dispute.** If the judgment creditor files a notice of dispute and request for hearing, the court shall promptly give notice of the date and time of the hearing to the judgment creditor, garnishee and the judgment debtor. The judgment creditor shall serve a copy of the notice of dispute and request for hearing on the judgment debtor and the garnishee.

L. **Hearing.** A hearing on the claim of exemption shall be held within ten (10) days after the filing of a notice of dispute and request for hearing. At the hearing, the court must determine the merits of the dispute unless the court postpones decision pending such discovery as may be required to determine the status of the property.

M. **Judgment on writ of garnishment.** If a notice of dispute and request for hearing is filed under this rule, judgment on the writ of garnishment shall not enter until a hearing has been held on the dispute. If the court finds that the property is not exempt from garnishment, the court shall enter a judgment on the writ of garnishment requiring the garnishee to turn over to the judgment creditor the property or amount of money set forth in the judgment.

N. **Form of writs, notices and claim of exemptions.** Applications for writs of garnishment, writs, answers, notices of right to claim exemptions, claims of exemptions, notices of dispute of claimed exemptions and request for hearing, and judgments shall be substantially in the form approved by the Supreme Court.

[Approved, effective January 1, 1996; as amended, effective February 15, 1999; as amended by Supreme Court Order No. S-1-RCR-2024-00107, effective for all cases pending or filed on or after December 31, 2024.]

Committee commentary. — Applications for writs of garnishment or execution are timely if filed "within seven years after the rendition or revival of the judgment" in the case. NMSA 1978, Section 39-1-20 (1971). But no writ of garnishment or execution may issue "after fourteen years from the date of the original judgment upon which it is founded." NMSA 1978, Section 37-1-2 (2021).

[Adopted by Supreme Court Order No. S-1-RCR-2024-00107, effective for all cases pending or filed on or after December 31, 2024.]

1-066. Injunctions and receivers.

A. **Preliminary injunctions; appointment of receivers; notice; bond; hearing.**

(1) No preliminary injunction shall be issued nor shall any receiver be appointed without notice to the opposite party.

(2) Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subparagraph shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

B. **Temporary restraining order; notice; hearing; duration.** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten (10) days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period, except that, if a party adverse to the party obtaining a restraining order shall disqualify the judge who would otherwise have heard the matter, then the order shall be deemed extended until ten (10) days after the designation of another judge or until such earlier time as may be fixed by the judge so designated. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two (2) days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event, the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

C. **Security.** No restraining order, preliminary injunction or appointment of a receiver shall issue or occur except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, or whose property may be found to have been thereby wrongfully placed in the hands of a receiver so appointed; provided, however, that for good cause shown and to be recited in the order made, the court or judge may waive the furnishing of security.

D. **Security; proceedings against sureties.** Whenever these rules require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on 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 sureties, if their addresses are known.

1-067. Deposit in court.

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing.

1-068. Offer of settlement.

A. **Offer of settlement.** Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until one hundred twenty (120) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

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

incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

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

B. **Domestic relations actions excluded.** This rule shall not apply to domestic relations actions.

C. **Awards not cumulative.** In those cases where a claimant would be entitled to double costs under Rule 1-068 and also entitled to interest pursuant to the statute, the court should award double costs or interest plus the costs awarded to the prevailing party pursuant to Rule 1-054(D)(2) NMRA, but not both statutory interest and double costs.

[As amended, effective August 1, 2003.]

Committee commentary for 2003 amendment.

Rule 1-068 formerly was titled "Offer of judgment" and required that the accepting party "allow judgment to be taken against him for the money or to the effect specified in the offer." Rule 1-068 NMRA (superseded). Requiring that a judgment be entered for the amount of the agreed-upon offer was a disincentive to some litigants to make offers because those litigants preferred to make the Rule 1-068 offer, tender full payment of the amount of the offer and then obtain a dismissal of the lawsuit with prejudice pursuant to Rule 1-041(A) NMRA when the offer and tender were accepted. The rule now titles the procedure an "Offer of settlement" to make explicit that when either party makes an offer of settlement which is accepted, the party who thereby agreed to make a payment may tender full payment of the agreed-upon sum before a judgment is entered. When this is done, the court should enter a judgment of dismissal with prejudice rather than a money judgment in the amount specified in the offer of settlement. Because the form of judgment will depend upon whether full payment is tendered before the accepted offer results in a judgment, the offer of settlement shall not be conditioned on the form that the judgment might take, but only upon the substantive content of the settlement proposal.

This rule also applies to actions seeking relief other than money damages. *See e.g., Assoc. of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd.*, 58 P.2d 608 (Hawaii 2002) ("[F]ederal courts have overwhelmingly applied Rule 68 to cases dealing with equitable relief.").

Rule 1-068 previously permitted only a party defending against a claim to make an offer of judgment. At least sixteen states have rules that allow the claimant as well as the defending party to do so. Allowing either party to make offers of settlement increases the likelihood that settlement will occur and provides equality of opportunity to all parties to initiate the settlement process.

Rule 1-068 has always provided that when a defending party's offer of judgment is not accepted and the claimant fails to obtain a judgment more favorable than the offer, the claimant must pay the costs of the defending party incurred after the making of the offer. The rule continues to provide this remedy. Rule 1-068 also now makes explicit what has been the universal construction of the rule - that when the claimant does not obtain a judgment more favorable than the offer, the claimant not only must pay the defending party's costs, but also is not entitled to its costs incurred after the making of the offer. *E.g., Crossman v. Maroccio*, 806 F.2d 329, 333 (1st Cir. 1986), cert. denied, 481 U.S. 1029 (1987); *see Moore's Federal Practice Digest* Par. 68.08[2] (3rd ed. 2002).

When a claimant's offer of settlement is declined and the claimant obtains a judgment greater than the offer, the appropriate sanction is more complicated. Because the claimant is normally entitled to costs if the claimant prevails in obtaining a judgment in any amount, *see* Rule 1-054(D)(1) NMRA, an award only of costs would not provide additional incentive for the defending party to accept the offer. To provide additional incentive, the rule provides that costs incurred by the claimant after the making of the offer of settlement shall be doubled and the doubled amount awarded as costs.

The plaintiff often has the opportunity for extensive investigation and preparation of the claim prior to filing suit. The claimant thus may be in a position to make an offer of settlement very early in the proceedings, before the defending party has had a fair opportunity through discovery to determine the relative merits of claimant's case. For this reason, the rule provides that an offer of settlement may not be made by a claimant until one hundred twenty days after the service of a responsive pleading by the defending party who thus has additional time to evaluate the offer before deciding whether to accept or reject it. For example, if the claimant is the plaintiff, the time for making an offer begins upon service of the answer by the defendant. If the claimant is a defendant who has filed a counterclaim, the time for making an offer begins upon service of the plaintiff's reply to the counterclaim. *See* Rule 1-007(A) NMRA.

"Costs" awardable pursuant to this rule are those provided for in Rule 1-054(D). Attorney's fees are not included in Rule 1-054(D), *see* Rule 1-054(E) NMRA, and are excluded from the cost-shifting provisions of this rule even if attorney's fees are included as costs for other purposes or in other contexts. *E.g.*, 28 U.S.C. Sec. 1988(b) (attorney's fees included as costs awardable in cases involving civil rights actions). While a cost award is mandatory under the conditions specified in Rule 1-068, the amount of those costs is separately determined by the trial court pursuant Rule 1-054(D). *See Key v. Chrysler Motors Corp.*, 2000-NMSC-010, 128 N.M. 739, 998 P.2d 575.

This rule does not apply to domestic relations actions because such actions frequently provide for the award of attorney's fees in the discretion of the court and this provides sufficient incentive for parties in domestic relations cases to seek to settle their disputes. The excluded "domestic relations actions" are those described in the Committee commentary to Rule 1-120 NMRA.

A statute, Section 56-8-4(B) NMSA 1978, authorizes the court to award interest to a plaintiff under certain circumstances if the defendant fails to make reasonable and timely offers of settlement to the plaintiff. This statute operates differently from Rule 1-068 NMRA in that the statute penalizes a defendant for not making offers rather than providing an incentive for plaintiffs to make offers of settlement. Nonetheless, awarding plaintiffs both double costs under this rule and interest pursuant to the statute is unduly punitive.

The broader terms "claimant" and "defending party" are used in the Rule instead of "plaintiff" and "defendant" because, for example, when a defendant files a counterclaim, the defendant also become a claimant and the plaintiff also becomes a defending party.

1-069. Judgment; supplementary proceedings.

A. **Examination; subpoena; hearing.** Upon request of the judgment creditor or a successor in interest, the clerk shall issue a subpoena directing any person with knowledge that will aid in enforcement of or execution on the judgment, including the judgment debtor, to appear before the district court to respond to questions concerning that knowledge. The subpoena shall be served in the same manner as other subpoenas except that it shall be served not less than three (3) days prior to the date the examination is to be conducted.

B. **Deposition in lieu of examination; other discovery.** In lieu of such an examination before the court, the judgment creditor or a successor in interest may obtain discovery from any person, including the judgment debtor, in any manner provided in these rules.

[As amended, effective January 1, 1997.]

1-070. Judgment for specific acts; vesting title.

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of

any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

1-071. Process in behalf of and against persons not parties.

When an order is made in favor of a person who is not a party to the action, he may enforce obedience to the order by the same process as if he were a party; and, when obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party.

1-071.1. Statutory stream system adjudication suits; service and joinder of water rights claimants; responses.

A. **Joinder by sections.** If the court determines, upon its own motion or motion by a party, that the division of the stream system into subsections would promote the speedy and efficient prosecution of a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978, the court may order the plaintiff to join water rights claimants by stream system subsections in accordance with the division ordered by the court.

B. **Service and joinder.** Upon the court's order, the plaintiff shall join water rights claimants as defendants to an adjudication by serving them with a proposed consent order or other document requiring a response by the claimant. The proposed consent order or other document served on a claimant pursuant to this paragraph shall contain a conspicuous notification of the claimant's obligation to respond and such additional information about the adjudication as the court deems appropriate. The form of the foregoing documents shall be approved by the court. Service of the foregoing documents shall be made pursuant to Rule 1-004 NMRA, except that the summons shall be issued and signed by the plaintiff. Service of the foregoing documents or execution of the waiver of service shall join the claimant as a defendant to the adjudication, and no further order of the court shall be required for joinder.

C. **Responses.** Unless the court orders otherwise, claimants shall respond to any proposed consent order or other document served as set forth in Paragraph B of this rule within the deadlines set, and by the procedures ordered, by the court. A claimant who fails to respond to a proposed consent order within the time period set by the court may be subject to the entry of a default judgment pursuant to Rule 1-055 NMRA, which judgment will adjudicate the claimant's water rights as proposed by the plaintiff in the proposed consent order. If the document requiring a response is not a proposed consent order, the default judgment will adjudicate the claimant's rights as set forth in a hydrographic survey in compliance with Section 72-4-16 NMSA 1978, unless the court for good cause orders otherwise.

[Provisionally approved by Supreme Court Order No. 07-8300-013 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order No. 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; as amended by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

1-071.2. Statutory stream system adjudication suits; stream system issue and expedited *inter se* proceedings.

A. **Stream system issue proceedings.**

(1) A stream system issue is any issue in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 the resolution of which could directly affect the water rights of all or a significant number of water rights claimants, regardless of whether the claimants have been served and joined as defendants.

(2) At any time during the adjudication prior to the notice of commencement of *inter se* proceedings, any party may file a motion requesting that the court designate an issue as a "stream system issue". The motion shall include a short, concise description of the issue and the reasons why such a proceeding is necessary and identify the section or sections of the adjudication affected by the issue. The court *sua sponte* may consider designating a stream system issue.

(3) The court shall conduct a hearing to determine whether to designate an issue as a stream system issue. The court shall designate an issue as a stream system issue if

(a) the resolution of the issue could directly affect the water rights of all, or a significant number of, water rights claimants, whether served and joined as defendants or not; or

(b) the resolution of the issue in a manner that did not bind all water rights claimants on the stream system that have been joined or in the future might be joined, would create a substantial risk of the following:

(i) inconsistent or varying decisions of an issue the determination of which could directly affect the water rights of other defendants or claimants; or

(ii) a decision that, as a practical matter, would be dispositive of an issue relating to the subject matter of the adjudication and preclude other claimants similarly situated from challenging that decision.

(4) If the court designates an issue as a stream system issue, it shall enter an order defining the scope, timing and procedures to be followed in the stream system

issue proceeding. Notice of the proceeding pursuant to Paragraph C of this rule shall be given to all claimants, regardless of whether they have been served and joined as defendants, in the sections of the stream system designated by the court. Unless the court orders otherwise or the parties otherwise agree, the movant requesting designation of the stream system issue shall provide the notice.

B. **Expedited *inter se* proceedings.**

(1) An expedited *inter se* proceeding is a proceeding in which a water rights claim is resolved in a stream system adjudication suit conducted pursuant to Section 72-4-17 NMSA 1978 both as between the plaintiff and the defendant and as among the defendant and other water rights claimants.

(2) The plaintiff or any claimant may file a motion requesting that the court designate an expedited *inter se* proceeding. The motion shall include a short, concise description of the defendant's claims and the reasons why such a proceeding is necessary. The court *sua sponte* may consider designating an expedited *inter se* proceeding.

(3) The court shall conduct a hearing to determine whether to conduct an expedited *inter se* proceeding, and may proceed if it finds that such a proceeding will promote judicial efficiency and expeditious completion of the adjudication. Among the factors the court shall consider are the following:

(a) whether failure to proceed will injure the party asserting the claim;

(b) whether proceeding will injure those parties opposing the claim; and

(c) the expense and delay resulting from the failure to proceed.

(4) If the court finds that the criteria for an expedited *inter se* proceeding exist, it shall enter an order defining the scope, timing and procedures to be followed in the proceeding. Notice of the proceeding pursuant to Paragraph C of this rule shall be given to all claimants, regardless of whether they have been served and joined as defendants, in the sections of the stream system designated by the court. Unless the court orders otherwise or the parties otherwise agree, the movant requesting designation of the expedited *inter se* proceeding shall provide the notice.

C. **Notice.** Notwithstanding Rule 1-004 NMRA, notice of a stream system issue proceeding or an expedited *inter se* proceeding shall be given in accordance with this paragraph. Notice of a stream system issue proceeding or an expedited *inter se* proceeding shall be given to all claimants, regardless of whether they have been served and joined as defendants, claiming water rights within the section or sections of the stream system identified by the court. Notice shall be given by first class mail with proper postage to all known claimants whose names and addresses are reasonably ascertainable. For all unknown claimants and claimants whose addresses cannot

reasonably be determined, notice shall be given in a manner reasonably calculated under all the circumstances to apprise claimants of the proceeding and shall be approved by the court.

(1) To the extent they are relevant, the following records, if available, shall be consulted to identify persons who may claim the right to use waters of the identified section or sections of the stream system:

(a) an existing hydrographic survey, if sufficiently current to provide accurate information;

(b) the public records of the county assessor;

(c) the public records of the state engineer; and

(d) the public records of irrigation districts, acequias, water conservancy districts, and other water users' associations or commissions.

(2) Any claimant who desires to participate in a stream system issue proceeding or an expedited *inter se* proceeding shall file with the court and serve on the plaintiff a notice of intent to participate within the time prescribed by the court. Thereafter, the court shall conduct such scheduling conferences, hearings, and other proceedings as necessary to resolve the issues.

D. **Effect of proceeding.** Stream adjudications are special proceedings to determine the rights to use the waters of a stream system. An order resolving a stream system issue proceeding or an expedited *inter se* proceeding binds all water rights claimants regardless of whether they were served and joined as defendants, participated in, or received actual notice of the proceeding, provided notice was given in accordance with Paragraph C of this rule.

[Provisionally approved by Supreme Court Order No. 07-8300-013 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; as amended by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

1-071.3. Statutory stream system adjudication suits; annual joint working session.

A. **Joint working sessions in state adjudications.** Thirty (30) days before the end of each fiscal year, the judges, special masters, the state and other parties in each stream adjudication court shall coordinate and set a working session for the purpose of discussing common issues among all pending stream adjudications and resource needs

of each adjudication court. The judges presiding over state stream system adjudications shall invite judges and special masters presiding over federal stream system adjudications to participate.

B. **Report of state's priorities.** Thirty (30) days prior to the joint working session, the state shall file a report setting out the plaintiff's suggested priorities and its analysis of resources needed by the courts and the state for each adjudication pending in state court.

[Provisionally approved by Supreme Court Order No. 07-8300-013 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; approved by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

Committee commentary. — The annual joint working session is called to balance the demands of state and federal court adjudications with the personnel and financial resources available to the state engineer and the courts. While each adjudication court must manage its case to ensure expeditious resolution, case management plans must be realistic and based on current resource information. Each adjudication court must take care to monitor its case management to avoid unnecessarily undermining the progress in other pending adjudications.

Because of the prohibition against *ex parte* contacts between the state and the judiciary, and because other parties' substantive and procedural rights might be impacted by decisions reached in the joint working session, such sessions are to be held only after notice of the date, time and place.

1-071.4. Statutory stream system adjudication suits; ex parte contacts; general problems of administration.

Rule 21-209(A) NMRA of the Code of Judicial Conduct applies to stream adjudications, except that judges, special masters and members of their staff in accordance with this rule may communicate with the plaintiff with respect to matters not addressing the merits of any pending adjudication that relate to general problems of administration and management of a pending or impending adjudication or the accurate reporting of water rights claims in the court's records.

[Provisionally approved by Supreme Court Order No. 07-8300-013 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order No. 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; approved by Supreme Court Order No. 11-8300-027,

effective for new and pending cases on or after June 8, 2011; as amended by Supreme Court Order No. 13-8300-017, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — The unique nature of a stream system adjudication, including its complexity and size, require coordination between the courts and the state to effectively manage the adjudication. At the same time, the courts are regulated by the Code of Judicial Conduct's prohibition against ex parte communications concerning pending matters. This rule expressly permits the court to have limited ex parte contacts with the plaintiff for the purposes of general administration and management of the adjudication.

1-071.5. Statutory stream system adjudication suits; excusal or recusal of a water judge.

Each water judge in each judicial district, including judges assigned to stream system adjudications, whether judges *pro tempore* or sitting judges, are designated by the chief justice of the Supreme Court. Paragraph E of Rule 1-088 NMRA applies and water judges cannot be excused peremptorily. If there is an excusal for cause or a recusal, the chief justice shall reassign the water right matter to another designated water judge.

[Provisionally approved by Supreme Court Order No. 07-8300-013 for one year, effective June 13, 2007; provisionally approved by Supreme Court Order 08-8300 for one additional year, effective June 9, 2008; provisionally approved by Supreme Court Order No. 09-8300-015, for one additional year, effective June 9, 2009; provisionally approved by Supreme Court Order No. 10-8300-020, for one additional year, effective June 8, 2010; approved by Supreme Court Order No. 11-8300-027, effective for new and pending cases on or after June 8, 2011.]

Committee commentary. — This rule clarifies the applicability of Paragraph E of Rule 1-088 NMRA to water judges. Judges designated by the Supreme Court cannot be peremptorily excused.

1-072. Appeal from magistrate courts in trial de novo cases.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a civil action in the magistrate court may appeal, as permitted by law, to the district court of the county within which the magistrate court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the magistrate court clerk's office. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before

the judgment or order is filed in the magistrate court clerk's office, shall be treated as timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state, its political subdivisions or the nonprofit corporations authorized to be formed under the Educational Assistance Act [21-21A-1 NMSA 1978] in any such appeal.

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

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

(2) promptly filing with the magistrate court:

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

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

C. **Content of the notice of appeal.** The notice of appeal shall be substantially in the form approved by the Supreme Court. A copy of the magistrate court judgment or final order appealed from, showing the date of the judgment or final order, shall be attached to the notice of appeal filed in the district court.

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

(1) serve each party or such party's attorney in the proceedings in the magistrate court with a copy of the notice of appeal in accordance with Rule 1-005 NMRA; and

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 1-005 NMRA.

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

F. **Jury trial.** Any party may demand a jury trial by filing a demand and paying the jury fees as provided by Rule 1-038 NMRA. A demand for jury trial shall be filed at the time the notice of appeal is filed in the district court, but not later than:

(1) thirty (30) days after service of the notice of appeal on each party to the action; or

(2) ten (10) days after the last pleading is filed, if additional pleadings are filed pursuant to Paragraph I of this rule.

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

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

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

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

(4) any exhibits; and

(5) any transcript of the proceedings made by the magistrate court, either stenographically recorded or tape recorded. If the transcript of the proceedings is a tape recording, the magistrate court shall prepare and file with the district court a duplicate of the tape and index log.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy.

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

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

I. **Pleadings.** The complaint and other pleadings filed in the magistrate court shall be the complaint and pleadings in the district court. An amended complaint may be filed within thirty (30) days after service of the notice of appeal. An amended complaint shall be served in the manner provided by Rule 1-004 NMRA of these rules. If an amended complaint is filed, a responsive pleading shall be filed within thirty (30) days and served as provided by these rules.

J. **Procedure on appeal.** Unless otherwise provided by this rule, all other Rules of Civil Procedure for the District Courts shall apply to appeals from the magistrate court.

K. **Stay of proceedings to enforce a judgment.**

(1) When an appeal is taken, the appellant may obtain a stay of the proceedings to enforce the judgment by posting a supersedeas bond with the clerk of the magistrate court as provided in the Rules of Civil Procedure for the Magistrate Courts.

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

L. **Review of supersedeas.** At any time after an appeal is filed pursuant to Paragraph B of this rule, the district court may, upon motion and notice, review any action of, or any failure or refusal to act by the magistrate court dealing with supersedeas or stay. If the district court modifies the terms, conditions or amount of a supersedeas bond or if it determines that the magistrate court should have allowed supersedeas and failed to do so on proper terms and conditions, it may grant additional time within which to file in the district court a supersedeas bond complying with the requirements for a supersedeas bond set forth in the Rules of Civil Procedure for the Magistrate Courts. Any change ordered by the district court shall be certified by the clerk of the district court and filed with the magistrate court clerk by the party seeking the review.

M. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

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

(1) thirty (30) days after entry of the order disposing of the case;

(2) thirty (30) days after disposition of a motion for rehearing; or

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

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

P. **Appeal.** Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure. Any supersedeas bond approved by the magistrate court, or modified by the district court, shall continue in effect pending appeal to the Supreme Court or Court of Appeals, unless modified pursuant to Rule 12-207 of the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996; as amended by Supreme Court Order No. 19-8300-017, effective for all cases pending or filed on or after December 31, 2019.]

1-073. Appeal from metropolitan court on the record.

A. **Right of appeal.** A party who is aggrieved by the judgment or final order in a civil action in the metropolitan court may appeal, as permitted by law, to the district court of the county within which the metropolitan court is located. The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is filed in the metropolitan court clerk's office. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set forth above. A notice of appeal filed after the announcement of a decision, or return of the verdict, but before the judgment or order is filed in the metropolitan court clerk's office, shall be treated as timely filed. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed against the state, its political subdivisions or the nonprofit corporations authorized to be formed under the Educational Assistance Act [21-21A-1 NMSA 1978] in any such appeal.

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

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

(2) promptly filing with the metropolitan court:

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

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

C. **Content of the notice** of appeal. The notice of appeal shall be substantially in the form approved by the Supreme Court. A copy of the metropolitan court judgment or final order appealed from, showing the date of the judgment or final order, shall be attached to the notice of appeal filed in the district court.

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

(1) serve each party or such party's attorney in the metropolitan court proceedings with a copy of the notice of appeal in accordance with Rule 1-005;

(2) file proof of service with the clerk of the district court that a copy of the notice of appeal has been served in accordance with Rule 1-005 NMRA; and

(3) if evidentiary or factual matters are involved in the appeal, file with the clerk of the district court a certificate of the clerk of the metropolitan court that satisfactory arrangements have been made with the metropolitan court for preparation and payment for the transcript of the proceedings.

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

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

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

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

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

(4) any exhibits; and

(5) any transcript of the proceedings made by the metropolitan court, either stenographically recorded or tape recorded. If the transcript of the proceedings is a tape recording, the metropolitan court clerk shall prepare and file with the district court a duplicate of the tape and index log.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy.

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

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

H. **Statement of appellate issues.** A statement of appellate issues shall be filed with the district court as follows:

(1) the appellant's statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on appeal in the district court; and

(2) the appellee's response shall be filed and served within thirty (30) days after service of the appellant's statement of issues.

I. **Appellant's statement of appellate issues.** The appellant's statement of appellate issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings which shall indicate briefly the nature of the case, the course of proceedings, and the disposition of the metropolitan court. The summary shall include a short recitation of all facts relevant to the issues presented for review, with appropriate references to the record on appeal showing how the issues were preserved in the proceedings before the metropolitan court;

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

(4) a statement of the precise relief sought.

J. **Appellee's statement of appellate issues; response.** The appellee's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph I of this rule, except that a statement of the issues or a summary of the proceedings shall not be made unless the appellant's statement of issues or summary of the proceedings is disputed or is incomplete.

K. **References in statement of appellate issues.** References in the statement of appellate issues shall be to the pages of the record on appeal or, if the reference is to a tape recording, the approximate counter numbers of the tape as shown on the index log shall be used. If reference is made to evidence the admissibility of which is in

controversy, reference shall be to the place in the record on appeal at which the evidence was identified, offered, and received or rejected.

L. **Length of statements of appellate issues.** Except by permission of the court, the argument portion of the appellant's statement of appellate issues shall not exceed eight (8) pages. Except by permission of the court, the argument portion of appellee's response shall not exceed eight (8) pages.

M. **Briefs.** Briefs may be filed only by leave of the district court and upon such conditions as the court may direct.

N. **Oral argument.** Upon motion of a party or on the court's own motion, the court may allow oral argument.

O. **Scope of review.** To preserve a question for review it must appear that a ruling or decision by the metropolitan court was fairly invoked, but formal exceptions are not required, nor is it necessary to file a motion for a new trial to preserve questions for review. Further, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice the party. This paragraph shall not preclude the district court from considering jurisdictional questions or, in its discretion, questions involving:

(1) general public interest; or

(2) fundamental error or fundamental rights of a party.

P. **Stay of proceedings to enforce a judgment.**

(1) When an appeal is taken, the appellant may obtain a stay of the proceedings to enforce the judgment by posting a supersedeas bond with the clerk of the metropolitan court as provided in the Rules of Civil Procedure for the Metropolitan Courts.

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

Q. **Review of supersedeas.** At any time after an appeal is filed pursuant to Paragraph B of this rule, the district court may, upon motion and notice, review any action of, or any failure or refusal to act by the metropolitan court dealing with supersedeas or stay. If the district court modifies the terms, conditions or amount of a supersedeas bond or if it determines that the metropolitan court should have allowed supersedeas and failed to do so on proper terms and conditions, it may grant additional time within which to file in the district court a supersedeas bond complying with the requirements for a supersedeas bond set forth in the Rules of Civil Procedure for the

Metropolitan Courts. Any change ordered by the district court shall be certified by the clerk of the district court and filed with the metropolitan court clerk by the party seeking the review.

R. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

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

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

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

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

T. **Remand.** Upon expiration of the time for appeal from the final order or judgment of the district court, the district court shall remand the case to the metropolitan court for enforcement of the district court's judgment.

U. **Appeal.** Any aggrieved person may appeal from a judgment of the district court to the New Mexico Supreme Court or Court of Appeals, as authorized by law in accordance with the Rules of Appellate Procedure. Any supersedeas bond approved by the metropolitan court, or modified by the district court, shall continue in effect pending appeal to the Supreme Court or Court of Appeals, unless modified pursuant to Rule 12-207 of the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996.]

1-074. Administrative appeals; statutory review by district court of administrative decisions or orders.

A. **Scope of rule.** This rule governs appeals from administrative agencies to the district courts when there is a statutory right of review to the district court, whether by appeal, right to petition for a writ of certiorari, or other statutory right of review. This rule does not create a right to appeal. For purposes of this rule, an “agency” means any state or local government administrative or quasi-judicial entity.

B. **Rule inapplicable.** This rule does not apply to:

(1) reviews from administrative agencies when there is no statutory right. If there is no statutory right of appeal or statutory right to writ of certiorari, an aggrieved person may be entitled to a constitutional review of an administrative decision or order pursuant to Rule 1-075 NMRA of these rules;

(2) appeals under the Human Rights Act. These appeals are governed by Rule 1-076 NMRA of these rules;

(3) the review of decisions relating to unemployment compensation claims under the Unemployment Compensation Law. Appeals from decisions involving unemployment compensation claims are governed by Rule 1-077 NMRA of these rules; and

(4) matters relating to water rights under Article XVI, Section 5 of the New Mexico Constitution.

C. **Filing appeal.** When provided or permitted by law, an aggrieved party may appeal a final decision or order of an agency by:

(1) filing with the district court a notice of appeal with proof of service that a copy of the notice has been served in accordance with Subparagraph (1) of Paragraph F of this rule; and

(2) promptly filing with the agency a copy of the notice of appeal that has been endorsed by the clerk of the district court.

D. **Content of the notice of appeal.** The notice of appeal shall specify:

(1) each party taking the appeal;

(2) each party against whom the appeal is taken;

(3) the name and address of appellate counsel if different from the person filing the notice of appeal; and

(4) any other information required by the law providing for the appeal to the district court.

A copy of the order or decision of the agency appealed from, showing the date of the order or decision, shall be attached to the notice of appeal filed in the district court.

E. **Time for filing appeals.** Unless a specific time is provided by law or local ordinance, an appeal from an agency shall be filed in the district court within thirty (30) days after the date of the final decision or order of the agency. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten (10) days after the date on which the first notice of appeal was served or within the time otherwise

prescribed by this rule, whichever period expires last. The three (3)-day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set forth in this paragraph. A notice of appeal filed after the announcement of a decision by an agency, but before the decision or order is issued by the agency, shall be treated as timely filed.

F. **Service of notice of appeal and arranging preparation of the record.** At the time the notice of appeal is filed in the district court, the appellant shall:

(1) serve each party or such party's attorney in the administrative proceedings with a copy of the notice of appeal in accordance with Rule 1-005 NMRA; and

(2) file a certificate in the district court that satisfactory arrangements have been made with the agency for preparation of and payment, if required, for the record of the proceedings.

G. **Docketing the appeal.** Upon the filing of the notice of appeal and proof of service and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a state agency or a political subdivision of the state in any such appeal.

