UNANNOTATED

Rules of Evidence

ARTICLE 1
General Provisions

11-101. Scope of rules.

These rules govern proceedings in the courts of the State of New Mexico, to the extent and with the exceptions stated in Rule 11-1101.

[As amended, effective December 1, 1993.]

11-102. Purpose and construction.

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-102 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-103. Rulings on evidence.

A. **Preserving a claim of error.** A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and

(1) if the ruling admits evidence, the party, on the record

(a) timely objects or moves to strike, and

(b) states the specific ground, unless it was apparent from the context, or

(2) if the ruling excludes evidence, the party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

B. **Not needing to renew an objection or offer of proof.** Once the court rules definitively on the record – either before or at trial – a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

C. **Court's statement about the ruling; directing an offer of proof.** The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

D. **Preventing the jury from hearing inadmissible evidence.** To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means.

E. **Taking notice of plain error.** A court may take notice of a plain error affecting a substantial right, even if the claim of error was not properly preserved.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 06-8300-025, effective December 18, 2006; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-103 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-104. Preliminary questions.

A. **In general.** The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

B. **Relevance that depends on a fact.** When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

C. **Conducting a hearing so that the jury cannot hear it.** The court must conduct any hearing on a preliminary question so that the jury cannot hear it if

(1) the hearing involves the admissibility of a confession,

(2) a defendant in a criminal case is a witness and so requests, or

(3) justice so requires.

D. **Cross-examining a defendant in a criminal case.** By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

E. **Evidence relevant to weight and credibility.** This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-104 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-105. Limiting evidence that is not admissible against other parties or for other purposes.

If the court admits evidence that is admissible against a party or for a purpose – but not against another party or for another purpose – the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

[As renumbered, effective April 1, 1976; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-105 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-106. Remainder of or related writings or recorded statements.

If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time.

[As renumbered, effective April 1, 1976; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-106 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-107. Comment by court.

The court shall not comment to the jury upon the evidence or the credibility of the witnesses.

[As renumbered, effective April 1, 1976; as amended, effective December 1, 1993.]

Committee commentary. — The federal rules do not contain a rule prohibiting comments on the evidence by the judge. The New Mexico rule covering that subject, former Rule 105, was renumbered as Rule 11-107 NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 2
Judicial Notice

11-201. Judicial notice of adjudicative facts.

A. **Scope.** This rule governs only judicial notice of adjudicative facts.

B. **Kinds of facts that may be judicially noticed.** The court may judicially notice a fact that is not subject to reasonable dispute because it

(1) is generally known within the court's territorial jurisdiction,

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned, or

(3) notice is provided for by statute.

C. **Taking notice.** The court

(1) may take judicial notice on its own, or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

D. **Timing.** The court may take judicial notice at any stage of the proceeding.

E. **Opportunity to be heard.** On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

F. **Instructing the jury.** In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-201 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. Paragraph B(3) is not in the analogous federal rule, but has been incorporated from the previous version of New Mexico's rule.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 3
Presumptions

11-301. Presumptions in civil cases generally.

In a civil case, unless a state statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut

the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

[As amended, effective July 1, 1980; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-201 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-302. Presumptions in criminal cases.

A. **Scope.** Except as otherwise provided by statute, in criminal cases, presumptions against an accused are governed by this rule.

B. **Submission to jury.** The court shall not direct the jury to find a presumed fact against the accused. When a presumed fact is an element of the offense or negates a defense, the court may submit the presumed fact for the jury's consideration only if a reasonable juror could find the presumed fact proved beyond a reasonable doubt. When the presumed fact is not an element of the offense or does not negate a defense, its existence may be submitted to the jury only if a reasonable juror could find that it is supported by substantial evidence.

C. **Instructing the jury.** If the presumed fact is an element of the offense or negates a defense, the court shall instruct the jury that its existence must be proved beyond a reasonable doubt. If the presumed fact is not an element of the offense or does not negate a defense, the court shall instruct the jury that it may, but is not required to, accept the presumed fact, provided the jury finds that it is supported by substantial evidence.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — There is no federal equivalent to this rule, but the committee amended the language of the rule in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 4
Relevancy and Its Limits

11-401. Test for relevant evidence.

Evidence is relevant if

A. it has any tendency to make a fact more or less probable than it would be without the evidence, and

B. the fact is of consequence in determining the action.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-401 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-402. General admissibility of relevant evidence.

Relevant evidence is admissible unless any of the following provides otherwise: the United States or New Mexico constitution, a statute, these rules, or other rules prescribed by the Court. Irrelevant evidence is not admissible.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-402 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-403. Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons.

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-403 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-404. Character evidence; crimes or other acts.

A. **Character evidence.**

(1) ***Prohibited uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a defendant or victim in a criminal case.*** The following exceptions apply in a criminal case:

(a) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(b) subject to the limitations in Rule 11-412 NMRA, a defendant may offer evidence of a victim's pertinent trait, and if the evidence is admitted, the prosecutor may

(i) offer evidence to rebut it, and

(ii) offer evidence of the defendant's same character trait, and

(c) in a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) ***Exceptions for a witness.*** Evidence of a witness's character may be admitted under Rules 11-607, 11-608, and 11-609 NMRA.

B. **Crimes, wrongs, or other acts.**

(1) ***Prohibited uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted uses.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) ***Notice in a criminal case.*** In a criminal case, the prosecution must

(a) provide reasonable notice of any evidence of crimes, wrongs, or other acts that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to review it;

(b) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(c) do so in writing before trial, or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

[Approved, effective July 1, 1973; as amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 06-8300-025, effective December 18, 2006; by Supreme Court Order No. 07-8300-035, effective February 1, 2008; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012; as amended by Supreme Court Order No. 22-8300-027, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — Rule 11-404 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence to make them more easily understood and to make style and terminology consistent throughout the rules. These changes were intended to be stylistic only. There was no intent to change any result in any ruling on admissibility.

Paragraph (B)(3) of this rule, unlike the federal rule, does not require the defendant to request the prosecution to provide notice of intent to introduce evidence under this paragraph. Instead, it requires the prosecution in a criminal case to provide notice of evidence the prosecution intends to offer under this paragraph regardless of any request.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012; as amended by Supreme Court Order No. 22-8300-027, effective for all cases pending or filed on or after December 31, 2022.]

11-405. Methods of proving character.

A. **By reputation or opinion.** When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

B. **By specific instances of conduct.** When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of conduct.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-405 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-406. Habit; routine practice.

A. **Admissibility.** Evidence of a person's habit or an organization's routine practice may by admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

B. **Method of proof.** Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-406(A) NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. This rule retains Paragraph B from the earlier version of the New Mexico rule. There is no federal equivalent to Paragraph B.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-407. Subsequent remedial measures.

When measures are taken by a defendant that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove the following: negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-407 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. The amended rule now states that evidence of subsequent remedial measures taken by a defendant are not admissible to prove defects in a product or design or the need for a warning. The rule is not applicable to subsequent remedial measures taken by non-defendants. *See Couch v. Astec Indus., Inc.*, 2002-NMCA-084, 132 N.M. 631, 53 P.3d 398, *cert. denied*, 132 N.M. 551, 52 P.3d 411 (2002).

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-408. Compromise offers and negotiations.

A. **Prohibited uses.** Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or contradiction:

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in order to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim.

