

**PUBLICATION FOR COMMENT
OF RECENTLY APPROVED AMENDMENTS
CONCERNING MENTAL-HEALTH RELATED DISPOSITIONS
THAT AFFECT THE RIGHT TO RECEIVE OR POSSESS
A FIREARM OR AMMUNITION UNDER FEDERAL LAW**

The Supreme Court has provisionally approved the new and amended rules set forth below with a retroactive effective date of May 18, 2016 to coincide with the effective date of related, recently enacted statutory changes. The approved rules and forms are intended to address the new firearm-related notice and reporting requirements under House Bill 336 (HB 336) as they relate to a person who has been “adjudicated as a mental defective” or “committed to a mental institution.” Those terms are used in HB 336 and are taken from the Brady Handgun Violence Protection Act of 1993. *See* 18 U.S.C. § 922(g)(4) (declaring it a federal crime for a person who has been “adjudicated as a mental defective” or “committed to a mental institution” to receive or possess a firearm or ammunition); 27 C.F.R. § 478.11 (defining the terms “adjudicated as a mental defective” and “committed to a mental institution”).

The Court provisionally approved the rules and forms on an emergency basis to comply with the requirements of HB 336, which went into effect on May 18, 2016. *Accord* Rule 23-106.1(C) NMRA (providing for out-of-cycle rule-making under “emergency circumstances,” including a change in statute). Due to the expedited approval process, the Court is now publishing the rules and forms for comment and has ordered the Ad hoc Committee on Rules for Mental Health Proceedings, with input from the Civil, Criminal, and Children's Court Rules Committees, to review any comments submitted during the comment period and to recommend revisions to the rules and forms by December 31, 2016. The Court invites input from the bench, bar, and public during the comment period.

The recently approved rules and forms are intended to allow the Administrative Office of the Courts (AOC) to meet two requirements imposed by HB 336. First, Subsection 2(B) of HB 336 requires the AOC to “electronically transmit information about a court order, judgment or verdict to the federal bureau of investigation for entry into the national instant criminal background check system [NICS] regarding each person who has been adjudicated as a mental defective or committed to a mental institution and is therefore, pursuant to federal law, disabled from receiving or possessing a firearm or ammunition.” The AOC has determined that all court records in proceedings that could result in such a “court order, judgment or verdict” are automatically sealed under Rules 1-079, 5-123, and 10-166 NMRA. *See, e.g.*, Rule 1-079(C)(5) (providing that “all court records . . . shall be automatically sealed without motion or order of the court” in proceedings under the Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978). The amendments to Rules 1-079, 5-123, and 10-166 therefore create a limited exception that permits the AOC to report the information that must be transmitted under HB 336 in proceedings that are otherwise automatically sealed.

Second, Subsection 2(C) of HB 336 requires the AOC, “[u]pon entry of a court order, judgment or verdict referred to in Subsection B . . . [to] notify the person that, as an adjudicated mental defective or as a person committed to a mental institution, the person is disabled pursuant to federal law from receiving or possessing a firearm or ammunition.” New Rules 1-131, 5-615, and

10-171 NMRA, together with new Forms 4-940, 9-515, and 10-604 NMRA, establish a procedure for providing the required notice. Rules 1-131, 5-615, and 10-171 identify the specific types of orders for which notice must be given in each court and provide that the notice must be in writing and in the form substantially approved by the Court. Forms 4-940, 9-515, and 10-604 are the forms approved by the Court for providing the notice.

Of particular interest, Rules 1-131, 5-615, and 10-171 list the types of orders identified by the AOC, with input from state and federal officials, that may be issued in proceedings under New Mexico law that fall within the federal definitions of “adjudicated as a mental defective” or “committed to a mental institution.” The federal definitions do not align perfectly with the findings required in state proceedings. *Compare* 27 C.F.R. § 478.11 (defining “adjudicated as a mental defective” in part as “[a] determination by a court . . . that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease . . . [I]acks the mental capacity to contract or manage his own affairs”), *with, e.g.*, NMSA 1978, § 45-5-304(C)(1) (providing that a guardian shall be appointed under the Uniform Probate Code based upon a finding by clear and convincing evidence that the person is “incapacitated”); § 45-5-101(F) (“[I]ncapacitated person” means either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person’s personal affairs or the person is unable to manage the person’s estate or financial affairs or both.”). The Court recognizes that some of the dispositions listed in the rules are a better fit with the federal definitions than others, and welcomes input regarding whether the listed dispositions fall within the federal definitions.

If you would like to comment on the recently approved new and amended rules and forms set forth below before the Court takes further action, you may do so by either submitting a comment electronically through the Supreme Court’s web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before August 5, 2016, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court’s web site for public viewing.

1-079. Public inspection and sealing of court records.

A. **Presumption of public access; scope of rule.** Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file

a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) “court record” means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) “lodged” means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) “protected personal identifier information” means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver’s license number, and all but the year of a person’s date of birth;

(4) “public” means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) “public access” means the inspection and copying of court records by the public; and

(6) “sealed” means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limitations on public access.** In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) proceedings commenced under the Adoption Act, Chapter 32A, Article 5 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsection A of Section 32A-5-8 NMSA 1978;

(2) proceedings to detain a person commenced under Section 24-1-15 NMSA 1978;

(3) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(4) proceedings commenced under the Adult Protective Services Act, Sections 27-7-14 to 27-7-31 NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(5) proceedings commenced under the Mental Health and Developmental Disabilities Code, Chapter 43, Article 1 NMSA 1978, subject to the disclosure requirements in Section 43-1-19 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978;

(6) wills deposited with the court pursuant to Section 45-2-515 NMSA 1978 that have not been submitted to informal or formal probate proceedings. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Section 45-2-515 NMSA 1978;

(7) proceedings commenced for the appointment of a person to serve as guardian for an alleged incapacitated person subject to the disclosure requirements of Subsection I of Section 45-5-303 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978; [~~and~~]

(8) proceedings commenced for the appointment of a conservator subject to the disclosure requirements of Subsection M of Section 45-5-407 NMSA 1978 and the firearm-related reporting requirements in Section 34-9-19 NMSA 1978; and

(9) proceedings commenced to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978.