H. **Record on appeal.** Unless a different period is provided by law, within thirty (30) days after the filing of the notice of appeal with the agency pursuant to Paragraph C of this rule, the agency shall number consecutively and bind the pages of the record on appeal taken in the proceedings and file it in accordance with Rule 1-005 NMRA. For purposes of this rule, unless the parties stipulate to a partial designation of the record by filing such a stipulation in the district court within five (5) days after the filing of the notice of appeal, the record on appeal shall consist of:

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

(2) a copy of all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing, which shall be organized by date submitted to the agency beginning with the earliest paper or pleading;

(3) a copy of the final decision or order sought to be reviewed with date of issuance noted thereon; and

(4) the transcript of the proceedings, if any. If the transcript of the proceedings is an audio or video recording, the agency shall prepare and file with the district court a duplicate of the recording and index log. If the proceedings were stenographically recorded, the agency shall transcribe and file with the court those parts of the record specified by any party.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy. The agency shall give prompt notice to all parties of the filing of the record on appeal with the court.

I. **Correction or modification of the record.** If anything material to either party is omitted from the record on appeal by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court; provided, however, only those materials described in Paragraph H of this rule shall be made a part of the record on appeal.

J. **Statement of appellate issues.** A statement of appellate issues shall be filed with the district court as follows:

(1) the appellant's statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on appeal in the district court;

(2) the appellee's response shall be filed and served within thirty (30) days after service of the appellant's statement of issues; and

(3) if the appellee files a response, the appellant may file a reply to the appellee's response within fifteen (15) days after service of the appellee's response.

K. **Appellant's statement of appellate issues.** The appellant's statement of the appellate issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings, briefly describing the nature of the case, the course of proceedings, and the disposition in the agency. The summary shall include a short recitation of all facts relevant to the issues presented for review, with specific references to the record on appeal showing how the issues were preserved in the proceedings before the agency. A contention that a decision or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition;

(3) an argument, which shall contain the contentions of the appellant with respect to each issue presented in the statement of appellate issues, with citations to the authorities, statutes, and the record on appeal relied upon, and with a statement of the applicable standard of review. Applicable New Mexico decisions shall be cited. The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive. A contention that a decision or finding of fact is not support by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence; and

(4) a statement of the precise relief sought.

L. **Appellee's response.** The appellee's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph K of this rule, except that a statement of the issues or summary of the proceedings shall not be made unless the appellant's statement of issues or a summary of the proceedings is disputed or is incomplete.

M. **References in statement of appellate issues and response.** All references to the record on appeal in the statement of appellate issues and response shall be to specific page numbers or, if the reference is to an audio or video recording, to the specific counter numbers or time of the recording.

N. **Length of statements of appellate issues.** Except by permission of the court, the appellant's statement of appellate issues shall not exceed twenty-five (25) pages. Except by permission of the court, the appellee's response shall not exceed twenty-five (25) pages. Any reply to the appellee's response shall not exceed ten (10) pages.

O. **Oral argument.** Upon the filing of a request for hearing of either party or on the court's own motion, the court may allow oral argument. A party requesting oral argument shall file the request for hearing on or before the expiration of all response times under Paragraph J of this rule. If neither party requests oral argument within the time provided in this paragraph, the appellant shall promptly file a notice of completion of briefing to notify the court that the case is ready for decision by the court.

P. **Motions.** After the filing of the notice of appeal, at the option of a party, the following matters may be raised by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) failure to join a party under Rule 1-019 NMRA;

(5) failure by the agency to issue a written decision that complies with Section 39-3-1.1(B) NMSA 1978;

(6) dismissal of the appeal on the ground that the agency decision does not constitute a final decision as defined in Section 39-3-1.1(H) NMSA 1978; and

(7) misjoinder of parties.

A motion filed pursuant to this paragraph shall not stay further proceedings unless the court orders otherwise.

Q. **Stay.** Upon motion, the district court may stay enforcement of the order or decision under review.

(1) ***Contents of motion.*** A motion for a stay pending appeal must:

(a) state that a request for stay was previously made to the agency and was denied, or explain why seeking a stay from the agency in the first instance would be impracticable;

(b) summarize the proceedings before the agency leading up to the action under review, to the extent necessary to inform the district court fully on matters relevant to the motion for stay;

(c) state the reasons for granting a stay and the facts relied upon to show that:

(i) the appellant will suffer irreparable injury unless a stay is granted;

(ii) the appellant is likely to prevail on the merits of the appeal;

(iii) other interested persons will not suffer substantial harm if a stay is granted; and

(iv) the public interest will not be harmed by granting a stay.

(2) ***Attachments to motion.*** A motion for stay shall include as attachments:

(a) any relevant portions of the administrative record that are available, including any statement by the agency regarding why a request to the agency to stay the action under review was denied; and

(b) any affidavits or other admissible evidence offered to establish the factors set forth in Subparagraph (1) of this paragraph.

(3) ***Bond.*** As a condition of granting a stay, the district court may require the posting of a bond or other appropriate surety.

R. **Standard of review.** The district court shall apply the following standards of review:

(1) whether the agency acted fraudulently, arbitrarily, or capriciously;

(2) whether based upon the whole record on appeal, the decision of the agency is not supported by substantial evidence;

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

S. **Certification.** Upon the district court's own review, or in response to a motion for certification by any party within thirty (30) days of the filing of the notice of appeal and after allowing fifteen (15) days from service for response, the district court may, as a matter of judicial discretion, certify to the Court of Appeals a final decision appealed to the district court, but undecided by that court, if the appeal involves an issue of substantial public interest that should be decided by the Court of Appeals. In determining whether a case involves an issue of substantial public interest, the district court shall consider, but is not limited to, whether the case involves:

(1) a novel question;

(2) a constitutional question;

(3) a question of state-wide impact;

(4) a question of imperative public importance;

(5) a question that is likely to recur and the need for uniformity is great;

(6) whether an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties; or

(7) whether the case involves an important local question which should receive consideration from the district court in the first instance.

Upon the request of a party or on the court's own motion, the court may allow oral argument on the issue of certification. After receipt of the completed record, the district court shall notify the parties of its decision concerning certification as provided by Rule 12-608 NMRA.

T. **District court decision.** The district court, in its appellate capacity, shall issue a written decision, which may include:

(1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations; the remand may also include instructions to make the case ripe for judicial review;

(2) reversing the decision under review, with a statement of the basis for the reversal as provided under Paragraph R of this rule; and

(3) affirming the decision under review, with a statement of the basis for affirmance.

U. **Rehearing.** A motion for rehearing may be filed within ten (10) days after filing of the district court's final order. The three (3)-day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

V. **Further review.** An aggrieved party may seek further review of an order or judgment of the district court in accordance with Rule 12-505 NMRA of the Rules of Appellate Procedure.

W. **Conflict between statute authorizing appeal.** If there is a conflict between the time period for taking an appeal set forth in this rule and a statutory time period for taking an appeal, the statute granting the right to appeal to the district court shall control.

X. **Failure to comply with rules.**

(1) If an appellant fails to file a statement of appellate issues in the district court as provided by these rules, such failure may be deemed sufficient grounds for dismissal of the appeal by the district court.

(2) If an appellee fails to file a response as provided by these rules, the cause may be submitted upon the statement of appellate issues of appellant, and appellee may not thereafter be heard, except by permission of the district court.

(3) An appeal filed within the time limits provided in this rule shall not be dismissed for technical violations of this rule that do not affect the substantive rights of the parties.

(4) For any failure to comply with these rules or any order of the district court, the court may, on motion by appellant or appellee or on its own initiative, take such action as it deems appropriate in addition to that set out in Subparagraphs (1) and (2) of this rule, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees or, in extreme cases, dismissal or affirmance.

[Adopted, effective January 1, 1996; as amended, effective May 1, 2001; October 1, 2002; as amended by Supreme Court Order No. 08-8300-041, effective December 15, 2008; as amended by Supreme Court Order No. 13-8300-017, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. —

(re related actions)

There may be instances when other actions arising out of the same facts and circumstances are brought simultaneously in district court by one of the parties to an appeal under this rule. Such actions could include complaints for declaratory judgment, petitions for writs of mandamus, civil rights actions, and other actions to enforce various statutes or other rights. This rule does not address the district court's options for consolidating or otherwise addressing such actions in a manner that promotes judicial economy and compliance with these rules and substantive law.

(re transcripts)

If a written transcription is made of an audio or video transcript, and all the parties agree to its accuracy, the written transcription should be made a part of the record on appeal. In the event of any discrepancies between the official audio or video transcript and the written transcription, the audio or video transcript shall control.

(re citations to administrative rules)

Any references to administrative rules should be made by citation to the specific page in the record where the rule appears rather than to any other codification of the rule that may exist outside of the record on appeal.

(re applicability of Rule 1-007.1 NMRA)

Any motions filed pursuant to this rule are subject to the general rules governing motions in Rule 1-007.1 NMRA.

(re stays)

Consistent with the broad applicability of Section 39-3-1.1 NMSA 1978 and the overall approach of Rule 1-074 NMRA, paragraph Q of the rule is intended to apply in any case in which a party appealing to the district court from the action of an administrative agency seeks a stay of the action under review. The court has power, during the pendency of an appeal, to stay the agency action in appropriate circumstances. *See Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 105 N.M. 708, 736 P.2d 986 (Ct. App. 1986). Whether to grant a stay rests in the sound discretion of the district court. *Id.*; *cf.* 5 U.S.C. § 705 (reviewing court may, "[o]n such conditions as may be required and to the extent necessary to prevent irreparable injury, . . . issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings"). An appellant may move for a stay at any time after filing the notice of appeal. *Cf.* Rule 1-062(D) NMRA (appellant in civil action may obtain stay of money judgment "at or after the time of filing the notice of appeal"). The motion is governed by the district court's regular procedures for motion practice.

Under the rule requiring exhaustion of administrative remedies, a party seeking a stay ordinarily would be expected to apply first to the agency involved. *Tenneco Oil Co.*, 105 N.M. at 710, 736 P.2d at 988. Application may be made initially to the district court if prior recourse to the agency would be impracticable. Initial resort to the agency might be impracticable, for instance, if the agency had no procedure for granting a stay. A motion for a stay of agency action pending appeal must state that the agency previously had denied a request for a stay or must explain why requesting a stay from the agency initially would be impracticable. *See* Fed. R. App. P. 18(a)(2)(A).

The factors that a court must consider in deciding whether to stay agency action pending appeal are set forth in *Tenneco Oil Co. See* 105 N.M. at 710, 736 P.2d at 988. These factors have been widely accepted judicially. *See* 16A Charles A. Wright et al., *Federal Practice and Procedure* § 3964, at 401-02 n.13 (1999); Louis L. Jaffe, *Judicial Control of Administrative Action* 689 (1965). The court may weigh the factors, giving greater weight to one or another of them as the circumstances require. *See Ohio ex rel. Celebrezze v. Nuclear Reg. Comm'n*, 812 F.2d 288 (6th Cir. 1987). However, some showing as to each factor must be made before a stay can be granted. *Tenneco Oil Co.*, 105 N.M. at 710, 736 P.2d at 988. Some courts hold that where a strong showing has been made as to the other three factors, a likelihood of success on the merits is sufficiently established if the appellant can show "serious questions" going to the merits. *See, e.g.*, *Celebrezze*, 812 F.2d at 290 (internal quotation marks and citation omitted).

The administrative record may not be available to the district court when a motion for stay is made. The motion should concisely and accurately summarize the administrative proceedings to the extent they are relevant to the district court's consideration of the motion. If the agency's findings on disputed factual matters are at issue, the summary should include the substance of all the evidence presented to the agency relating to the disputed matters. *See Nat'l Council on Compensation Ins. v. N.M. State Corp. Comm'n*, 107 N.M. 278, 282, 756 P.2d 558, 562 (1988) (under "whole record" review of agency factfinding, court views evidence in light most favorable to agency decision but also considers any contravening evidence); *Martinez v. S.W. Landfills, Inc.*, 115 N.M. 181, 184-85, 848 P.2d 1108, 1111-12 (Ct. App. 1993) (party challenging sufficiency of evidence to support agency action must set forth substance of all relevant evidence in brief and explain why evidence, viewed favorably to agency, on balance fails to support agency's decision).

The appellant may attach as exhibits to the motion any available, relevant parts of the agency record that would help inform the court with respect to the motion. *Cf. Pincheira v. Allstate Ins. Co.*, 2004-NMCA-030, ¶ 8, 135 N.M. 220, 86 P.3d 645 (party seeking writ of error to review district court ruling may attach to petition any relevant portions of record before district court); Fed. R. App. P. 18(a)(2)(B)(iii). If the agency has provided a statement of reasons why a prior request to the agency for a stay was denied, the agency's statement must be included as an attachment. *Cf.* Fed. R. App. P. 18(a)(2)(A)(ii). Any party may include affidavits or other admissible evidence to establish the factors relevant to a stay. Material submitted in support of or in opposition to a stay should not be deemed part of the record on appeal.

The court may condition relief on the posting of a bond or other security to protect the interests that might be adversely affected by a stay. *Cf.* Rule 1-062(C) NMRA (on appeal from injunction, appellate court may grant stay "upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party"); Rule 1-062(D) NMRA (supersedeas bond for stay of money judgment); Fed. R. App. P. 18(b).

Under New Mexico law an aggrieved party may, in some circumstances, bring an independent declaratory judgment action against an agency to challenge a disputed agency action as an alternative to pursuing an administrative appeal. *See Smith v. City of Santa Fe*, 2007-NMSC-055, 142 N.M. 786, 171 P.3d 300. New Mexico courts have applied the same factors in deciding whether to grant preliminary injunctive relief as apply to the question of granting a stay of administrative action under *Tenneco Oil Co. See LaBalbo v. Hymes*, 115 N.M. 314, 317-18, 850 P.2d 1017, 1020-21 (Ct. App. 1993).

(re certification)

Section 39-3-1.1(F) NMSA 1978 allows a district court to certify a final decision appealed to the district court from an administrative agency directly to the court of appeals if it involves an issue of substantial public interest that should be decided by the court of appeals. In drafting the proposed amendment providing standards for certification, the drafters considered Section 39-3-1.1 NMSA 1978, Rule 1-074 NMRA, Rule 12-608 NMRA, Wyoming's Rules of Appellate Procedures, Rule 12-Judicial Review of Administrative Action, specifically, W.R.A.P. Rule 12.09 Extent of Review, and its enabling legislation.

The drafters found that the criteria set out in the Wyoming rule to be very helpful and believe that the same complements current New Mexico case law. The drafters also incorporated specific language the court of appeals has utilized in defining "substantial public interest." *See Jicarilla Apache Nation v. Rio Arriba County Assessor*, 2004-NMCA-055, 135 N.M. 630, 92 P.3d 642 (case law suggests that an issue is one of "substantial public interest" when it raises a question of first impression that is likely to recur, and when the need for uniformity is great). Although the drafters initially discussed including "complex factual record" as one of the objective criteria a district court should consider in addressing "substantial public interest," they ultimately concluded this is an argument to be made in the context of requesting certification, and not a separate objective criterion. For example, in support of a motion for certification, one could argue that an interest of judicial economy will be served where the record is voluminous and complex. Such an argument would be made in requesting relief pursuant to subparagraph S(6), i.e., "whether an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties." Finally, the drafters also reviewed a New Mexico Law Review Article, Seth D. Montgomery & Andrew S. Montgomery, *Jurisdiction As May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico*, 36 N.M. L. Rev. 215 (2006). The drafters felt that the article raised some interesting issues concerning statutory authorization. However,

they ultimately concluded that the proposed amendment reflects objective criteria that the district court may utilize in assessing “substantial public interest,” and therefore the concerns raised in the article were not an issue.

(re submission for decision)

Upon completion of oral argument, or upon the notification of the district court that no party requests for oral argument, the case should be considered submitted for purposes of Rule 1-054.1 NMRA.

[Adopted by Supreme Court Order No. 08-8300-041, effective December 15, 2008; as amended by Supreme Court Order No. 13-8300-017, effective for all cases pending or filed on or after December 31, 2013.]

1-075. Constitutional review by district court of administrative decisions and orders.

A. **Scope of rule.** This rule governs writs of certiorari to administrative officers and agencies pursuant to the New Mexico Constitution when there is no statutory right to an appeal or other statutory right of review. For purposes of this rule, an “agency” means any state or local government administrative or quasi-judicial entity. This rule does not create a right to appeal or review by writ of certiorari. This rule does not govern appeals in matters relating to water rights under Article XVI, Section 5 of the New Mexico Constitution.

B. **Filing of petition for writ.** An aggrieved party may seek review of a final decision or order of an agency by:

(1) filing a petition for writ of certiorari in the district court with proof of service; and

(2) promptly filing with the agency a copy of the petition for writ of certiorari that has been endorsed by the clerk of the district court

C. **Petition; contents.** A petition for writ of certiorari shall contain:

(1) the grounds on which jurisdiction of the district court is based;

(2) a description of the proceedings of the agency relating to the petition;

(3) the names of the parties to the agency proceedings;

(4) a concise showing that the petitioner is entitled to relief; and

(5) a concise statement of the relief sought.

The petition shall have attached a copy of the final decision or order sought to be reviewed with the date of issuance noted thereon.

D. **Time for filing petitions.** A petition for writ of certiorari shall be filed in the district court within thirty (30) days after the date of final decision or order of an agency. If a timely petition for writ of certiorari is filed by a party, any other party may file a petition for writ of certiorari in the same proceedings within ten (10) days after the date on which the first petition was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3)-day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set forth in this paragraph. A petition for writ of certiorari filed after the announcement of a decision by an agency, but before the decision or order is issued by the agency, shall be treated as timely filed.

E. **Service of notice of review.** At the time the petition is filed, the petitioner shall:

(1) serve each party or such party's attorney in the administrative proceedings with a copy of the petition in the manner provided by Rule 1-005 NMRA;

(2) file proof of service in the district court that a copy of the petition has been served in accordance with Rule 1-005 NMRA; and

(3) file a certificate in the district court that satisfactory arrangements have been made with the agency for preparation and payment for the transcript of the proceedings.

F. **Docketing the petition for writ.** Upon the filing of a petition for writ of certiorari and payment of the docket fee, if required, the clerk of the district court shall docket the petition in the district court. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a state agency or a political subdivision of the state.

G. **Issuance of writ.** The court shall issue a writ of certiorari to review the action of the agency if:

(1) the petitioner has complied with the provisions of Paragraphs B through E of this rule; and

(2) the petition makes a prima facie showing that the court has jurisdiction over the agency, that the petitioner is entitled to relief, and that the petitioner does not have a right to review by appeal.

The granting of a writ of certiorari shall not automatically stay the proceedings before the agency. The petitioner shall serve the writ on the agency and all parties to the administrative proceeding by delivery or by certified mail.

H. **Record on review.** The writ of certiorari shall be substantially in the form approved by the Supreme Court and shall direct the agency to number consecutively the pages of the record on appeal taken in the proceedings and file it in accordance with Rule 1-005 NMRA within thirty (30) days after service of the writ on the agency or within such other period of time as the court may order. For purposes of this rule, unless the parties stipulate to a partial designation of the record by filing such a stipulation in the district court within five (5) days after the filing of the petition for the writ, the record on review shall consist of:

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

(2) a copy of all papers, pleadings, and exhibits filed in the proceedings of the agency, entered into or made a part of the proceedings of the agency, or actually presented to the agency in conjunction with the hearing, which shall be organized by date submitted to the agency beginning with the earliest paper or pleading;

(3) a copy of the final decision or order sought to be reviewed with date of issuance noted thereon; and

(4) the transcript of the proceedings, if any. If the transcript of the proceedings is an audio or video recording, the agency shall prepare and file with the district court a duplicate of the recording and index log. If the proceedings were stenographically recorded, the agency shall transcribe and file with the court those parts of the record specified by any party.

Any party desiring a copy of the transcript of the proceedings shall be responsible for paying the cost, if any, of preparing such copy. The agency shall give prompt notice to all parties of the filing of the record on review with the court.

I. **Correction or modification of the record.** If anything material to either party is omitted from the record on review by error or accident, the parties by stipulation, or the agency on request, or the district court, on proper suggestion or on its own initiative, may direct that the omission be corrected and a supplemental record transmitted to the district court; provided, however, only those materials described in Paragraph H of this rule shall be made a part of the record on review.

J. **Statement of review issues.** A statement of the review issues shall be filed with the district court as follows:

(1) the petitioner’s statement shall be filed and served within thirty (30) days from the date of service of the notice of filing of the record on review in the district court;

(2) the respondent’s response shall be filed and served within thirty (30) days after service of the petitioner’s statement of the review issues; and

(3) if the respondent files a response, the petitioner may file a reply to the response within fifteen (15) days after service of the response.

K. **Petitioner's statement of review issues.** The petitioner's statement of the review issues, under appropriate headings and in the order here indicated, shall contain:

(1) a statement of the issues;

(2) a summary of the proceedings, briefly describing the nature of the case, the course of proceedings, and the disposition in the agency. The summary shall include a short recitation of all facts relevant to the issues presented for review, with specific references to the record on review showing how the issues were preserved in the proceedings before the agency. A contention that a decision or finding of fact is not supported by substantial evidence shall be deemed waived unless the summary of proceedings includes the substance of the evidence bearing upon the proposition;

(3) an argument, which shall contain the contentions of the petitioner with respect to each issue presented in the statement of review issues, with citations to the authorities, statutes, and the record on review relied upon, and with a statement of the applicable standard of appellate review. Applicable New Mexico decisions shall be cited. The argument shall set forth a specific attack on any finding, or such finding shall be deemed conclusive. A contention that a decision or finding of fact is not supported by substantial evidence shall be deemed waived unless the argument identifies with particularity the fact or facts that are not supported by substantial evidence; and

(4) a statement of the precise relief sought.

L. **Respondent's response.** The respondent's response shall conform to the requirements of Subparagraphs (1) to (4) of Paragraph K of this rule, except that a statement of the issues or a summary of the proceedings shall not be made unless the petitioner's statement of issues or summary of the proceedings is disputed or is incomplete.

M. **References in statement of review issues and response.** All references to the record on appeal in the statement of review issues and response shall be to specific page numbers or, if the reference is to an audio or video recording, to the specific counter numbers or time of the recording.

N. **Length of statements of review issues.** Except by permission of the court, the petitioner's statement of review issues shall not exceed twenty-five (25) pages. Except by permission of the court, the respondent's response shall not exceed twenty-five (25) pages. Any reply to the response shall not exceed ten (10) pages.

O. **Oral argument.** Upon the filing of a request for hearing of either party or on the court's own motion, the court may allow oral argument. A party requesting oral

argument shall file the request for hearing on or before the expiration of all response times under Paragraph J of this rule. If neither party requests oral argument within the time provided in this paragraph, the appellant shall promptly file a notice of completion of briefing to notify the court that the case is ready for decision by the court.

P. **Motions.** After the filing of the petition, at the option of a party, the following matters may be raised by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) failure to join a party under Rule 1-019 NMRA;

(5) failure by the agency to issue a written decision;

(6) dismissal of the appeal on the grounds that the agency decision does not constitute a final decision; and

(7) misjoinder of parties.

A motion filed pursuant to this paragraph shall not stay further proceedings unless the court orders otherwise.

Q. **Stay.** Upon motion, the district court may stay enforcement of the order or decision under review.

(1) ***Contents of motion.*** A motion for a stay pending review must:

(a) state that a request for stay was previously made to the agency and was denied, or explain why seeking a stay from the agency in the first instance would be impracticable;

(b) summarize the proceedings before the agency leading up to the action under review, to the extent necessary to inform the district court fully on matters relevant to the motion for stay;

(c) state the reasons for granting a stay and the facts relied upon to show that:

(i) the petitioner will suffer irreparable injury unless a stay is granted;

(ii) the petitioner is likely to prevail on the merits of the appeal;

(iii) other interested persons will not suffer substantial harm if a stay is granted; and

(iv) the public interest will not be harmed by granting a stay.

(2) ***Attachments to motion.*** A motion for stay shall include as attachments:

(a) any relevant portions of the administrative record that are available, including any statement by the agency regarding why a request to the agency to stay the action under review was denied; and

(b) any affidavits or other admissible evidence offered to establish the factors set forth in Subparagraph (1) of this paragraph.

(3) ***Bond.*** As a condition of granting a stay, the district court may require the posting of a bond or other appropriate surety.

R. **Standard of review.** The district court shall apply the following standards of review:

(1) whether the agency acted fraudulently, arbitrarily, or capriciously;

(2) whether based upon the whole record on review, the decision of the agency is not supported by substantial evidence;

(3) whether the action of the agency was outside the scope of authority of the agency; or

(4) whether the action of the agency was otherwise not in accordance with law.

S. **Certification.** Upon the district court's own review, or in response to a motion for certification by any party within thirty (30) days of the filing of the petition and after allowing fifteen (15) days from service for response, the district court may, as a matter of judicial discretion, certify to the Court of Appeals a final decision presented for review to the district court, but undecided by that court, if the matter involves an issue of substantial public interest that should be decided by the Court of Appeals. In determining whether a case involves an issue of substantial public interest, the district court shall consider, but is not limited to, whether the case involves:

(1) a novel question;

(2) a constitutional question;

(3) a question of state-wide impact;

(4) a question of imperative public importance;

(5) a question that is likely to recur and the need for uniformity is great;

(6) whether an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties; or

(7) whether the case involves an important local question which should receive consideration from the district court in the first instance.

Upon motion of a party or on the court's own motion, the court may allow oral argument on the issue of certification. After receipt of the completed record, the district court shall notify the parties of its decision concerning certification as provided by Rule 12-608 NMRA.

T. **District court decision.** The district court, in its appellate capacity, shall issue a written decision, which may include:

(1) remanding the case to the administrative agency with specific instructions for further proceedings and determinations; the remand may also include instructions to make the case ripe for judicial review;

(2) reversing the decision under review, with a statement of the basis for the reversal as provided under Paragraph R of this rule; and

(3) affirming the decision under review, with a statement of the basis for affirmance.

U. **Rehearing.** A motion for rehearing may be filed within ten (10) days after filing of the district court's final order. The three (3)-day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

V. **Further review.** An aggrieved party may seek further review of an order or judgment of the district court in accordance with Rule 12-505 NMRA of the Rules of Appellate Procedure.

W. **Failure to comply with rules.**

(1) If an appellant fails to file a statement of review issues in the district court as provided by these rules, such failure may be deemed sufficient grounds for dismissal of the appeal by the district court.

(2) If an appellee fails to file a response as provided by these rules, the cause may be submitted upon the statement of review issues of appellant, and appellee may not thereafter be heard, except by permission of the district court.

(3) An appeal filed within the time limits provided in this rule shall not be dismissed for technical violations of this rule that do not affect the substantive rights of the parties.

(4) For any failure to comply with these rules or any order of the district court, the court may, on motion by appellant or appellee or on its own initiative, take such action as it deems appropriate in addition to that set out in Subparagraphs (1) and (2) of this rule, including but not limited to citation of counsel or a party for contempt, refusal to consider the offending party's contentions, assessment of fines, costs or attorney fees or, in extreme cases, dismissal or affirmance.

[Adopted effective January 1, 1996; as amended, effective May 1, 2001; October 1, 2002; as amended by Supreme Court Order No. 08-8300-041, effective December 15, 2008; as amended by Supreme Court Order No. 13-8300-017, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — *See* committee commentary to Rule 1-074 NMRA.

1-076. Appeals from Human Rights Commission.

A. **Scope of rule.** This rule governs *de novo* appeals from the Human Rights Commission, or "commission", to the district court.

B. **Filing appeal.** An appeal from the Human Rights Commission may be taken by filing a notice of appeal in the form of a complaint in the district court in the manner provided by these rules for the filing of a civil action in the district court. An appeal may be taken by:

(1) any aggrieved person, including the complainant, by an order of the commission; or

(2) if the director has served notice of a waiver of the complainant's right to hearing, by the complainant.

C. **Joinder or claims and parties.** In compliance with the provisions of Rules 1-018, 1-019 and 1-020 NMRA, a complaint filed pursuant to this rule may:

(1) include issues not raised in the Human Rights Commission proceeding; and

(2) join persons who were not parties in the Human Rights Commission proceeding.

If additional claims or parties are included in the complaint on appeal, service shall be made in accordance with Rule 1-004 NMRA.

D. **Time for filing appeals.** An appeal from the Human Rights Commission shall be taken within ninety (90) days from the date of service on the parties to the administrative proceeding of:

(1) the commission's order; or

(2) the director's or complainant's notice of waiver of the complainant's right to hearing before the commission.

If a timely notice of appeal is filed by a party, any other party may file a cross notice of appeal in the form of a cross-complaint within ten (10) days after the date on which the notice of appeal was served or within the time otherwise prescribed by this rule, whichever period expires last. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limit for filing a notice of appeal. A notice of appeal filed after the announcement of a decision by the commission, but before the decision or order is served by the commission, shall be treated as timely filed.

E. **Service.** A copy of the complaint or cross-complaint shall be served on all parties who appeared before the commission and on the commission in the manner provided by law.

F. **Docketing the appeal.** Upon the filing of the notice of appeal and payment of the docket fee, the clerk of the district court shall docket the appeal in the district court. Notwithstanding any other provision of this rule, no docket fee or other cost shall be imposed upon a state agency or a political subdivision of the state in any such appeal.

G. **Transcript of proceedings.** Within ten (10) days after service of the notice of appeal, each party shall designate which part of the transcript of the proceedings of the Human Rights Commission, whether stenographically recorded or tape recorded, is to be filed in the district court. Within thirty (30) days after receipt from the parties of the designation of transcript, the Human Rights Division of the Labor Department shall file with the clerk of the district court the designated parts of the transcript of proceedings of the commission. If the transcript of the proceedings is a tape recording, the commission shall prepare and file with the district court a duplicate of the tape and index log.

H. **Rules applicable on appeal.** After service of the complaint in the manner provided by law, the Rules of Civil Procedure for the District Courts of New Mexico shall apply to and govern the procedure in the district court for de novo appeals from the Human Rights Commission.

I. **Jury trial.** Any party may demand a jury trial by filing a demand in the manner provided by Rule 1-038 NMRA.

J. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3) day mailing period set forth in Rule 1-006 does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

K. **Stay.** A party appealing a decision or order of the Human Rights Commission may petition the district court for a stay of enforcement of the order or decision of the commission. Upon notice to the commission and the parties and a hearing, the district court may grant a stay of enforcement of the order or decision of the commission.

L. **Appeal.** An aggrieved party may appeal an order or judgment of the district court in accordance with the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996; as amended by Supreme Court Order No. 06-8300-012, effective June 12, 2006.]