B. **Exceptions.** The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

[As amended, effective April 1, 1976; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-408 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. New Mexico's rule, unlike its federal counterpart, does not create an exception for "conduct or statements made during compromise negotiations offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority." *See* Fed. R. Evid. 408(a)(2).

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-409. Offers to pay medical and similar expenses.

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-409 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-410. Pleas, plea discussions, and related statements.

A. **Prohibited uses.** In a civil, criminal, or children's court case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) an admission in a delinquency case;

(4) a statement made during a proceeding on any of those pleas or admissions in any court;

(5) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or resulted in a later-withdrawn guilty plea.

B. **Exceptions.** The court may admit a statement described in Rule 11-410(A)(4) or (5) NMRA

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness both statements ought to be considered together, or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

[As amended, effective February 1, 2000; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-410 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The New Mexico rule, unlike the federal rule, also applies to Children's Court delinquency proceedings.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-411. Liability insurance.

Evidence that a person was or was not insured against liability is not admissible to prove that the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or proving agency, ownership, or control.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-411 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Rule 11-411 NMRA previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the rule. To improve the language of the rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the rule, its admissibility remains governed by other rules of evidence.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-412. Sex crimes; testimony; limitations; in camera hearing.

A. **Prohibited uses.** The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior, or

(2) evidence offered to prove a victim's sexual predisposition.

B. **Exceptions.** The court may admit evidence of the victim's past sexual conduct that is material and relevant to the case when the inflammatory or prejudicial nature does not outweigh its probative value.

C. **Procedure to determine admissibility.**

(1) **Motion.** If the defendant intends to offer evidence under Rule 11-412(B) NMRA, the defendant must file a written motion before trial. If the defendant discovers new information during trial, the defendant shall immediately bring the information to the attention of the court outside the presence of the jury.

(2) **Hearing.** Before admitting evidence under this rule, the court shall conduct an in camera hearing to determine whether such evidence is admissible.

(3) **Order.** If the court determines that the proposed evidence is admissible, the court shall issue a written order stating what evidence may be introduced by the defendant and stating the specific questions to be permitted. Unless the court orders otherwise, the motion, order, related materials, and the record of the hearing must remain sealed.

[Adopted, effective July 1, 1980; former Rule 11-413 amended and recompiled as Rule 11-412 by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — This rule, previously numbered Rule 11-413 NMRA, was renumbered in 2012 as Rule 11-412 NMRA, and Rule 11-412 NMRA was renumbered as Rule 11-413 NMRA. The renumbering was adopted because the subject matter of renumbered Rule 11-412 is now consistent with Federal Rule 412, although the rule is substantively different. Changes to the renumbered rule were intended to be stylistic only and not intended to change the rule in any substantive way.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-413. Use of evidence obtained under immunity order precluded.

Testimony or evidence compelled under an order of immunity, or any information derived from such testimony or evidence, may not be used against the person compelled to testify or to produce evidence in any criminal case, except

1. in a prosecution for perjury committed during that testimony, or

2. in a contempt proceeding for failure to comply with an order of immunity.

[Adopted, effective April 1, 1976; former Rule 11-412 amended and recompiled as Rule 11-413 by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — This rule, previously numbered Rule 11-412 NMRA, was renumbered in 2012 as Rule 11-413 NMRA, and Rule 11-413 NMRA was renumbered as Rule 11-412 NMRA. The renumbering was adopted because the subject matter of renumbered Rule 11-412 is now consistent with Federal Rule 412, although the rule is substantively different. Changes to the renumbered rule were intended to be stylistic only and not intended to change the rule in any substantive way.

This rule was added in conjunction with adoption of witness immunity rule. *See also* Rule 5-116 NMRA. The New Mexico rules were derived from the federal statute. *See* 18 U.S.C. § 6003. There is no comparable federal rule.

For statute and rules on witness immunity, *see* Section 31-6-15, NMSA 1978, and Rules 5-116 and 10-341 NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 5
Privileges

11-501. Privileges recognized only as provided.

Unless required by the constitution, these rules, or other rules adopted by the supreme court, no person has a privilege to

A. refuse to be a witness;

B. refuse to disclose any matter;

C. refuse to produce any object or writing; or

D. prevent another from being a witness, disclosing any matter, or producing any object or writing.

[As amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-502. Required reports privileged by statute.

A. **Scope of the privilege.** Should any law require a return or report to be made and the law mandating the creation of that return or report provides for its confidentiality, the person or entity, in either a public or private capacity, making the return or report has a privilege to refuse to disclose, or to prevent any other person from disclosing, the return or report.

B. **Exceptions.** The privilege does not cover a return or report that does not comply with the law that mandates its creation, nor actions involving perjury, false statements, or fraud in the return or report.

[As amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-503. Lawyer-client privilege.

A. **Definitions.** For purposes of this rule,

(1) a “client” is a person, public officer, corporation, association, or other entity who consults with, seeks advice from, or retains the professional services of a lawyer or a lawyer’s representative;

(2) a “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation;

(3) a “representative of a lawyer” is one employed to assist the lawyer in providing professional legal services; and

(4) a communication is “confidential” if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the

communication and includes the act of contacting or retaining a lawyer for the purpose of seeking professional legal services if not intended to be disclosed to third persons.

B. **Scope of the privilege.** A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made for the purpose of facilitating or providing professional legal services to that client,

(1) between the client and the client's lawyer or representative;

(2) between the client's lawyer and the lawyer's representative;

(3) between the client or client's lawyer and another lawyer representing another in a matter of common interest;

(4) between representatives of the client or between the client and a representative of the client; or

(5) between lawyers representing the client.

C. **Who may claim the privilege.** The privilege may be claimed by

(1) the client;

(2) the client's guardian or conservator;

(3) the personal representative of a deceased client; or

(4) the successor, trustee, or similar representative of a corporation, association, or other entity, whether or not in existence.

The lawyer of the client at the time of the communication may claim the privilege only on behalf of the client. Authority to claim the privilege is presumed absent evidence to the contrary.

D. **Exceptions.** There is no privilege under this rule:

(1) ***Furtherance of crime or fraud.*** If the professional legal services were sought or obtained to enable or assist anyone in committing or planning to commit what the client knew or reasonably should have known to be a crime or fraud;

(2) ***Claimants through same deceased client.*** For a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

(3) ***Breach of duty by lawyer or client.*** For a communication relevant to an issue of breach of duty either by the lawyer to the lawyer's client or by the client to the client's lawyer;

(4) ***Document attested by lawyer.*** For a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

(5) ***Joint clients.*** For a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients.

[As amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-504. Physician-patient and psychotherapist-patient privilege.

A. **Definitions.** For purposes of this rule,

(1) a "patient" is a person who consults with or is examined by a physician, psychotherapist, or state or nationally licensed mental-health therapist;

(2) a "physician" is a person authorized to practice medicine in any state or nation, or reasonably believed by the patient to be so licensed;

(3) a "psychotherapist" is a person engaged in the diagnosis or treatment of a mental or emotional condition, including drug addiction, and who is

(a) a physician; or

(b) a person licensed or certified as a psychologist under the laws of any state or nation, or reasonably believed by the patient to be so licensed or certified.