The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. Protection of personal identifier information.

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

E. Motion to seal court records required. Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. Any party or member of the public may file a response to the motion to seal. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. Procedure for lodging court records. A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rules 1-008.1 and 1-010 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. Requirements for order to seal court records.

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

(a) the existence of an overriding interest that overcomes the right of

public access to the court record;

(b) the overriding interest supports sealing the court record;
(c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;

(d) the proposed sealing is narrowly tailored; and

(e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. Sealed court records as part of record on appeal.

(1) Court records sealed in the magistrate, metropolitan, or municipal court, or records sealed in an agency proceeding in accordance with the law, that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court pursuant to Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. Motion to unseal court records.

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. Failure to comply with sealing order. Any person or entity who knowingly

discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Adopted by Supreme Court Order No. 10-8300-004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023 temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; by Supreme Court Order No. 11-8300-006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as amended by Supreme Court Order No. 13-8300-017, effective for all cases pending or filed on or after December 31, 2013; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016.]

Committee commentary. — This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

For some of the classes of cases identified in Paragraph C, automatic sealing is subject to other statutory disclosure or reporting requirements. For example, under NMSA 1978, Section 34-9-19, the administrative office of the courts (AOC) is required to transmit to the federal bureau of investigation's national instant criminal background check system (NICS) information about a court order, judgment, or verdict regarding each person who has been "adjudicated as a mental defective" or "committed to a mental institution" under federal law. Automatic sealing under Paragraph C therefore does not prevent the AOC from transmitting such information to the NICS in the proceedings described in Subparagraphs C(4), (5), (7) and (8). A person who is the subject of the information compiled and reported by the AOC to NICS has a right to obtain and inspect that information. See NMSA 1978, § 34-9-19(K).

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or

otherwise subject to limitations on disclosure. *See, e.g.*, Section 7-1-4.2(H) NMSA 1978 (providing for confidentiality of taxpayer information); Section 14-6-1(A) NMSA 1978 (providing for confidentiality of patient health information); Section 24-1-9.5 NMSA 1978 (limiting disclosure of test results for sexually transmitted diseases); Section 29-10-4 NMSA 1978 (providing for confidentiality of certain arrest record information); Section 29-12A-4 NMSA 1978 (limiting disclosure of local crime stoppers program information); Section 29-16-8 NMSA 1978 (providing for confidentiality of DNA information); Section 31-25-3 NMSA 1978 (providing for confidentiality of certain communications between victim and victim counselor); Section 40-8-2 NMSA 1978 (providing for sealing of certain name change records); Section 40-6A-312 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); Section 40-10A-209 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); Section 40-13-7.1 NMSA 1978 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); Section 40-13-12 NMSA 1978 (providing for limits on internet disclosure of certain information in domestic violence cases) Section 44-7A-18 NMSA 1978 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record.

Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending

the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal." If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as Sealed Pleading or In the Matter of a Sealed Case, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access. If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order

must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Adopted by Supreme Court Order No. 10-8300-004, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-006, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016.]

[NEW MATERIAL]

1-131. Notice of federal restriction on right to possess or receive a firearm or ammunition.

A. **Notice required.** The court shall provide written notice to a person who is the subject of an order set forth in Paragraph B of this rule that the person is prohibited under federal law from receiving or possessing a firearm or ammunition. The notice shall further state that the person's identifying information will be transmitted to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System.

B. **Orders requiring notice.** The notice required under Paragraph A of this rule shall be in the form substantially approved by the Supreme Court and shall be attached to the following:

- (1) An order appointing a guardian for an adult under Section 45-5-304(C) NMSA 1978;
- (2) An order appointing a conservator for an adult under Section 45-5-407(I) NMSA 1978;
- (3) An order of commitment under Sections 43-1-11, -12, or -13 NMSA 1978;
- (4) An order appointing a treatment guardian under Section 43-1-15 NMSA 1978;
- (5) An order for involuntary protective services or protective placement under

Section 27-7-24 NMSA 1978; and

(6) An order to participate in assisted outpatient treatment under Chapter 84 of New Mexico Laws of 2016.

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016.]

Committee commentary. — Enacted in 2016, NMSA 1978, Section 34-9-19(C) requires the Administrative Office of the Courts to notify a person who has been “adjudicated as a mental defective” or “committed to a mental institution” that the person “is disabled pursuant to federal law from receiving or possessing a firearm or ammunition.” Federal law declares it a crime for a person who has been “adjudicated as a mental defective” or “committed to a mental institution” to, among other things, receive or possess a firearm or ammunition. *See* 18 U.S.C. § 922(g)(4) (“It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

The terms “adjudicated as a mental defective” and “committed to a mental institution” are defined under federal regulation as follows:

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial

. . . .

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11.

This rule sets forth the procedure for providing the notice required under Section 34-9-19(C) and identifies the orders under New Mexico law for which notice must be given in a civil proceeding. *See also* Form 4-940 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition).

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016.]

[NEW MATERIAL]

4-940. Notice of federal restriction on right to possess or receive a firearm or ammunition.

[For use with Rule 1-131 NMRA]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT

_____,
Petitioner,

v.