1-077. Appeals pursuant to Unemployment Compensation Law.

A. **Scope of rule.** This rule governs appeals from final decisions of the board of review of the Workforce Transition Services Division or the secretary of the Department of Workforce Solutions pursuant to Section 51-1-8 NMSA 1978 of the Unemployment Compensation Law [Section 51-1-1 NMSA 1978].

B. **Filing appeal.** An appeal pursuant to Section 51-1-8 NMSA 1978 may be taken by an aggrieved person filing a notice of appeal in the form of a petition for writ of certiorari in the county in which the person seeking the review resides. The district court of any other county has jurisdiction to hear an appeal pursuant to this rule upon a determination by the district court where the petition is filed that, as a matter of equity and due process, venue should be in that county. The writ of certiorari shall contain a short statement of the proceedings and the grounds relied on for issuance of a permanent writ.

C. **Time for appeal.** An appeal in the form of a petition for writ of certiorari pursuant to this rule shall be filed in the district court within thirty (30) days from the date of the final decision of the secretary or board of review. The three (3)-day mailing period set forth in Rule 1-006 NMRA does not apply to the time limit for filing a notice of appeal.

D. **Docketing the appeal.** Upon the filing of the petition for writ of certiorari and payment of the docket fee, if required, the clerk of the district court shall docket the appeal in the district court. No individual claiming benefits shall be charged fees of any kind by any court or officer thereof.

E. **Service.** The petition for writ of certiorari shall be served by the petitioner on the Office of General Counsel of the Department of Workforce Solutions, the respondent

former employer or employee, and all other parties to the proceedings before the secretary or board of review.

F. **Petitioner's statement of appellate issues.** The petitioner shall set forth in the petition for writ of certiorari a statement of the appellate issues under appropriate headings and in the order here indicated:

(1) a statement of the issues;

(2) a concise summary of the proceedings which shall indicate briefly the nature of the case, the course of proceedings, and the disposition of the secretary or board of review. The summary shall include a short recitation of all facts relevant to the issues presented for review. The summary shall also state how the issues were preserved in the proceedings before the agency; and

(3) a statement of the precise relief sought.

G. **Response and record on appeal.** Upon the filing of a petition for writ of certiorari pursuant to this rule, the court shall enter a writ of certiorari provided by the petitioner directing the Department of Workforce Solutions to file the record on appeal within twenty (20) days from the date of service of the writ. The record on appeal shall include a copy of all reports, papers, pleadings, and documents filed in the proceedings before the board of review or the secretary and a certified transcript of proceedings before the secretary or board of review. If the transcript of the proceedings is an audio recording, the Department of Workforce Solutions shall prepare and file with the district court a duplicate of the recording.

H. **Supersedeas.** No bond shall be required in an appeal to the district court pursuant to this rule.

I. **Hearing.** An appeal pursuant to this rule shall be heard in a summary manner and shall be given precedence over all other civil cases.

J. **Scope of review.** The district court shall determine the appeal upon the evidence introduced at the hearing before the board of review or secretary of the Department of Workforce Solutions. The district court may enter an order reversing the decision of the board of review or the secretary if it finds that:

(1) the board of review or secretary acted fraudulently, arbitrarily, or capriciously;

(2) based upon the whole record on appeal, the decision of the board of review or secretary is not supported by substantial evidence; or

(3) the action of the board of review or secretary was outside the scope of authority of the agency.

K. **Rehearing.** A motion for reconsideration may be filed within ten (10) days after filing of the district court's final order. The three (3)-day mailing period set forth in Rule 1-006 NMRA does not apply to the time limits set by this rule. The motion shall state briefly and with particularity, but without argument, the points of law or fact that in the opinion of the movant the court has overlooked or misapprehended. No response to a motion for rehearing shall be filed unless requested by the court.

L. **Further review.** An aggrieved party may seek further review of an order or judgment of the district court in accordance with Rule 12-505 NMRA of the Rules of Appellate Procedure.

[Adopted, effective January 1, 1996; as amended by Supreme Court Order No. 11-8300-012, effective April 18, 2011; as amended by Supreme Court Order No. 13-8300-017, effective for all cases pending or filed on or after December 31, 2013.]

1-077.1. Expungement.

A. **Scope of Rule.** This rule governs proceedings for expungement of arrest and public records under the Criminal Record Expungement Act, Sections 29-3A-1 to -9 NMSA 1978.

B. **Commencement of Action.** An expungement proceeding is commenced by filing a civil petition in the appropriate district court as follows:

(1) A petition seeking expungement of arrest records or public records wrongfully identifying a person therein as a result of identity theft under Section 29-3A-3 NMSA 1978 shall be filed in the district court of the county where the charges originated, or the arrest occurred, or where a conviction was entered.

(2) A petition seeking expungement of arrest records and public records where there is no conviction under Section 29-3A-4 NMSA 1978 shall be filed in the district court for the county where the charges originated or the arrest occurred.

(3) An action seeking expungement of records upon conviction under Section 29-3A-5 NMSA 1978 shall be filed in the district court in the county in which petitioner's conviction was entered.

(4) An action seeking expungement of an arrest, release without conviction, or conviction of a charge that the petitioner believes is legally invalid due to the passage of the Cannabis Regulation Act and is eligible for automatic expungement under Section 29-3A-8 NMSA 1978, which automatic expungement has not occurred, shall be filed in the district court in which the arrest occurred, the charges were originally filed, or the conviction was entered. There shall be no filing fee for an action commenced under the automatic expungement provisions of Section 29-3A-8.

(5) A petition to expunge may contain a request to expunge arrest records and public records pertaining to any number of arrests, criminal charges filed without arrest, and/or convictions in a single judicial district.

C. **Sealing of Petition.** A petition for expungement of records upon release without conviction shall be filed under seal and subject to the requirements of Rule 1-079 NMRA and the provisions of this rule. If the petition seeks both expungement of records upon conviction and expungement of records upon release without conviction, the district court shall treat the petition as one filed for expungement of records upon conviction and the petition shall not be subject to Rule 1-079 NMRA.

D. **Contents of Petition.** A petition for expungement shall conform with the requirements of Form 4-951 NMRA (expungement of arrest records and public records upon identity theft), Form 4-452 NMRA (expungement of arrest records and public records upon release without conviction), Form 4-953 NMRA (expungement of arrest records and public records upon conviction), or Form 4-954 NMRA (automatic expungement of arrest records and public records), the use of which are mandatory in expungement proceedings.

E. **Service.** Service of the petition and attachments thereto is only required in cases seeking expungement of records upon release without conviction and upon conviction.

(1) A petition for expungement of records upon release without conviction and all attachments thereto shall be served upon:

(a) the district attorney for the county in which the arrest was made or the criminal charge or proceeding filed; and

(b) the New Mexico Department of Public Safety.

(2) A petition for expungement of records upon conviction and all attachments thereto shall be served upon:

(a) the district attorney for the county in which the conviction was entered;

(b) the New Mexico Department of Public Safety; and

(c) the law enforcement agency that arrested petitioner.

(3) Service under this section is made by first-class United States mail. Petitioner shall file a certificate of service with the district court.

(4) Subsequent pleadings shall be served in accordance with Rules 1-005, 1-005.1, or 1-005.2 NMRA.

F. **Court action upon insufficient petition.** If the court concludes that the initial petition does not comply with the provisions of this rule and the applicable form, the court may enter an order granting the petitioner leave to file a proper amended petition within sixty (60) days from entry of the order. If the petition fails to comply with the order or this rule, the court may dismiss the petition without prejudice.

G. **Response.**

(1) Within sixty (60) days from service of the petition, the parties entitled to notice of the proceeding by way of service of the petition, as identified in Paragraph E of this rule, shall file and serve specific objections (Form 4-957 NMRA) or shall file a Notice of Non-Objection (Form 4-958 NMRA). A responding party filing and serving a Notice of Non-Objection shall be excused from further participation in the proceeding.

(2) If a party objects to a petition for expungement of arrest records or public records without conviction on the basis of the contents of petitioner's Federal Bureau of Investigation's record of arrests and prosecutions, the objecting party shall provide petitioner with a copy of the FBI Rap sheet, at no charge, at the time of filing the objection.

H. **Notice of Completion of Briefing.** For petitions seeking expungement of records upon release without conviction and upon conviction, petitioner must file a notice of completion of briefing (Form 4-959 NMRA (upon release without conviction) or Form 4-960 NMRA (upon conviction)) after expiration of the objection period set forth in Paragraph G of this rule. Petitioner shall serve the notice of completion of briefing on all parties that have filed an objection.

Petitioner shall attach completed Form 4-960.2 NMRA (affirmation in support of expungement of records, upon release without conviction) or Form 4-960.3 NMRA (affirmation in support of expungement of records, upon conviction) to the notice of completion of briefing. If Form 4-960.2 or Form 4-960.3 contains information regarding arrests, charges without arrest, and/or convictions that occurred subsequent to the filing of the petition, the parties shall have twenty (20) days after service of the notice of completion of briefing and attachments thereto to file additional objections to the petition for expungement.

I. **Burden of Proof.** Petitioner bears the burden of proving the requirements for statutory expungement.

J. **Hearings.** No hearing on the merits will be set in an expungement action prior to the filing and service of the notice of completion of briefing as set forth in Paragraph H of this rule.

If the petition is filed under Section 29-3A-3 NMSA 1978 (expungement of records upon identity theft) or Section 29-3A-4 NMSA 1978 (expungement of records upon

release without conviction) and no objections to the petition are filed, the court may decide the petition on the pleadings and affirmation (if applicable) without a hearing.

If the petition is filed under Section 29-3A-8 NMSA 1978, the court may decide the petition on the pleadings without a hearing.

If the petition is filed under Section 29-3A-5 NMSA 1978 (expungement of records upon conviction), the court shall hold a hearing to determine whether petitioner has established that the requirements of Section 29-3A-5(C) NMSA 1978have been met.

Any party wishing to participate in any hearing by telephonic or other electronic means, may do so by giving notice to the court and the other parties as provided for in the petition and objection forms. A motion and order for telephonic or electronic appearance shall not be required. The court may order any party to attend a hearing in-person.

K. **Orders.** When there is a hearing on a petition for expungement, the court shall issue an order within sixty (60) days of the hearing. Any order requiring the expungement of arrest and public records shall allow a minimum of sixty (60) days to complete the expungement. Any order granting a petition shall require that the civil expungement proceeding be expunged. The court shall not expunge court records earlier than 30-days from entry of its order of expungement.

L. **Service of Orders on the Merits.** On granting a petition for expungement, the court shall cause a copy of an order on a petition for expungement to be delivered to all relevant law enforcement agencies and courts. The order shall prohibit all relevant law enforcement agencies and courts from releasing copies of the records to any persons, except as authorized by the Criminal Records Expungement Act, or on order of the court.

M. **Mandatory Forms.** The use of Forms 4-951 to -960.3 NMRA, as appropriate, is mandatory in expungement proceedings.

[Provisionally adopted by Supreme Court Order No. 21-8300-033, effective for all cases filed or pending on or after January 28, 2022.]

Committee commentary. —

2021 Amendment to Rule 1-004 NMRA

The Supreme Court has concluded that in the context of proceedings under the Criminal Record Expungement Act, NMSA 1978, Sections 29-3A-1 to -9 (2019, as amended 2021), if the petitioner serves notice of the petition as required by Paragraph F of Rule 1-077.1 NMRA and subsequently affirms that service was made in accordance with this rule, *see* Form 4-955 NMRA (certificate of service, expungement of records upon release without conviction) or Form 4-956 NMRA (certificate of service, expungement of

records upon conviction), such service satisfies the requirements of due process because the recipients of the notice must either file objections or file a "Notice of Non-Objection" before the district court holds a hearing pursuant to Section 29-3A-4(E) or Section 29-3A-5(C).

Section 29-3A-3(D) (expungement of records upon identity theft); due process issue

Section 29-3A-3(D) provides that "Aft er notice to and a hearing for all interested parties and in compliance with all applicable law, the court shall insert in the records the correct name and other identifying information of the offender, if known or ascertainable, in lieu of the name of the person wrongly identified." Identity theft is a crime. *See, e.g.*, NMSA 1978, § 30-16-24.1 (2009) (theft of identity; obtaining identity by electronic fraud). It would be a violation of due process for the court in a civil proceeding to publicly declare that it found a person guilty of the crime of identity theft and to identify in public records the name and identifying information of the offender, particularly when the statute does not require notice of the proceeding be given to the alleged wrongdoer. For this reason, Rule 1-077.1 omits requirements related to the statutory provision quoted above.

Rule 1-077.1(G)

Rule 1-077.1(G) provides that parties entitled to notice of these proceedings must file and serve specific objections or a Notice of Non-Objection within sixty days of service of the petition. This time limit is contrary to Section 29-3A-4(B), which provides for a thirty-day response time for filing objections to a petition seeking expungement of records upon release without conviction. Rule 1-077.1(G) controls because the Supreme Court can modify a procedural provision in a statute by adopting a contrary rule. *Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 15, 111 N.M. 336, 805 P.2d 603 ("[L]egislative rules relating to pleading, practice and procedure in the courts, particularly where those rules relate to court management or housekeeping functions, may be modified by a subsequent rule promulgated by the Supreme Court."); *see also id.* ¶ 10 ("[T]here are good reasons for construing [statutory time limits] simply as the legislative adoption of a housekeeping rule to assist the courts with the management of their cases, [which] have effect unless and until waived by a court in a particular case or modified by a rule of this Court on the same subject.").

Rule 1-077.1(J)

Rule 1-077.1(J) provides that if no objections are filed, the district court may decide a petition for expungement of records upon identity theft, § 29-3A-3, or for expungement of records upon release without conviction, § 29-3A-4, without a hearing. This conflicts with Section 29-3A-3(B), which provides that the district court shall issue an order "after a hearing" on a petition for expungement of records upon identity theft and with Section 29-3A-4(E), which provides likewise in the context of a petition for expungement of records upon release without conviction. Rule 1-077.1(J) controls because the Supreme Court can modify a procedural provision in a statute by adopting a contrary rule.

Lovelace Med. Ctr., 1991-NMSC-002, ¶ 15 ("[L]egislative rules relating to pleading, practice and procedure in the courts, particularly where those rules relate to court management or housekeeping functions, may be modified by a subsequent rule promulgated by the Supreme Court.).

Rule 1-077.1(K)

Rule 1-077.1(K) provides that the district court shall issue an order within sixty (60) days of an expungement hearing. This time limit is contrary to Section 29-3A-4(E) and Section 29-3A-5(C), which require the district court to issue an order within thirty (30) days of certain expungement hearings. For the reasons stated above in the committee commentary to Rule 1-077.1(G), the time limits in Rule 1-077.1(K) control.

[Provisionally adopted by Supreme Court Order No. 21-8300-033, effective for all cases filed or pending on or after January 28, 2022.]

ARTICLE 9
District Courts

1-078. Motion day.

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct and hearing of actions.

1-079. Public inspection and sealing of court records.

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

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

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

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

(3) “protected personal identifier information” means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver’s license number, and all but the year of a person’s date of birth;

(4) “public” means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) “public access” means the inspection and copying of court records by the public; and

(6) “sealed” means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limits on public access.** In addition to court records protected under Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) proceedings commenced under the Adoption Act, Chapter 32A, Article 5 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Section 32A-5-8(A) NMSA 1978;

(2) proceedings to detain a person commenced under Section 24-1-15 NMSA 1978;

(3) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(4) proceedings commenced under the Adult Protective Services Act, Sections 27-7-14 to 27-7-31 NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(5) proceedings commenced under the Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978, subject to the disclosure requirements in Section 43-1-19 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(6) wills deposited with the court under Section 45-2-515 NMSA 1978 that have not been submitted to informal or formal probate proceedings. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Section 45-2-515 NMSA 1978;

(7) proceedings commenced for the appointment of a person to serve as guardian for an alleged incapacitated person under Chapter 45, Article 5, Part 3 NMSA 1978, as provided in Rule 1-079.1 NMRA;

(8) proceedings commenced for the appointment of a conservator under Chapter 45, Article 5, Part 4 NMSA 1978, as provided in Rule 1-079.1 NMRA;

(9) proceedings commenced to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(10) proceedings commenced under the Assisted Outpatient Treatment Act, Chapter 43, Article 1B NMSA 1978, subject to the disclosure requirements in Section 43-1B-14 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978; and

(11) proceedings commenced under Section 29-3A-4 (Expungement of records upon release without conviction) of the Criminal Record Expungement Act, Sections 29-3A-1 to -9 NMSA 1978.

The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. **Protection of personal identifier information.**

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court websites. The court shall not publicly display protected personal identifier information in the courthouse. Any attorney or other person granted electronic access to court records containing protected personal identifier information shall be responsible for taking all reasonable precautions to ensure that the protected personal identifier information is not unlawfully disclosed by the attorney or other person or by anyone under the supervision of that attorney or other person. Failure to comply with the provisions of this subparagraph may subject the attorney or other person to sanctions or the initiation of disciplinary proceedings.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number, along with a government-issued form of identification or other acceptable form of identification.

E. **Motion to seal court records required.** Unless provided in Paragraphs C and D of this rule, no part of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. If applicable, the motion should identify any statute, regulation, rule, or other source of law

that addresses access to court records in the particular type of proceeding. Any party or member of the public may file a response to the motion to seal. The movant shall lodge the court record with the court under Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record under Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court, or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL," and affix to the envelope or container a cover sheet that contains the information required under Rules 1-008.1 and 1-010 NMRA, and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain, but not file, the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)," and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. **Requirements for order to seal court records.**

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of public access to the court record;

(b) the overriding interest supports sealing the court record;

(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;

(d) the proposed sealing is narrowly tailored; and

(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or parts of a court record that contain the material that needs to be sealed. All other parts of each document or page shall be filed without limit on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event on which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. **Sealed court records as part of record on appeal.**

(1) Court records sealed in the magistrate, metropolitan, or municipal court, or records sealed in an agency proceeding in accordance with the law, that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal the records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court under Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. **Motion to unseal court records.**

(1) A sealed court record shall not be unsealed except by court order or under the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. If applicable, the motion should identify any statute, regulation, rule, or other source of law that addresses access to court records in the particular type of proceeding. A copy of the motion to unseal shall be served on all persons and entities who were identified in the sealing order under Subparagraph (G)(6) for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

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

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

[Adopted by Supreme Court Order No. 10-8300-004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023 temporarily suspending Paragraph D for ninety (90) days effective August 11, 2010; as amended by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional ninety (90) days, effective November 10, 2010; as amended by Supreme Court Order No. 11-8300-006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court websites on or after February 7, 2011; as amended by Supreme Court Order No. 13-8300-017, effective for all cases pending or filed on or after December 31, 2013; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017; as amended by Supreme Court Order No. 18-8300-005, effective for all cases filed, or pending, but not adjudicated, on or after July 1, 2018, and for motions to seal or unseal filed in all cases on or after July 1, 2018; as provisionally amended by Supreme Court Order No. 21-8300-033, effective for all cases filed or pending on or after January 28, 2022.]

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

Although most court records are subject to public access, this rule recognizes that in some instances, public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. Unless otherwise provided in this rule, public access to a court record may not be limited without a written court order entered under this rule. Unless otherwise ordered by the court, any limits on the public's right to access court records do not apply

to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases set forth in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the Legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

For some of the classes of cases identified in Paragraph C, automatic sealing is subject to other statutory disclosure or reporting requirements. For example, under NMSA 1978, § 34-9-19 (2016), the Administrative Office of the Courts (AOC) is required to send to the Federal Bureau of Investigation's National Instant Criminal Background Check System (NICS) information about a court order, judgment, or verdict about each person who has been "adjudicated as a mental defective" or "committed to a mental institution" under federal law. Automatic sealing under Paragraph C, therefore, does not prevent the AOC from sending the information to the NICS in the proceedings described in Subparagraphs (C)(4), (5), (9), and (10). A person who is the subject of the information compiled and reported by the AOC to NICS has a right to obtain and inspect that information. *See* NMSA 1978, § 34-9-19(K) (2016). Another example includes records sealed under Section 29-3A-4 (Expungement of records upon release without conviction) of the Criminal Record Expungement Act, NMSA 1978, §§ 29-3A-1 to -9 (2019, as amended through 2021), which will be available to law enforcement and courts if a person is charged with a future crime. *See* NMSA 1978, § 29-3A-2(C)(2) (2019). These records will also be released in connection with any application for or query regarding qualification for employment or association with any financial institution regulated by the Financial Industry Regulatory Authority or the Securities and Exchange Commission. *See* NMSA 1978, § 29-3A-7 (2019).

Aside from entire categories of cases that may warrant limits on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limits on disclosure. *See, e.g.*, NMSA 1978, § 7-1-4.2(H) (2017) (providing for confidentiality of taxpayer information); NMSA 1978, § 14-6-1(A) (1977) (providing for confidentiality of patient health information); NMSA 1978, § 29-10-4 (1993) (providing for confidentiality of certain arrest record information); NMSA 1978, § 29-12A-4 (2003) (limiting disclosure of local crime stoppers program information); NMSA 1978, § 29-16-8 (2006) (providing for confidentiality of DNA information); NMSA 1978, § 31-25-3 (1987) (providing for confidentiality of certain communications between victim and victim counselor); NMSA 1978, § 40-8-2 (2001) (providing for sealing of certain name change records); NMSA 1978, § 40-6A-312

(2005) (providing for limits on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); NMSA 1978, § 40-10A-209 (2001) (providing for limits on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); NMSA 1978, § 40-13-7.1 (2005) (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); NMSA 1978, § 40-13-12 (2008) (providing for limits on internet disclosure of certain information in domestic violence cases); NMSA 1978, § 44-7A-18 (2001) (providing for limits on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of these items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. Any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (G)(1) of this rule before deciding whether to seal any particular court record. When determining whether a motion to seal should be granted, the court should consider any statute, regulation, rule, or other source of law that addresses access to court records in the particular type of proceeding. *See, e.g.*, NMSA 1978, §§ 45-5-303(J), 45-5-407(M) (2019) (providing that a court may seal the record in a guardianship or conservatorship proceeding on motion of the alleged incapacitated person, individual subject to guardianship or conservatorship, or parent or guardian of a minor subject to conservatorship after the petition has been dismissed or the guardianship or conservatorship has been terminated).

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

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

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

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

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

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

If the court denies the motion to seal, the clerk will return the lodged court record to the party; it will not become part of the case file, and will, therefore, not be subject to public

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

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

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. When determining whether a motion to unseal should be granted, the court should consider any statute, regulation, rule, or other source of law that addresses access to court records in the particular type of proceeding. *See, e.g.*, NMSA 1978, §§ 45-5-303(K), 45-5-407(N) (2019) ("A person not otherwise entitled to access court records . . . for good cause may petition the court for access to court records of the [guardianship or conservatorship]. The court shall grant access if access is in the best interest of the alleged incapacitated person or [the protected person or protected person subject to conservatorship] or furthers the public interest and does not endanger the welfare or financial interests of the alleged incapacitated person or [the protected person or individual].").

A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, if a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. Nonetheless, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But, in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Adopted by Supreme Court Order No. 10-8300-004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court websites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016; as amended by Supreme Court Order No. 17-8300-002, effective for all cases pending or filed on or after March 31, 2017; as amended by Supreme Court Order No. 18-8300-005, effective for all cases filed, or pending, but not adjudicated, on or after July 1, 2018, and for motions to seal or unseal filed in all cases on or after July 1, 2018; as provisionally amended by Supreme Court Order No. 21-8300-033, effective for all cases filed or pending on or after January 28, 2022.]

1-079.1. Public inspection and sealing of court records; guardianship and conservatorship proceedings.

A. **Scope of rule; Rule 1-079 NMRA.** This rule governs access to court records in proceedings to appoint a guardian or conservator under Chapter 45, Article 5, Parts 3 and 4 NMSA 1978. This rule incorporates the provisions of Rule 1-079 NMRA in their entirety and is intended to supplement only the automatic sealing provisions set forth in Subparagraphs (C)(7) and (C)(8) of that rule. All other matters related to access to court records in guardianship and conservatorship proceedings, including motions to seal and unseal court records, remain subject to the provisions of Rule 1-079 NMRA.

B. **Guardianship proceedings.** All court records in proceedings commenced for the appointment of a person to serve as guardian for an alleged incapacitated person under Chapter 45, Article 5, Part 3 NMSA 1978, are confidential and shall be automatically sealed without motion or order of the court, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978 and the following:

(1) the register of actions and docket entries used by the court to document the activity in a case shall not be sealed and shall be subject to public access, provided that the court shall not disclose diagnostic, treatment, or other medical or psychological information;

(2) except as provided in Subparagraph (4) of this paragraph, persons identified in the petition under Section 45-5-303(B) NMSA 1978 shall be permitted to

access the order appointing a guardian under Section 45-5-304 NMSA 1978 and all court records filed in the proceeding with a filing date that precedes the filing date of the order appointing a guardian;

(3) except as provided in Subparagraph (4) of this paragraph, access to court records filed after the order appointing a guardian under Section 45-5-304 NMSA 1978 shall be limited to the protected person, the guardian, and any other person the court determines under Section 45-5-307(G)(2) or (H) NMSA 1978, Section 45-5-309(D) NMSA 1978, Rule 1-140 NMRA, or Rule 1-141 NMRA; and

(4) access to a report filed by a qualified health care professional under Section 45-5-303(E) NMSA 1978, a visitor under Section 45-5-303(F) NMSA 1978, a guardian *ad litem* under Section 45-5-303.1 NMSA 1978, or a guardian under Section 45-5-314 NMSA 1978 shall be limited to the protected person, the petitioner, the visitor, the guardian *ad litem*, an attorney of record, an agent under a power of attorney unless the court orders otherwise, and any other person as determined by the court under Section 45-5-303(L) NMSA 1978.

C. **Conservatorship proceedings.** All court records in proceedings commenced for the appointment of a conservator under Chapter 45, Article 5, Part 4 NMSA 1978, are confidential and shall be automatically sealed without motion or order of the court, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978 and the following:

(1) the register of actions and docket entries used by the court to document the activity in a case shall not be sealed and shall be subject to public access, provided that the court shall not disclose diagnostic, treatment, or other medical or psychological information;

(2) except as provided in Subparagraph (4) of this paragraph, persons identified in the petition under Section 45-5-404(B) NMSA 1978 shall be permitted to access the order appointing a conservator under Section 45-5-407 NMSA 1978 and all court records filed in the proceeding with a filing date that precedes the filing date of the order appointing a conservator;

(3) except as provided in Subparagraph (4) of this paragraph, access to court records filed after the order appointing a conservator under Section 45-5-407 NMSA 1978 shall be limited to the protected person, the conservator, and any other person the court determines under Section 45-5-405(D) NMSA 1978, Section 45-5-415(G)(2) or (H) NMSA 1978, Rule 1-140 NMRA, or Rule 1-141 NMRA; and

(4) access to a report filed by a qualified health care professional under Section 45-5-407(C) NMSA 1978, a visitor under Section 45-5-407(D) NMSA 1978, a guardian *ad litem* under Section 45-5-404.1 NMSA 1978, or a conservator under Section 45-5-409 NMSA 1978 shall be limited to the protected person, the petitioner, the visitor, the guardian *ad litem*, an attorney of record, an agent under a power of

attorney unless the court orders otherwise, and any other person as determined by the court under Section 45-5-407(O) NMSA 1978.

[Approved by Supreme Court Order No. 18-8300-005, effective for all cases filed, or pending but not adjudicated, on or after July 1, 2018 and for motions to seal or unseal filed in all cases on or after July 1, 2018; as amended by Supreme Court Order No. 19-8300-019, effective December 1, 2019.]

Committee commentary. — This rule is intended to supplement Rule 1-079(C) NMRA as it applies to the automatic sealing of court records in guardianship and conservatorship proceedings. These proceedings are treated separately because of the 2018 and 2019 amendments to the Uniform Probate Code, which established a complicated framework for who may access court records that are otherwise sealed in guardianship and conservatorship proceedings. *See* N.M. Laws 2019, Ch. 228; N.M. Laws 2018, Ch. 10. Other issues related to access to court records in guardianship and conservatorship proceedings, including motions to seal or unseal court records, remain subject to the provisions of Rule 1-079 NMRA.

[Approved by Supreme Court Order No. 18-8300-005, effective for all cases filed or pending but not adjudicated on or after July 1, 2018 and for motions to seal or unseal filed in all cases on or after July 1, 2018; as amended by Supreme Court Order No. 19-8300-019, effective December 1, 2019.]

1-080. Stenographer; stenographic report or transcript as evidence.

A. **Stenographer.** A master may direct that evidence be taken stenographically and may appoint a stenographer for that purpose. The fees of such stenographer shall be fixed by the court and may be taxed ultimately as costs, in the discretion of the court. Upon motion of a master or party or upon the court's own motion, the court may order that evidence be taken by other than stenographic means, in which event the order shall designate the manner of recording, preserving and filing the evidence, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at his own expense.

B. **Stenographic report or transcript as evidence.** Whenever the testimony of a witness at a trial or hearing which was stenographically reported is admissible in evidence at a later trial, it may be proved by the transcript thereof duly certified by the person who reported the testimony.

ARTICLE 10
General Provisions

1-081. Remand to district court from federal court.

Whenever a cause shall have been removed from a district court to a United States court and thereafter remanded, judgment by default shall not be entered therein until the expiration of ten (10) days after service of notice upon defendants that the order remanding such cause has been filed. Within such time the defendants may move or plead as they might have done had such cause not been removed.

[As amended, effective August 1, 1988; January 1, 1996.]

1-082. Jurisdiction and venue unaffected.

These rules shall not be construed to extend or limit the jurisdiction of the district courts of the state or the venue of actions therein.

1-083. Withdrawn.

1-084. Bankruptcy proceedings; stay.

A. **Notice of stay.** A party shall file a written notice of any bankruptcy court stay that may affect the pending action upon becoming aware of the stay.

B. **Termination or modification.** A party shall file written notice of the termination or modification of any bankruptcy court stay that may affect the pending action upon becoming aware of the termination or modification.

[Approved, effective December 3, 2001.]

1-085. Judgments or orders on mandate.

A. **Party responsible.** Within thirty (30) days after an appellate court has sent its mandate to the district court, the prevailing party on appeal shall either:

(1) present to the court a proposed judgment or order on the mandate containing the specific directions of the appellate court; or

(2) if necessary, request a hearing.

B. **Service.** The proposed judgment or order on the mandate shall be served on all parties.

[Approved, effective September 27, 1999.]

1-086. Repealing and saving clause.