(4) a "state or nationally licensed mental-health therapist" is a person licensed or certified to provide counseling services as a social worker, marriage or family therapist, or other mental-health counselor; and

(5) a communication is "confidential" if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

B. **Scope of the privilege.** A patient has a privilege to refuse to disclose, or to prevent any other person from disclosing, a confidential communication made for the purpose of diagnosis or treatment of the patient's physical, mental, or emotional

condition, including drug addiction, between the patient and the patient's physician, psychotherapist, or state or nationally licensed mental-health therapist.

C. **Who may claim the privilege.**

(1) The privilege may be claimed by

(a) the patient;

(b) the patient's guardian or conservator; or

(c) the personal representative of the deceased patient.

(2) The privilege may be asserted on the patient's behalf by

(a) the patient's physician;

(b) the patient's psychotherapist;

(c) the patient's state or nationally licensed mental-health therapist; or

(d) any other person included in the communication to further the patient's interests, including individuals participating under the direction of the patient's physician, psychotherapist, or state or nationally licensed mental-health therapist.

(3) Authority to claim the privilege is presumed absent evidence to the contrary.

D. **Exceptions.**

(1) ***Proceedings for hospitalization.*** If a physician, psychotherapist, or state or nationally licensed mental-health therapist has determined that a patient must be hospitalized due to mental illness or presents a danger to himself or others, no privilege shall apply to confidential communications relevant to the proceedings to hospitalize the patient.

(2) ***By order of the court.*** Unless the court orders otherwise, any communications made by an individual during an examination of that individual's physical, mental, or emotional condition that has been ordered by the court are not privileged.

(3) ***Elements of a claim or defense.*** If a patient relies on a physical, mental, or emotional condition as part of a claim or defense, no privilege shall apply concerning confidential communications made relevant to that condition. After a patient's death, should any party rely on a patient's physical, mental, or emotional condition as part of a

claim or defense, no privilege shall apply for confidential communications made relevant to that condition.

(4) ***Required reports.*** No privilege shall apply for confidential communications concerning any material that a physician, psychotherapist, state or nationally licensed mental-health therapist, or patient is required by law to report to a public employee or public agency.

[As amended, effective July 1, 1990; January 1, 1995; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — Under the previous version of the rule, the privilege applied only to confidential communications with physicians, psychiatrists, and licensed or certified psychologists. The Supreme Court, however, endorsed expanding the scope of the privilege in *Albuquerque Rape Crisis Center vs. Blackmer*, 2005-NMSC-032, 138 N.M. 398, 120 P.3d 820 (holding that confidential communications with a victim counselor are privileged). Although *Blackmer* did not address the issue of licensure, expanding the privilege to include communications with a "state or nationally licensed mental-health therapist" is consistent with the broader view of the privilege recognized in that case. *See also generally Jaffee v. Redmond*, 518 U.S. 1 (1996) (applying the psychotherapist-patient privilege under the Federal Rules of Evidence to communications with a licensed social worker). The remaining amendments to the rule are intended to be stylistic only.

[Adopted by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-505. Spousal privileges.

A. **Definition.** A communication is "confidential" if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

B. **Scope of the privilege.** A person has a privilege to refuse to disclose, or to prevent another from disclosing, a confidential communication by the person to that person's spouse while they were married.

C. **Who may claim the privilege.**

(1) The privilege may be claimed by

(a) the spouse who made the confidential communication;

(b) that spouse's guardian or conservator; or

(c) that spouse's personal representative.

(2) The privilege may also be claimed by the spouse to whom the confidential communication was made.

(3) Authority to claim the privilege is presumed absent evidence to the contrary.

D. **Exceptions.**

(1) ***Criminal cases.*** No privilege shall apply to confidential communications relevant to proceedings in which one spouse is charged with a crime against

(a) the person or property of the other spouse or a child of either; or

(b) the person or property of a third person committed during the course of a crime against the other spouse.

(2) ***Civil cases.*** No privilege shall apply to confidential communications relevant to a civil action brought by or on behalf of one spouse or a child of either against the other spouse or a child of either.

[As amended, effective April 1, 1976; July 1, 1980; December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — This rule was completely rewritten in 1976 to include a privilege for confidential communications between husband and wife. This rule is not in the federal rules.

11-506. Communications to clergy.

A. **Definitions.** For purposes of this rule,

(1) a "member of the clergy" is a minister, priest, rabbi, or similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting that person;

(2) a communication is "confidential" if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

B. **Scope of the privilege.** A person has a privilege to refuse to disclose, or to prevent another from disclosing, a confidential communication made for the purpose of seeking spiritual advice by the person to a member of the clergy.

C. **Who may claim the privilege.** The privilege may be claimed by

(1) the person who consults with a member of the clergy;

(2) the person's guardian or conservator; or

(3) the person's personal representative if the person is deceased.

The privilege may be asserted on the person's behalf by the member of the clergy. Authority to claim the privilege is presumed absent evidence to the contrary.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-507. Political vote.

Every person has a privilege to refuse to disclose the tenor of the person's vote in a political election conducted by secret ballot unless the person voted unlawfully.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-508. Trade secrets.

A. **Scope of the privilege.** Unless upholding the privilege will tend to conceal fraud or otherwise work an injustice, a person or entity owning a trade secret has a privilege to refuse to disclose, or to prevent others from disclosing, the trade secret.

B. **Who may claim the privilege.** The privilege may be claimed by a person or entity owning the trade secret, including any agent or employee of that person or entity.

C. **Protective orders.** If a court orders the disclosure of a trade secret, the court must order any appropriate protective measures to safeguard the interests of the trade secret's owner or any interests that justice requires.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-509. Communications to juvenile probation officers and social services workers.

A. **Definitions.** For purposes of this rule,

(1) “probation officer” means a person employed by the Children, Youth and Families Department or successor entity who conducts preliminary inquiries pursuant to the Children’s Code [Chapter 32A NMSA 1978] and Children’s Court Rules and Forms;

(2) “social services worker” means a person employed by the Children, Youth and Families Department or successor entity who conducts preliminary inquiries pursuant to the Children’s Code and Children’s Court Rules and Forms; and

(3) a communication is “confidential” if made privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication.

B. **Scope of the privilege.** A child alleged to be delinquent or in need of supervision and a parent, guardian, or custodian who allegedly neglected a child has a privilege to refuse to disclose, or to prevent any other person from disclosing, confidential communications, either oral or written, between the child, parent, guardian, or custodian and a probation officer or a social services worker which are made during the course of a preliminary inquiry.

C. **Who may claim the privilege.** The privilege provided in Paragraph B of this rule may be claimed by the child in a criminal proceeding or in a children’s court proceeding; or by the parent, guardian, or custodian who allegedly abused or neglected a child. The claim of privilege may be asserted by the attorney, the probation officer, or the social services worker on behalf of the child, parent, guardian, or custodian.

[As amended, effective December 1, 1993; February 1, 2000; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

Committee commentary. — This rule was added in conjunction with the adoption of N.M.R. Child. Ct. This rule is not in the federal rules. The purpose of the rule is to facilitate informal settlement of juvenile matters at the preliminary inquiry stage.

11-510. Identity of informer.

A. **Definition.** An “informer” is a person who has provided information concerning a possible violation of the law to

(1) a law enforcement officer;

(2) a legislative committee member or staffer; or

(3) an individual who has assisted with an investigation into a violation of the law.