No. _____

_____,
Respondent.

**NOTICE OF FEDERAL RESTRICTION ON RIGHT TO
POSSESS OR RECEIVE A FIREARM OR AMMUNITION**

TO: _____

ADDRESS: _____

YOU ARE HEREBY NOTIFIED that as a result of the order entered against you in this proceeding, you are prohibited from possessing or receiving a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4).

YOU ARE FURTHER NOTIFIED that the Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about your identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System (NICS).

YOU ARE FURTHER NOTIFIED that you may petition the Court as provided in Section 34-9-19 NMSA 1978 to restore your right to possess or receive a firearm or ammunition and to remove your name from the NICS.

DISTRICT COURT

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders filed on or after May 18, 2016.]

5-123. Public inspection and sealing of court records.

A. **Presumption of public access; scope of rule.** Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally

under seal, or subject to a pending motion to seal under the provisions of this rule.

B. Definitions. For purposes of this rule the following definitions apply:

(1) “court record” means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) “lodged” means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) “protected personal identifier information” means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver’s license number, and all but the year of a person’s date of birth;

(4) “public” means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) “public access” means the inspection and copying of court records by the public; and

(6) “sealed” means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. Limitations on public access. In addition to court records protected pursuant to Paragraphs D and E of this rule, all court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) grand jury proceedings in which a no bill has been filed under Section 31-6-5 NMSA 1978;

(2) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(3) proceedings commenced upon an application for an order for wiretapping, eavesdropping or the interception of any wire or oral communication under Section 30-12-3 NMSA 1978;

(4) pre-indictment proceedings commenced under Chapter 31, Article 6 NMSA 1978 or Rule 5-302A NMRA; ~~and~~

(5) proceedings to determine competency under Chapter 31, Article 9 NMSA 1978, subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978; and

(6) proceedings commenced to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978.

The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. Protection of personal identifier information.

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court’s judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person’s name, address, and telephone number along with a government-issued form of

identification or other acceptable form of identification.

E. **Motion to seal court records required.** Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. The motion is subject to the provisions of Rule 5-120 NMRA, and a copy of the motion shall be served on all parties who have appeared in the case in which the court record has been filed or is to be filed. Any party or member of the public may file a response to the motion to seal under Rule 5-120 NMRA. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rule 5-202 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. **Requirements for order to seal court records.**

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

- (a) the existence of an overriding interest that overcomes the right of public access to the court record;
- (b) the overriding interest supports sealing the court record;
- (c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;
- (d) the proposed sealing is narrowly tailored; and
- (e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. Sealed court records as part of record on appeal.

(1) Court records sealed in the magistrate, metropolitan, or municipal court that are filed in an appeal to the district court shall remain sealed in the district court. The district court judges and staff may have access to the sealed court records unless otherwise ordered by the district court. Requests to unseal such records or modify a sealing order entered in the magistrate, metropolitan, or municipal court shall be filed in the district court pursuant to Paragraph I of this rule if the case is pending on appeal.

(2) Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. Motion to unseal court records.

(1) A sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal is subject to the provisions of Rule 5-120 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. Failure to comply with sealing order. Any person or entity who knowingly discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate.

[Adopted by Supreme Court Order No. 10-8300-007, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023 temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; as amended by Supreme Court Order No. 11-8300-009, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as amended by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016.]

Committee commentary. — This rule recognizes the presumption that all documents filed

in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that all court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

For some of the classes of cases identified in Paragraph C, automatic sealing is subject to other statutory disclosure or reporting requirements. For example, under NMSA 1978, Section 34-9-19, the administrative office of the courts (AOC) is required to transmit to the federal bureau of investigation's national instant criminal background check system (NICS) information about a court order, judgment, or verdict regarding each person who has been "adjudicated as a mental defective" or "committed to a mental institution" under federal law. Automatic sealing under Paragraph C therefore does not prevent the AOC from transmitting such information to the NICS in the proceedings described in Subparagraphs C(5) and (6). A person who is the subject of the information compiled and reported by the AOC to NICS has a right to obtain and inspect that information. See NMSA 1978, § 34-9-19(K).

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, Section 7-1-4.2(H) NMSA 1978 (providing for confidentiality of taxpayer information); Section 14-6-1(A) NMSA 1978 (providing for confidentiality of patient health information); Section 24-1-9.5 NMSA 1978 (limiting disclosure of test results for sexually transmitted diseases); Section 29-10-4 NMSA 1978 (providing for confidentiality of certain arrest record information); Section 29-12A-4 NMSA 1978 (limiting disclosure of local crime stoppers program information); Section 29-16-8 NMSA 1978 (providing for confidentiality of DNA information); Section 31-25-3 NMSA 1978 (providing for confidentiality of certain communications between victim and victim counselor); Section 40-8-2 NMSA 1978 (providing for sealing of certain name change records); Section 40-6A-312 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); Section 40-10A-209 NMSA 1978 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and

Enforcement Act); Section 40-13-7.1 NMSA 1978 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); Section 40-13-12 NMSA 1978 (providing for limits on internet disclosure of certain information in domestic violence cases); Section 44-7A-18 NMSA 1978 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record. Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal." If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk

to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as Sealed Pleading or In the Matter of a Sealed Case, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access.

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be

served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Adopted by Supreme Court Order No. 10-8300-007, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-009, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016.]

[NEW MATERIAL]

5-615. Notice of federal restriction on right to receive or possess a firearm or ammunition.

A. **Notice required.** The court shall provide written notice to a person who is the subject of an order set forth in Paragraph B of this rule that the person is prohibited under federal law from receiving or possessing a firearm or ammunition. The notice shall further state that the person's identifying information will be transmitted to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System.

B. **Orders requiring notice.** The notice required under Paragraph A of this rule shall be in the form substantially approved by the Supreme Court and shall be attached to the following:

- (1) An order finding a defendant incompetent to stand trial; and
- (2) An order finding a defendant not guilty by reason of insanity at the time of

the offense.