All rules of court relating to pleading, practice and procedure in judicial proceedings in the courts other than the Supreme Court of New Mexico heretofore adopted by the

Supreme Court and rules supplementary thereto, not herein contained shall remain in full force and effect unless superseded, modified or repealed by these rules.

1-087. Contest of nomination or election.

A. **Who may contest nomination or election.** As provided in Section 1-14-1 NMSA 1978, any unsuccessful candidate for nomination or election to any public office may contest the selection of the candidate to whom a certificate of nomination or a certificate of election has been issued.

B. **Procedure for contesting nominations or elections.** An action contesting a nomination or an election pursuant to Chapter 1, Article 14 NMSA 1978 shall proceed pursuant to this rule and to the Rules of Civil Procedure for the District Courts not inconsistent with this rule.

C. **Filing of verified complaint; time for filing; place of filing.** An action to contest a nomination or an election shall be commenced by filing a verified complaint of contest in the district court of the county where a party resides no later than thirty (30) days after issuance of the certificate of nomination or issuance of the certificate of election to the successful candidate. The party instituting the action shall be known as the contestant. The party against whom the action is filed shall be known as the contestee.

D. **Answer.** The contestee shall file and serve upon the contestant a verified answer within fifteen (15) days after service of the notice of verified complaint upon the contestee.

E. **Peremptory challenge to district court judge.** The statutory right to exercise a peremptory challenge to a district court judge pursuant to Section 38-3-9 NMSA 1978 and Rule 1-088.1 NMRA shall be exercised by filing an affidavit of disqualification on or before the date when the answer is required to be filed pursuant to Paragraph D of this rule.

F. **Accelerated proceedings.** Proceedings to contest a nomination or election shall be advanced for hearing and decision.

G. **Preservation of ballots.** Either party to an election contest may secure the preservation of ballots pursuant to Section 1-14-6 NMSA 1978.

H. **Impoundment of ballots.** Either party to an election contest may petition the district court in the county in which the affected precincts are located for an order impounding ballots in one or more precincts in which the petitioner is a candidate. The district court shall issue appropriate orders, including an order of impoundment as provided in Sections 1-14-8 to 1-14-12 NMSA 1978.

I. **Recount or recheck of votes.** Either party to an election contest may apply for a recount or recheck of the votes cast in an election pursuant to Sections 1-14-14 to 1-14-18 NMSA 1978.

[Rule 87; approved, effective June 1, 1946; 1-087 SCRA; as amended, effective November 1, 2002.]

Committee commentary. — Sections 1-14-1 to 1-14-21 NMSA 1978, provide that an unsuccessful candidate may challenge the result in an election or nomination contest. The statute also contains procedures for such contests. The statute creates a special statutory proceeding. *Montoya v. McManus*, 68 N.M. 381, 384, 362 P.2d 771, 773 (1961) (holding, under an earlier version of the Election Code, "an election contest is a special proceeding unknown to the common law."). The Rules of Civil Procedure for the District Courts apply to special statutory proceedings "except to the extent that ... existing rules applicable to special statutory ... proceedings are inconsistent" with the district court rules. Thus, the district court rules apply to election and nomination contests unless Article 14 contains inconsistent provisions.

Rule 1-087 was drafted to provide procedures consistent with Article 14. The rule, as initially promulgated, proved to be unsatisfactory for several reasons. First, by its terms it only applied to nomination contests, even though Article 14 applies to both nomination and election contests. Second, Rule 1-087 contained procedures for the appeal of nomination contests, a subject matter that should be covered by the Rules of Appellate Procedure, rather than by Rules of Civil Procedure for the District Courts.

In 2002, Rule 1-087 was redrafted to make it applicable to both election contests and nomination contests, to eliminate procedural rules governing appeals of judgments in election and nomination contests and to assure that procedures provided in the special statutory proceedings are incorporated into the rule in order to avoid conflict between the rules and procedures set forth in Article 14, *Procedural Provisions Unique to Election and Nomination Contests*.

Article 14 contains some procedural provisions that vary from the Rules of Civil Procedure for the District Courts. Because those statutory procedures apply to election and nomination contests, Rule 1-001 NMRA, the statutory procedures are incorporated into Rule 1-087, and control over general provisions of the rules that are inconsistent with Rule 1-087. Rule 1-087(B) explicitly so provides. Apart from the different procedures contained in Rule 1-087, the Rules of Civil Procedure for the District Courts apply to election and nomination contests brought pursuant to Article 14. *See* Rule 1-001 (Rules of Civil Procedure apply to extent not inconsistent with procedures established in special statutory proceedings); Section 1-14-3 NMRA 1978. ("The Rules of Civil Procedure apply to all actions commenced under the provisions of this section".)

Paragraphs C to F of Rule 1-087 incorporate procedural requirements contained in Article 14 into the Rules of Civil Procedure for District Courts, in order to prevent any conflict between Article 14 and the rules. Paragraph B of the rule provides that these

sections apply to election and nomination contests rather than otherwise-applicable general provisions in the Rules of Civil Procedure for the District Courts. *See Eturriaga v. Valdez*, 109 N.M. 205, 784 P.2d 24 (1989) (thirty day requirement for filing an election contest contained in Article 14 cannot be modified by rule of court).

Rule 1-087(A) incorporates the statutory provision that provides to unsuccessful candidates the right to contest a nomination or election.

Not included in Rule 1-087 are the provisions of Section 1-14-13 NMSA 1978 which establish the burden of proof and provide certain remedies in election and nomination contests. These provisions, though applicable to election or nomination contests, are substantive in nature and thus do not belong in a rule of civil procedure. *See Gunaji v. Macias*, 130 N.M. 734, 741, 31 P.3d 1008, 1015 (2001) ("it is the procedure in an election contest which is exclusive, not the grounds and the remedy.")

Rule 1-087(G) incorporates a provision in Article 14 that allows a contestant in a pending election or nomination contest to preserve ballots by a procedure set forth in Section 1-14-6 NMSA 1978.

Rule 1-087(H) incorporates provisions in Article 14 that allows a contestant to petition the district court to impound ballots by a procedure set forth in Sections 1-16-8 to 1-14-12 NMSA 1978.

Rule 1-087(I) incorporates provisions in Article 14 that allow a candidate to apply for a recount or recheck of the votes that were cast. Sections 1-14-14 to 1-14-18 NMSA 1978. These provisions do not require that an election or nomination contest be pending in order to obtain relief and are incorporated in the rule simply to reflect that a contestant may seek this relief in conjunction with an election or nomination contest.

[Effective, November 1, 2002.]

1-088. Designation of judge.

A. **Assignment of cases.** The judge before whom the case is to be tried shall be designated at the time the complaint is filed under local district court rule.

B. **Procedure for replacing a district judge who has been excused or recused.** Upon the filing of a notice that a district judge has been excused or recused, the clerk shall assign a district judge of another division at random, in the same fashion as cases are originally assigned or pursuant to local district court rule. If all district judges in the district have been excused or recused, the clerk of the district court shall notify the chief justice of the Supreme Court of New Mexico, who shall designate a judge, justice, or judge pro tempore to hear all further proceedings.

C. **Automatic recusal.** If a civil proceeding is filed in any county of a judicial district by or against a judge or an employee of the district, a judge from another district shall be designated in accordance with procedures ordered by the chief justice.

D. **Designation of temporary judge.** If a party is seeking an emergency order or a temporary restraining order under Rule 1-066 NMRA and all of the judges of a judicial district are ineligible to hear the matter or have recused themselves, the clerk shall immediately certify the case to the Supreme Court for designation of a judge to hear all matters in the proceedings until such time as a judge may be agreed upon by the parties or designated in accordance with this rule.

E. **Excuse of judge appointed by chief justice.** Any judge designated by the chief justice may not be excused except under Article VI, Section 18 of the New Mexico Constitution.

F. **Departure of judge designated by chief justice; transfer of cases.** When a judge designated to serve by the chief justice is no longer a member of the judiciary, the cases assigned to the judge shall remain on the docket of the judge's successor. The new judge may not be excused except under Article VI, Section 18 of the New Mexico Constitution.

[As amended, effective March 1, 2000; as amended by Supreme Court Order No. 09-8300-004, effective April 8, 2009; as amended by Supreme Court Order No. 17-8300-026, effective for all cases pending or filed on or after December 31, 2017.]

1-088.1. Peremptory excusal of a district judge; recusal; procedure for exercising.

A. **Limit on excusals or challenges.** No party shall excuse more than one judge. A party may not excuse a judge after the party has attended a hearing or requested that judge to perform any act other than an order for free process or a determination of indigency. For the purpose of peremptory excusals, the term "party" shall include all members of a group of parties when aligned as co-plaintiffs or co-defendants in any of the following situations:

(1) the parties are represented by the same lawyer or law firm;

(2) the parties have filed joint pleadings;

(3) the parties are related to each other as spouse, parent, child, or sibling;

(4) the parties consist of a business entity or other organization and its owners, parents, subsidiaries, officers, directors, or major shareholders; or

(5) the parties consist of a government agency and its subordinate agencies, commissions, boards, or personnel. If the interests of any parties grouped together as

one party under this rule are found to be sufficiently diverse from one another, the assigned judge may grant a motion to allow separate peremptory excusals for the party or parties whose interests are shown to differ.

B. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

C. **Procedure for exercising peremptory excusal of a district judge.** A party may exercise the statutory right to excuse the district judge before whom the case is pending by filing a peremptory excusal as follows:

(1) A plaintiff may file a peremptory excusal within ten (10) days after service of notice of assignment of the first judge in the case. A defendant may file a peremptory excusal within ten (10) days after the defendant files the first pleading or motion under Rule 1-012 NMRA.

(2) Any party may file a peremptory excusal within ten (10) days after the clerk serves notice of reassignment on the parties or completes publication of a notice of a mass reassignment.

(3) In situations involving motions to reopen a case to enforce, modify, or set aside a judgment or order, if the case has been reassigned to a different judge since entry of the judgment or order at issue, the movant may file a peremptory excusal within ten (10) days after filing the motion to reopen and service of the notice of reassignment, and the non-movant may file a peremptory excusal within ten (10) days after service of the motion to reopen.

(4) In addition to the other limits contained in this rule, no peremptory excusal may be filed by any original or later-added party more than one hundred twenty (120) days after the judge sought to be excused was assigned to a case.

D. **Notice of reassignment.** After the filing of the complaint, if the case is reassigned to a different judge, the clerk shall serve notice of the reassignment to all parties. When a mass reassignment occurs, the clerk shall serve notice of the reassignments to all parties by publishing the notice for four (4) consecutive weeks on the State Bar web site and in two (2) consecutive New Mexico Bar Bulletins. Service of notice by publication is complete on the date printed on the second issue of the Bar Bulletin.

E. **Service of excusal.** Any party excusing a judge shall serve notice of the excusal on all parties.

F. **Misuse of peremptory excusal procedure.** Peremptory excusals are not to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or group of attorneys may be using peremptory excusals for improper purposes or with such frequency as to impede the administration of justice, the Chief Judge of the

district shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written notice to the attorney or group of attorneys believed to be improperly using peremptory excusals. The Chief Justice may take appropriate action to address any misuse, including issuance of an order providing that the attorney or attorneys or any party they represent may not file peremptory excusals for a specified period of time or until further order of the Chief Justice.

G. **Recusal.** Nothing in this rule precludes the right of any party to move to recuse a judge for cause. No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

H. **Objections to the validity of a peremptory excusal; excused judge to rule.** An objection to the timeliness or validity of a peremptory excusal may be raised by any party or by the court on its own motion. The excused judge shall rule on the timeliness or validity of any such objection. If the excused judge determines that the excusal has met the applicable procedural and legal requirements in this rule, the judge shall proceed no further. If the excused judge determines that the excusal has not met the applicable procedural and legal requirements in this rule, the judge may proceed to preside over the case.

[As amended, effective August 1, 1988; January 1, 1995; as amended by Supreme Court Order No. 07-8300-001, effective March 15, 2007; by Supreme Court Order No. 08-8300-038, effective December 15, 2008; as amended by Supreme Court Order No. 12-8300-031, effective for all cases filed or pending on or after January 7, 2013; as amended by Supreme Court Order No. 15-8300-019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-003, effective March 1, 2018; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — The March 2018 amendment to Rule 1-088.1(C)(4) NMRA corrects a conflict between two subparagraphs of the rule that resulted in a failure of the rule to accomplish the purposes underlying the two subparagraphs. Amendments in December 2015 added Subparagraph (C)(4) to provide the following: "Regardless of the other limits contained in this rule, no peremptory excusal may be filed by any original party or later-added party more than one hundred twenty (120) days after the first judge has been assigned to the case."

The commentary to an earlier draft of the new subparagraph published for comment in 2013 to add a time limitation on excusals of judges who had actually been presiding over a case for the prescribed period of time clearly stated the intent of the provision as follows:

> [The] time limit on exercise of peremptories requires their exercise at the outset of a case, before the judge has gotten involved in learning about the case and making rulings. If the original parties do not perceive the need at the outset of the case to peremptorily excuse the judge, there is little justification for allowing later-added parties to review the judge's rulings and remove the judge who has been presiding over the case, especially since the constitutional right to disqualify a judge for cause is always available.

But the wording of various parts of the 2013 proposals were amended for unrelated reasons before their eventual promulgation in 2015, including an amendment that substituted "the first judge has been assigned to the case" for "the case has been at issue before the judge sought to be excused." The result was a clear textual conflict between the intended limitation of the right to excuse a judge who had already been presiding over a case for a period of time, and the intent of the provisions in Subparagraphs (C)(2) and (C)(3) allowing any party to excuse a new judge within ten (10) days of a mass reassignment or a reopening of the case.

The March 2018 amendment by its limitation on the excusal of a judge who has been assigned to a case for at least one hundred twenty (120) days clarifies that Subparagraph (C)(4) neither expands nor reduces the right of a party to file an excusal within ten (10) days of reassignment in the situations described in Subparagraphs (C)(2) and (C)(3).

Reassignment of a judge usually occurs in individual cases in which a party has excused the judge or the judge recuses himself or herself. When this happens, the clerk easily can and does serve individual notice of the reassignment to the parties by mail or electronic transmission. Whether served by mail or electronic transmission, Rule 1-006 NMRA gives the parties an additional three (3) days to file a peremptory excusal under this rule.

When a judge retires, dies, is disabled, or assumes responsibility for different types of cases (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory excusal may choose to excuse the successor judge. Providing individual notice to every party in each such case is administratively difficult, expensive and time consuming. Clerks sometimes serve notice of reassignment in an alternative manner—usually through publication in the New Mexico Bar Bulletin, on the State Bar's web site, or both.

The 2008 amendment formally incorporates into Rule 1-088.1 NMRA the use of notice by publication in such a situation — now identified as a "mass reassignment." The amended rule requires that the specified notice be published on the State Bar's web site for four (4) consecutive weeks and in two (2) consecutive issues of the New Mexico Bar Bulletin and provides that a party who has not yet exercised a peremptory excusal may do so within ten (10) days after the date of the second Bar Bulletin. When a judge's entire caseload is reassigned, the publication notice need not contain the caption of

each affected case, but must contain the names of the initially-assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example when an additional judge is appointed in a judicial district and a portion of other judges' cases are assigned to the new judge. When this occurs, if the number of pending cases collectively reassigned exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may publish such a list in the Bar Bulletin, publish a notice in the Bar Bulletin that directs the reader to the court's web site where the list will be posted, or post notice on the State Bar's web site.

Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. Where actual notice is not achieved through publication, the trial court has ample authority to accept a late excusal. *See* Rule 1-006(B)(2) NMRA (providing that the court may permit act to be done after deadline has passed if excusable neglect is shown).

As with any other pleading filed in court, a peremptory excusal of a judge must be signed by the party's attorney or, if the party is not represented by counsel, it must be signed by the party. *See* Rule 1-011 NMRA. All of the procedures for excusing a judge in Paragraph C are subject to the limitations in Paragraph A.

[Adopted by Supreme Court Order No. 08-8300-038, effective December 15, 2008; as amended by Supreme Court Order No. 12-8300-031, effective for all cases filed or pending on or after January 7, 2013; as amended by Supreme Court Order No. 15-8300-019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 18-8300-003, effective March 1, 2018; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020.]

1-089. Entry of appearance; withdrawal or substitution of attorneys.

A. **Entry of appearance.** When an attorney represents a party, the attorney shall file an entry of appearance, unless the court filed an order appointing the attorney. Filing a pleading pursuant to Rule 1-007 NMRA signed by an attorney constitutes an entry of appearance under this rule.

If an attorney's appearance is limited pursuant to Paragraph C of Rule 16-102 NMRA, the attorney shall:

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

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

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

B. **Withdrawal by court order required.** An attorney shall obtain a court order permitting withdrawal when:

(1) the attorney has appeared without limitation; or

(2) the attorney's appearance is limited pursuant to Paragraph A of this rule and the attorney has not completed the purpose of the representation. A copy of any order permitting an attorney to withdraw shall be filed with the clerk and served on all parties.

The court may place conditions on an order approving withdrawal as justice requires, such as directing the substitution of counsel with an accompanying written notice filed with the clerk and served on the parties or ordering the attorney withdrawing on behalf of a party to file with the clerk and serve on the parties a notice of an address where service may be made upon the party.

When an order permitting withdrawal will result in a party to an action not being represented by an attorney, the order shall reasonably advise that the unrepresented party shall have twenty (20) days to retain an attorney or be deemed to have entered an appearance pro se. The withdrawing attorney shall serve a copy of the order permitting withdrawal on the unrepresented party pursuant to Paragraph B of Rule 1-005 NMRA.

C. **Withdrawal upon completion of limited representation.** An attorney whose appearance is limited as set forth in Paragraph A of this rule and who has completed the purpose of the limited representation need not obtain a court order permitting withdrawal. Such an attorney shall file with the clerk and serve on all parties a notice of withdrawal or substitution of counsel. If an attorney ceases to act without complying with the provisions of this rule, upon motion of any party or upon the court's own motion, the court may enter an order requiring any actions that the court deems necessary.

D. **Service upon attorneys of record.** Attorneys of record shall continue to be subject to service for ninety (90) days after entry of final judgment. This rule does not preclude the earlier withdrawal of counsel as provided above.

E. **Service upon responding party.** In the event of further legal proceedings between the parties after the ninety (90) days have elapsed, the moving party shall effect service of process upon the responding party pursuant to Rule 1-004 NMRA.

[As amended, effective August 1, 1989; April 1, 2002; as amended by Supreme Court Order No. 08-8300-013, effective June 20, 2008.]

Committee commentary. — The 2008 amendments to Rule 1-089 NMRA consist of new provisions applicable to situations when attorneys enter a limited appearance under Rule 16-102 NMRA as well as stylistic changes to bring the rule up to date with current practice. The rule now permits an attorney to enter a limited entry of appearance and provides specific procedures for withdrawal upon completion of the limited representation.

Previously, the rule provided for withdrawal once an attorney obtained written consent from the court and then provided notice. The 2008 amendments bring the rule into current practice by requiring a court order for withdrawal when an attorney appears without limitation or the attorney's appearance is limited and the attorney has not yet completed the purposes of the limited representation.

The requirement of an order approving withdrawal triggers application of Rules 1-007 and 1-007.1 NMRA concerning written motions, as well as briefings and a hearing when the motion is opposed. Because the new provisions contemplate filing and service of an order permitting withdrawal of counsel, it is not necessary to file an additional notice of withdrawal or substitution. However, the rule specifically affords the court authority to require such additional notices as the court deems necessary.

In situations where an order allowing an attorney to withdraw will leave a party unrepresented, the written order must make specific reference that an unrepresented party has 20 days to retain counsel or will be deemed to appear pro se. The withdrawing attorney must serve the order on the attorney's former client pursuant to Paragraph B of Rule 1-005 NMRA. For further guidance, attorneys may wish to consult Rule 16-116 NMRA, which concerns declining or terminating representation.

1-089.1. Nonadmitted and nonresident counsel.

A. **Nonadmitted counsel.** Except as otherwise provided in Paragraph C of this rule, counsel not admitted to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or country, may upon compliance with Rule 24-106 NMRA, participate in proceedings before New Mexico courts only in association with counsel licensed to practice law in good standing in New Mexico, who, unless excused by the court, must be present in person in all proceedings before the court. Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another state or country and that they have complied with Rule 24-106 NMRA. The affidavit shall be filed with the first paper filed in the court, or as soon as practicable after a party decides on representation by nonadmitted counsel. Upon filing of the affidavit, nonadmitted counsel shall be deemed admitted subject to the other terms and conditions of this paragraph. A separate motion and order are not required for the participation of nonadmitted counsel. New Mexico counsel must sign the first motion or pleading and New Mexico counsel's name and address must appear on all subsequent papers or pleadings. New Mexico counsel shall be deemed to have signed every subsequent pleading and shall therefore be subject to the provisions of Rule 1-011 NMRA. For noncompliance with Rule 24-106 NMRA or this

rule, or for other good cause shown, the court may issue an appropriate sanction including termination of the attorney's appearance in any proceeding.

B. **Nonresident counsel licensed in New Mexico.** In order to promote the speedy and efficient administration of justice by assuring that a court has the assistance of attorneys who are available for court appointments, for local service, for docket calls and to prevent delays of motion hearings and matters requiring short notice, the court may require a nonresident counsel licensed to practice and in good standing in New Mexico to associate resident New Mexico counsel in connection with proceedings before the court.

C. **Discovery matters; counsel not licensed in New Mexico.** Counsel who are not New Mexico residents and who are not licensed to practice law in New Mexico, but who are licensed to practice law and in good standing in another state or territory may, without associating New Mexico counsel, participate in discovery proceedings which arise out of litigation pending in another state or territory. However, in a specific proceeding, the court may require association of New Mexico counsel.

[As amended, effective October 15, 1986; January 20, 2005; as amended by Supreme Court Order No. 13-8300-040, effective December 31, 2013.]

1-090. Conduct of court proceedings.

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

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.

1-091. Adopting procedural statutes.

All statutes relating to pleading, practice and procedure in judicial proceedings in any of the courts of New Mexico, existing upon the taking effect of the act of the eleventh legislature, approved March 13, 1933, (L. 1933, c. 84) [Section 38-1-1, 38-1-2 NMSA 1978], and all statutes since enacted by any session of the legislature relating to said subjects, or any of them except as any of said statutes heretofore may have been or hereafter may be amended or vacated by order of this court, shall remain and be in effect and have full force and operation as rules of court.

1-092. Nonstenographic recording.

The district court may, upon its own motion or the motion of a party, order that the record, or any part thereof, of any proceeding before it be made by other than stenographic means, in which event the order shall designate the portion or portions to be so made, and the manner of recording and preserving the same and may include other provisions to assure that the record will be accurate and trustworthy. Such other provisions may, but are not required to, include a provision for utilizing a court reporter to record the proceedings in addition to recording by other means.

1-093. Suspended.

[Adopted by Supreme Court Order No. 15-8300-020, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 16-8300-016, effective for all cases pending or filed on or after December 31, 2016; suspended by Supreme Court Order No. 21-8300-032, effective November 22, 2021, until further order of the court.]

1-094. Clinical education; university of New Mexico school of law.

A. **Purpose.** To permit a clinical program for the university of New Mexico school of law.

B. **Procedure.** Any law student admitted to the clinical program at the university of New Mexico school of law shall be authorized under the control and direction of the dean of the law school to advise persons and to negotiate and to appear before the courts and administrative agencies of this state, in civil and criminal matters, under the active supervision of a member of the state bar of New Mexico designated by the dean of the law school. Such supervision shall include assignment of all matters, review and examination of all documents and signing of all pleadings prepared by the student. The supervising lawyer need not be present while a student is advising a client or negotiating, but shall be present during court appearances. Each student in the program may appear in a given court with the written approval of the judge presiding over the case and shall file in the court a copy of the order granting approval. The order approving the practice by such student shall be substantially in the form approved by the Supreme Court. The law school shall report annually to the Supreme Court.

C. **Eligible students.** Any full-time student in good standing in the university of New Mexico school of law who has received a passing grade in law school courses aggregating thirty (30) or more semester hours (or their equivalent), but who has not graduated, shall be eligible to participate in a clinical program if the student meets the academic and moral standards established by the dean of the school.

[As amended, effective May 1, 1986; January 1, 1995.]

1-094.1. Clinical education; out-of-state law school approved programs.

A. **Purpose.** To permit out-of-state law students to earn law school clinical law credit hours under the supervision of New Mexico attorneys.

B. **Practice permitted.** An eligible law student may advise persons, negotiate and appear before the courts and administrative agencies of this state, in civil and criminal matters, under the active supervision of a member of the state bar of New Mexico who has been admitted to practice law for at least five (5) years. Such supervision shall include assignment of all matters, review and examination of all documents and signing of all pleadings prepared by the student. The supervising lawyer need not be present while a student is advising a client or negotiating, but shall be present during court appearances. Each student in the program may appear in a given court with the written approval of the judge presiding over the case and shall file in the court a copy of the order granting approval and a copy of the dean of the law school's certificate required by Paragraph C of this rule. The order approving the practice by such student and the certificate of the dean of the law school shall be substantially in the form approved by the Supreme Court.

C. **Eligible students.** Any law student who is regularly enrolled in an American Bar Association accredited law school may participate in a clinical law program of that law school under the direction of a qualified lawyer of this state as provided in Paragraph B of this rule if the dean of such law school provides a certificate to the supervising lawyer:

(1) that the clinical law program complies with the current standards of the American Bar Association regarding "field placement programs";

(2) the student has received a passing grade in law school courses aggregating thirty (30) or more semester hours or their equivalent; and

(3) the student meets the academic and moral standards required of students enrolled at the institution.

D. **Additional student requirements.** Prior to participating in a clinical law program pursuant to the provisions of this rule, an eligible law student shall read and be familiar with the Rules of Professional Conduct and this rule.

E. **Certificate requirements.** In addition to the requirements set forth in Paragraph C of this rule, the certificate of the dean of an out-of-state law school shall specify the period during which the law student will participate in the clinical law program. Certificates shall be limited to terms not exceeding four (4) months.

[Adopted, effective January 1, 1995.]

1-095. Informal probate proceedings in probate court.

A. **Applicability of rule.** This rule shall apply to informal probate proceedings filed in the probate court.

B. **Initial pleadings.** At the time an informal probate proceeding is filed the probate court shall advise the clerk of the district court in writing of the style of the case and the names and addresses of the party filing the initial pleading and his attorney, if any. Upon the appointment of a personal representative in an informal proceeding, the probate court shall advise the clerk of the district court in writing of the names and addresses of the personal representative and his attorney, if any. When the informal probate proceeding is closed, the probate court shall furnish to the clerk of the district court a copy of the docket sheet for said proceeding showing all entries. The district court shall retain such information as a part of its records.

C. **Filing of documents.** After furnishing a copy of the docket sheet, the probate court shall, promptly upon the filing of any document with the probate court, cause to be furnished to the clerk of the district court notice of the type of document so filed and date of filing. If any such document shall evidence the appointment of a personal representative or any change in the name or address of a personal representative, the notice shall include the name and address of the personal representative, or any change therein. The clerk of the district court shall enter such information on its copy of the appropriate docket sheet.

D. **Copies of documents.** The clerk of the probate court shall, upon request and payment of fees required by law, furnish a certified copy of any document filed in an informal probate proceeding in the probate court. The obligation of the clerk of the district court to issue certified copies is limited to copies of documents actually filed in the district court.

E. **Docket fee.** If application for informal probate of a decedent's estate has been filed with the probate court and a claimant presents a claim against the estate by filing claim with the district court pursuant to Section 45-3-804 NMSA 1978, the clerk shall require payment of the docket fee required for filing other civil cases and shall promptly furnish to the probate court a copy of such claim.

F. **Demand for notice.** If a demand for notice is filed with the clerk of the district court pursuant to Section 45-3-204 NMSA 1978, and an informal proceeding is then pending in the probate court, the clerk of the district court shall promptly furnish a copy of such demand to the clerk of the probate court. If at the time of filing such demand there is no proceeding pending in either the district court or the probate court, and an informal proceeding is thereafter brought in the probate court, the clerk of the district court shall promptly furnish a copy of such demand to the clerk of the probate court upon receipt of copy of the docket sheet provided for in Paragraph B of this rule. Further, upon being furnished the name and address of a personal representative, the clerk of the district court shall mail a copy of the demand to the personal representative as required by Section 45-3-204 NMSA 1978.

1-096. Challenge of nominating petition.

A. **Complaint; filing deadline.** Court action challenging a nominating petition provided for in the Primary Election Law, Sections 1-8-10 through 1-8-52 NMSA 1978, shall be initiated by filing a complaint and request for expedited hearing no later than ten (10) days after the last day for filing the declaration of candidacy with which the nominating petition was filed. The plaintiff shall immediately deliver a copy of the complaint and request for expedited hearing to the assigned judge and to any subsequent judges appointed pursuant to Rule 1-088 NMRA or Paragraph G of this rule.

B. **Service of process.** The complaint shall be served in accordance with Rule 1-004 NMRA upon the proper filing officer as provided in Section 1-8-35(B) NMSA 1978 and as defined by Section 1-8-25 NMSA 1978, and the plaintiff shall, immediately after filing the complaint, also deliver a copy of the complaint and request for expedited hearing to the candidate whose nominating petition is challenged. Delivery shall be effected in a manner that is reasonably calculated to provide actual notice to the candidate of the filing of the complaint.

C. **Challenges to signatures; separate counts and specificity in complaint required.** If claim is made that any signature on a nominating petition should not be counted, the complaint shall

(1) specify in separate counts each signature so challenged;

(2) specify the grounds on which the signature is challenged as required by Paragraphs D and E of this rule;

(3) identify the line number and the page of the nominating petition where each such signature appears;

(4) attach a copy of the nominating petition upon which the signature appears; and

(5) attach any exhibits required by Paragraph D of this rule. If multiple signatures are challenged on one common ground only, notwithstanding Subparagraph (1) of this paragraph, those signatures may be challenged in one count that lists the signatures so challenged and otherwise satisfies the requirements of Subparagraphs (2), (3), (4), and (5) of this paragraph.

D. **Challenges based on duplicate signatures.** If any signature is challenged on the ground that the person signing has signed more than one nominating petition for the same office, or has signed one petition more than once, the complaint shall attach as an exhibit all nominating petitions containing such signatures and identify the page and line number on each such petition where the person is alleged to have signed.