B. **Scope of the privilege.** The United States, a state, or a subdivision thereof has a privilege to refuse to disclose the identity of an informer.

C. **Who may claim the privilege.** The privilege may be claimed by an appropriate representative of the United States, a state, or a subdivision thereof.

D. **Exceptions:**

(1) ***Criminal cases.*** In criminal cases, the privilege shall not be allowed if the United States, a state, or a subdivision thereof objects.

(2) ***Voluntary disclosure.*** The privilege no longer exists if the informer or a holder of the privilege discloses the informer's identity to anyone whose interests are adverse to the informer or to a holder of the privilege. Disclosure occurs when

(a) the informer's actual identity is disclosed; or

(b) information that is substantially certain to reveal the informer's identity is disclosed.

(3) ***Compelled testimony.***

(a) *Motion by a party.* A party may move the court for an in camera determination of whether the disclosure of an informer's identity or ability to testify should be ordered if the United States, a state, or a subdivision thereof invokes the informer privilege, and the evidence suggests that the informer can provide testimony that is

(i) relevant and helpful to a criminal defendant;

(ii) necessary for a fair determination of the guilt or innocence of a criminal defendant; or

(iii) material to the merits in a civil case in which the United States, a state, or a subdivision thereof is a party.

When such a motion is made, the court will provide the United States, the state, or the subdivision thereof an opportunity to present evidence for an in camera review addressing whether the informant can, in fact, supply such testimony.

(b) *In camera proof.* In an ordinary case, the United States, a state, or a subdivision thereof may defend such a motion with affidavits. If the court determines that the issue cannot be resolved through affidavits, the court may order testimony from the informer or other relevant persons.

(c) *Standard governing disclosure.* If the court finds a reasonable probability that the informer can provide testimony favorable to the movant, the court shall require the disclosure of the informer's identity or testimony. If the United States, a state, or a subdivision thereof declines to make the disclosure, the court may, upon a motion of the movant or sua sponte

(i) dismiss the charges relating to the informer's testimony in a criminal case; or

(ii) order any remedy that justice requires.

(d) *Record.* If any counsel is permitted to be present at any stage of the proceedings conducted before the court, all counsel shall be given the opportunity to appear. Any evidence 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 evidentiary record shall not be revealed without an order of the court.

(4) ***Lawfulness of obtaining evidence.***

(a) *Motion by a party or court.* When any employee of the United States, a state, or a subdivision thereof relies upon information from an informer to establish the legal means to obtain evidence and the court finds that the informer's information was not reliable or credible, the court may order the disclosure of the informer's identity. Such an order may be limited to a disclosure in camera, but the court may order any disclosure that justice requires.

(b) *Record.* If any counsel concerned with the legality of evidence obtained through an informer is permitted to be present before the court, all counsel shall be given the opportunity to appear. If the informer's identity is disclosed in camera and not ordered to be disclosed publicly, the record of that disclosure shall be placed under seal and preserved for appellate review. The evidentiary record shall not be revealed without an order from a court with jurisdiction over the case.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-511. Waiver of privilege by voluntary disclosure.

A person who possesses a privilege against disclosure of a confidential matter or communication waives the privilege if the person voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is a privileged communication.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-512. Privileged matter disclosed under compulsion or without opportunity to claim privilege.

A disclosure of a privileged matter is not admissible against a holder of the privilege when the disclosure

A. was compelled erroneously; or

B. was made without the opportunity to claim the privilege.

[As amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

11-513. Comment upon or inference from claim of privilege; instruction.

A. **Comment or inference not permitted.** Neither the court nor counsel may comment when a privilege has been claimed at any time. No inference may be drawn from any claim of privilege.

B. **Claiming privilege without knowledge of jury.** To the extent possible, the court shall conduct jury trials to allow claims of privilege to be made without the jury's knowledge.

C. **Jury instruction.** Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to a jury instruction that no inference may be drawn from the claim of privilege.

D. **Application; Self-Incrimination.** Paragraphs A through C of this rule shall not apply to a claim of the privilege against self-incrimination in a non-criminal proceeding.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. S-1-RCR-2023-00027, effective for all cases pending or filed on or after December 31, 2023.]

Committee commentary. — Paragraph D is patterned after similar rules of evidence in other states recognizing the Supreme Court of the United States' opinion in *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

[Adopted by Supreme Court Order No. S-1-RCR-2023-00027, effective for all cases pending or filed on or after December 31, 2023.]

11-514. News media-confidential source or information privilege.

A. **Definitions.** Unless a different meaning clearly appears from the context of this rule, for purposes of this rule,

(1) a source who communicates information is “confidential” if the identity of the source is disclosed privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication;

(2) information is “confidential” if communicated privately and not intended for further disclosure except to other persons in furtherance of the purpose of the communication;

(3) “in the course of pursuing professional news activities” does not include any situation in which a news media person participates in any act of criminal conduct;

(4) “news” means any written, oral, or pictorial information gathered, procured, transmitted, compiled, edited, or disseminated by, or on behalf of any person engaged or employed by a news media and so procured or obtained while such required relationship is in effect; and

(5) “news media” means newspapers, magazines, press associations, news agencies, wire services, radio, television, or other similar printed, photographic, mechanical, or electronic means of disseminating news to the general public.

B. **Scope of the privilege.** A person engaged or employed by news media for the purpose of gathering, procuring, transmitting, compiling, editing, or disseminating news for the general public or on whose behalf news is so gathered, procured, transmitted, compiled, edited, or disseminated has a privilege to refuse to disclose:

(1) a confidential source who provided information to the person in the course of pursuing professional news activities; and

(2) any confidential information obtained in the course of pursuing professional news activities.

The provisions of this rule do not apply to radio stations unless the radio station maintains and keeps open for inspection by a person affected by the broadcast, for a period of at least one hundred eighty (180) days from the date of an actual broadcast, an exact recording, transcription, or certified written transcript of the actual broadcast.

The provisions of this rule do not apply to television stations unless the television station maintains and keeps open for inspection by a person affected by the broadcast, for a period of at least one year from the date of an actual telecast, an exact recording or written transcript of the actual telecast.

C. **Exception.** There is no privilege under this rule in any action in which the party seeking the evidence shows by a preponderance of evidence, including all reasonable inferences, each of the following:

(1) a reasonable probability exists that a news media person has confidential information or sources that are material and relevant to the action;

(2) the party seeking disclosure has reasonably exhausted alternative means of discovering the confidential information or sources sought to be disclosed;

(3) the confidential information or source is crucial to the case of the party seeking disclosure; and

(4) the need of the party seeking the confidential source or information is of such importance that it clearly outweighs the public interest in protecting the news media's confidential information and sources.

D. **Procedure.** If a person defined in Paragraph B claims the privilege, and the court is asked to determine whether the exception applies, a hearing shall be held in open court to consider all information, evidence, or argument deemed relevant by the court. If possible, the determination of whether the exception applies shall be made without requiring disclosure of the confidential source or information sought to be protected by the privilege.

If it is not possible for the court to make a determination of whether the exception applies without the court knowing the confidential source or information sought to be protected, the court may issue an order requiring disclosure to the court alone, in camera.

Following the in camera hearing, the court shall enter written findings of fact and conclusions of law without disclosing any of the matters for which the privilege is asserted, and a written order identifying what, if anything, shall be disclosed.