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders filed on or after May 18, 2016.]

Committee commentary. — Enacted in 2016, NMSA 1978, Section 34-9-19(C) requires the Administrative Office of the Courts to notify a person who has been “adjudicated as a mental defective” or “committed to a mental institution” that the person “is disabled pursuant to federal law from receiving or possessing a firearm or ammunition.” Federal law declares it a crime for a person who has been “adjudicated as a mental defective” or “committed to a mental institution” to, among other things, receive or possess a firearm or ammunition. *See* 18 U.S.C. § 922(g)(4) (“It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

The terms “adjudicated as a mental defective” and “committed to a mental institution” are defined under federal regulation as follows:

Adjudicated as a mental defective.

- (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) is a danger to himself or to others; or
(2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—
(1) A finding of insanity by a court in a criminal case; and
(2) Those persons found incompetent to stand trial

...
Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11.

This rule sets forth the procedure for providing the notice required under Section 34-9-19(C) and identifies the orders under New Mexico law for which notice must be given in a criminal proceeding. *See also* Form 9-515 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition).

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders filed on or after May 18, 2016.]

[NEW MATERIAL]

9-515. Notice of federal restriction on right to possess or receive a firearm or ammunition.

[For use with Rule 5-615 NMRA]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT

STATE OF NEW MEXICO,

v. No. _____

_____,
Defendant.

**NOTICE OF FEDERAL RESTRICTION ON RIGHT TO
POSSESS OR RECEIVE A FIREARM OR AMMUNITION**

TO: _____

ADDRESS: _____

YOU ARE HEREBY NOTIFIED that as a result of the order entered against you in this proceeding, you are prohibited from possessing or receiving a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4).

YOU ARE FURTHER NOTIFIED that the Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about your identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System (NICS).

YOU ARE FURTHER NOTIFIED that you may petition the Court as provided in Section 34-9-19 NMSA 1978 to restore your right to possess or receive a firearm or ammunition and to remove your name from the NICS.

DISTRICT COURT

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders filed on or after May 18, 2016.]

10-166. Public inspection and sealing of court records.

A. **Presumption of public access; scope of rule.** Court records are subject to public access unless sealed by order of the court or otherwise protected from disclosure under the provisions of this rule. This rule does not prescribe the manner in which the court shall provide public access to court records, electronically or otherwise. No person or entity shall knowingly file a court record that discloses material obtained from another court record that is sealed, conditionally under seal, or subject to a pending motion to seal under the provisions of this rule. This rule does not apply to court records sealed under Rule 10-262 NMRA or Section 32A-2-26 NMSA 1978, unless otherwise specified in this rule.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) “court record” means all or any portion of a document, paper, exhibit, transcript, or other material filed or lodged with the court, and the register of actions and docket entries used by the court to document the activity in a case;

(2) “lodged” means a court record that is temporarily deposited with the court but not filed or made available for public access;

(3) “protected personal identifier information” means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver’s license number, and all but the year of a person’s date of birth;

(4) “public” means any person or entity, except the parties to the proceeding, counsel of record and their employees, and court personnel;

(5) “public access” means the inspection and copying of court records by the public; and

(6) “sealed” means a court record for which public access is limited by order of the court or as required by Paragraphs C or D of this rule.

C. **Limitations on public access.** In addition to court records protected pursuant to Paragraphs D and E of this rule, court records in the following proceedings are confidential and shall be automatically sealed without motion or order of the court:

(1) proceedings commenced under the Adoption Act, Chapter 32A, Article 5

NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Subsection A of Section 32A-5-8 NMSA 1978;

(2) proceedings for testing commenced under Section 24-2B-5.1 NMSA 1978;

(3) proceedings commenced under the Family in Need of Court-Ordered Services Act, Chapter 32A, Article 3B NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Sub-subsections (1) through (6) of Subsection B of Section 32A-3B-22 NMSA 1978;

(4) proceedings commenced under the Abuse and Neglect Act, Chapter 32A, Article 4 NMSA 1978. The automatic sealing provisions of this subparagraph shall not apply to persons and entities listed in Sub-subsections (1) through (6) of Subsection B of Section 32A-4-33 NMSA 1978, and disclosure by the Children, Youth, and Families Department as governed by Section 32A-4-33 NMSA 1978;

(5) proceedings commenced under the Children's Mental Health and Developmental Disabilities Code, Chapter 32A, Article 6A NMSA 1978, subject to the disclosure requirements in Section 32A-6A-24 NMSA 1978, and subject to the firearm-related reporting requirements in Section 34-9-19 NMSA 1978; [and]

(6) court records in delinquency proceedings protected by Section 32A-2-32 NMSA 1978; and

(7) proceedings commenced to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978.

The provisions of this paragraph notwithstanding, the docket number and case type for the categories of cases listed in this paragraph shall not be sealed without a court order.

D. Protection of personal identifier information.

(1) The court and the parties shall avoid including protected personal identifier information in court records unless deemed necessary for the effective operation of the court's judicial function. If the court or a party deems it necessary to include protected personal identifier information in a court record, that is a non-sanctionable decision. Protected personal identifier information shall not be made available on publicly accessible court web sites. The court shall not publicly display protected personal identifier information in the courthouse.

(2) The court clerk is not required to review documents for compliance with this paragraph and shall not refuse for filing any document that does not comply with this paragraph. The court clerk is not required to screen court records released to the public to prevent disclosure of protected personal identifier information.

(3) Any person requesting public access to court records shall provide the court with the person's name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification.