E. **Challenges to the qualifications of the person signing the petition.** If any signature is challenged on the ground that the person signing is not qualified to sign the nominating petition, the complaint shall specify as to each signature:

(1) that the qualifications of the person signing the nominating petition are challenged because that person:

(a) was not a registered member of the candidate's political party ten (10) days prior to the filing of the nominating petition;

(b) failed to provide information required by the nominating petition;

(c) is not a qualified voter of the state, district, county or area to be represented by the office for which the person seeking the nomination is a candidate;

(d) is not of the same political party as the candidate named in the nominating petition as shown by the signer's certificate of registration; or

(e) is not the person whose name appears on the nominating petition;

(2) the voter registration records upon which the challenge relies;

(3) the name and address of each person who searched the voter registration records upon which the challenge relies;

(4) the date on which each search was made; and

(5) any variations in names, spelling or addresses for which search was made.

F. **Challenges to Nominating Petition.** If a nominating petition, or any page thereof, is challenged because it fails to comply with statutory requirements for the form of the nominating petitions, the complaint shall specify each challenged page of the nominating petition and each violation of statute on which the challenge is based.

G. **Waiver.** Objection to counting a signature and any ground for rejecting a signature shall be conclusively waived unless set out in the manner above provided within ten (10) days after the last day for filing the challenged nominating petition.

H. **Disqualification of judge.** The provisions of Paragraph C of Rule 1-088.1 NMRA notwithstanding, the plaintiff may exercise the statutory right to excuse the district judge assigned to the case by filing a peremptory election to excuse on the same day the complaint is filed. The plaintiff shall serve notice of the peremptory election to excuse at the same time that the complaint is served and delivered in accordance with Paragraph B of this rule. If more than one plaintiff is named in the complaint, the plaintiffs only may exercise one collective peremptory election to excuse the district

judge. The candidate whose nominating petition is challenged may file a peremptory election to excuse the district judge within two (2) days after delivery of the complaint. In all other respects, Rule 1-088.1 NMRA governs the exercise of peremptory elections to excuse the district judge. If there is an excusal for cause or a recusal, the chief justice shall reassign the case to another judge, justice or judge pro tempore to hear all further proceedings.

I. **Hearing and decision.** Within ten (10) days after the complaint is filed, the district court shall hold a hearing and render a decision.

J. **Appeal.** The decision of the district court may be appealed to the Supreme Court in accordance with Rule 12-603 NMRA.

[As amended by Supreme Court Order No. 09-8300-040, effective November 10, 2009; by Supreme Court Order No. 12-8300-004, effective for cases filed on or after March 1, 2012; as amended by Supreme Court Order No. 16-8300-009, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — The time periods in this rule are to be computed under NMSA 1978, Section 1-1-22. The 2012 and 2016 amendments to Paragraphs B and C of this rule were intended to incorporate the Supreme Court's ruling in *Charley v. Johnson*, 2010-NMSC-024, ¶¶ 16, 22, nn. 1 & 3, 148 N.M. 246, 233 P.3d 775, and to recognize the need for expeditious and fair resolution of petition challenges.

The Legislature, in NMSA 1978, Sections 1-8-25 and -35, has made the secretary of state (or county clerk depending on the office involved) the statutory agent for service of process on candidates whose petitions have been challenged and has required the secretary of state or county clerk to then mail the process to the candidate, while requiring the district court to conduct an evidentiary hearing on the challenge within no more than ten days of the filing date. Because these statutory requirements may not result in actual notice of the action getting to the candidate in time to know about and prepare for the evidentiary hearing, the Supreme Court has added provisions under its rule-making authority to increase the likelihood of prompt actual notice to the candidate without placing on the challenger technical demands that may be unreasonably difficult in a particular case. Accordingly, Paragraph B of this rule provides for delivery to be "effected in a manner that is reasonably calculated to provide actual notice to the candidate of the filing of the complaint." Although the rule does not provide exclusive methods of providing actual notice of the filing and evidentiary hearing, illustrative examples of such delivery could include the following:

(1) handing it to the candidate; or if the candidate refuses to accept delivery, by leaving the copies at the location where the candidate has been found;

(2) electronic transmission to the email address listed on the "Candidate Information for Campaign Reporting" filed with the secretary of state;

(3) leaving it at the candidate's campaign office with a clerk or other person in charge thereof, or, if there is no one in charge, leaving it in a conspicuous place in the office; or

(4) leaving it at the candidate's residence address as listed on the candidate's "Declaration of Candidacy" filed with the secretary of state pursuant to NMSA 1978, Section 1-8-29 with some person of suitable age and discretion, or if no one is present, by posting in a conspicuous place.

[Adopted by Supreme Court Order No. 09-8300-040, effective November 10, 2009; as amended by Supreme Court Order No. 12-8300-004, effective for cases filed on or after March 1, 2012; as amended by Supreme Court Order No. 16-8300-009, effective for all cases pending or filed on or after December 31, 2016.]

1-096.1. Review of election recall petitions.

A. **Scope.** This rule governs district court review of petitions to recall elected county officials as required by Article X, Section 9 of the New Mexico Constitution and challenges to petitions to recall local school board members as required by Section 22-7-12 NMSA 1978.

B. **Initiation of district court review.**

(1) Prior to circulating a petition for recall of an elected county official pursuant to the provisions of Article X, Section 9 of the New Mexico Constitution, the plaintiff seeking permission to circulate a recall petition shall file a complaint in the district court for the county where the recall is proposed. The complaint shall attach a copy of the proposed recall petition.

(2) Any person seeking to challenge a recall petition under the Local School Board Member Recall Act shall file a complaint in the district court for the county where the local school board is located within ten (10) days after the county clerk determines whether sufficient signatures have been submitted in accordance with the provisions of Section 22-7-9 NMSA 1978. The complaint shall attach a copy of the recall petition.

C. **Contents of complaint.** A complaint filed pursuant to the provisions of Paragraph B of this rule shall set forth:

(1) for the proposed recall of an elected county official, the factual allegations that the plaintiff asserts as grounds, as stated in the proposed recall petition, for determining that the elected county official committed malfeasance or misfeasance in office or otherwise violated the oath of office.

(2) for recall petitions concerning a local school board member:

(a) any challenges to the validity of signatures on the recall petitions;

(b) any challenges to the determination of the county clerk as to the minimum number of signatures; and

(c) any challenges to the sufficiency of the charges in the recall petition not previously considered by the district court under the provisions of Section 22-7-9.1 NMSA 1978.

D. **Challenges to signatures on local school board member recall petitions.**

(1) If a complaint alleges that any signature on the recall petition should not be counted, the complaint shall specify each signature so challenged and the specific ground on which it is challenged; it shall further identify the line number and the page of the recall petition where each such signature appears;

(2) If a complaint challenges any signature on the ground that the person signing has signed more than one petition for the same office, the complaint shall identify the page and line number on such other recall petition the person is alleged to have signed and shall attach such other recall petition as an exhibit;

(3) If a complaint challenges any signature on the ground that the person signing is not a registered voter of the county and school district represented by the local school member who is the subject of the recall petition, the complaint shall allege that the challenge is based on a diligent search of all registration records of the appropriate county and shall specify as to each challenged signature:

(a) the county where the search was made;

(b) the name and address of each person making the search;

(c) the date when each search was made; and

(d) any variations in names, spelling or addresses for which search was made.

E. **Service of process.** The plaintiff shall, immediately after filing the complaint, serve a copy of the complaint and notice of hearing to the county clerk, the person subject to the recall, and the person, group or organization initiating the recall petition. Service shall be effected in the manner provided by Rule 1-004 NMRA.

F. **Hearing.** Within ten (10) days after the complaint is filed in the district court, the court shall set a hearing and render a decision in accordance with the standards set forth in Article X, Section 9 of the New Mexico Constitution or Section 22-7-12 NMSA 1978, as applicable. At the hearing, the plaintiff, the county clerk, the official sought to be recalled, and the person, group or organization initiating the recall petition shall be given an opportunity to present evidence and argument as directed by the district court.

G. **Appeal.** Any party to the recall proceeding who is aggrieved by the decision of the district court may appeal to the Supreme Court in accordance with the provisions of Rule 12-603.

[Adopted by Supreme Court Order No. 09-8300-021, effective September 4, 2009.]

ARTICLE 11
Miscellaneous

1-097. Eminent domain; notice of presentation of petition; service.

Upon the filing of the petition in eminent domain, a copy thereof, together with a notice specifying the time when and place where such petition will be presented to the court shall be served upon such owner. If any such owner has a usual place of abode in this state, but is absent therefrom, such notice and copy of petition may be served upon such owner by leaving a copy thereof at such usual place of abode with some person over the age of fifteen (15) years, residing at the usual place of abode of such owner, and informing such person that said notice is to be delivered to the owner upon whom such service is sought to be had. All such services made upon an owner in person within this state shall be made at least ten (10) days before the date specified for the presentation of such petition. Such services may be made by any disinterested person over the age of eighteen (18) years, and proof of the service shall be made by the affidavit of such person.

If the name or residence of any owner be unknown, or if the owners, or any of them, do not reside within the state, or cannot be found therein, and are not served with such notice as provided herein, notice of the time of hearing the petition, reciting the substance of the petition and the time and place fixed for the hearing thereof, shall be given by publication for three (3) consecutive weeks prior to the time of hearing the petition, the last publication to be at least three (3) days prior to such date, in a newspaper published in the county in which the proceedings are pending, if one is published in the county, and in a newspaper published in another county, having a general circulation in the county in which such proceedings are pending, if no paper is published in the county where said proceedings are pending. Personal service of such notice and copy of the petition out of the State of New Mexico at least twenty (20) days before the date specified for the presentation of the petition shall be equivalent to publication with respect to all persons so served. Return of such service shall be made by the affidavit of the person making the same.

1-098. Withdrawn.

1-099. District court civil filing fees.

A. **Docket fee.** Except as provided in Paragraph B or otherwise provided by law, a filing fee shall be collected in civil matters in the amount prescribed by law for the

docketing of any cause, whether original or reopened or by appeal or transfer from a court of limited jurisdiction.

B. **Exceptions.** No docket fee shall be charged:

(1) for filing any paper within ninety (90) days after the final disposition of the case;

(2) if a docket fee has been previously paid or waived in the case, for filing a stipulated order or other request for action which may be performed by the clerk of the court pursuant to these rules, even if further action may be required by the judge;

(3) for the filing of a motion to correct a mistake in the judgment, order or record; or

(4) if a docket fee has been previously paid or waived in the case, for filing a motion to enforce a child support order.

C. **Miscellaneous fees.** The miscellaneous district court civil filing fees are as follows:

taking an acknowledgment of one person and affixing seal	$1.50
taking acknowledgments of additional persons at same time, each additional person	.75
single copy of records, per typewritten folio	.35
each additional copy of records ordered at same time, per typewritten folio	.35
copies of records reproduced by photographic process, per page	.35
certificate and seal authenticating any paper as true copy	1.50.

[As amended, effective January 1, 1989; April 1, 1989; September 27, 1999; August 1, 2001.]

Committee commentary. — If a docket fee has been previously paid or waived, a party may file a stipulated order at any time without paying a filing fee even though the signature of the judge is required. This permits the parties to agree to modifications of court orders such as custody orders.

1-100. Form of papers.

Except exhibits and papers filed by electronic transmission pursuant to Rule 1-005.2 NMRA of these rules, all pleadings and papers filed in the district court shall be: clearly legible; printed on one side of the page, on good quality white paper eight and one-half by eleven (8½ x 11) inches in size, with a left margin of one (1) inch, a right margin of

one (1) inch and top and bottom margins of one and one-half (1½) inches; with consecutive page numbers at the bottom; stapled at the upper left hand corner; and, except for a cover page, shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface. A space of at least two and one-half (2½) by two and one-half (2½) inches for the clerk's recording stamp shall be left in the upper right-hand corner of the first page of each pleading. The contents, except quotations and footnotes, shall be double spaced. Exhibits which are copies of original documents may be reproduced from originals by any duplicating or copying process which produces a clear black image on white paper on one side of each page. The size of any exhibits shall be their original size or any smaller size not less than eight and one-half by eleven (8½ x 11) inches.

[Adopted effective January 1, 1983; Misc. Rule 4; recompiled as 1-100 SCRA 1986; as amended, effective January 1, 1998; November 1, 2002.]

1-101. Reserved.

1-102. Deposit of litigant funds.

A. **Distinct accounts.** Litigant funds deposited with the district court shall be deposited by the court within two (2) business days of receipt in one or more trust fund checking accounts in a bank that is a member of the Federal Deposit Insurance Corporation distinct from the court’s accounts for general funds.

B. **Interest bearing accounts.** Funds deposited in a trust fund checking account under Paragraph A of this rule shall be invested in accordance with Section 34-6-36 NMSA 1978 in obligations of the United States or in an interest bearing account in a financial institution insured by the Federal Deposit Insurance Corporation or the Federal Savings & Loan Insurance Corporation, as may be prescribed by regulation of the Director of the Administrative Office of the Courts. To the extent that the funds are deposited with the court in accordance with Section 42A-1-19 NMSA 1978, the funds shall be invested by the court clerk in federal securities or in federally-insured interest bearing accounts in a financial institution located within the court’s judicial district.

C. **Interest.** Interest on deposits shall inure to the benefit of the person entitled to the principal only as follows:

(1) in proceedings if a single deposit of twenty-five thousand dollars ($25,000) or more is made for a minimum period of thirty (30) days and the court, on the request and stipulation of the parties, so orders; or

(2) in an eminent domain proceeding if the applicable statute provides for investment at interest for the benefit of a party.

D. **Records of clerk.** In any case in which interest is ordered to be paid under Paragraph C of this rule, the clerk shall, before making payment, ascertain the amount

of interest included in the payment and shall require the payee to furnish a completed Form W-9 (Request for Taxpayer Identification Number and Certification) providing the payee's name, mailing address, and taxpayer identification number. The clerk shall make and keep a record of the payee's name, mailing address, taxpayer identification number, and the amount of interest included in the payment.

E. **Administrative trust account.** Deposits other than those made under Subparagraph (C)(1) or (C)(2) of this rule shall be made in a separate account designated the administrative trust account. The clerk shall distribute to the state treasurer interest earned on the administrative trust account within ten (10) days after receipt by the clerk of each monthly statement dealing with the account.

[As amended by Supreme Court Order No. 21-8300-018, effective for all cases pending or filed on or after December 31, 2021.]

1-103. Court interpreters.

A. **Scope and definitions.** This rule applies to all civil proceedings filed in the district court. The following definitions apply to this rule:

(1) "case participant" means a party, witness, or other person required or permitted to participate in a proceeding governed by these rules;

(2) "interpretation" means the transmission of a spoken or signed message from one language to another;

(3) "transcription" means the interpretation of an audio, video, or audio-video recording, which includes but is not limited to 911 calls, wire taps, and voice mail messages, that is memorialized in a written transcript for use in a court proceeding;

(4) "translation" means the transmission of a written message from one language to another;

(5) "court interpreter" means a person who provides interpretation or translation services for a case participant;

(6) "certified court interpreter" means a court interpreter who is certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the Administrative Office of the Courts or who is acknowledged in writing by the Administrative Office of the Courts as a court interpreter certified by another jurisdiction that is a member of the Consortium for Language Access in the Courts;

(7) "justice system interpreter" means a court interpreter who is listed on the Registry of Justice System Interpreters maintained by the Administrative Office of the Courts;

(8) "language access specialist" means a bilingual employee of the New Mexico Judiciary who is recognized in writing by the Administrative Office of the Courts as having successfully completed the New Mexico Center for Language Access Language Access Specialist Certification program and is in compliance with the related continuing education requirements;

(9) "non-certified court interpreter" means a justice system interpreter, language access specialist, or other court interpreter who is not certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the Administrative Office of the Courts;

(10) "sight translation" means the spoken or signed translation of a written document; and

(11) "written translation" means the translation of a written document from one language into a written document in another language.

B. **Identifying a need for interpretation.**

(1) The need for a court interpreter exists whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding. The need for a court interpreter may be identified by the court or by a case participant. A court interpreter shall be appointed if one is requested.

(2) The court is responsible for making arrangements for a court interpreter for a juror who needs one.

(3) A party is responsible for notifying the court of the need for a court interpreter as follows:

(a) if a party needs a court interpreter, the party or the party's attorney shall notify the court when the party files the complaint or petition or when the party files the answer or other responsive pleading; and

(b) if a court interpreter is needed for a party's witness, the party shall notify the court in writing substantially in a form approved by the Supreme Court upon service of a notice of hearing and shall indicate whether the party anticipates the proceeding will last more than two (2) hours.

(4) If a party fails to timely notify the court of a need for a court interpreter, the court may assess costs against that party for any delay caused by the need to obtain a court interpreter unless that party establishes good cause for the delay.

(5) Notwithstanding any failure of a party, juror, or other case participant to notify the court of a need for a court interpreter, the court shall appoint a court

interpreter for a case participant whenever it becomes apparent from the court's own observations or from disclosures by any other person that a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding.

C. **Appointment of court interpreters.**

(1) When a need for a court interpreter is identified under Paragraph B of this rule, the court shall appoint a certified court interpreter except as otherwise provided in this paragraph.

(2) Upon approval of the court, the parties may stipulate to the use of a non-certified court interpreter for non-evidentiary hearings without complying with the waiver requirements in Paragraph D of this rule.

(3) To avoid the appearance of collusion, favoritism, or exclusion of English speakers from the process, the judge shall not act as a court interpreter for the proceeding or regularly speak in a language other than English during the proceeding. A party's attorney shall not act as a court interpreter for the proceeding, except that a party and the party's attorney may engage in confidential attorney-client communications in a language other than English.

(4) If the court has made diligent, good faith efforts to obtain a certified court interpreter and one is not reasonably available, after consulting with the Administrative Office of the Courts, the court may appoint a justice system interpreter subject to the restrictions in Sub-subparagraphs (d) and (e) of this paragraph. If the court has made diligent, good faith efforts to obtain a justice system interpreter and one is not reasonably available, after consulting with the Administrative Office of the Courts, the court may appoint a language access specialist or less qualified non-certified court interpreter only after the following requirements are met:

(a) the court provides notice to the parties substantially in a form approved by the Supreme Court that the court has contacted the Administrative Office of the Courts for assistance in locating a certified court interpreter or justice system interpreter but none is reasonably available and has concluded after evaluating the totality of the circumstances including the nature of the court proceeding and the potential penalty or consequences flowing from the proceeding that an accurate and complete interpretation of the proceeding can be accomplished with a less qualified non-certified court interpreter;

(b) the court finds on the record that the proposed court interpreter has adequate language skills, knowledge of interpretation techniques, and familiarity with interpretation in a court setting to provide an accurate and complete interpretation for the proceeding;

(c) the court finds on the record that the proposed court interpreter has read, understands, and agrees to abide by the New Mexico Court Interpreters Code of Professional Responsibility set forth in Rule 23-111 NMRA;

(d) with regard to a non-certified signed interpreter, in no event shall the court appoint a non-certified signed language interpreter who does not, at a minimum, possess both a community license from the New Mexico Regulations and Licensing Department and a generalist interpreting certification from the Registry of Interpreters for the Deaf; and

(e) a non-certified court interpreter shall not be used for a juror.

D. **Waiver of the right to a court interpreter.** Any case participant identified as needing a court interpreter under Paragraph B of this rule may at any point in the case waive the services of a court interpreter with approval of the court only if the court explains in open court through a court interpreter the nature and effect of the waiver and finds on the record that the waiver is knowingly, voluntarily, and intelligently made. The waiver may be limited to particular proceedings in the case or for the entire case. With the approval of the court, the case participant may retract the waiver and request a court interpreter at any point in the proceedings.

E. **Procedures for using court interpreters.** The following procedures shall apply to the use of court interpreters:

(1) Qualifying the court interpreter. Before appointing a court interpreter to provide interpretation services to a case participant, the court shall qualify the court interpreter in accordance with Rule 11-604 of the Rules of Evidence. The court may use the questions in Form 4-114 NMRA to assess the qualifications of the proposed court interpreter. A certified court interpreter is presumed competent, but the presumption is rebuttable. Before qualifying a justice system interpreter or other less qualified non-certified court interpreter, the court shall inquire on the record into the following matters:

(a) whether the proposed court interpreter has assessed the language skills and needs of the case participant in need of interpretation services; and

(b) whether the proposed court interpreter has any potential conflicts of interest.

(2) Instructions regarding the role of the court interpreter during trial. Before the court interpreter begins interpreting for a party during trial, the court shall instruct the parties and others present in the courtroom regarding the role of the court interpreter. If the court interpreter will provide interpretation services for a juror, the court also shall instruct the jury in accordance with UJI 13-110A NMRA.

(3) Oath of the court interpreter. Before a court interpreter begins interpreting, the court shall administer an oath to the court interpreter as required by Section 38-10-8

NMSA 1978. If a court interpreter will provide interpretation services for a juror, the court also shall administer an oath to the court interpreter in accordance with UJI 13-110B NMRA. All oaths required under this subparagraph shall be given on the record in open court.

(4) Objections to the qualifications or performance of a court interpreter. A party shall raise any objections to the qualifications of a court interpreter when the court is qualifying a court interpreter as required by Subparagraph (1) of this paragraph or as soon as the party learns of any information calling into question the qualifications of the court interpreter. A party shall raise any objections to court interpreter error at the time of the alleged interpretation error or as soon as the party has reason to believe that an interpretation error occurred that affected the outcome of the proceeding.

(5) Record of the court interpretation. Upon the request of a party, the court may make and maintain an audio recording of all spoken language court interpretations or a video recording of all signed language interpretations. Unless the parties agree otherwise, the party requesting the recording shall pay for it. Any recordings permitted by this subparagraph shall be made and maintained in the same manner as other audio or video recordings of court proceedings. This subparagraph shall not apply to court interpretations during jury discussions and deliberations.

(6) Court interpretation for multiple case participants. When more than one case participant needs a court interpreter for the same spoken language, the court may appoint the same court interpreter to provide interpretation services for those case participants. When more than one case participant needs court interpretation for a signed language, separate court interpreters shall be appointed for each case participant. If a party needs a separate court interpreter for attorney-client communications during a court proceeding, prior to the commencement of the court proceeding, the party shall obtain a court interpreter of the party's own choosing and at the party's own expense.

(7) Use of team court interpreters. To avoid court interpreter fatigue and promote an accurate and complete court interpretation, when the court anticipates that a court proceeding requiring a court interpreter for a spoken language will last more than two (2) hours the court shall appoint a team of two (2) court interpreters to provide interpretation services for each spoken language. For court proceedings lasting less than two (2) hours, the court may appoint one (1) court interpreter but the court shall allow the court interpreter to take breaks approximately every thirty (30) minutes. The court shall appoint a team of two (2) court interpreters for each case participant who needs a signed language court interpreter when the court proceeding lasts more than one (1) hour. If a team of two (2) court interpreters are required under this subparagraph, the court may nevertheless proceed with only one (1) court interpreter if the following conditions are met:

(a) two (2) qualified court interpreters could not be obtained by the court;

(b) the court states on the record that it contacted the Administrative Office of the Courts for assistance in locating two (2) qualified court interpreters but two (2) could not be found; and

(c) the court allows the court interpreter to take a five (5)-minute break approximately every thirty (30) minutes.

(8) Use of court interpreters for translations and transcriptions. If a court interpreter is required to provide a sight translation, written translation, or transcription for use in a court proceeding, the court shall allow the court interpreter a reasonable amount of time to prepare an accurate and complete translation or transcription and, if necessary, shall continue the proceeding to allow for adequate time for a translation or transcription. Whenever possible, the court shall provide the court interpreter with advance notice of the need for a translation or transcription before the court proceeding begins and, if possible, the item to be translated or transcribed.

(9) Modes of court interpretation. The court shall consult with the court interpreter and case participants regarding the mode of interpretation to be used to ensure a complete and accurate interpretation.

(10) Remote spoken language interpretation. Court interpreters may be appointed to serve remotely by audio or audio-video means approved by the Administrative Office of the Courts for any proceeding when a court interpreter is otherwise not reasonably available for in-person attendance in the courtroom. Electronic equipment used during the hearing shall ensure that all case participants hear all statements made by all case participants in the proceeding. If electronic equipment is not available for simultaneous interpreting, the hearing shall be conducted to allow for consecutive interpreting of each sentence. The electronic equipment that is used must permit attorney-client communications to be interpreted confidentially.

(11) Court interpretation equipment. The court shall consult and coordinate with the court interpreter regarding the use of any equipment needed to facilitate the interpretation.

(12) Removal of the court interpreter. The court may remove a court interpreter for any of the following reasons:

(a) inability to adequately interpret the proceedings;

(b) knowingly making a false interpretation;

(c) knowingly disclosing confidential or privileged information obtained while serving as a court interpreter;

(d) knowingly failing to disclose a conflict of interest that impairs the ability to provide complete and accurate interpretation;

(e) failing to appear as scheduled without good cause;

(f) misrepresenting the court interpreter's qualifications or credentials;

(g) acting as an advocate; or

(h) failing to follow other standards prescribed by law and the New Mexico Court Interpreter's Code of Professional Responsibility.

(13) Cancellation of request for a court interpreter. A party shall advise the court in writing substantially in a form approved by the Supreme Court as soon as it becomes apparent that a court interpreter is no longer needed for the party or a witness to be called by the party. The failure to timely notify the court that a court interpreter is no longer needed for a proceeding is grounds for the court to require the party to pay the costs incurred for securing the court interpreter.

F. **Payment of costs for the court interpreter.** Unless otherwise provided in this rule, and except for court interpretation services provided by an employee of the court as part of the employee's normal work duties, all costs for providing court interpretation services by a court interpreter shall be paid from the Jury and Witness Fee Fund in amounts consistent with guidelines issued by the Administrative Office of the Courts.

[Approved, effective February 16, 2004; as amended by Supreme Court Order No. 12-8300-022, effective for all cases pending or filed on or after January 1, 2013.]

Committee commentary. — This rule governs the procedure for the use of court interpreters in court proceedings. In addition to this rule, the New Mexico Judiciary Court Interpreter Standards of Practice and Payment Policies issued by the Administrative Office of the Courts (the AOC Standards), also provide guidance to the courts on the certification, use, and payment of court interpreters. But in the event of any conflicts between the AOC Standards and this rule, the rule controls.

The rule requires the use of certified court interpreters whenever possible but permits the use of less qualified interpreters in some situations. For purposes of this rule, a certified court interpreter may not be reasonably available if one cannot be located or if funds are not available to pay for one. But in all instances, before a court may use a non-certified court interpreter, the court must contact the Administrative Office of the Courts (AOC) for assistance and to confirm whether funds may in fact be available to pay for a certified court interpreter.

The rule does not attempt to set forth the criteria for determining who should be a certified court interpreter. Instead, the task of certifying court interpreters is left to the AOC. When a court interpreter is certified by the AOC, the certified court interpreter is placed on the New Mexico Directory of Certified Court Interpreters, which is maintained by the AOC and can be viewed on its web site. A certified court interpreter is also

issued an identification card by the AOC, which can be used to demonstrate to the court that the cardholder is a certified court interpreter.

In collaboration with the New Mexico Center for Language Access (NMCLA), the AOC is also implementing a new program for approving individuals to act as justice system interpreters and language access specialists who are specially trained to provide many interpretation services in the courts that do not require a certified court interpreter. Individuals who successfully complete the Justice System Interpreting course of study offered by the NMCLA are approved by the AOC to serve as justice system interpreters and will be placed on the AOC Registry of Justice System Interpreters. Those who are approved as justice system interpreters will also be issued identification cards that may be presented in court as proof of their qualifications to act as a justice system interpreter. Under this rule, if a certified court interpreter is not reasonably available, the court should first attempt to appoint a justice system interpreter to provide court interpretation services. If a justice system interpreter is not reasonably available, the court must contact the AOC for assistance before appointing a non-certified court interpreter for a court proceeding.

In addition to setting forth the procedures and priorities for the appointment of court interpreters, this rule also provides procedures for the use of court interpreters within the courtroom. In general, the court is responsible for determining whether a juror needs a court interpreter, and the parties are responsible for notifying the court if they or their witnesses will need a court interpreter. But in most cases, the court will be responsible for paying for the cost of court interpretation services, regardless of who needs them. However, the court is not responsible for providing court interpretation services for confidential attorney-client communications during a court proceeding, nor is the court responsible for providing court interpretation services for witness interviews or pre-trial transcriptions or translations that the party intends to use for a court proceeding. When the court is responsible for paying the cost of the court interpretation services, the AOC standards control the amounts and procedures for the payment of court interpreters.

Although this rule generally applies to all court interpreters, the court should be aware that in some instances the procedures to follow will vary depending on whether a spoken or signed language court interpreter is used. Courts should also be aware that in some instances when court interpretation services are required for a deaf or hard-of-hearing individual, special care should be taken because severe hearing loss can present a complex combination of possible language and communication barriers that traditional American Sign Language/English interpreters are not trained or expected to assess. If a deaf or hard-of-hearing individual is having trouble understanding a court interpreter and there is an indication that the person needs other kinds of support, the court should request assistance from the AOC for a language assessment to determine what barriers to communication exist and to develop recommendations for solutions that will provide such individuals with meaningful access to the court system.

While this rule seeks to provide courts with comprehensive guidance for the appointment and use of court interpreters, the courts should also be aware that the

AOC provides additional assistance through a full-time program director who oversees the New Mexico Judiciary's court interpreter program and who works in tandem with the Court Interpreter Advisory Committee appointed by the Supreme Court to develop policies and address problems associated with the provision of court interpreter services in the courts. Whenever a court experiences difficulties in locating a qualified court interpreter or is unsure of the proper procedure for providing court interpretation services under this rule, the court is encouraged, and sometimes required under this rule, to seek assistance from the AOC to ensure that all case participants have full access to the New Mexico state court system.

[Amended by Supreme Court Order No. 12-8300-022, effective for all cases pending or filed on or after January 1, 2013.]

1-104. Courtroom closure.

A. **Courtroom proceedings open.** All courtroom proceedings shall be open to the public unless the courtroom is closed automatically under Paragraph B of this rule or by order of the court under Paragraph E of this rule. An agreement of the parties to close the courtroom shall not constitute a sufficient basis for the issuance of an order for courtroom closure. Unless otherwise ordered by the court, the following persons may be present during a closed courtroom proceeding: the parties and their attorneys, witnesses while testifying, and court employees and security personnel. This rule does not affect the court's inherent authority to impose reasonable time, place, and manner limitations on public access to the courtroom, including reasonable limitations on broadcasting, televising, photographing, and recording of court proceedings as set forth in Rule 23-107 NMRA.