Evidence submitted to the court in camera, and any record of the in camera proceedings, shall be sealed and preserved to be made available to an appellate court in the event of an appeal. The contents of the sealed evidence shall not be revealed without the consent of the person asserting the privilege.

All counsel and parties shall be permitted to be present at every stage of the proceedings under this rule, except at the in camera hearing. The person asserting the privilege and counsel for that person shall be the only persons permitted to be present during the in camera proceedings with the court.

Any order requiring an in camera disclosure or ordering or denying disclosure may be appealed by any party or by the person asserting the privilege, if not a party, in the procedural manner provided by the Rules of Appellate Procedure.

[Adopted, effective November 1, 1982; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 13-8300-025, effective for all cases pending or filed on or after December 31, 2013.]

ARTICLE 6
Witnesses

11-601. Competency to testify in general.

Every person is competent to be a witness unless these rules provide otherwise.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-601 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-602. Need for personal knowledge.

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to testimony by an expert witness under Rule 11-703 NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-602 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-603. Oath or affirmation to testify truthfully.

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-603 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-604. Interpreter.

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-604 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

See UJI 13-110B NMRA and UJI 14-6021 NMRA for the text of the oath to be given by the interpreter. *See also State v. Pacheco*, 2007-NMSC- 009, 141 N.M. 340, 155 P.3d 745, for the qualifications for an interpreter.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-605. Judge's competency as a witness.

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-605 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective

December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-606. Juror's competency as a witness.

A. **At the trial.** A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

B. **During an inquiry into the validity of a verdict or indictment.**

(1) **Prohibited testimony or other evidence.** During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(2) **Exceptions.** A juror may testify about whether

(a) extraneous prejudicial information was improperly brought to the jury's attention;

(b) an outside influence was improperly brought to bear on any juror; or

(c) a mistake was made in entering the verdict on the verdict form.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 07-8300-035, effective February 1, 2008; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-606 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-607. Who may impeach a witness.

Any party, including the party that called the witness, may attack the witness's credibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-607 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-608. A witness's character for truthfulness or untruthfulness.

A. **Reputation or opinion evidence.** A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for untruthfulness has been attacked by opinion or reputation evidence or otherwise.

B. **Specific instances of conduct.** Except for a criminal conviction under Rule 11-609 NMRA, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness of

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 07-8300-035, effective February 1, 2008; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-608 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and

terminology consistent throughout the rules. New Mexico's rule, however, unlike the federal rule, retains the phrase "by opinion or reputation or otherwise" at the end of Paragraph A. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-609. Impeachment by evidence of a criminal conviction.

A. **In general.** The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one (1) year the evidence

(a) must be admitted, subject to Rule 11-403 NMRA, in a civil case or in a criminal case in which the witness is not a defendant, and

(b) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant, and

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

B. **Limit on using the evidence after ten (10) years.** This paragraph applies if more than ten (10) years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect, and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

C. **Effect of a pardon, annulment, or certificate of rehabilitation.** Evidence of a conviction is not admissible if

(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one (1) year, or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure, based on a finding of innocence.

D. **Juvenile adjudications.** Evidence of a juvenile adjudication is admissible under this rule only if

(1) it is offered in a criminal case,

(2) the adjudication was of a witness other than the defendant,

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility, and

(4) admitting the evidence is necessary to fairly determine guilt, or innocence.

E. **Pendency of an appeal.** A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

[As amended, effective April 1, 1976; January 1, 1991; December 1, 1993; February 1, 1996; as amended by Supreme Court Order No. 07-8300-035, effective February 1, 2008; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-609 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-610. Religious beliefs or opinions.

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-610 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-611. Mode and order of examining witnesses and presenting evidence.

A. **Control by the court; purposes.** The court should exercise reasonable control over the mode and order of questioning witnesses and presenting evidence so as to

(1) make those procedures effective for determining the truth,

(2) avoid wasting time, and

(3) protect witnesses from harassment or undue embarrassment.

B. **Scope of cross-examination.** Cross-examination should not go beyond the subject matter of the direct examination and matters affecting a witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

C. **Leading questions.** Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions

(1) on cross-examination, and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-611 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-612. Writing used to refresh a witness's memory.

A. **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory

(1) while testifying, or

(2) before testifying, if the court decides that justice requires a party to have those options.

B. **Adverse party's options; deleting unrelated matter.** Unless otherwise provided by law in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

C. **Failure to produce or deliver the writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or – if justice so requires – declare a mistrial.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-612 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-613. Witness's prior statement.

A. **Showing or disclosing the statement during examination.** When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

B. **Extrinsic evidence of a prior inconsistent statement.** Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This paragraph does not apply to an opposing party's statement under Rule 11-801(D)(2) NMRA.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-613 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-614. Court's calling or examining a witness.

A. **Calling.** The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

B. **Examining.** The court may examine a witness regardless of who calls the witness.

C. **Objections.** A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-614 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-615. Excluding witnesses.

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony, or the court may do so on its own. This rule does not authorize excluding

A. a party who is a natural person,

B. an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney,

C. a person whose presence a party shows to be essential to presenting the party's claim or defense, or

D. a person authorized by law to be present.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-615 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 7
Opinions and Expert Testimony

11-701. Opinion testimony by lay witnesses.

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is

A. rationally based on the witness's perception,

B. helpful to clearly understanding the witness's testimony or to determining a fact in issue, and

C. not based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702 NMRA.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 06-8300-025, effective December 18, 2006; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-701 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The committee deleted all references to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

The addition of Paragraph C in 2006 brought this rule into alignment with federal rule 701. This amendment was made to the federal rule in 2000 to avoid the misuse of the lay witness opinion rule as a guise for offering testimony that in reality is based on some form of claimed expertise of the witness. The amendment reflects New Mexico and federal case law. The amendment was a non-substantive change designed to clarify that lay witness testimony under this rule should not be based on "scientific, technical or other specialized knowledge". If the witness testifies to such scientific, technical or other specialized knowledge, then the admissibility of such testimony must be analyzed under Rule 11-702 NMRA for expert testimony.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-702. Testimony by expert witnesses.

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-702 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

New Mexico has not adopted the changes made to the federal rule in 2000 to incorporate the requirements of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), in light of the differences between federal law and New Mexico law regarding whether *Daubert* applies to nonscientific testimony.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-703. Bases of an expert's opinion testimony.

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; as amended by Supreme Court Order No. 06-8300-025, effective December 18, 2006; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-703 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The committee deleted all reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

The 2006 amendment added clarifying language consistent with New Mexico and federal case law identical to language added to federal Rule 703 in 2000. It is intended to strike a balance between an expert's need to rely upon sources of information used in the expert's field in arriving at decisions, but at the same time to avoid using the expert witness as a conduit for inadmissible evidence to be transmitted to the jury and improperly used as substantive evidence. When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted for such a limited purpose under this balancing test, a limiting instruction under Rule 11-105 NMRA would be appropriate.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-704. Opinion on an ultimate issue.

An opinion is not objectionable just because it embraces an ultimate issue.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-704 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. New Mexico's rule differs from the federal rule in that it does not create an exception prohibiting expert witnesses in criminal cases from testifying about the accused's mental state.

The committee deleted all reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-705. Disclosing the facts or data underlying an expert's opinion.

Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-705 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

The committee deleted all reference to an "inference" on the grounds that the deletion made the rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-706. Court-appointed expert witnesses.

A. **Appointment process.** On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert witness that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

B. **Expert's role.** The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert

(1) must advise the parties of any findings the expert makes,

(2) may be deposed by any party,

(3) may be called to testify by the court or any party, and

(4) may be cross-examined by any party, including the party that called the expert.

C. **Compensation.** The expert is entitled to a reasonable compensation as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment and Article II, Section 2 of the New Mexico Constitution, from any funds that are provided by law; and

(2) in any other civil case, by the parties in proportion and at the time that the court directs – and the compensation is then charged like other costs.

D. **Disclosing the appointment to the jury.** The court may authorize disclosure to the jury that the court appointed the expert.

E. **Parties' choice of their own experts.** This rule does not limit a party in calling its own experts.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-706 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-707. Polygraph examinations.

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

(1) "chart" means the record of bodily reactions by a polygraph instrument that is attached to the human body during a series of questions;

(2) "polygraph examination" means a test using a polygraph instrument which at a minimum simultaneously graphically records on a chart the physiological changes in human respiration, cardiovascular activity, galvanic skin resistance, or reflex for the purpose of lie detection;

(3) "polygraph examiner" means any person who is qualified to administer or interpret a polygraph examination; and

(4) "relevant question" means a clear and concise question which refers to specific objective facts directly related to the purpose of the examination and does not allow rationalization in the answer.

B. **Minimum qualifications of polygraph examiner.** A polygraph examiner must have the following minimum qualifications prior to administering or interpreting a polygraph examination to be admitted as evidence:

(1) at least five (5) years' experience in administration or interpretation of polygraph examinations or equivalent academic training; and

(2) possess a current, active polygraph examiner license, in good standing, in New Mexico or in another jurisdiction with licensure standards that are equal to or greater than those in New Mexico.

C. **Admissibility of results.** A polygraph examiner's opinion as to the truthfulness of a person's answers in a polygraph examination may be admitted if:

(1) the polygraph examination was administered by a qualified polygraph examiner;

(2) the polygraph examination was quantitatively scored in a manner that is generally accepted as reliable by polygraph experts;

(3) the polygraph examiner was informed as to the examinee's background, health, education, and other relevant information prior to conducting the polygraph examination;

(4) at least two (2) relevant questions were asked during the examination;

(5) at least three (3) charts were taken of the examinee; and

(6) the entire examination was recorded in full on an audio or video recording device, including the pretest interview and, if conducted, the post-test interview.

D. **Notice of examination.** A party who wishes to use polygraph evidence at trial must provide written notice no less than thirty (30) days before trial or within such other time as the district court may direct. Such notice must include these reports:

(1) a copy of the polygraph examiner's report, if any;

(2) a copy of each chart;

(3) a copy of the audio or video recording of the entire examination, including the pretest interview, and, if conducted, the post-test interview; and

(4) a list of any other polygraph examinations taken by the examinee in the matter under question, including the names of all persons administering such examinations, the dates, and the results of the examinations.

E. **Determination of admissibility.** The court shall make any determination as to the admissibility of a polygraph examination outside the presence of the jury.

F. **Compelled polygraph examinations.** No witness shall be compelled to take a polygraph examination. If notice to use a polygraph examination of a witness has been given under Paragraph D by one party, the court may, for good cause shown, compel a second polygraph examination of that witness by the other party. The results of the second polygraph examination may be admitted if the second polygraph examination is conducted as required under this rule. Should the witness refuse to take a second polygraph examination, then the results of the first polygraph are inadmissible.

[Adopted, effective June 1, 1983; as amended, effective July 1, 1990; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012; as amended by Supreme Court Order No. 15-8300-012, effective for all cases filed or pending on or after December 31, 2015.]

Committee commentary. — The changes made to this rule in 2012 are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. However, in the process of making stylistic changes to the rule the committee felt it was important to clarify what needed to be recorded as part of the examination. It also addressed a criticism of the existing rule to require disclosure of all other polygraph examinations, and not just examinations made prior to the one being submitted.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 8
Hearsay

11-801. Definitions that apply to this article; exclusions from hearsay.

A. **Statement.** "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

B. **Declarant.** "Declarant" means the person who made the statement.

C. **Hearsay.** Means a statement that

(1) the declarant does not make while testifying at the current trial or hearing, and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

D. **Statements that are not hearsay.** A statement that meets the following conditions is not hearsay:

(1) **A declarant-witness's prior statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement

(a) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,

(b) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying, or

(c) identifies a person as someone the declarant perceived earlier.

(2) **An opposing party's statement.** The statement is offered against an opposing party and

(a) was made by the party in an individual or representative capacity,

(b) is one that the party manifested that it adopted or believed to be true,

(c) was made by a person whom the party authorized to make a statement on the subject,

(d) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed, or

(e) was made by the party's co-conspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under Paragraph D(2)(c) of this rule, the existence or scope of the relationship under Paragraph D(2)(d) of this rule, or the existence of the conspiracy or participation in it under Paragraph D(2)(e) of this rule.

[Approved, effective July 1, 1973; as amended, effective December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. 06-8300-025, effective December 18, 2006; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-801 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Statements falling under the hearsay exclusion provided by Rule 11-801(D)(2) NMRA are no longer referred to as "admissions" in the title to the paragraph. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense – a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 11-804(B)(3) NMRA exception for declarations against interest. No change in application of the exclusion is intended.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-802. The rule against hearsay.

Hearsay is not admissible except as provided by these rules or by other rules adopted by the Supreme Court or by statute.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The title of this rule was amended in 2012 to be consistent with other amendments made at that time to Article 8 of these rules.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-803. Exceptions to the rule against hearsay—regardless of whether the declarant is available as a witness.

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.

(1) ***Present sense impression.*** A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) ***Excited utterance.*** A statement relating to a startling event or condition, made while the declarant was under the stress or excitement that it caused.

(3) ***Then-existing mental, emotional, or physical condition.*** A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) ***Statement made for medical diagnosis or treatment.*** A statement that

(a) is made for—and is reasonably pertinent to—medical diagnosis or treatment, and

(b) describes medical history, past or present symptoms, pain, or sensations, their inception, or their general cause.

(5) ***Recorded recollection.*** A record that

(a) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately,

(b) was made or adopted by the witness when the matter was fresh in the witness's memory, and

(c) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) ***Records of a regularly conducted activity.*** A record of an act, event, condition, opinion, or diagnosis if

(a) the record was made at or near the time by—or from information transmitted by—someone with knowledge,

(b) the record was kept in the course of a regularly conducted activity of a business, institution, organization, occupation, or calling, whether or not for profit,

(c) making the record was a regular practice of that activity, and

(d) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 11-902(11) or (12) NMRA or with a statute permitting certification.

This exception does not apply if the opponent shows that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) ***Absence of a record of a regularly conducted activity.*** Evidence that a matter is not included in a record described in Paragraph 6 if

(a) the evidence is admitted to prove that the matter did not occur or exist, and

(b) a record was regularly kept for a matter of that kind.

This exception does not apply if the opponent shows that the possible source of the information or other circumstances indicate a lack of trustworthiness.

(8) ***Public records.*** A record or statement of a public office if it sets out

(a) the office's activities,

(b) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel, or

(c) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation.