E. Motion to seal court records required. Except as provided in Paragraphs C and D of this rule, no portion of a court record shall be sealed except by court order. Any party or member of the public may file a motion for an order sealing the court record. The motion is subject to the provisions of Rule 10-111 NMRA, and a copy of the motion shall be served on all parties who have appeared in the case in which the court record has been filed or is to be filed. Any party or member of the public may file a response to the motion to seal under Rule 10-111 NMRA. The movant shall lodge the court record with the court pursuant to Paragraph F when the motion is made, unless the court record was previously filed with the court or good cause exists for not lodging the court record pursuant to Paragraph F. Pending the court's ruling on the motion, the lodged court record will be conditionally sealed. If necessary to prevent disclosure, any motion, response or

reply, and any supporting documents, shall be filed in a redacted version that will be subject to public access and lodged in a complete, unredacted version that will remain conditionally sealed pending the court's ruling on the motion. If the court denies the motion, the clerk shall return any lodged court records and shall not file them in the court file.

F. **Procedure for lodging court records.** A court record that is the subject of a motion filed under Paragraph E of this rule shall be secured in an envelope or other appropriate container by the movant and lodged with the court unless the court record was previously filed with the court or unless good cause exists for not lodging the court record. The movant shall label the envelope or container lodged with the court "CONDITIONALLY UNDER SEAL" and affix to the envelope or container a cover sheet that contains the information required under Rules 10-112 and 10-114 NMRA and which states that the enclosed court record is subject to a motion to seal. On receipt of a lodged court record, the clerk shall endorse the cover sheet with the date of its receipt and shall retain but not file the court record unless the court orders it filed. If the court grants an order sealing a court record, the clerk shall substitute the label provided by the movant on the envelope or container with a label prominently stating "SEALED BY ORDER OF THE COURT ON (DATE)" and shall attach a file-stamped copy of the court's order. Unless otherwise ordered by the court, the date of the court order granting the motion shall be deemed the file date of the lodged court record.

G. **Requirements for order to seal court records.**

(1) The court shall not permit a court record to be filed under seal based solely on the agreement or stipulation of the parties. The court may order that a court record be filed under seal only if the court by written order finds and states facts that establish the following:

- (a) the existence of an overriding interest that overcomes the right of public access to the court record;
- (b) the overriding interest supports sealing the court record;
- (c) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed;
- (d) the proposed sealing is narrowly tailored; and
- (e) no less restrictive means exist to achieve the overriding interest.

(2) The order shall require the sealing of only those documents, pages, or portions of a court record that contain the material that needs to be sealed. All other portions of each document or page shall be filed without limitation on public access. If necessary, the order may direct the movant to prepare a redacted version of the sealed court record that will be made available for public access.

(3) The order shall state whether the order itself, the register of actions, or individual docket entries are to be sealed.

(4) The order shall specify who is authorized to have access to the sealed court record.

(5) The order shall specify a date or event upon which it expires or shall explicitly state that the order remains in effect until further order of the court.

(6) The order shall specify any person or entity entitled to notice of any future motion to unseal the court record or modify the sealing order.

H. **Sealed court records as part of record on appeal.** Court records sealed under the provisions of this rule that are filed in the appellate courts shall remain sealed in the appellate courts. The appellate court judges and staff may have access to the sealed court records unless otherwise ordered by the appellate court.

I. **Motion to unseal court records.**

(1) Court records sealed under Rule 10-262 NMRA or Section 32A-2-26 NMSA 1978 shall not be unsealed under this paragraph. In all other cases, a sealed court record shall not be unsealed except by court order or pursuant to the terms of the sealing order itself. A party or member of the public may move to unseal a sealed court record. A copy of the motion to unseal is subject to the provisions of Rule 10-111 NMRA and shall be served on all persons and entities who were identified in the sealing order pursuant to Subparagraph (6) of Paragraph G for receipt of notice. If necessary to prevent disclosure, the motion, any response or reply, and supporting documents shall be filed in a redacted version and lodged in a complete and unredacted version.

(2) In determining whether to unseal a court record, the court shall consider the matters addressed in Subparagraph (1) of Paragraph G. If the court grants the motion to unseal a court record, the order shall state whether the court record is unsealed entirely or in part. If the court's order unseals only part of the court record or unseals the court record only as to certain persons or entities, the order shall specify the particular court records that are unsealed, the particular persons or entities who may have access to the court record, or both. If, in addition to the court records in the envelope or container, the court has previously ordered the sealing order, the register of actions, or individual docket entries to be sealed, the unsealing order shall state whether those additional court records are unsealed.

J. Failure to comply with sealing order. Any person or entity who knowingly discloses any material obtained from a court record sealed or lodged pursuant to this rule may be held in contempt of court or subject to other sanctions as the court deems appropriate. [Adopted by Supreme Court Order No. 10-8300-008, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 10-8300-023, temporarily suspending Paragraph D for 90 days effective August 11, 2010; by Supreme Court Order No. 10-8300-037, extending the temporary suspension of Paragraph D for an additional 90 days, effective November 10, 2010; by Supreme Court Order No. 11-8300-010, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites on or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016.]

Committee commentary. — This rule recognizes the presumption that all documents filed in court are subject to public access. This rule does not address public access to other records in possession of the court that are not filed within the context of litigation pending before the court, such as personnel or administrative files. Nor does this rule address the manner in which a court must provide public access to court records.

Although most court records are subject to public access, this rule recognizes that in some instances public access to court records should be limited. However, this rule makes clear that no court record may be sealed simply by agreement of the parties to the litigation. And except as otherwise provided in this rule, public access to a court record may not be limited without a written court order entered in accordance with the provisions of this rule. Unless otherwise ordered by the court, any limitations on the public's right to access court records do not apply to the parties to the proceeding, counsel of record and their employees, and court personnel. While employees of a lawyer or law firm who is counsel of record may have access to sealed court records, the lawyer or law firm remains responsible for the conduct of their employees in this regard.