B. **Courtroom closure without motion.**

(1) Unless otherwise ordered by the court, the following proceedings shall be closed automatically:

(a) hearings in adoption proceedings as provided by Subsection C of Section 32A-5-8 NMSA 1978;

(b) proceedings to detain a person with a threatening communicable disease as provided by Subsection J of Section 24-1-15 NMSA 1978;

(c) proceedings for testing as provided by Subsection B of Section 24-2B-5.1 NMSA 1978; and

(d) pretrial proceedings under the New Mexico Uniform Parentage Act, as set forth in Section 40-11A-625 NMSA 1978.

(2) The requirements set forth in Paragraphs C through E of this rule do not apply to any automatic courtroom closure under this paragraph.

C. **Motion for courtroom closure.** A motion for courtroom closure must advance an interest that overrides the public's interest in attending the proceeding. When applicable, a motion for courtroom closure should identify any statute, regulation, rule, or other source of law that addresses courtroom closure in the particular type of proceeding.

(1) ***Motion of the court*.** If the court determines on the court's own motion that a courtroom proceeding should be closed, the court shall file and serve on each party an order to show cause why the proceeding should not be closed.

(2) ***Motion of a party, or other interested person or entity*.** A party, or any person or entity with a sufficient interest, may move to exclude the public from any portion of a courtroom proceeding. A written motion for courtroom closure shall be filed and served at least forty-five (45) days prior to the commencement of the courtroom proceeding, unless upon good cause shown the court waives the time requirement.

(3) ***Response*.** A party opposing a motion for courtroom closure or responding to an order to show cause may file a written response within fifteen (15) days after service of the motion or order to show cause, unless a different time period is ordered by the court.

(4) ***Reply*.** A party may file a written reply within fifteen (15) days after service of the written response, unless a different time period is ordered by the court.

(5) ***Response by non-party*.** Any member of the public may file a written response to a motion for courtroom closure at any time before the hearing required under Paragraph D of this rule. The court may grant a party additional time to reply to a response filed by a non-party.

(6) ***Continuance*.** In the court's discretion or at the request of the parties, the court may continue a courtroom proceeding to allow time to file written responses or replies.

D. **Public hearing.** Unless the court denies a motion for courtroom closure on the pleadings, the court shall hold a public hearing on any proposed courtroom closure considered under Subparagraph (C)(1) or (C)(2) of this rule.

(1) ***Notice of hearing to the public*.** Media organizations, persons, and entities that have requested to receive notice of proposed courtroom closures shall be given timely notice of the date, time, and place of any hearing under this paragraph. Any member of the public shall be permitted a reasonable opportunity to be heard at the hearing.

(2) ***In camera review*.** Although the court is required to hold a public hearing on a motion for courtroom closure, this rule does not preclude the court from holding part of a hearing in camera for the limited purpose of reviewing sensitive or confidential

information relevant to the motion. Any evidence or argument tendered to the court for an in camera review that is not ordered to be disclosed shall be placed under seal and preserved for appellate review. The record of the in camera hearing shall not be revealed without an order of the court.

E. **Order for courtroom closure.** An order for courtroom closure shall be in writing, shall articulate the overriding interest being protected, and shall specify the court's findings underlying the order. The court may order the exclusion of the public from all or part of a courtroom proceeding only if

(1) the court concludes that such order is necessary to preserve an overriding interest that is likely to be prejudiced if the courtroom is not closed;

(2) the order for courtroom closure is narrowly tailored to protect the overriding interest; and

(3) the court has considered reasonable alternatives to courtroom closure.

[Adopted by Supreme Court Order No. 16-8300-022, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 18-8300-005, effective for all cases on or after July 1, 2018.]

Committee commentary. — New Mexico statute requires all courtroom proceedings to be open to the public unless otherwise provided by law. *See* NMSA 1978, § 34-1-1 (1851) ("Except as provided in the Children's Code [32A-1-1 NMSA 1978] and in other laws making specific provisions for exclusion of the public, all courts of this state shall be held openly and publicly, and all persons whatsoever shall be freely admitted to the courts and permitted to remain so long as they shall observe good order and decorum.").

However, certain statutes include exceptions to the general rule that courtroom proceedings should be open to the public and provide that specific types of courtroom proceedings should be closed. The court may close the proceedings listed in Subparagraph (B)(1) of this rule without following the procedures set forth in Paragraphs C through E of this rule.

Prior to 2018, Subparagraph (B)(1) of this rule required the automatic closure of hearings in guardianship and conservatorship proceedings. *See also* NMSA 1978, § 45-5-303(K) (2009, prior to 2018 amendments) ("The issue of whether a guardian shall be appointed . . . shall be determined by the court at a closed hearing unless the alleged incapacitated person requests otherwise."); § 45-5-407(O) (1998, prior to 2018 amendments) (same for conservatorship proceedings). The rule was amended in 2018 to remove guardianship and conservatorship proceedings from Subparagraph (B)(1), consistent with the 2018 amendments to the Uniform Probate Code. *See* NMSA 1978, § 45-5-303(N) (2018) ("The issue of whether a guardian shall be appointed . . . shall be determined by the court at an open hearing unless, for good cause, the court

determines otherwise); § 45-5-407(Q) (2018) (same for conservatorship proceedings). As a result, hearings in guardianship and conservatorship proceedings are presumptively open to the public and shall be closed only when the requirements of Paragraphs C through E of this rule have been satisfied.

Aside from entire categories of cases that may be closed in accordance with statutory authority, numerous statutes identify particular types of information as confidential or otherwise subject to limitations on disclosure. *See, e.g*., NMSA 1978, § 27-7-29(A) (providing that "[a]ll records . . . created or maintained pursuant to investigations under the Adult Protective Services Act . . . shall be confidential and shall not be disclosed directly or indirectly to the public"); NMSA 1978, § 43-1-19 (limiting the disclosure of information under the Mental Health and Developmental Disabilities Code); committee commentary to Rule 1-079 NMRA (listing statutory confidentiality provisions). This rule does not authorize automatic courtroom closure for proceedings involving information designated by statute as confidential unless the statute expressly provides that the proceedings shall be closed. Instead, if a party believes that courtroom closure is warranted for any reason, including the protection of confidential information, such party may file a motion for courtroom closure under Subparagraph (C)(2) of this rule. And statutory confidentiality provisions notwithstanding, the court must still engage in the balancing test set forth in Paragraph E of this rule before deciding whether to close any particular proceeding and must provide for public notice and hearing as set forth in Paragraph D of this rule prior to entering any order for courtroom closure. When determining whether a motion for courtroom closure is supported by an overriding interest, the court should consider any statute, regulation, rule, or other source of law that addresses courtroom closure in the particular type of proceeding. *See, e.g*., NMSA 1978, §§ 45-5-303(N), 45-5-407(Q) (2018) ("The issue of whether a [guardian or conservator] shall be appointed . . . shall be determined by the court at an open hearing unless, for good cause, the court determines otherwise.").

The prerequisites to a courtroom closure order, as set forth in Paragraph E, are taken from *State v. Turrietta*, 2013-NMSC-036, ¶¶ 17, 19, 308 P.3d 964, which provides that the court cannot order a full or partial closure of the courtroom unless the closure is warranted under the four-factor "overriding interest" standard set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). Under *Waller*,

[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the [district] court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.

Turrietta, 2013-NMSC-036, ¶ 17 (alteration in original) (quoting *Waller*, 467 U.S. at 48).

Courts are obligated to consider reasonable alternatives to courtroom closure. *See id*. ¶¶ 28, 30; *Presley v. Georgia*, 558 U.S. 209, 214-15 (2010). For example, if the alleged overriding interest is the potential for witness intimidation, reasonable alternatives to closure might include "screening observers, admonishing spectators of possible criminal

sanctions, the wait-and-see method, or increased security in the courtroom." *Turrietta*, 2013-NMSC-036, ¶ 29 (internal citations omitted). Or, to protect sensitive information conveyed by potential jurors during jury selection, the court could consider alternatives to closure such as sealing "[t]hose parts of the transcript reasonably entitled to privacy" or disclosing "the substance of the sensitive answers while preserving the anonymity of the jurors involved." *Press-Enterprise Co. v. Superior Court of Cal., Riverside Cnty*., 464 U.S. 501, 513 (1984). The range of reasonable alternatives available to the court will depend on the circumstances.

Except for proceedings that are closed automatically under Paragraph B, this rule permits public participation prior to the issuance of an order closing a courtroom proceeding. Under Subparagraph (C)(2), a non-party may file a motion for courtroom closure if such non-party has a sufficient interest in closing the proceeding, for example, if such non-party is the subject of testimony or evidence. Under Paragraph D, the public is entitled to notice and an opportunity to be heard before a courtroom proceeding is closed. The court shall follow the procedure developed by the Supreme Court for providing notice of public hearings to media organizations and other persons and entities who have requested to receive notice under Subparagraph (D)(1) of this rule.

This rule shall not diminish the court's inherent authority to exclude disruptive persons from the courtroom to ensure decorum, prevent distractions, and ensure the fair administration of justice.

[Adopted by Supreme Court Order No. 16-8300-022, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 18-8300-005, effective for all cases on or after July 1, 2018.]

1-105. Notice to statutory beneficiaries in wrongful death cases.

A. **Scope.** This rule pertains to statutory beneficiaries of wrongful death estates as they are defined in Section 41-2-3 NMSA 1978 of the Wrongful Death Act, Sections 41-2-1 to -4 NMSA 1978.

B. **Required notice; timing.** Upon entry of an order appointing a personal representative under the Wrongful Death Act, the personal representative shall provide notice under Rule 1-004 NMRA to all known or reasonably ascertainable statutory beneficiaries of the information set forth in Paragraph C of this rule.

C. **Contents of notice.** The notice required by this rule shall contain the following information:

(1) the name of the personal representative of the estate and the name, address, telephone number, and email address of the personal representative's lawyer;

(2) a statement that the personal representative understands the legal requirement that the personal representative must act only in the best interests of all statutory beneficiaries of the decedent's estate;

(3) instruction to the statutory beneficiaries that they shall provide the personal representative or the personal representative's lawyer with current contact information so that they may be notified of matters in the pending action;

(4) a statement that all statutory beneficiaries will be timely notified of any and all trial settings, dismissals, settlements, and verdicts obtained on behalf of the decedent's estate;

(5) a statement that all statutory beneficiaries will be specifically advised of any proposed distribution of proceeds under the Wrongful Death Act prior to any distribution of the proceeds; and

(6) a statement that, prior to the distribution of any proceeds of a wrongful death estate, if any controversy exists or arises concerning distribution that requires a court hearing, all statutory beneficiaries will be notified of the hearing and will be entitled to attend.

D. **Subsequent notices.** Notifications provided to statutory beneficiaries after the initial notice required by Paragraph B shall comply with Rule 1-005 NMRA.

[Adopted by Supreme Court Order No. 17-8300-027, effective December 31, 2017.]

Committee commentary. —

The Wrongful Death Act, NMSA 1978, §§ 41-2-1 to -4, creates statutory rights for the estate of a deceased person at civil law that are not governed by the Uniform Probate Code. The Court of Appeals has ruled that the personal representative referenced in Section 41-2-3 is distinguishable from the personal representative of the estate of the deceased as defined in the Probate Code. *See In re Estate of Sumler*, 2003-NMCA-030, ¶ 8, 133 N.M. 319, 62 P.3d 776 ("[I]t is improper to equate a personal representative under the Wrongful Death Act with a personal representative as defined by the Probate Code."). *See also* Rule 1-017(B) NMRA (providing that a wrongful death action may only be brought by a personal representative appointed by the district court for that purpose).

Notice to known and reasonably ascertainable statutory beneficiaries is to be made under Rule 1-004 NMRA. When the statutory beneficiaries are known to the personal representative, service shall be made in compliance with Paragraph F (Process; personal service upon an individual) or Paragraph I (Process; service upon minor, incompetent person, guardian, or fiduciary) if possible. When Rule 1-004(F) or (I) NMRA service cannot be made on a known statutory beneficiary, the personal representative

shall petition the court under Rule 1-004(J) NMRA for an order providing an alternative method of service.

There may be occasions where a potential statutory beneficiary is not known to the personal representative but could be identified with reasonable effort. For example, the deceased may have no living spouse or living child but potentially may have living grandchildren who would be statutory beneficiaries, *see* NMSA 1978, Section 41-2-3(C), but whose existence or identity are not known to the personal representative. The personal representative must make reasonable efforts to learn of the existence and identity of such grandchildren, and those whose identity are learned must be given notice under Rule 1-004(F), (I), or (J) NMRA.

In rare cases, there may be statutory beneficiaries who are not known to the personal representative and whose identities are not reasonably ascertainable. Paragraph B of this rule does not compel the personal representative to provide some form of notice to such beneficiaries. *Compare* NMSA 1978, Section 45-1-401(A)(3) (requiring publication notice of hearings to persons having an interest in any hearing whose "address or identity . . . is not known and cannot be ascertained with reasonable diligence"). The mere theoretical possibility that such beneficiaries might exist does not justify the burden and cost of imposing a mandatory publication notice requirement on the personal representative. If the personal representative concludes that such beneficiaries might exist, the personal representative may petition the court under Rule 1-004(J) NMRA to fashion a form of notice, such as publication, to provide them with notice.

Rule 1-105(C)(3) NMRA requires statutory beneficiaries to keep the personal representative apprised of current contact information. Non-compliance may result in the failure of the statutory beneficiary to receive notice of the information set forth in Paragraphs (C)(4), (C)(5), and (C)(6), but shall not constitute a waiver of rights granted by the Wrongful Death Act. *See* NMSA 1978, §§ 41-2-3, -4.

[Adopted by Supreme Court Order No. 17-8300-027, effective December 31, 2017.]

1-106. Enforcement of mediated settlement agreement.

A. **Scope.** This rule applies to any case in which the parties have entered into a mediated settlement agreement that, by its terms, requires performance over a period of time, and in which the parties have agreed to comply with the terms of the agreement without first asking the court to enter a stipulated judgment.

B. **Stipulation of dismissal.**

(1) If the parties have entered into a mediated settlement agreement and agree that the court should not enter a stipulated judgment, the parties shall file a stipulation of dismissal;

(2) The mediated settlement agreement shall be reduced to writing and signed by the parties;

(3) The mediated settlement agreement shall be filed unless the parties agree in writing to waive the filing of the mediated settlement agreement in the pending case. If the parties waive filing, then each party shall be responsible for retaining a copy of the mediated settlement agreement, and in any action related to the mediated settlement agreement, the responsibility to produce a copy of the mediated settlement agreement belongs to the parties and not to the court;

(4) If the parties have entered into a mediated settlement agreement and have filed a stipulation of dismissal, the court shall close the case, provided that the court shall retain jurisdiction to later reopen the case to enter any orders and judgments as may be appropriate to enforce the mediated settlement agreement and to grant any other relief as the court deems just and proper.

C. **Motion for judgment and statement of noncompliance.**

(1) In the event of noncompliance with the terms of a mediated settlement agreement, the party alleging noncompliance may, within five (5) years of the filing of the stipulation of dismissal, move the court to reopen the case and to enter a judgment enforcing the terms of the agreement. A party seeking a judgment under this rule shall file with the court and serve on the opposing party a motion for judgment and statement of noncompliance, together with a copy of the mediated settlement agreement;

(2) If a party to a mediated settlement agreement files a motion for judgment and statement of noncompliance within five (5) years of the filing of the stipulation of dismissal, the court clerk shall reopen the case, and no additional filing fee shall be required;

(3) The party alleged to have breached the terms of a mediated settlement agreement may, within fifteen (15) days after service of the motion for judgment and statement of noncompliance, file with the court and serve on the opposing party a written response, and may request a hearing;

(4) If the party alleged to have breached the terms of a mediated settlement agreement timely files a response and requests a hearing under Subparagraph (C)(3) of this rule, the court shall hold a hearing and shall proceed under the Rules of Civil Procedure for the District Courts.

D. **Entry of judgment.** If a case has been reopened under Paragraph C of this rule, the court may enter a judgment for any remaining money due, and the court and may order other relief that the court deems just and proper.

E. **Retention of case files.** The court shall retain a case file for any case in which the parties have reached a mediated settlement agreement for five (5) years after the filing of the stipulation of dismissal.

[Adopted by Supreme Court Order No. 20-8300-003, effective August 31, 2020.]

ARTICLE 12
Domestic Relations Rules

1-120. Domestic relations actions; scope; mandatory use of court-approved forms by self-represented litigants.

A. **Scope.** Rules 1-120 to 1-128.13 NMRA provide additional rules for domestic relations actions.

B. **Mandatory use of court-approved forms by self-represented litigants.**

(1) ***Dissolution of marriage forms.*** Self-represented litigants must use Forms 4A-100 through 4A-315 NMRA in dissolution of marriage cases and in any case involving child custody or child support. Upon request, all district courts must provide self-represented litigants in dissolution of marriage proceedings with the Domestic Relations Forms approved by the New Mexico Supreme Court. No court shall distribute forms for use in dissolution of marriage proceedings other than those approved by the New Mexico Supreme Court. Courts must provide Domestic Relations Forms in dissolution of marriage proceedings as follows:

(a) Forms 4A-100 through 4A-105 NMRA must be used to file a dissolution of marriage case and to file a response;

(b) Forms 4A-200 through 4A-215 NMRA must be used to request temporary assistance from the court after the case has been filed and while it is pending;

(c) Forms 4A-300 through 4A-306 NMRA must be used to complete a dissolution of marriage by presenting proposed final orders for court approval; and

(d) Forms 4A-310 through 4A-315 NMRA must be used to request a dissolution of marriage by default as provided by Rule 1-055 NMRA and Form 4A-310.

(2) ***Kinship guardianship forms.*** Self-represented litigants must use Forms 4A-501 through 4A-513 NMRA in all cases under the Kinship Guardianship Act, Sections 40-10B-1 to 40-10B-15 NMSA 1978.

C. **Notarization.** The following forms must be notarized before a self-represented litigant may file them or submit them to the court for approval:

(1) Form 4A-301 NMRA (Marital settlement agreement);

(2) Form 4A-302 NMRA (Custody plan and order);

(3) Form 4A-303 NMRA (Child support obligation and order);

(4) Form 4A-314 NMRA (Default judgment and final decree of dissolution of marriage (without children));

(5) Form 4A-315 NMRA (Default judgment and final decree of dissolution of marriage (with children));

(6) Form 4A-505 NMRA (Parental consent to appointment of kinship guardian and waiver of service of process);

(7) Form 4A-507 NMRA (Ex parte motion to appoint temporary kinship guardian); and

(8) Form 4-968 NMRA (Application to modify, terminate, or extend the order of protection from domestic abuse).

D. **Mandatory acceptance of filings in dissolution of marriage cases.**

(1) District courts must accept the forms approved by the New Mexico Supreme Court in dissolution of marriage cases.

(2) The clerk of the court must accept a filing submitted by a party in a dissolution of marriage case. The clerk shall not make a determination of whether the filing complies with the Domestic Relations Rules and Forms.

[Approved, effective, November 1, 2000 until November 1, 2001; approved, effective November 1, 2001; as amended by Supreme Court Order No. 13-8500-010, effective for all pleadings and papers filed on or after May 31, 2013, in all cases pending or filed on or after May 31, 2013; as amended by Supreme Court Order No. 15-8300-024, effective for all pleadings and papers filed after November 18, 2015; as amended by Supreme Court Order No. 16-8300-020, effective for all pleadings and papers filed on or after December 31, 2016.]

Committee commentary. —

General

This part of the Rules of Civil Procedure for the District Courts recognizes that domestic relations cases are frequently filed by pro se litigants and that supplemental statewide rules and forms are needed for the effective administration of justice.

These rules and the Domestic Relations Forms supersede local rules and forms currently required by many judicial districts. The primary goal of these rules and forms is to provide uniformity in the practice of law in this state.

The committee intends the dissolution of marriage forms to be used in contested and uncontested proceedings. To emphasize the order in which forms are filed in a typical contested proceeding, the committee has grouped the forms into three stages. The committee encourages judicial districts to guide self-represented litigants through the contested divorce process by distributing the forms in those stages. All forms may be made available as appropriate for uncontested cases or for cases that become uncontested during the proceedings.

Scope of rules

As used in this rule, “domestic relations actions” includes:

(1) legal separations, Section 40-4-3 NMSA 1978;

(2) dissolution of marriage, Section 40-4-5 NMSA 1978;

(3) annulment, Section 40-1-9 NMSA 1978;

(4) spousal support, Section 40-4-7 NMSA 1978;

(5) child support, Sections 40-4-11 to 40-4-11.6 NMSA 1978;

(6) division or distribution of community or separate property or debts, Sections 40-2-1 to 40-2-9, 40-3-1 to 40-3-17 and 40-4-20 NMSA 1978;

(7) determination of paternity pursuant to the Uniform Parentage Act, Sections 40-11-1 to 40-11-23 NMSA 1978;

(8) actions brought pursuant to the Uniform Interstate Family Support Act, Sections 40-6A-101 to 40-6A-902 NMSA 1978;

(9) child custody actions pursuant to Sections 40-4-9 and 40-4-9.1 NMSA 1978 and actions brought pursuant to the Child Custody Jurisdiction Act, Sections 40-10-1 to 40-10-24 NMSA 1978 [repealed, now see Uniform Child-Custody Jurisdiction and Enforcement Act, 40-10A-101 to 40-10A-403 NMSA 1978.];

(10) actions brought pursuant to the Mandatory Medical Support Act, Sections 40-4C-1 to 40-4C-14 NMSA 1978;

(11) actions brought pursuant to the Support Enforcement Act, Sections 27-2-32, 37-1-29, 40-4-15 and 40-4A-1 to 40-4A-16 NMSA 1978; and

(12) proceedings brought pursuant to the Family Violence Protection Act, Sections 40-13-1 to 40-13-7 NMSA 1978.

As used in this rule "domestic relations actions" does not include:

(1) termination of parental rights actions brought in the children's court;

(2) adoption of a child pursuant to Sections 32A-5-1 to 32A-5-45 NMSA 1978;

(3) adoption of an adult pursuant to the Adult Adoption Act, Sections 40-14-1 to 40-14-15 NMSA 1978;

(4) proceedings brought pursuant to the Grandparent Visitation Privileges Act, Sections 40-9-1 to 40-9-4 NMSA 1978 except mediation and attorney fee proceedings;

(5) actions arising out of enforcement of the Parental Responsibility Act, Sections 40-5A-1 to 40-5A-13 NMSA 1978; or

(6) change of name proceedings brought pursuant to Sections 40-8-1 to 40-8-3 NMSA 1978.

[As amended by Supreme Court Order No. 13-8500-010, effective for all pleadings and papers filed on or after May 31, 2013, in cases pending or filed on or after May 31, 2013; as amended by Supreme Court Order No. 15-8300-024, effective for all pleadings and papers filed after November 18, 2015.]

1-121. Temporary domestic orders.

A. **Temporary domestic orders required.** Except as provided in this rule, in all original domestic relations actions where a summons has been issued, the court shall enter a temporary domestic order, unless:

(1) the action was filed by the state regarding child support; or

(2) otherwise ordered by the court.

B. **Approved form.** If a temporary domestic order is issued it shall be substantially in the form approved by the Supreme Court. Any prohibition or limitation on the parties not included in the Supreme Court approved form shall only be approved after notice and hearing by the court.

C. **Issuance.** Coincident with the issuance of summons, the clerk shall file a temporary domestic order, and deliver an endorsed copy of the order to the person obtaining the summons. The petitioner shall cause to be served an endorsed copy of the temporary domestic order on the respondent. If served with the summons and

petition, the return of summons shall include a statement that the temporary domestic order was served with the petition.

D. **Effective date of temporary domestic orders.** The verification to the petition shall include a statement that the petitioner understands the content of the temporary domestic order. The temporary domestic order shall be binding upon the petitioner at the time the petition is filed and upon the respondent at the time it is personally served on the respondent. Actions taken by either party that are contrary to the terms of the temporary domestic order are subject to redress by the court, including costs and attorney fees.

E. **Applicability.** Unless the court orders otherwise, this rule shall not apply to domestic relations actions or proceedings filed:

(1) pursuant to Section 40-4-20 NMSA 1978 to divide or distribute property;

(2) after entry of the final order or decree;

(3) pursuant to the Uniform Interstate Family Support Act;

(4) pursuant to the Uniform Parentage Act; or

(5) as a third party custody action.

F. **Temporary restraining orders.** This rule shall not preclude a party from requesting the entry of a temporary restraining order under Rule 1-066 of these rules.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001; as amended by Supreme Court Order No. 17-8300-017, effective for all pleadings and papers filed on or after December 31, 2017.]

Committee commentary. — The summons and petition may be served in accordance with Rule 1-004 NMRA.

[As amended by Supreme Court Order No. 17-8300-017, effective for all pleadings and papers filed on or after December 31, 2017.]

1-122. Dissolution of marriage and Section 40-4-3 NMSA 1978 proceedings; interim order allocating income and expenses.

A. **Interim order allocating income and expenses.** Absent exceptional circumstances, during the pendency of a dissolution of marriage or Section 40-4-3 NMSA 1978 proceeding, community income and expenses shall be equally divided between the parties. Upon motion, separate income and expenses may also be divided if appropriate.

B. **Agreement by parties.** The parties may file a stipulation waiving the entry of an interim order allocating income and expenses.

C. **Allocation of income and expenses.** If the parties have not agreed to or waived entry of an interim order allocating income and expenses, at any time after commencement of the proceeding

(1) a party may file a motion requesting the court to enter an interim order allocating income and expenses; or

(2) the court, on its own motion, may set a hearing to allocate income and expenses. At least five (5) days prior to the hearing the parties shall be required to exchange the information set out in Domestic Relations Form 4A-212 NMRA.

D. **Modification of interim allocation.** Any party may file a motion to modify or supplement the interim order allocating income and expenses.

E. **Form of statements, orders, and notices.** Interim monthly income and expense statements, interim orders allocating income and expenses, notices of hearing for an interim order dividing income and expenses and orders for production shall be substantially in the form approved by the Supreme Court.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001; as amended by Supreme Court Order No. 13-8300-047, effective for all cases filed or pending on or after December 31, 2013.]

Committee commentary. — There are two choices available for interim orders allocating income and expenses. A district court may:

(1) provide for an interim allocation of income and expenses upon motion of a party (Domestic Relations Form 4A-111 NMRA); or

(2) unless waived by the parties at the time of the filing of the petition, provide for an interim allocation of community income and expenses in every proceeding by serving a notice in accordance with Domestic Relations Form 4A-121 NMRA. Upon motion of a party, the court may also divide separate income and expenses.

The interim allocation or communication and expenses form, Domestic Relations Form 4A-122 NMRA, uses a fixed percentage of income to determine child support expenses. If the parties have a negative or minimal net spendable income, the court has the discretion to fashion an appropriate order.

1-123. Mandatory disclosure in domestic relations and paternity actions; preliminary disclosure requirements.

A. **Duty to disclose.** Parties to domestic relations actions shall disclose to other parties relevant information concerning characterization, valuation, division, or distribution of assets or liabilities, whether separate or community property, in any proceeding involving the distribution of property or the establishment or modification of child or spousal support as provided in this rule.

B. **Preliminary disclosure.** Unless otherwise stipulated by the parties and ordered by the court or otherwise ordered by the court

(1) in every domestic relations action involving property and debt division or characterization, within forty-five (45) days after service of the petition, the parties shall serve a disclosure as provided in Domestic Relations Form 4A-212 NMRA. The disclosure shall contain

(a) an interim monthly income and expense statement;

(b) a community property and liabilities schedule; and

(c) a separate property and liabilities schedule.

The statements and schedules shall substantially comply with Domestic Relations Forms 4A-212, 4A-214, and 4A-215 NMRA approved by the Supreme Court. The schedules shall be accompanied by a list of the documents utilized to complete the schedules.

(2) in actions concerning spousal support or child support, within forty-five (45) days of service of process on the opposing party, the petitioner or movant shall serve on the opposing party, and the opposing party shall serve on the petitioner or movant, an affidavit of disclosure containing the following information

(a) federal and state tax returns, including all schedules, for the year preceding the request;

(b) W-2 statements for the year preceding the request;

(c) Internal Revenue Service Form 1099s for the year preceding the request;

(d) work-related daycare statements for the year preceding the request, if applicable;

(e) dependent medical insurance premiums for the year preceding the request, if applicable;

(f) wage and payroll statements for four months preceding the request; and

(g) in actions concerning modification of spousal support, a statement of income and expenses pursuant to Domestic Relations Form 4A-212 NMRA.

C. **Supplemental disclosure.** Sworn disclosure schedules shall be served in accordance with Rule 1-026 NMRA upon all parties, with copies to the trial court, at least five (5) days before trial.

D. **Child support worksheets.** In actions involving child support, the parties shall each complete a child support worksheet as provided by Section 40-4-11.1 NMSA 1978. The worksheets shall be served upon all parties, with copies to the trial judge, at least five (5) days before trial.

E. **Duty of the State as a party.** Under this rule, the State of New Mexico is required to produce only documents intended to be introduced at an evidentiary hearing, at least five (5) days prior to the hearing, unless otherwise prohibited by law.

F. **Failure to comply.** Failure to comply with this rule may result in the assessment of costs and attorney fees against the delinquent party or such other sanctions as the court deems appropriate.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001; as amended by Supreme Court Order No. 06-8300-020, effective December 18, 2006; as amended by Supreme Court Order No. 13-8300-047, effective for all cases filed or pending on or after December 31, 2013.]

Committee commentary. — In domestic relations actions, the parties are subject to the mandatory disclosure requirements set forth in this rule. The purpose of mandatory disclosure is to decrease acrimony and mistrust between the parties, lessen legal fees and costs, emphasize fiduciary duties, assist parties to make honest, full, and complete disclosure of the existence and value of assets, debts, and income, and encourage the parties to restructure their relationships inexpensively, efficiently, and respectfully. The parties should be mindful of these objectives in making their disclosures under these rules.

Although these disclosures are mandatory, this rule in no way limits permissible discovery pursuant to Rules 1-026 to 1-037 NMRA. The parties are free to avail themselves of all applicable discovery procedures unless the court orders otherwise.

As is typical with other discovery requests and responses, disclosures under this rule are not to be filed with the court. Rather, they are to be served upon the parties and the trial court as set forth in the rule. Certificates of service of the disclosure should be filed with the clerk pursuant to Rule 1-005 NMRA.

1-124. Child custody; parenting plans; binding arbitration.