This exception does not apply if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

(9) ***Public records of vital statistics.*** Records or data compilations of births, deaths, or marriages, if reported to a public office in accordance with a legal duty.

(10) ***Absence of a public record.*** Testimony—or a certification under Rule 11-902 NMRA—that a diligent search failed to disclose a public record or statement if

(a) the testimony or certification is admitted to prove that

(i) the record or statement does not exist, or

(ii) a matter did not occur or exist, even though a public office regularly kept a record or statement for a matter of that kind, and

(b) in a criminal case, a prosecutor who intends to offer a certification files and serves written notice of that intent at least fourteen (14) days before trial, and the defendant does not file and serve an objection in writing within seven (7) days of service of the notice—unless the court sets a different time for the notice or the objection.

(11) ***Records of religious organizations concerning personal or family history.*** A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) ***Certificates of marriage, baptism, and similar ceremonies.*** A statement of fact contained in a certificate

(a) made by a person who is authorized by a religious organization or by law to perform the act certified,

(b) attesting that the person performed a marriage or similar ceremony or administered a sacrament, and

(c) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) ***Family records.*** A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) ***Records of documents that affect an interest in property.*** The record of a document that purports to establish or affect an interest in property if

(a) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it,

(b) the record is kept in a public office, and

(c) a statute authorizes recording documents of that kind in that office.

(15) ***Statements in documents that affect an interest in property.*** A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose—unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) ***Statements in ancient documents.*** A statement in a document that was prepared before January 1, 1998, and whose authenticity is established.

(17) ***Market reports and similar commercial publications.*** Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) ***Statements in learned treatises, periodicals, or pamphlets.*** A statement contained in a treatise, periodical, or pamphlet, if

(a) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination, and

(b) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) ***Reputation concerning personal or family history.*** A reputation among a person's family by blood, adoption, or marriage—or among a person's associates or in the community—concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) ***Reputation concerning boundaries or general history.*** A reputation in a community—arising before the controversy—concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) ***Reputation concerning character.*** A reputation among a person's associates or in the community concerning the person's character.

(22) ***Judgment of a previous conviction.*** Evidence of a final judgment of conviction if

(a) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea,

(b) the judgment was for a crime punishable by death or by imprisonment for more than a year,

(c) the evidence is admitted to prove any fact essential to the judgment, and

(d) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) ***Judgments involving personal, family, or general history, or a boundary.*** A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter

(a) was essential to the judgment, and

(b) could be proved by evidence of reputation.

[Adopted effective July 1, 1973; as amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 07-8300-023, effective November 1, 2007; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012; as amended by Supreme Court Order No. 15-8300-012, effective for all cases filed or pending on or after December 31, 2015; as amended by Supreme Court Order No. 16-8300-013, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 22-8300-028, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — Effective December 31, 2016, Rule 11-803(10) NMRA was amended to add a notice-and-demand requirement to the hearsay exception for the absence of a public record, which is similar to a change made in 2013 to Rule 803(10) of the Federal Rules of Evidence. The notice-and-demand procedure was added to the federal rule in response to *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), which specifically approved the procedure as a means of satisfying the Confrontation Clause of the Sixth Amendment. The New Mexico rule differs from its federal counterpart by requiring the notice and objection to be “filed and served” within the appropriate time limits, whereas the federal rule merely requires that the notice be “provided.”

Rule 11-803 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. The internal numbering of the rule was also changed to conform to the numbering of the federal rule.

In 2007, the committee added language to former Paragraph F, now renumbered as Paragraph 6, taken from a similar change made in 2000 to Rule 803(6) of the Federal Rules of Evidence. The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and

inconvenience of producing time-consuming but non-substantive foundation witnesses. Corresponding changes have been made to Rule 11-902 NMRA.

Eliminating the identical “catch-all” exception in former Paragraph X of this rule and former Rule 11-804(B)(5) NMRA (2006) and combining them in Rule 11-807 NMRA, adopted in 2007, with no intended change in meaning, tracks the 2000 amendments to the corresponding federal rules.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012; as amended by Supreme Court Order No. 16-8300-013, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. 22-8300-028, effective for all cases pending or filed on or after December 31, 2022.]

11-804. Exceptions to the rule against hearsay – when the declarant is unavailable as a witness.

A. **Criteria for being unavailable.** "Unavailability as a witness" includes situations in which the declarant

(1) is exempted from testifying about the subject matter of the declarant’s statement because the court rules that a privilege applies,

(2) refuses to testify about the subject matter despite a court order to do so,

(3) testifies to not remembering the subject matter,

(4) cannot be present to testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness, or

(5) is absent from the trial or hearing and the statement’s proponent has not been able, by process or other reasonable means, to procure

(a) the declarant’s attendance, in the case of a hearsay exception under Rule 11-804(B)(1) or (5) NMRA, or

(b) the declarant’s attendance or testimony, in the case of a hearsay exception under Rule 11-804(B)(2), (3), or (4) NMRA.

But Paragraph A does not apply if the statement’s proponent procured or wrongfully caused the declarant’s unavailability in order to prevent the declarant from attending or testifying.

B. **The exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) **Former testimony.** Testimony that

(a) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(b) is now offered against a party who had – or, in a civil case, whose predecessor in interest had – an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

(2) **Statement under the belief of imminent death.** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

(3) **Statement against interest.** A statement that

(a) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability, and

(b) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

(4) **Statement of personal or family history.** A statement about

(a) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact, or

(b) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) **Statement offered against a party who wrongfully caused the declarant's unavailability.**

A statement offered against a party that wrongfully caused – or acquiesced in wrongfully causing – the declarant's unavailability as a witness, and did so intending that result.

[As amended, effective April, 1, 1976; December 1, 1993; January 1, 1995; as amended by Supreme Court Order No. 07-8300-023, effective November 1, 2007; by Supreme

Court Order No. 10-8300-042, effective January 31, 2011; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-804 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Paragraph (B)(3) was amended in 2010 to be consistent with amendments to federal Rule 804(b)(3), effective on December 1, 2010. These amendments require the state to show corroborating circumstances as a condition for admission of an unavailable declarant's statement against penal interest. The previous rule required only the defendant to make such a showing. A unitary approach to declarations against penal interest assures both the prosecution and the accused that the rule will not be abused and that only reliable hearsay statements will be admitted under this exception.

In 2007, the identical "catch-all" exception in Subparagraph (5) of Paragraph B of this rule and former Paragraph X of Rule 11-803 NMRA were eliminated and combined in new Rule 11-807 NMRA, consistent with the corresponding federal rules, with no intended change in meaning.

The new exception added to Subparagraph (6) of Paragraph B was taken verbatim from federal Rule 804(b)(6), which was adopted in 1997, and reflects a substantial body of state and federal case law. *See, e.g., State v. Romero*, 2007-NMSC-013, 141 N.M. 403, 156 P.3d 694; *State v. Alvarez-Lopez*, 2004-NMSC-030, 136 N.M. 309, 98 P.3d 699 (2004). It lessens a party's ability to benefit from intentionally making a witness unavailable.

[Amended by Supreme Court Order No. 10-8300-042, effective January 31, 2011; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-805. Hearsay within hearsay.

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-805 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-806. Attacking and supporting the declarant's credibility.