Paragraph C of this rule recognizes that court records within certain classes of cases should be automatically sealed without the need for a motion by the parties or court order. Most of the classes of cases identified in Paragraph C have been identified by statute as warranting confidentiality. However, this rule does not purport to cede to the legislature the final decision on

whether a particular type of case or court record must be sealed. Paragraph C simply lists those classes of cases in which all court records shall be automatically sealed from the commencement of the proceedings without the need for a court order. Nonetheless, a motion to unseal some or all of the automatically sealed court records in a particular case still may be filed under Paragraph I of the rule.

For some of the classes of cases identified in Paragraph C, automatic sealing is subject to other statutory disclosure or reporting requirements. For example, under NMSA 1978, Section 34-9-19, the administrative office of the courts (AOC) is required to transmit to the federal bureau of investigation's national instant criminal background check system (NICS) information about a court order, judgment, or verdict regarding each person who has been "adjudicated as a mental defective" or "committed to a mental institution" under federal law. Automatic sealing under Paragraph C therefore does not prevent the AOC from transmitting such information to the NICS in the proceedings described in Subparagraphs C(5) and (7). A person who is the subject of the information compiled and reported by the AOC to NICS has a right to obtain and inspect that information. See NMSA 1978, § 34-9-19(K).

Aside from entire categories of cases that may warrant limitations on public access, numerous statutes also identify particular types of documents and information as confidential or otherwise subject to limitations on disclosure. *See, e.g.*, NMSA 1978, § 7-1-4.2(H) (providing for confidentiality of taxpayer information); NMSA 1978, § 14-6-1(A) (providing for confidentiality of patient health information); NMSA 1978, § 24-1-9.5 (limiting disclosure of test results for sexually transmitted diseases); NMSA 1978, § 29-10-4 (providing for confidentiality of certain arrest record information); NMSA 1978, § 29-12A-4 (limiting disclosure of local crime stoppers program information); NMSA 1978, § 29-16-8 (providing for confidentiality of DNA information); NMSA 1978, § 31-25-3 (providing for confidentiality of certain communications between victim and victim counselor); NMSA 1978, § 40-8-2 (providing for sealing of certain name change records); NMSA 1978, § 40-6A-312 (providing for limitations on disclosure of certain information during proceedings under the Uniform Interstate Family Support Act); NMSA 1978, § 40-10A-209 (providing for limitations on disclosure of certain information during proceedings under the Uniform Child-Custody Jurisdiction and Enforcement Act); NMSA 1978, § 40-13-7.1 (providing for confidentiality of certain information obtained by medical personnel during treatment for domestic abuse); NMSA 1978, § 40-13-12 (providing for limits on internet disclosure of certain information in domestic violence cases); NMSA 1978, § 44-7A-18 (providing for limitations on disclosure of certain information under the Uniform Arbitration Act). However, Paragraph C does not contemplate the automatic sealing of such items. Instead, if a party believes a particular statutory provision warrants sealing a particular court record, the party may file a motion to seal under Paragraph E of this rule. And any statutory confidentiality provision notwithstanding, the court must still engage in the balancing test set forth in Subparagraph (1) of Paragraph G of this rule before deciding whether to seal any particular court record.

Paragraph D of this rule recognizes that certain personal identifier information often included within court records may pose the risk of identity theft and other misuse. Accordingly, Paragraph D discourages the inclusion of protected personal identifier information in a court record unless the court or a party deems its inclusion necessary for the effective operation of the court's judicial function. Although the decision to include protected personal identifier information in the court record is a non-sanctionable decision, the rule nonetheless prohibits public access to protected personal identifier information on court web sites and also prohibits the court from publicly displaying protected personal identifier information in the courthouse, which would include docket

call sheets, court calendars, or similar material intended for public viewing.

The court need not review individual documents filed with the court to ensure compliance with this requirement, and the clerk may not refuse to accept for filing any document that does not comply with the requirements of Paragraph D. Moreover, the clerk is not required to screen court records released to the public to prevent the disclosure of protected personal identifier information. However, anyone requesting public access to court records shall provide the court with his or her name, address, and telephone number along with a government-issued form of identification or other acceptable form of identification. The court may also consider maintaining a log of this information.

Paragraphs E and F set forth the procedure for requesting the sealing of a court record. Any person or entity may file a motion to seal a court record, and all parties to the action in which the court record was filed, or is to be filed, must be served with a copy of the motion. Any person or entity may file a response to the motion to seal the court record, but, if the person or entity filing the response is not a party to the underlying litigation, that person or entity does not become a party to the proceedings for any other purpose.

Ordinarily, the party seeking to seal a court record must lodge it with the court at the time that the motion is filed. A lodged court record is only temporarily deposited with the court pending the court's ruling on the motion. Accordingly, a lodged court record is not filed by the clerk and remains conditionally sealed until the court rules on the motion. To protect the lodged court record from disclosure pending the court's ruling on the motion, the movant is required to enclose the lodged court record in an envelope or other appropriate container and attach a cover sheet to the envelope or container that includes the case caption, notes that the enclosed court record is the subject of a pending motion to seal, and is clearly labeled "conditionally under seal." If necessary to prevent disclosure pending the court's ruling, the motion, any response or reply, and other supporting documents should either be lodged with the court as well or filed in redacted and unredacted versions so that the court may permit public access to the redacted pleadings until the court rules on the motion.