A. **Parenting plan required.** If a domestic relations proceeding involves custody or visitation of minor children, the parties shall attempt to agree upon and file a joint parenting plan pursuant to Section 40-4-9.1 NMSA 1978 within sixty (60) days of the filing of the petition for dissolution.

B. **Binding arbitration.** If the parties have not filed a parenting plan, the parties may agree to submit issues involving custody or visitation to binding arbitration pursuant to Section 40-4-7.2 NMSA 1978.

C. **Mediation.** If the parties have not agreed to a parenting plan or to binding arbitration pursuant to Paragraphs A or B of this rule, the court may refer the matter to family counseling or mediation prior to holding a hearing on child custody or visitation.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

1-125. Domestic Relations Mediation Act programs.

A. **Applicability.** This rule shall apply only to domestic relations proceedings which involve custody, periods of parental responsibility or visitation of minor children pending in a judicial district that has established a domestic relations mediation program, safe exchange program, or supervised visitation program pursuant to the Domestic Relations Mediation Act. This rule shall not apply to referrals to private programs by stipulation of the parties or preclude a court from operating a program for no fee.

B. **Referral by court.** If the parties to a domestic relations action involving minor children have not filed a parenting plan pursuant to Section 40-4-9.1 NMSA 1978, unless binding arbitration is pending pursuant to Section 40-4-7.2 NMSA 1978, the court may order the parties to:

(1) attend a general information session;

(2) meet with a counselor designated by the court;

(3) participate in mediation;

(4) participate in priority consultation pursuant to this rule; or

(5) participate in advisory consultation pursuant to this rule.

C. **Mediation; parenting plan.** If the court orders the parties to participate in mediation, if the mediation is successful, the counselor or mediator shall prepare a parenting plan which shall be submitted to the parties and their respective counsel for approval. When the parenting plan has been signed it shall be submitted to the court for approval together with an order approving it.

D. **Priority consultation.** The court may refer the parties to a priority consultation pursuant to the Domestic Relations Mediation Act. Upon conclusion of a priority consultation, the consultant shall prepare written recommendations to the court which shall be filed with the court and served on the parties. If a party does not agree with the recommendations, within eleven (11) days of the filing of the priority consultation recommendations, the party shall file a motion specifically describing the reasons for the party's objections to the recommendations. The party's objections shall be served on all other parties. The opposing party may file a written response within eleven (11) days after the date of service of the objections. No reply may be filed. The parties may jointly interview the consultant at any time after the filing of the objections and before a hearing on the objections. If no objections are filed within eleven (11) days after service of the recommendations, an order adopting the recommendations shall be entered.

E. **Advisory consultations.** The court may enter an order requiring the parties to submit to an advisory consultation. The order shall be substantially in the form approved by the Supreme Court. At the conclusion of an advisory consultation a report shall be prepared and served on each party.

The person preparing the report shall also prepare and file with the court written recommendations. The written recommendations filed with the court shall not contain the basis for the recommendations.

If a party does not agree with the recommendations, within eleven (11) days of the filing of the advisory consultation recommendations, the party shall file a motion specifically describing the reasons for party's objections to the recommendations. The party's objections shall be served on all other parties. The opposing party may file a written response within eleven (11) days after service of the objections. No reply may be filed. The parties may jointly interview the consultant at any time after the filing of the objections and before a hearing on the objections. If no objections are filed within eleven (11) days after service of the recommendations, an order adopting the recommendations shall be entered.

F. **Confidentiality.**

(1) ***Mediation.*** All communications made by any person who participates in mediation proceedings pursuant to this rule are confidential except that there is no protection for information derived from such communications which a participant is required by law to report to a law enforcement officer or state agency. The Mediation Procedures Act, Sections 44-7B-1 to 44-7B-6 NMSA 1978, shall apply to proceedings commenced under this rule.

(2) ***Other services.*** Information obtained, regardless of the source or type of transmission of the information, during a priority consultation, advisory consultation, or similar service conducted by a court-operated program is confidential and may be disclosed only as follows:

(a) in written recommendations issued in accordance with this rule;

(b) in testimony within the case from which it was ordered; or

(c) by court order upon a showing of good cause for access to the information.

(3) ***Construction.*** This paragraph shall be construed to protect the best interests of the child.

G. **Conduct in domestic relations mediation programs.** The parties to a domestic relations mediation proceeding commenced under this rule are expected to participate in good faith, but sanctions shall not be imposed for failure to settle or compromise any claim or defense.

H. **Safe exchange or supervised visitation programs.** The court may establish a safe exchange program or supervised visitation program under Section 40-12-5.1 NMSA 1978. The court may order the parties to use the services of a safe exchange program or supervised visitation program when the court determines that the child's best interest will be served by avoiding contact or confrontation between the parents during exchanges of custody or by providing supervised contact between a parent and the child.

I. **Sliding fee scales.**

(1) Any party who is ordered to participate in a domestic relations mediation program, safe exchange program, or supervised visitation program under this rule shall pay a fee in accordance with a sliding fee scale under Section 40-12-5 NMSA 1978 or Section 40-12-5.1 NMSA 1978. Any fees payable under this rule may be reallocated between the parties in the district court's discretion as appropriate. If a district court elects to operate a domestic relations mediation program, safe exchange program, or supervised visitation program under this rule, either in-house with court staff or by contracting with an outside service provider, the court shall submit a proposed sliding fee scale to the Supreme Court for its approval. Nothing in this rule shall preclude a court from operating a program for no charge.

(2) When submitting a proposed sliding fee scale for the Supreme Court's consideration, the district court shall do the following:

(a) provide the Supreme Court with detailed information regarding the costs incurred by the district court for operating an in-house program or contracting with an outsider service provider to provide services under this rule;

(b) explain how the district court arrived at the cost it proposes to charge each party receiving services from the domestic relations mediation program, safe exchange program, or supervised visitation program;

(c) submit a separate sliding fee scale for each type of program services the court elects to provide under Paragraphs C, D, E, or H of this rule;

(d) structure the proposed sliding fee scale based on the party's gross income and proportionate ability to pay; and

(e) if the Supreme Court approves the proposed sliding fee scale, the district court shall post the sliding fee scale in the courthouse and on the court's web site.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001; as amended by Supreme Court Order No. 09-8300-013; effective May 18, 2009; by Supreme Court Order No. 10-8300-038, effective December 31, 2010; by Supreme Court Order No. 12-8300-029, effective for all cases filed or pending on or after January 7, 2013; as amended by Supreme Court Order No. 17-8300-030, effective for all cases pending or filed on or after December 31, 2017.]

Committee commentary. — The committee is aware that some judicial districts have non-disclosure and confidentiality local rules. The committee does not believe that this is a matter for local district court rules. Any local rules and forms containing good faith participation requirements shall conform to the provisions of this rule. The committee takes no position on how individual courts may choose to administer the collection of fees payable under rule.

Paragraph F was amended in 2017 to clarify that, like information obtained during a mediation, information obtained during a priority consultation, advisory consultation, or similar service conducted by a court-operated program is confidential and is not subject to disclosure except in limited circumstances. These programs are offered to provide the court and the parties with an assessment and written report about the "parenting situation" in a custody proceeding. NMSA 1978, § 40-12-3(A), (G) (defining "advisory consultation" and "priority consultation" under the Domestic Relations Mediation Act). The assessment and report are based on confidential, sensitive information about the "positions, situations[,] and relationships of family members" involved in the proceeding, including medical, psychological, mental health, or educational records or assessments. *See id*. Maintaining the confidentiality of such information promotes full and frank participation by the parties. The committee is mindful, however, that there may be circumstances in which disclosure of this information may be warranted, such as when the records may conceal fraud or may be relevant to proceedings in which the child or a parent is charged with a crime. *Cf*. Rule 11-503(D)(1) NMRA. Subparagraph (F)(2)(c) therefore permits disclosure "by court order upon a showing of good cause for access to the information."

[Adopted by Supreme Court Order No. 10-8300-038, effective December 31, 2010; as amended by Supreme Court Order No. 12-8300-029, effective for all cases filed or pending on or after January 7, 2013; as amended by Supreme Court Order No. 17-8300-030, effective for all cases pending or filed on or after December 31, 2017.]

1-126. Partial decrees.

A. **Limited to exceptional circumstances.** Partial decrees dissolving the marriage will be granted only upon a showing that exceptional circumstances exist.

B. **Motion contents.** The motion shall address the impact of entry of a partial decree on the parties and their children, including, but not limited to, medical coverage, child custody, income division, child support, spousal support and taxes paid by the parties.

C. **Entry of partial decree.** A partial decree may include provisions that the court deems necessary for the protection of the parties and their minor children.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

1-127. Attorney fees in domestic relations cases.

A motion for attorney fees pursuant to Rule 1-054 NMRA shall include an itemization of time expended and an affirmation that the fees claimed are correctly stated and necessary. In awarding fees, the court shall consider relevant factors presented by the parties, including but not limited to:

A. disparity of the parties' resources, including assets and incomes;

B. prior settlement offers;

C. the total amount of fees and costs expended by each party, the amount paid from community property funds, any balances due and any interim advance of funds ordered by the court; and

D. success on the merits.

[Approved, effective November 1, 2000 until November 1, 2001; approved, effective November 1, 2001.]

1-128. Uniform collaborative law rules; short title; definitions; applicability.

A. **Short title.** Rules 1-128 to 1-128.13 NMRA may be cited as the Uniform Collaborative Law Rules.

B. **Definitions.** The following definitions shall apply in these rules:

(1) “Collaborative law communication” means a statement, whether oral or in a record, or verbal or nonverbal, that,

(a) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(b) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) “Collaborative law participation agreement” means an agreement by persons to participate in a collaborative law process.

(3) “Collaborative law process” means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons,

(a) sign a collaborative law participation agreement; and

(b) are represented by collaborative lawyers.

(4) “Collaborative lawyer” means a lawyer who represents a party in a collaborative law process.

(5) “Collaborative matter” means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which is described in a collaborative law participation agreement and arises under Chapter 40 NMSA 1978, including,

(a) marriage, divorce, dissolution, annulment, and property distribution;

(b) child custody, visitation, and parenting time;

(c) alimony, maintenance, and child support;

(d) adoption;

(e) parentage; and

(f) premarital, marital, and post-marital agreements.

(6) “Law firm” means,

(a) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(b) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision or agency.

(7) “Nonparty participant” means a person, other than a party and the party’s collaborative lawyer, who participates in a collaborative law process.

(8) “Party” means a person who signs a collaborative law participation agreement and whose consent is necessary to resolve a collaborative matter.

(9) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision or agency, or any other legal or commercial entity.

(10) “Proceeding” means a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery.

(11) “Prospective party” means a person who discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) “Related to a collaborative matter” means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) “Sign” means to create a signature in accordance with Rule 1-011(A) NMRA.

(15) “Tribunal” means a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity that, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party’s interests in a matter.

C. **Applicability.** These rules apply to a collaborative law participation agreement that meets the requirements of Rule 1-128.1 NMRA.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.1. Collaborative law participation agreement; requirements.

A. **Requirements.** A collaborative law participation agreement shall be in a record, signed by the parties, and must include the following:

(1) a statement of the parties' intention to resolve a collaborative matter through a collaborative law process under these rules;

(2) a description of the nature and scope of the matter;

(3) the name of each collaborative lawyer who represents a party in the process; and

(4) a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.

B. **Other provisions.** Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with these rules.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.2. Initiation of collaborative law process; voluntary participation; conclusion; termination; notice of discharge or withdrawal of collaborative lawyer; continuation with successor collaborative lawyer.

A. **Initiation.** A collaborative law process begins when the parties sign a collaborative law participation agreement.

B. **Voluntary participation.** A tribunal shall not order a party to participate in a collaborative law process over that party's objection.

C. **Conclusion.** A collaborative law process shall conclude upon the occurrence of any of the following:

(1) resolution of a collaborative matter as evidenced by a signed record;

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process;

(3) any other method provided in a collaborative law participation agreement for concluding the collaborative law process; or

(4) termination of the process.

D. **Termination.** A party may terminate a collaborative law process with or without cause, provided that a collaborative law process shall terminate upon the occurrence of any of the following:

(1) when a party gives notice to other parties in a record that the process is ended;

(2) when a party begins a proceeding related to a collaborative matter without the agreement of all parties;

(3) in a pending proceeding related to the matter, when a party

(i) initiates without the agreement of all parties a pleading, motion, order to show cause, or request for a conference with the tribunal; or

(ii) takes similar action without the agreement of all parties requiring notice to be sent to the parties; or

(4) except as otherwise provided by Paragraph F of this rule, when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

E. **Notice of discharge or withdrawal of a collaborative lawyer.** A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

F. **Continuation with successor collaborative lawyer.** Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than thirty (30) days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by Paragraph E of this rule is sent to the parties,

(1) the unrepresented party engages a successor collaborative lawyer; and

(2) in a signed record,

(a) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(b) the agreement is amended to identify the successor collaborative lawyer; and

(c) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.3. Proceedings pending before tribunal; status report; dismissal.

A. **Abatement of pending proceeding.** Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. If an agreement is signed, then the parties shall file promptly with the tribunal a certificate or stipulated order of abatement, which shall toll all deadlines in the proceeding. The certificate or stipulated order shall include the following:

(1) a statement that the parties are making significant progress toward settlement or are attempting reconciliation and wish to toll the running of the time periods provided in the Rules of Civil Procedure for the District Courts;

(2) a statement of the present status of the case, including a list of all documents which have been filed as required by the Rules of Civil Procedure for the District Courts; and

(3) the signatures of counsel for both parties and of both parties themselves. Any certificate or stipulated order filed which does not include all required signatures shall be of no effect.

B. **Notice to tribunal of conclusion of collaborative law process.** Unless a final order or decree is entered by the tribunal, the parties shall file promptly with the tribunal and serve on the other party notice when a collaborative law process concludes, including when a party wishes to terminate the period of abatement and the collaborative law process. The period of abatement of the proceeding under Paragraph A of this rule is terminated when the notice is filed. The notice may not specify any reason for termination of the process.

C. **Status report.** A tribunal in which a proceeding is abated under Paragraph A of this rule may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information about whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

D. **Effect of prohibited communication.** A tribunal may not consider a communication made in violation of Paragraph C of this rule.

E. **Dismissal.** A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a certificate of abatement is filed based on delay or failure to prosecute.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.4. Emergency order.

Notwithstanding a pending collaborative law process, a tribunal may issue any order under the Family Violence Protection Act, Section 40-13-1 to -12 NMSA 1978.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.5. Adoption of agreement by tribunal.

A tribunal may adopt as an order of the tribunal any agreement resulting from a collaborative law process.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.6. Disqualification of collaborative lawyer and lawyers in associated law firm.

A. **Disqualification of collaborative lawyer.** Except as otherwise provided in Paragraph C of this rule, a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

B. **Disqualification of law firm.** Except as otherwise provided in Paragraph C of this rule, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under Paragraph A of this rule.

C. **Exception; Adoption of agreement.** A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party before a tribunal to seek an order adopting an agreement resulting from the collaborative law process.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

Committee commentary. — Disqualification of the collaborative lawyer from participation in subsequent adjudicative proceedings in the same matter, according to the Uniform Law Commission, “is a fundamental defining characteristic of collaborative law.” Unif. Collab. Law R. 9 cmt. (Unif. Law Comm’n 2010). Requiring disqualification gives the parties and their collaborative lawyers a unique incentive to reach an

acceptable settlement within the collaborative process. *See* Pauline H. Tesler, *Collaborative Law: Achieving Effective Resolution in Divorce without Litigation*, 12 (2d ed. 2009) ("Unlike any other kind of family law representation, the risk of failure is distributed to the lawyers as well as to the clients in collaborative law."). The disqualification requirement also results in a much greater level of comfort, candor, and trust for many collaborative participants because there is no risk, for example, of being cross-examined in court by the other party's collaborative lawyer. *See* David Hoffman, *Foreword to the Second Edition* of Tesler, *supra*, at xvii ("Because the parties do not have to fear that they will one day face the other party's lawyer in adversarial proceedings in court, they are able to achieve deeper levels of communication and resolution.").

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.7. Disclosure of information.

Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.8. Standards of professional responsibility and mandatory reporting not affected.

These rules do not affect,

A. the professional obligations and standards applicable to a lawyer or other licensed professional; or

B. the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the laws of New Mexico.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.9. Appropriateness of collaborative law process.

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall do the following:

A. assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter, including whether there is a history of a coercive or violent relationship as set forth in Rule 1-128.10 NMRA;

B. provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, or arbitration; and

C. advise the prospective party of the following:

(1) after signing an agreement, if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(2) participation in a collaborative law process is voluntary and any party has the right to terminate a collaborative law process with or without cause; and

(3) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Rule 1-128.6(C) NMRA.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.10. Coercive or violent relationship.

A. **Reasonable inquiry.** Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

B. **Continuing assessment.** Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.11. Confidentiality of collaborative law communication.

A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than these rules.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.12. Privilege against disclosure for collaborative law communication; admissibility; discovery.

A. **Scope of the privilege.** A party has a privilege to refuse to disclose, and to prevent any other person from disclosing, a collaborative law communication, provided that evidence or information that is otherwise admissible or subject to discovery does not become privileged solely because of its disclosure or use in a collaborative law process.

B. **Who may claim the privilege.** The privilege may be claimed by

(1) a party;

(2) a party's guardian or conservator;

(3) the personal representative of a deceased party; or

(4) a nonparty participant, but only with respect to a collaborative law communication of the nonparty participant.

C. **Waiver of privilege.**

(1) The privilege may be waived in a record or orally during a proceeding if it is expressly waived by all parties.

(2) A party who discloses a collaborative law communication for which the privilege has not been waived under Subparagraph (1) of this paragraph shall be deemed to have waived the privilege, but only to the extent necessary to permit any other party to respond to the unauthorized disclosure.

D. **Exceptions.**

(1) There is no privilege for a collaborative law communication that,

(a) is required by law to be made public or otherwise disclosed;

(b) is threatening or leads to actual violence;

(c) reveals the intent of a party to commit a felony or inflict bodily harm to the party's self or another person;

(d) relates to whether the parties reached a binding and enforceable agreement in the collaborative law process; or

(e) is in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(2) Disclosure or admission of evidence excepted from the privilege under Paragraph B or C does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-128.13. Authority of tribunal in case of noncompliance.

Notwithstanding a failure to comply with Rules 1-128.1, -128.9, or -128.10 NMRA, a tribunal may enforce an agreement, apply the disqualification provisions of Rule 1-128.6 NMRA, or apply a privilege under Rule 1-128.12 NMRA when the tribunal concludes that the parties intended to enter into a collaborative law participation agreement and to participate in a collaborative law process. Such a conclusion shall be based upon the following findings:

A. the parties signed a record indicating an intent to enter into a collaborative law participation agreement;

B. the parties reasonably believed they were participating in a collaborative law process; and

C. the interests of justice require finding that the parties were participating in a collaborative law process.

[Adopted by Supreme Court Order No. 16-8300-020, effective for all cases pending or filed on or after December 31, 2016.]

1-129. Proceedings under the Family Violence Protection Act.

A. **First petition.** The first petition filed between two parties for an order of protection under the Family Violence Protection Act, Sections 40-13-1 to -12 NMSA 1978, shall proceed under these rules as they apply to all civil proceedings. For the purposes of this rule, the proceeding arising from the first petition shall be referred to as the original proceeding.

B. **Subsequent petition.** Any subsequent petition filed under the Family Violence Protection Act by either of the parties named in the first petition against the other party named in the first petition shall be filed as part of the original proceeding and shall not open a new proceeding under Paragraph A of this rule.

(1) ***Pending proceedings.*** If the original proceeding is pending or subject to the court's jurisdiction at the time that the subsequent petition is filed, the subsequent petition shall be treated as a pleading or paper in the original proceeding.

(2) ***Closed proceedings.*** If the original proceeding has been closed at the time that the subsequent petition is filed, the court clerk shall re-activate the case number assigned to the first petition and return the new matter to the judge who presided over the original proceeding or to that judge's successor.

C. **Caption.** After the court clerk has assigned a case number to the first petition, all subsequent pleadings and papers filed in the proceeding, including a subsequent petition under Paragraph B of this rule, shall use the same case number.

[Approved by Supreme Court Order No. 17-8300-028, effective for all petitions filed on or after December 31, 2017.]

ARTICLE 13
Mental Health Rules

1-130. Appointment of a treatment guardian.

A. **Definitions.** For purposes of this rule, the following definitions shall apply:

(1) ***Capacity to make mental health treatment decisions.*** A person has capacity to make mental health treatment decisions when the person has the ability to understand and appreciate the nature and consequences of proposed mental health treatment, including significant benefits and risks and alternatives to the proposed mental health treatment, and to make and communicate an informed mental health treatment decision;

(2) ***Mental health treatment.*** Mental health treatment includes the administration of psychotropic medication, psychosurgery, convulsive therapy, experimental treatment, or a behavior modification program involving aversive stimuli or substantial deprivations;

(3) ***Mental health treatment facility.*** A mental health treatment facility is an inpatient facility that provides treatment for psychiatric disorders or habilitation for developmental disabilities;

(4) ***Penal institution.*** A penal institution is a place for the confinement of persons in lawful detention, including a jail, detention facility, prison, or correctional facility;

(5) ***Respondent.*** A respondent is a person who is the subject of a petition to appoint a treatment guardian; and

(6) ***Treatment guardian.*** A treatment guardian is an individual or entity appointed under Section 43-1-15 NMSA 1978 to make mental health treatment decisions for a person who has been found by clear and convincing evidence to be incapable of making the person's own mental health treatment decisions.

B. **Scope.** This rule governs the appointment of a treatment guardian under Section 43-1-15 NMSA 1978. The procedures set forth in this rule shall apply when the following circumstances have been met:

(1) a mental health or developmental disabilities professional or physician has proposed a course of mental health treatment for the respondent; and

(2) the mental health or developmental disabilities professional or physician or any interested person believes that the respondent lacks the capacity to make mental health treatment decisions.

C. **Petition.** Any interested person authorized under Section 43-1-15(B) NMSA 1978 may petition the court to appoint a treatment guardian under the circumstances described in Paragraph B of this rule. The petition shall

(1) identify the respondent's name, age, and county of residence;

(2) identify the respondent's last-known location at the time of the filing of the petition, whether a mental health treatment facility, penal institution, the respondent's home address, or other location;

(3) identify the respondent's current mental health diagnosis;

(4) describe the respondent's symptoms or behaviors that support the diagnosis;

(5) state where the respondent currently receives treatment, whether in an institution or a facility or in the community;

(6) provide the name and address of the respondent's mental health or developmental disabilities professional or physician and describe the proposed course of treatment;

(7) provide the date (if any) on which the respondent last received emergency medications pursuant to Section 43-1-15(M) NMSA 1978;

(8) allege that the respondent is incapable of giving or withholding informed consent to the proposed course of treatment and therefore lacks capacity to make his or her own mental health care treatment decisions;

(9) describe the efforts made by the mental health or developmental disabilities professional or physician to discuss the proposed course of treatment with the respondent;

(10) identify the proposed treatment guardian;

(11) state the proposed treatment guardian's relationship to the respondent, if any;

(12) allege that the proposed treatment guardian has received a copy of Form 4-931 NMRA from the petitioner;

(13) identify any previously designated or court-appointed agents for the respondent;

(14) identify any witnesses that the petitioner intends to call at the hearing on the petition; and

(15) request the appointment of a treatment guardian for a specified period of time not to exceed one year.

D. **Notice of hearing.** Upon the filing of a petition, the court shall issue a notice of hearing. The hearing shall be set for a date no later than three (3) business days after the filing of the petition, provided that the court may extend the time for a hearing for good cause shown, including the inability of the petitioner to prove that the respondent and the respondent's attorney were served prior to the hearing.

E. **Service.** The petition and notice of hearing shall be served as soon as practicable on the respondent and on the respondent's attorney as provided in Paragraphs D through F of Rule 1-004 NMRA. Effective service shall be presumed if the respondent appears at the hearing and is represented by counsel.

F. **Hearing.** Unless the respondent knowingly waives the right to a hearing, the hearing shall conform with the following requirements:

(1) The respondent shall be represented by counsel as required by Section 43-1-4(B) NMSA 1978, and shall have the right to be present, to call witnesses, and to cross-examine opposing witnesses;

(2) The petitioner shall introduce the sworn testimony of a physician or of a mental health or developmental disabilities professional acceptable to the court. The professional or physician shall testify about the conclusion that the respondent lacks capacity to make mental health treatment decisions and the reasons supporting the proposed mental health treatment;

(3) The petitioner shall introduce evidence that the proposed treatment guardian understands and accepts the duties and responsibilities set forth in Sections 43-1-15 and 43-1-19 NMSA 1978; and

(4) If the court determines by clear and convincing evidence that the respondent lacks capacity to make mental health treatment decisions, it shall issue a written order appointing a treatment guardian for a specified period not to exceed one year. The order shall include written findings that the respondent lacks capacity to make mental health treatment decisions and that the treatment guardian understands the duties and responsibilities set forth in Sections 43-1-15 and 43-1-19 NMSA 1978.

G. **Substitution of treatment guardian.** If during a term of appointment, the treatment guardian, the mental health or developmental disabilities professional or physician, the respondent, or any other interested person believes that a substitute treatment guardian should be appointed, such person may move the court for a substitute treatment guardian to complete the current term of appointment. A copy of Form 4-931 NMRA, signed by the proposed substitute treatment guardian, shall be attached to the motion. If the motion is due to a change in the respondent's physical location, the court shall consider the proposed substitute treatment guardian's availability at the respondent's new location.

[Adopted by Supreme Court Order No. 14-8300-013, effective for all cases filed or pending on or after December 31, 2014.]

Committee commentary. —

In general

This rule and the accompanying forms resulted from the appointment of the Ad Hoc Committee on Rules for Mental Health Proceedings (the committee). The rule governs proceedings for the appointment of a treatment guardian under NMSA 1978, Section 43-1-15, and is intended to raise the profile of an important, but rarely used, procedure for providing mental health treatment to individuals who lack the capacity to consent to such treatment. A treatment guardian may be appointed when the requirements of this rule have been satisfied, regardless of the respondent's status as an inpatient, outpatient, detainee, or inmate. If the appointment is made while the respondent is admitted to a mental health facility or housed in a penal institution, the appointment may be limited to the duration of the respondent's admission, detention, or sentence, so long as the appointment does not exceed one year.

A primary aim of this rule is to increase the likelihood that individuals will access mental health treatment in the community without unnecessary detention or incarceration. For that reason, the issuance of a bench warrant to compel attendance at a hearing under this rule is strongly discouraged.

The appointment of a treatment guardian is not an emergency proceeding. Other statutory procedures are available for involuntarily administering emergency medication to an individual who is in crisis, *see, e.g.*, NMSA 1978, § 43-1-15(G), and for involuntarily detaining an individual for evaluation and treatment, *see id.* § 43-1-10. The relief provided for in this rule should not be awarded based solely on the respondent's failure to appear at the hearing or to answer the allegations in the petition. Nothing in this rule, however, is intended to prevent the court from appointing a treatment guardian in the respondent's absence, so long as the requirements of this rule have been satisfied, including proof of service upon the respondent and the respondent's attorney and a finding supported by clear and convincing evidence that the respondent lacks capacity to make mental health treatment decisions.

Capacity to make mental health treatment decisions

Section 43-1-15(B) provides that certain individuals or entities who believe that a client is "incapable of informed consent" may petition for the appointment of a treatment guardian. However, the statute does not define the phrase "incapable of informed consent." *But see* NMSA 1978, § 43-1-15(B) ("If the client is capable of understanding the proposed nature of treatment and its consequences and is capable of informed consent, the client's consent shall be obtained before the treatment is performed."). The committee, therefore, elected to use the phrase "capacity to make mental health treatment decisions" and to define the phrase in accordance with the Mental Health Care Treatment Decisions Act, NMSA 1978, §§ 24-7B-1 to 24-7B-16. *See* NMSA 1978, § 24-7B-3(C) (defining "capacity" under the Mental Health Care Treatment Decisions Act).

Substitution of treatment guardian

Paragraph G permits a motion for substitution of a treatment guardian, which may be appropriate under a variety of circumstances. In particular, if a treatment guardian's term coincides with a respondent's temporary stay at a mental health facility or penal institution, a substitute treatment guardian may be necessary to maximize the treatment guardian's availability and effectiveness when the respondent is released to a location that is geographically remote from the facility or institution.

[Adopted by Supreme Court Order No. 14-8300-013, effective for all cases filed or pending on or after December 31, 2014.]

1-131. Notice of federal restriction on right to possess or receive a firearm or ammunition.

A. **Notice required.** A person who is the subject of an order set forth in Paragraph B of this rule shall be given written notice of the following:

(1) The person is prohibited under federal law from receiving or possessing a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4);

(2) The Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about the person's identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System; and

(3) The person may petition the court as provided in Section 34-9-19 NMSA 1978 to restore the person's right to possess or receive a firearm or ammunition and to remove the person's name from the National Instant Criminal Background Check System.

B. **Orders requiring notice.** The written notice required under Paragraph A of this rule shall be included in or made a part of the following orders:

(1) An order appointing a full or plenary guardian for an adult that includes a finding that the person is totally incapacitated under Section 45-5-304(C) NMSA 1978;

(2) An order appointing a full or plenary conservator for an adult that includes a finding that the person is totally incapacitated under Section 45-5-407(I) NMSA 1978;

(3) An order of commitment under Sections 43-1-11, -12, or -13 NMSA 1978;

(4) An order for involuntary protective services or protective placement under Section 27-7-26 NMSA 1978; and

(5) An order to participate in assisted outpatient treatment that includes a finding of serious violent behavior or of threatened or attempted serious physical harm under Section 43-1B-3(C)(2) NMSA 1978.

[Provisionally approved by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

Committee commentary. — Enacted in 2016, NMSA 1978, Section 34-9-19(C) requires the Administrative Office of the Courts to notify a person who has been "adjudicated as a mental defective" or "committed to a mental institution" that the person "is disabled pursuant to federal law from receiving or possessing a firearm or ammunition." Federal law declares it a crime for a person who has been "adjudicated as a mental defective" or "committed to a mental institution" to, among other things, receive or possess a firearm or ammunition. *See* 18 U.S.C. § 922(g)(4) ("It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

The terms “adjudicated as a mental defective” and “committed to a mental institution” are defined under federal regulation and New Mexico law as follows:

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11; NMSA 1978, § 34-9-19(M) (“[T]he terms “adjudicated as a mental defective” and “committed to a mental institution” have the same meaning as those terms are defined in federal regulations at 27 C.F.R. Section 478.11 . . . .”).