When a hearsay statement – or a statement described in Rule 11-801(D)(2)(c), (d), or (e) NMRA – has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-806 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-807. Residual exception.

A. **In general.** Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 11-803 NMRA or Rule 11-804 NMRA:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

B. **Notice.** The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement

and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

[Approved by Supreme Court Order No. 07-8300-023, effective November 1, 2007; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-807 NMRA has been amended to be consistent with the restyling of the federal rules of evidence to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

This "catch-all" hearsay exception provision applies to Rule 11-803 NMRA and Rule 11-804 NMRA and replaces the redundant provisions previously repeated in both of those rules.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 9
Authentication and Identification

11-901. Requirement of authentication or identification.

A. **In general.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

B. **Examples.** The following are examples only – not a complete list – of evidence that satisfies the requirement:

(1) **Testimony of a witness with knowledge.** Testimony that an item is what it is claimed to be.

(2) **Nonexpert opinion about handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) **Comparison by an expert witness or the trier of fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) **Distinctive characteristics and the like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) **Opinion about a voice.** An opinion identifying a person's voice – whether heard firsthand or through mechanical or electronic transmission or recording – based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) **Evidence about a telephone conversation.** For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(a) a particular person, if circumstances, including self-identification, show that the person answering was the one called, or

(b) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) **Evidence about public records.** Evidence that

(a) a document was recorded or filed in a public office as authorized by law, or

(b) a purported public record or statement is from the office where items of this kind are kept.

(8) **Evidence about ancient documents or data compilations.** For a document or data compilation, evidence that it

(a) is in a condition that creates no suspicion about its authenticity,

(b) was in a place where, if authentic, it would likely be, and

(c) is at least twenty (20) years old when offered.

(9) **Evidence about a process or system.** Evidence describing a process or system and showing that it produces an accurate result.

(10) **Methods provided by a statute or rule.** Any method of authentication or identification allowed by a statute or a rule prescribed by the Supreme Court.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-901 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-902. Evidence that is self-authenticating.

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) **Domestic public documents that are sealed and signed.** A document that bears

(a) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; a Federally Recognized American Indian Tribe or Nation; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above, and

(b) a signature purporting to be an execution or attestation.

(2) **Domestic public documents that are not sealed but are signed and certified.** A document that bears no seal if

(a) it bears the signature of an officer or employee of an entity named in Rule 11-902(1)(a) NMRA, and

(b) another public officer who has a seal and official duties within that same entity certifies under seal – or its equivalent – that the signer has the official capacity and that the signature is genuine.

(3) **Foreign public documents.** A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester – or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consult general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either

(a) order that it be treated as presumptively authentic without final certification, or

(b) allow it to be evidenced by an attested summary with or without final certification.

(4) **Certified copies of public records.** A copy of an official record – or a copy of a document that was recorded or filed in a public office as authorized by law – if the copy is certified as correct by

(a) the custodian or another person authorized to make the certification, or

(b) a certificate that complies with Rule 11-902(1), (2), or (3), a statute, or a rule prescribed by the Supreme Court.

(5) **Official publications.** A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) **Newspapers and periodicals.** Printed material purporting to be a newspaper or periodical.

(7) **Trade inscriptions and the like.** An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) **Acknowledged documents.** A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) **Commercial paper and related documents.** Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) **Presumptions under a statute.** A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.

(11) **Certified domestic records of a regularly conducted activity.** The original or a copy of a domestic record that meets the requirements of Rule 11-803(6)(a) to (c) NMRA, as shown by a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record – and must make the record and certification available for inspection – so that the party has a fair opportunity to challenge them.

(12) **Certified foreign records of a regularly conducted activity.** In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 11-902(11) NMRA, modified as follows: the certification, rather than complying with a statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 11-902(11) NMRA.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 07-8300-023, effective November 1, 2007; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-902 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility. The internal lettering of the rule was also changed to conform to the numbering of the federal rule. The committee added the seal of a Federally Recognized American Indian Tribe or Nation to the list of seals in Paragraph (1)(a) of this rule.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-903. Subscribing witness' testimony.

A subscribing witness’s testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-903 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 10
Contents of Writings, Recordings and Photographs

11-1001. Definitions that apply to this article.

In this article

A. A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

B. A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

C. A "photograph" means a photographic image or its equivalent stored in any form.

D. An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout – or other output readable by sight – if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

E. A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

[As amended, effective April 1, 1976; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1001 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1002. Requirement of the original.

An original writing, recording, or photograph is required in order to prove its content unless these rules or a statute provides otherwise.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1002 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1003. Admissibility of duplicates.

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1003 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1004. Admissibility of other evidence of content.

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if

A. all the originals are lost or destroyed, and not by the proponent acting in bad faith;

B. an original cannot be obtained by any available judicial process;

C. the party against whom the original would be offered has control of the original, was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing, and fails to produce it at the trial or hearing; or

D. the writing, recording, or photograph is not closely related to a controlling issue.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1004 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1005. Copies of public records to prove content.

The proponent may use a copy to prove the content of an official record – or of a document that was recorded or filed in a public office as authorized by law – if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 11-902(4) NMRA or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1005 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1006. Summaries to prove content.

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. The court may order the proponent to produce them in court.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1006 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1007. Testimony or statement of a party to prove content.

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

[As amended, effective December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1007 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1008. Functions of the court and jury.

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 11-1004 or 11-1005 NMRA. But in a jury trial, the jury determines – in accordance with Rule 11-104(B) NMRA – any issue about whether

A. an asserted writing, recording, or photograph ever existed,

B. another one produced at the trial or hearing is the original, or

C. other evidence of content accurately reflects the content.

[As amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1007 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

ARTICLE 11
Miscellaneous Rules

11-1101. Applicability of the rules.

A. **To courts and judges.** These rules apply to proceedings before New Mexico district courts, metropolitan court, magistrate courts, municipal courts, and special masters, referees, and child support hearing officers appointed by the court.

B. **To cases and proceedings.** These rules apply in civil cases and proceedings, criminal cases and proceedings, and contempt proceedings, except those in which the court may act summarily.

C. **Rules on privilege.** The rules on privilege apply to all stages of a case or proceeding.

D. **Exceptions.** These rules - except for those on privilege - do not apply to the following:

(1) the court's determination, under Rule 11-104(A) NMRA, on a preliminary question of fact governing admissibility;

(2) grand jury proceedings, and

(3) miscellaneous proceedings, such as

(a) extradition or rendition,

(b) issuing an arrest warrant, criminal summons, or search warrant,

(c) sentencing by the court without a jury,

(d) granting or revoking probation or supervised release,

(e) considering whether to release on bail or otherwise,

(f) dispositional hearings in children's court proceedings, and

(g) the following abuse and neglect proceedings:

(i) issuing an ex parte custody order;

(ii) custody hearings;

(iii) permanency hearings; and

(iv) judicial review proceedings.

[As amended effective July 1, 1980; December 1, 1993; November 17, 1999; as amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or

filed on or after June 16, 2012; by Supreme Court Order No. 13-8300-003, effective for all cases pending or filed on or after May 5, 2013.]

Committee commentary. — The language of Rule 11-1101 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

11-1102. Title.

These rules may be cited as the New Mexico Rules of Evidence.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]

Committee commentary. — The language of Rule 11-1102 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence, effective December 1, 2011, to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

[Adopted by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]