Although a lodged court record is not officially filed with the court unless and until the motion to seal is granted, the clerk need not keep lodged court records in a physically separate location from the rest of the court file. In this regard, the rule does not purport to require the clerk to maintain lodged court records in any particular manner or location. As long as the lodged record is protected from public disclosure, each court retains the discretion to decide for itself how it will store lodged court records, and this rule anticipates that most courts will choose to store and protect lodged and sealed court records in the same way that those courts have traditionally stored and protected sealed and conditionally sealed court records filed with the court before the adoption of this rule.

When docketing a motion to seal, the clerk's docket entry should be part of the publicly available register of actions and should reflect that a motion to seal was filed, the date of filing, and the name of the person or entity filing the motion. However, any docket entries related to the motion to seal should avoid including detail that would disclose the substance of the conditionally sealed material before the court has ruled. If necessary to prevent disclosure, in rare cases, a court order granting a motion to seal may provide for the sealing of previous or future docket entries related to the sealed court records provided that the court's register of actions contains, at a minimum, a docket entry containing the docket number, an alias docket entry or case name such as Sealed Pleading or In the Matter of a Sealed Case, and an entry indicating that the pleading or case has been sealed so that anyone inspecting the court's docket will know of its existence.

If the court denies the motion to seal, the clerk will return the lodged court record to the

party, it will not become part of the case file, and will therefore not be subject to public access. However, even if the court denies the motion, the movant still may decide to file the previously lodged court record but it then will be subject to public access.

If the court grants the motion to seal, it must enter an order in accordance with the requirements of Paragraph G. The order must state the facts supporting the court's decision to seal the court record and must identify an overriding interest that overcomes the public's right to public access to the court record and that supports the need for sealing. The rule itself does not identify what would constitute an overriding interest but anticipates that what constitutes an overriding interest will depend on the facts of the case and will be developed through case law on a case by case basis. The rule further provides that the sealing of the court record must be narrowly tailored and that there must not be a less restrictive alternative for achieving the overriding interest. To that end, the rule encourages the court to consider partial redactions whenever possible rather than the wholesale sealing of pages, documents, or court files. Paragraph G also requires the court to specify whether any other matter beyond the court record (such as the order itself, the register of actions, or docket entries) will be sealed to prevent disclosure. The sealing order also must specify who may and may not have access to a sealed court record, which may include prohibiting access to certain parties or court personnel. In addition, the sealing order must specify a date or event upon which the order expires or provide that the sealing remains in effect until further order of the court. Finally, the order must list those persons or entities who must be given notice of any subsequently filed motion to unseal the court record or modify the sealing order.

Any court records sealed under the provisions of this rule remain sealed even if subsequently forwarded to the appellate court as part of the record on appeal. However, sealed court records forwarded to the appellate court as part of the record on appeal may be reviewed by the appellate court judges and staff unless otherwise ordered by the appellate court. Any other motions requesting modification to a sealing order in a case on appeal must be filed with the appellate court.

Motions to unseal previously sealed court records are governed by Paragraph I of this rule. A party or any member of the public may move to unseal a court record, and the rule does not provide a time limit for filing a motion to unseal a court record. Motions to unseal follow the same general procedures and standards used for motions to seal. A copy of a motion to unseal must be served on all persons and entities identified in the sealing order as entitled to receive notice of a future motion to unseal.

Although most court records should remain available for public access, when a court record is sealed under this rule, all persons and entities who do have access to the sealed material must act in good faith to avoid the disclosure of information the court has ordered sealed. That said, the protections provided by this rule should not be used to effect an unconstitutional prior restraint of free speech. But in the absence of a conflict with a countervailing First Amendment principle that would permit disclosure, any knowing disclosure of information obtained from a court record sealed by the court may subject the offending person or entity to being held in contempt of court or other sanctions as deemed appropriate by the court.

[Adopted by Supreme Court Order No. 10-8300-008, for all court records filed on or after July 1, 2010; as amended by Supreme Court Order No. 11-8300-010, effective for all court records filed, lodged, publicly displayed in the courthouse, or posted on publicly accessible court web sites or after February 7, 2011; as provisionally amended by Supreme Court Order No. 16-8300-003, effective for all cases pending or filed on or after May 18, 2016.]

[NEW MATERIAL]

10-171. Notice of federal restriction on right to receive or possess a firearm or ammunition.

A. **Notice required.** The court shall provide written notice to a child who is the subject of an order set forth in Paragraph B of this rule that the child is prohibited under federal law from receiving or possessing a firearm or ammunition. The notice shall further state that the child's identifying information will be transmitted to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System.

B. **Orders requiring notice.** The notice required under Paragraph A of this rule shall be in the form substantially approved by the Supreme Court and shall be attached to the following:

(1) An order appointing a treatment guardian under Section 32A-6A-17 NMSA 1978; and

(2) An order for placement in involuntary residential treatment under Section 32A-6A-22 NMSA 1978.

[Provisionally Adopted by Supreme Court Order No.16-8300-003, effective for all orders issued on or after May 18, 2016.]

Committee commentary. — Enacted in 2016, NMSA 1978, Section 34-9-19(C) requires the Administrative Office of the Courts to notify a person who has been “adjudicated as a mental defective” or “committed to a mental institution” that the person “is disabled pursuant to federal law from receiving or possessing a firearm or ammunition.” Federal law declares it a crime for a person who has been “adjudicated as a mental defective” or “committed to a mental institution” to, among other things, receive or possess a firearm or ammunition. *See* 18 U.S.C. § 922(g)(4) (“It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.”).

The terms “adjudicated as a mental defective” and “committed to a mental institution” are defined under federal regulation as follows:

Adjudicated as a mental defective.

(a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:

(1) is a danger to himself or to others; or

(2) Lacks the mental capacity to contract or manage his own affairs.

(b) The term shall include—

(1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial

. . . .