Paragraph A of this rule prescribes the notice that must be given under Section 34-9-19(C) to a person who has been “adjudicated as a mental defective” or “committed to a mental institution.” *See also* Form 4-940 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition). Paragraph B identifies the types of orders in a civil proceeding that require the prescribed notice because the orders may include one or more findings that substantially align with the federal definition of “adjudicated as a mental defective” or “committed to a mental institution.” The orders listed in Subparagraphs (B)(3) and (4) necessarily include such a finding and therefore require notice in every case. However, the orders listed in Subparagraphs (B)(1), (2), and (5) may be issued without a finding or combination of findings that satisfies either definition. The rule therefore clarifies that notice is required under Subparagraphs (B)(1), (2), and (5) only when the order includes a specific finding that, taken with other findings that are statutorily required, ensures that the order substantially aligns with one of the federal definitions.

[Provisionally approved by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016; Supreme Court Order No. 17-8300-003, withdrawing amendments provisionally approved by Supreme Court Order No. 16-8300-003, effective retroactively to May 18, 2016, and approving new amendments, effective for all orders filed on or after March 31, 2017.]

ARTICLE 14
Guardianship and Conservatorship Proceedings

1-140. Guardianship and conservatorship proceedings; mandatory use of forms.

A. **Order determining persons entitled to notice of proceedings and access to court records.** When the court files an order appointing a guardian or conservator, the court shall file a separate order using Form 4-993 NMRA to identify all persons entitled to notice of the proceedings and access to court records following the appointment.

B. **Order to secure or waive bond.** When the court files an order appointing a conservator, the court shall file a separate order using Form 4-994 NMRA directing the conservator to secure bonding or an alternative asset-protection arrangement or waiving the bonding requirement, as provided in Section 45-5-411 NMSA 1978.

C. **Notice of bonding and corporate surety statement.** Unless waived by the court, a conservator shall file a separate notice of bonding using Form 4-995 NMRA. The notice of bonding shall be filed at the same time that an inventory or report is filed under Paragraphs E or F of this rule. A statement completed by the corporate surety using Form 4-995.1 NMRA shall be attached to a notice of bonding filed under this paragraph.

D. **Guardian's report.** A guardian filing a ninety (90)-day, annual, or final report under Section 45-5-314 NMSA 1978 shall use Form 4-996 NMRA.

E. **Conservator's inventory.** A conservator filing a ninety (90)-day inventory under Section 45-5-418 NMSA 1978 shall use Form 4-997 NMRA.

F. **Conservator's report.** A conservator filing an annual or final report under Section 45-5-409 NMSA 1978 shall use Form 4-998 NMRA.

G. **Notice of hearing and rights.** A person filing a petition to appoint a guardian or conservator shall use Form 4-999 NMRA to provide notice of the hearing on the petition and notice of the rights of the alleged incapacitated person as required under Sections 45-5-309 and 45-5-405 NMSA 1978.

[Approved by Supreme Court Order No. 18-8300-005, effective for all cases on or after July 1, 2018; provisionally amended by Supreme Court Order No. 18-8300-007, effective for all cases filed on or after October 15, 2018; approved by Supreme Court Order No. 19-8300-001, effective January 14, 2019.]

1-141. Guardianship and conservatorship proceedings; determination of persons entitled to notice of proceedings or access to court records.

Any determination by the court of persons entitled to notice of the proceedings or access to court records shall be made by a separate, written order. The order shall not address any other matter in the proceeding.

[Approved by Supreme Court Order No. 18-8300-005, effective for all cases on or after July 1, 2018.]

Committee commentary. — The persons entitled to notice and access to court records in a proceeding under NMSA 1978, Chapter 45, Article 5, Parts 3 and 4, are subject to change throughout the proceeding upon order of the court. *See, e.g.*, NMSA 1978, §§ 45-5-303(K), 45-5-407(N) (providing that a person who is not otherwise entitled to access court records may petition the court for access to court records of the guardianship or conservatorship); NMSA 1978, §§ 45-5-309(C), 45-5-405(C) (providing that notice of a proceeding to appoint a guardian or conservator shall be given, *inter alia*, to "any other person interested in the alleged incapacitated person's welfare that the court determines"). To assist court staff with identifying such changes, the rule requires the court to file a separate order any time it makes a determination of who is entitled to notice and access to court records.

In addition, an order appointing a guardian or conservator will, in most cases, affect who is entitled to notice and access to court records following the appointment. Before the order of appointment, anyone identified in the petition is entitled to notice and access to court records in the proceeding. *See* NMSA 1978, §§ 45-5-309(C), 45-5-405(C) (providing that notice of a proceeding on a petition to appoint a guardian or a conservator shall be given to any person required to be listed in the petition under NMSA 1978, Sections 45-5-303(B) and 45-5-404(B)); §§ 45-5-303(K), 45-5-407(N) (providing that a person entitled to notice may access court records of the proceeding and resulting guardianship or conservatorship). After an order appointing a guardian or conservator, however, the persons entitled to notice and access to court records are limited to the protected person, the guardian or conservator, and any other person the court determines. *See* NMSA 1978, §§ 45-5-309(D), 45-5-405(D). This rule and Rule 1-140(A) NMRA therefore require the court upon the filing of an order appointing a guardian or conservator to file a separate order to identify each person entitled to notice and access following the filing of the order of appointment. *See* Form 4-993 NMRA (Order identifying persons entitled to notice or access to court records).

[Approved by Supreme Court Order No. 18-8300-005, effective for all cases on or after July 1, 2018.]

1-142. Guardianship and conservatorship proceedings; proof of certification of professional guardians and conservators.

A. **Scope.** This rule establishes qualification requirements under Sections 45-5-311 and 45-5-410 NMSA 1978 for an individual or entity who may be appointed as a professional guardian or conservator.

B. **Definition.** For purposes of this rule, a "professional guardian or conservator" means an individual or entity that serves as guardian or conservator for more than two individuals who are not related to the guardian or conservator by marriage, adoption, or third degree of blood or affinity.

C. **Proof of certification.** An order appointing a professional guardian or conservator under Chapter 45, Article 5, Parts 3 or 4 NMSA 1978, shall include a provision that requires the professional guardian or conservator to submit proof that the individual who has been assigned the duties of guardian or conservator for the protected person is certified and in good standing with the Center for Guardianship Certification. The proof required under this paragraph shall be submitted to the court not later than the first to occur of the following:

(1) Ninety (90) days after the filing of the order of appointment; or

(2) The filing of the initial report required under Section 45-5-314(A) NMSA 1978 or the inventory required under Section 45-5-418(A) NMSA 1978.

D. **Continuing duty.** A professional guardian or conservator must submit proof annually that the certification required under Paragraph C of this Rule is in good standing.

E. **Applicability.** This rule shall apply to all professional guardians and conservators appointed on or after the effective date of this rule. Professional guardians or conservators appointed before the effective date of this rule shall provide the proof required under Paragraph C of this rule within six months of the effective date of this rule and as further required by Paragraph D.

[Adopted by Supreme Court Order No. 19-8300-001, effective for all cases on or after July 1, 2019.]

Committee commentary. — The definition of a professional guardian or conservator focuses on the number of non-relatives who are under the care of the guardian or conservator. The definition therefore excludes, for example, a guardian or conservator appointed to care only for relatives, regardless of number. Similarly, the definition excludes a guardian or conservator appointed to care for one or two non-relatives. The definition limits relatives by blood or affinity to the third degree of relationship to the guardian or conservator, which includes the guardian's or conservator's spouse, parent, stepparent, brother, sister, stepbrother, stepsister, half-brother, half-sister, uncle, aunt, niece, nephew, first cousin, or any person denoted by the prefix "grand" or "great," or the spouse or former spouse of the persons specified. *Accord* NMSA 1978, § 40-10B-3(E).

The Center for Guardianship Certification (CGC) provides certification to guardians and conservators who demonstrate "sufficient skill, knowledge and understanding of the universal guardianship principles to be worthy of the responsibility entrusted to him or her." *Center for Guardianship Certification*, https://guardianshipcert.org/about-us/. Certification by the CGC demonstrates that the guardian or conservator has met certain professional and ethical standards, including the following:

> Certification entitles the guardian [or conservator] to represent to the courts and the public that he or she is eligible to be appointed, is not disqualified by prior conduct, agrees to abide by universal ethical standards governing a person with fiduciary responsibilities, submits to a disciplinary process, and can demonstrate through a written test an understanding of basic guardianship principles and laws.

Id. To view the CGC's certification requirements, visit https://guardianshipcert.org/certification-requirements/.

Under Paragraph C of this rule, an order appointing a professional guardian or conservator shall require the professional guardian or conservator to submit proof within ninety (90) days that the person who has been assigned the duties of a guardian or conservator has been certified with the CGC. A person assigned the duties of a guardian or conservator is the individual who makes decisions on behalf of the protected person, including but not limited to the professional guardian's or conservator's employee, subcontractor, agent, case manager, guardianship coordinator, or an individual who signs a report submitted under NMSA 1978, Sections 45-5-314, 45-5-409, or 45-5-418. If a corporate entity is appointed as a guardian or conservator, the identity of the person who will be assigned the duties of a guardian or conservator may not be known at the time that the order of appointment is issued. The ninety (90) day time limit set forth in Paragraph C is intended to provide a reasonable amount of time for a corporate entity to assign the duties of a guardian or conservator to a specific individual and to submit proof that the individual is certified.

[Adopted by Supreme Court Order No. 19-8300-001, effective for all cases on or after July 1, 2019.]

1-143. Guardianship and conservatorship proceedings; appointment of visitor, qualified health care professional, and guardian *ad litem*; timing and review of reports.

A. **Scope; computation of time.** This rule governs the appointment of and filing of reports by a visitor, qualified health care professional, and guardian *ad litem* in a guardianship or conservatorship proceeding under Chapter 45, Article 5, Parts 3 and 4 NMSA 1978. All time periods set forth in this rule, regardless of length, shall be computed using calendar days as provided in Rule 1-006(A)(1) NMRA.

B. **Appointment.** Upon the filing of a petition for the appointment of a guardian or conservator, the court shall appoint a qualified health care professional, visitor, and if necessary, a guardian *ad litem*.

C. **Timing of reports.** An order of appointment under Paragraph B of this rule shall require the appointee to file a report as follows.

(1) ***Qualified health care professional*.** A qualified health care professional shall file the report required under Section 45-5-303(E) or 45-5-407(C) NMSA 1978 no later than fourteen (14) days before the hearing on a petition to appoint a guardian or conservator.

(2) ***Visitor*.** A visitor shall file the report required under Section 45-5-303(F) or 45-5-407(D) NMSA 1978 no later than eleven (11) days before the hearing on a petition to appoint a guardian or conservator.

(3) ***Guardian* ad litem.** A guardian *ad litem* shall file the report required under Section 45-5-303.1(A)(6) or 45-5-404.1(A)(6) NMSA 1978 no later than seven (7) days before the hearing on a petition to appoint a guardian or conservator.

D. **Provision of reports.** Within three (3) days of the filing of a report required under Paragraph C of this rule, the petitioner shall provide a copy of the report to the alleged incapacitated person, the visitor, the guardian *ad litem*, any attorney of record, any agent under a power of attorney unless the court orders otherwise, and any other person the court determines under Rule 1-079.1(B)(4) or (C)(4) NMRA. The report may be provided to such persons in any manner reasonably calculated to afford a meaningful opportunity to review the report before the hearing on the petition to appoint a guardian or conservator.

E. **Review.** Prior to the hearing, the guardian *ad litem* shall review the reports with the alleged incapacitated person by making the alleged incapacitated person aware of the contents of the reports and their significance.

[Adopted by Supreme Court Order No. 19-8300-005, effective July 1, 2019.]

Committee commentary. — The time limits and review requirements set forth in this rule are intended to provide an opportunity for meaningful communication about the content and recommendations contained in the reports before the hearing on the petition for the alleged incapacitated person and any other person entitled to access the reports under Rule 1-079.1 NMRA.

[Adopted by Supreme Court Order No. 19-8300-005, effective July 1, 2019.]

1-144. Guardianship and conservatorship proceedings; mandatory viewing of New Mexico Courts' Guardian and Conservator Orientation Program videos.

A. **Scope.** This rule establishes the requirement that any proposed guardian or conservator of an alleged incapacitated person must view the New Mexico Courts' Guardian and Conservator Orientation Program videos prior to being appointed guardian or conservator.

B. **Applicability.** This rule applies to proposed guardians and conservators and to proposed professional guardians or conservators.

C. **Definitions.** For the purpose of this rule, a "professional guardian or conservator" means an individual or entity that serves as guardian or conservator for more than two individuals who are not related to the guardian or conservator by marriage, adoption, or third degree of blood or affinity.

D. **Required videos for proposed guardian.** Prior to the Court appointing a guardian, the proposed guardian must view the following videos of the New Mexico Courts' Guardian and Conservator Orientation Program:

(1) Introduction;

(2) Guardian Orientation;

(3) How to Complete the Guardian's Report;

(4) Guide to Filing and Distributing Guardian and Conservator's Reports;

(5) Abuse and Neglect; and

(6) How to File a Grievance.

E. **Required videos for proposed conservator.** Prior to the Court appointing a conservator, the proposed conservator must view the following videos of the New Mexico Courts' Guardian and Conservator Orientation Program:

(1) Introduction;

(2) Conservator Orientation;

(3) Overview of Conservator's Report and Bonding Requirements;

(4) How to Complete the Conservator's Inventory;

(5) How to Complete the Conservator's Report;

(6) Guide to Filing and Distributing Guardian and Conservator's Reports;

(7) Abuse and Neglect; and

(8) How to File a Grievance.

F. **Proof of viewing.** No later than five (5) calendar days before the hearing on a petition to appoint a guardian or conservator, the proposed guardian or conservator shall file a certificate with the court stating that the required videos have been viewed.

[Adopted by Supreme Court Order No. 21-8300-001, effective for cases pending or filed on or after February 1, 2021.]

Cover Sheet for use with Rule 1-145 NMRA

STATE OF NEW MEXICO

COUNTY OF _____

_____ JUDICIAL DISTRICT

In the matter of _____, No. _____
a Protected Person.

SEALED – CONFIDENTIAL INFORMATION

This filing complies with Rule 1-145 NMRA and contains confidential financial statements in the above referenced matter. Pursuant to Rule 1-145(E)(3)(b), these records shall "be automatically sealed by the court, without the need for a separate court order."

According to Rule 1-145(E)(3)(e), this separate filing shall "not be disclosed to any person or entity other than the State Auditor .... unless authorized by court order. Absent a court order, and notwithstanding the provisions of Rule 1-079.1(C)(4) NMRA, the confidential filing required under this Paragraph shall not be disclosed to the protected person, the parties to the proceeding, a court-appointed guardian, or counsel of record and their employees."

A total of _____ pages, containing confidential financial statements for or on behalf of the protected person, are being submitted to the Court by (select one):

□ the court-appointed conservator or □ the court-appointed guardian

in the above referenced matter.

Date _____

_____
Signature

_____
Typed/Printed Name

_____
Street or Post Office Address

_____
City, State and Zip Code

1-145. Conservatorship proceedings; professional conservators; procedures and time limits for filing reports and financial statements.

A. **Scope; computation of time**. This rule governs the filing of reports by a professional conservator in a conservatorship proceeding under Section 45-5-409 NMSA 1978. *See* Rule 1-142(B) NMRA (defining the term "professional . . . conservator"). All time periods set forth in this rule shall be computed in accordance with the provisions of Rule 1-006(A) NMRA, unless otherwise indicated.

B. **Appointment.** On the filing of a petition for the appointment of a conservator the court, taking into account the priorities set forth in Section 45-5-410(A) NMSA 1978, may appoint a professional conservator.

C. **Timing of reports.** An order of appointment under Paragraph B of this rule shall require the professional conservator to file a report, substantially in compliance with Form 4-998 NMRA, within the following time limits:

(1) in the case of an annual report, within thirty (30) days after the anniversary date of the professional conservator's appointment;

(2) in the case of all other reports, within sixty (60) days after the professional conservator's resignation, removal, or termination, whichever is applicable; or

(3) a reasonable period of time as determined by the court beyond the deadlines specified in Subparagraphs (1) and (2) of this paragraph.

D. **Filing and service of reports.** A professional conservator's report shall be filed in the court in which the case is currently assigned, with copies served on

(1) the protected person, consistent with the provisions of Rule 1-004.1(C) NMRA;

(2) the protected person's guardian, if any, in accordance with the provisions of Rules 1-004.1(D) and 1-005 NMRA; and

(3) the district judge currently assigned to the case, in accordance with the provisions of Rules 1-004.1(D) and 1-005 NMRA.

E. **Required documents; financial statements; separate confidential filing.**

(1) Every report filed by a professional conservator shall require a separate confidential filing of financial statements that detail the following:

(a) all income and assets reported, respectively, in Sections II and IV of Form 4-998; and

(b) all expenses and debts reported, respectively, in Sections III and V of Form 4-998.

(2) For purposes of this rule, the term “financial statements” shall mean written documentation in any form from a third-party financial institution that reflects one or more of the relevant individual transactions for or on behalf of the protected person that occurred during the period covered in the report.

(3) Considering the confidential nature of the information contained in the financial statements, the separate confidential filing shall

(a) be filed contemporaneously with Form 4-998;

(b) be automatically sealed by the court, without the need for a separate court order;

(c) include a cover sheet captioned “Sealed—Confidential Information” that indicates the total number of pages, excluding the cover sheet, being filed;

(d) not redact any confidential information;

(e) not be disclosed to any person or entity other than the State Auditor as provided in Paragraph F of this Rule, unless authorized by court order. Absent a court order, and notwithstanding the provisions of Rule 1-079.1(C)(4) NMRA, the confidential filing required under this Paragraph shall not be disclosed to the protected person, the parties to the proceeding, a court-appointed guardian, or counsel of record and their employees.

F. **Audit process.**

(1) The court shall forward a professional conservator’s report and all financial statements to the State Auditor for review within five (5) days of the court’s receipt of those documents.

(2) The State Auditor shall submit, within fifteen (15) business days of receiving a professional conservator's report and all financial statements from the court, one of the following:

(a) a letter of review declining to conduct an audit;

(b) a letter of acceptance to conduct an audit; or

(c) a letter requesting that the professional conservator submit additional information or financial statements to help assess whether an audit is warranted or appropriate.

(3) The professional conservator shall comply with any request made by the State Auditor for additional information or financial statements within fifteen (15) business days of receiving the request. For good cause shown, the court may extend the time limit governing the professional conservator's response for an additional period of up to fifteen (15) business days.

(a) If, in the opinion of the State Auditor, the professional conservator's response satisfactorily provides the requested information or financial statements missing from the initial submission, the State Auditor shall submit the following within fifteen (15) business days of receiving the response:

(i) a letter of review declining to conduct an audit, or

(ii) a letter of acceptance to conduct an audit.

(b) If the professional conservator fails to respond to the State Auditor's request or if, in the opinion of the State Auditor, a submitted response lacks the requested information or financial statements, the State Auditor shall promptly notify the court of the professional conservator's lapse. The court, in turn, shall set the matter for a status conference, at which the professional conservator, appearing through counsel, shall advise the court of the reason for the delayed or inadequate response. Any costs associated with preparing for and appearing at the status conference shall be borne by the professional conservator and shall not be charged to the protected person's estate. The court may issue any order, up to and including an order holding the professional conservator in contempt, appropriate to promote the efficient processing of the report.

(4) If the State Auditor decides to conduct an audit of the contents in the professional conservator's report without requesting additional information or financial statements, an audit report shall be filed with the court within ninety (90) days of the State Auditor's submission of the letter of acceptance to conduct an audit. If the State Auditor decides to conduct an audit of the contents in the professional conservator's report after requesting and receiving additional information or financial statements, an audit report shall be filed with the court within ninety (90) days of the professional conservator's submission of the additional information or financial statements.

G. **Costs incurred.** Any costs incurred by the State Auditor in exercising its authority to subpoena documents, records, or statements under Section 45-5-409(H) NMSA 1978 shall be borne by the professional conservator and shall not be charged to the protected person's estate.

[Provisionally adopted by Supreme Court Order No. 22-8300-005, effective for all cases pending or filed on or after March 16, 2022.]

ARTICLE 15
Kinship Guardianship Proceedings

1-150. Scope; forms.

A. **Scope**. Rules 1-150 to 1-156 NMRA apply to all kinship guardianship petitions. A petition about a child with at least one living parent shall be governed by the Domestic Relations Code. Kinship guardianship matters involving the Children, Youth and Families Department as a party may be assigned to the family court division or the children's court division at the discretion of the chief judge of the district, or under local rule. A local rule shall be created to address reassignment of kinship guardianship cases, when necessary.

B. **Forms.** Self-represented litigants must use Forms 4A-501 through 4A-513 NMRA in all cases under the Kinship Guardianship Act, Sections 40-10B-1 to -15 NMSA 1978. Attorneys shall file pleadings that are consistent with both court rules and forms.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

1-151. Petition; parties; intervention; joinder and sealing.

A. **Who may file.** A petition for the appointment of a guardian shall only be filed by a person meeting the definition of caregiver in Section 40-10B-3 NMSA 1978.

B. **Petition; content.** A petition seeking the appointment of a guardian shall be verified by the petitioner and shall

(1) allege facts consistent with Section 40-10B-5(B) NMSA 1978; and

(2) include a copy of a guardianship assistance agreement created between the Children, Youth and Families Department ("the department") and the kin caregiver, if one exists, which shall be filed under seal in accordance with the requirements of Rule 1-079 NMRA.

C. **Parties; department as a party.** The parties to a kinship guardianship petition shall be identified as set forth in Rule 1-001 NMRA.

(1) When the department is a party, the petitioners shall serve the department with a copy of the petition under Rule 1-004 NMRA. The department shall designate and provide contact information for the department's agent who will accept service of kinship guardianship petitions.

(2) When the department has legal custody of a child by court order, the department may file to intervene.

(3) When the department has legal custody of a child but not through a voluntary placement agreement or a guardianship assistance agreement with petitioner, the department must file an answer, objection, or consent to the petition by the same method and rules that apply to any other named respondents.

(4) When the department has legal custody of the child by written voluntary placement agreement with the parent and has a guardianship assistance agreement with the petitioner, the court shall join the department as a party.

(a) When the department is joined as a party, it shall file the following under seal:

(i) a response to the petition for kinship guardianship, including, if applicable, the department's specific actions related to a written voluntary placement agreement with an Indian child's parents and how they meet the requirements of the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963;

(ii) the written voluntary placement agreement for the child;

(iii) notice when a written voluntary placement agreement or a guardianship assistance agreement has been revoked by any party; and

(iv) notice that a petition alleging abuse or neglect has been filed against the parents or caregivers about the same child, including the case number. The department shall disclose in the petition alleging abuse or neglect that there is a pending kinship guardianship case, including the case number.

(b) When the department is a party, the court may, on motion of a party or the court's own motion, seal hearings, documents, exhibits, records, and pleadings related to the confidential information about the department's involvement with the child, parents, and caregiver, under Rule 1-079 NMRA. No party shall disclose any documents, exhibits, records, and pleadings that are sealed without a specific order from the court.

(c) When the department is joined under this subparagraph and the petitioners are self-represented and while the guardianship assistance agreement between the department and these petitioners remains unrevoked, the department shall be responsible for

(i) serving the kinship guardianship petition on a child's parents or guardians consistent with Rule 1-004 NMRA, including bearing any cost of service;

(ii) timely requesting all hearing settings;

(iii) creating and providing notice of hearings to all parties and, if applicable, the child's tribe;

(iv) issuing subpoenas for witnesses for a kinship guardianship hearing;

(v) if parents are consenting, preparing the court-approved forms for parental consent, including making a notary public available to the parents;

(vi) preparing the department's consent to the appointment of the petitioner as guardian using the Supreme Court-approved form, Form 4A-514 NMRA; and

(vii) creating orders as directed by the judge.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — The terms "guardianship assistance agreement" and "voluntary placement agreement," as used in this rule and the other rules in this section, are defined under NMSA 1978, Section 40-10B-3 (2020).

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

1-152. Mandatory and discretionary appointment of guardian ad litem; powers and duties of the guardian ad litem; payment.

A. **Mandatory appointment.** The court shall appoint a guardian ad litem when the following are met:

(1) a parent of the child is participating in the proceedings and objects to the petition to appoint a kinship guardian; or

(2) a parent of the child is petitioning for revocation of an established guardianship created under the Kinship Guardianship Act and the guardian objects to the revocation.

B. **Discretionary appointment.** The court may appoint a guardian ad litem for the child on the motion of a party or solely in the court's discretion.

C. **Powers and duties.** The order of appointment shall be substantially in the form adopted by the Supreme Court. *See* Form 4A-515 NMRA. A guardian ad litem appointed by the court in these proceedings shall

(1) in connection with a petition to establish a kinship guardianship

(a) make a diligent investigation of the circumstances surrounding the petition, including visiting the child in the home, interviewing the person proposed as guardian, and interviewing the parents of the child, if available;

(b) report to the court about the best interests of the child and the child's position on the requested relief; and

(c) recommend an appropriate transition plan if the child is residing with the petitioner and the petition for kinship guardianship is not granted.

(2) in connection with a petition or motion for revocation of a guardianship

(a) report to the court about the best interests of the child and the child's position on the requested relief; and

(b) recommend an appropriate transition plan if the guardianship is revoked.

D. **Payment.** The court may order all or some of the parties to pay a reasonable fee for a guardian ad litem. If all of the parties are indigent, the court may award a reasonable fee to the guardian ad litem to be paid out of funds of the court.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — *See* Administrative Office of the Courts Court-Appointed Attorneys Payments Guidelines.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

1-153. Advisement of rights.

At the first appearance of the respondent, the court shall inform the respondent of the following:

A. the right to have the proceedings interpreted into a language the respondent understands;

B. the parties to the case, including whether the Children, Youth and Families Department is a party;

C. allegations of the kinship guardianship petition;

D. the right to a trial on the allegations; and

E. the consequences if the allegations of the petition are found to be true, including the possibility of child support if the kinship guardianship is granted.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

1-154. Kinship guardianship hearing; elements of proof; judgment.

A. **Applicability of Rules of Evidence.** The Rules of Evidence shall apply to the kinship guardianship hearing.

B. **Elements of proof.** The petitioner must prove the following allegations by clear and convincing evidence:

(1) jurisdiction and venue are appropriate;

(2) service on the parents of the child has been completed;

(3) the parents had notice of the kinship guardianship hearing;

(4) the appointment of the proposed guardian is in the best interest of the child;

(5) for a child who has reached the age of fourteen (14), that

(a) if the proposed guardian is the person nominated by the child, it would be in the child's best interest to appoint that nominee; and

(b) the child has not filed a written objection to the proposed guardian;

(6) the petitioner seeking appointment as the guardian is in fact qualified because the petitioner meets the requirements of Section 40-10B-5(A) NMSA 1978;

(7) no guardian has been appointed for the child under a provision of the Uniform Probate Code; and

(8) for each parent of the child, at least one of the following:

(a) the parent of the child is living and has consented in writing to the appointment of a guardian and the consent has not been withdrawn; or

(b) the parent of the child is living but all parental rights in regard to the child have been terminated or suspended by prior court order; or

(c) the child has resided with the petitioner without the parent for a period of ninety (90) days or more immediately preceding the date the petition is filed, and a parent having legal custody of the child is currently unwilling or unable to provide adequate care, maintenance, and supervision for the child; or

(d) there are extraordinary circumstances.

C. **Elements not proven.** If the court finds that the elements of proof set forth in Paragraph B of this rule have not been proven by clear and convincing evidence, the court may dismiss the proceedings or make any other disposition of the matter that will serve the best interests of the child.

D. **Support and visitation.** As part of a judgment entered under the Kinship Guardianship Act, the court may

(1) order a parent to pay the reasonable costs of support and maintenance of the child that the parent is financially able to pay; or

(2) order visitation between a parent and child to maintain or rebuild a parent-child relationship if the visitation is in the best interest of the child.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — At least one of the elements must be met for each parent. In many cases, that element will be different for each parent; there is no requirement that the parents meet the same element. *See Freedom C. v. Brian D.*, 2012-NMSC-017, 280 P.3d 909, *rev'g Freedom C. v. Julie Ann D.*, 2011-NMCA-040, 149 N.M. 588, 252 P.3d 812.

The court shall consider the potential impact of financial payments under this subsection on the relationship of the parent and child and on the prospects of family reunification. The court may use the child support guidelines set forth in NMSA 1978, Section 40-4-11.1 (2021) to calculate a reasonable payment. *See* NMSA 1978, § 40-10B-8(D) (2020).

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

1-155. Appointment of guardian.

A. **Letters of guardianship.** When the court enters an order appointing a guardian, it shall issue letters of guardianship for the purpose of, without disclosing unnecessary information, clearly stating that the kinship guardian has all the authority of a parent,

except the right to consent to adoption and any other rights the court orders be retained by a parent. If any rights are retained, those rights shall be clearly stated in the letter of guardianship.

B. **Caption; department a party.** If the Children, Youth and Families Department ("the department") is a party to the case, all orders that are likely to be disclosed to a non-party, including the letters of guardianship, shall use the following caption only: "In the Matter of [initials of child]," and shall include the case number.

C. **Caption; department not a party.** If the department is not a party to the case, the case caption shall be "In the Matter of [initials of child]," and shall name the petitioner and respondents.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — A letter of guardianship allows a kinship guardian to provide a short and easily-understood notice to all third parties (be it schools, doctors, or the Social Security Administration) that a child has a kinship guardian and the guardian is the legal custodian of that child. Many orders appointing kinship guardians include sensitive information about parents and have information that is not necessary for a third party to know (such as the amount of child support or whether the parents must test negative for drugs before visiting).

The form letter of guardianship, Form 4A-516 NMRA, excludes private information about the parties and the child but provides information about what authority the kinship guardian has regarding the child.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]

1-156. Successor guardian.

If a guardian appointed under the Kinship Guardianship Act dies or is incapacitated, a new petition for the appointment of a guardian may be filed by the new caregiver. The court is not bound by any agreements made between the Children, Youth and Families Department ("the department") and a kin caregiver addressing a successor guardian in a guardianship assistance agreement, but under Section 40-10B-19(B) NMSA 1978, the department may be required to pay the costs associated with a qualified successor guardian in obtaining a subsidized guardianship of the child in an amount limited by the Kinship Guardianship Act.

[Adopted by Supreme Court Order No. 22-8300-020, effective for all cases pending or filed on or after December 31, 2022.]