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution voluntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

27 C.F.R. § 478.11.

This rule sets forth the procedure for providing the notice required under Section 34-9-19(C)

and identifies the orders under New Mexico law for which notice must be given in a children's court proceeding. *See also* Form 10-604 NMRA (Notice of federal restriction on right to possess or receive a firearm or ammunition).

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders issued on or after May 18, 2016.]

[NEW MATERIAL]

10-604. Notice of federal restriction on right to possess or receive a firearm or ammunition.

[For use with Rule 10-171 NMRA]

STATE OF NEW MEXICO
COUNTY OF _____
_____ JUDICIAL DISTRICT
IN THE CHILDREN'S COURT

In the matter of _____, a child. No. _____

**NOTICE OF FEDERAL RESTRICTION ON RIGHT TO
POSSESS OR RECEIVE A FIREARM OR AMMUNITION**

TO: _____

ADDRESS: _____

YOU ARE HEREBY NOTIFIED that as a result of the order entered against you in this proceeding, you are prohibited from possessing or receiving a firearm or ammunition as provided by 18 U.S.C. § 922(g)(4).

YOU ARE FURTHER NOTIFIED that the Administrative Office of the Courts is required under Section 34-9-19(B) NMSA 1978 to report information about your identity to the Federal Bureau of Investigation for entry into the National Instant Criminal Background Check System (NICS).

YOU ARE FURTHER NOTIFIED that you may petition the Court as provided in Section 34-9-19 NMSA 1978 to restore your right to possess or receive a firearm or ammunition and to remove your name from the NICS.

DISTRICT COURT

[Provisionally Adopted by Supreme Court Order No. 16-8300-003, effective for all orders filed on or after May 18, 2016.]

Name

J. Michael Thomas

Phone Number

5756224121

Email

JThomas@da.state.nm.us

Rule Number

5-615

Comment

On the form Notice of Federal Restriction on Right to Possess or Receive a Firearm or Ammunition, would you consider adding a place at the bottom of the notice for a judge to sign or certificate for service? Thank you.

**SUPREME COURT OF NEW MEXICO
FILED**

JUL -6 2016

A handwritten signature in black ink, appearing to be 'JMT', is written over the date stamp.

JUL 12 2016

Comment for proposed rule 2016-063



The proposed rule change (particularly the committee commentary) does not reflect current federal law with regards to the definition of “adjudicated as a mental defective.”

The committee commentary purports to quote federal regulatory guidance on the definition of a mental defective by saying that it includes “(2) Those persons found incompetent to stand trial....” The use of the ellipsis is highly misleading, to say the least, because the actual federal regulation, found at 27 CFR § 478.11 (meaning of words), is “(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.” (current as of July 7, 2016) The shortened version used in the proposed state rule jettisons the limiting language of the federal regulation.

Thus, the current federal regulatory definition does NOT include those found incompetent to stand trial by state courts. Federal courts have given the term “mental defective” a narrow construction. For example, *see U.S. v. B.H.*, 466 F.Supp.2d 1139 (N.D. Iowa December 7, 2006):

Congress did not define the term “mental defective.” *Hansel*, 474 F.2d at 1123. After considering the term at length, however, the Eighth Circuit Court of Appeals defined “[a] mental defective” as “a person who has never possessed a normal degree of intellectual capacity.” *Hansel*, 474 F.2d at 1124. A “mental defective” is to be contrasted with an “insane person.” *Id.* An “insane person” is defined as a person who has “faculties which were originally normal [but were] impaired by mental disease.” *Id.*

.....
Accordingly, because the referee did not find that B.H. never possessed a normal degree of intellectual capacity, the court holds that B.H. was not “adjudged as a mental defective” in September of 2002. 18 U.S.C. § 922(g)(4).

The federal executive branch, apparently unhappy with such rulings, has *proposed* a rule change to “clarify” that the firearm ban applies to those who have been found incompetent by a State court. Such attempted regulatory “clarification” of a statute is itself a matter of great controversy. However, it is important to note that the proposed rule change has not yet taken effect, and may never be implemented. The proposed rule change can be found at:

27 CFR Part 478 (Docket No. ATF 51P; AG Order No. 3411-2014)

RIN 1140-AA47

“The Department also proposes amending the definition of ‘adjudicated as a mental defective’ in 27 CFR 478.11 by removing the reference to articles 50a and 72b of the UCMJ and adding ‘by a court in a criminal case’ to clarify that the term includes federal, state, local and military courts that can find persons incompetent to stand trial or not guilty by reason of mental disease or defect, lack of mental responsibility, or insanity.”

Online at <https://www.gpo.gov/fdsys/pkg/FR-2014-01-07/pdf/2014-00039.pdf#page=1> last viewed July 12, 2016.

In summary, the committee commentary of the proposed rule seems to indicate that the AOC should be sending notice of firearm disqualification every time a person is found incompetent to stand trial. This is contrary to current federal regulation and existing federal case law. Incompetence to stand trial can be caused by temporary and non-dangerous conditions that do not warrant a lifelong loss of 2nd amendment rights. In particular, in misdemeanor courts defendants often get only an abbreviated evaluation of questionable value to make such a momentous finding. Even if the federal regulation is changed, there is likely to be a protracted legal battle in the federal courts before the issue is clarified.

In the meantime, the Committee Commentary should state explicitly that a finding of incompetent to stand trial, alone, can NOT be the basis of the firearms notification. Of course, some people who are found incompetent may qualify for the firearms ban under other prongs of the regulations (such as those found dangerous and committed to a mental institution).

Thank you for your time,

Steven J. Forsberg

Assistant Public Defender

(all opinions are my own and do not necessarily reflect those of the Law office of the Public Defender)



SUPREME COURT OF NEW MEXICO
FILED

JUL 27 2016

July 27, 2016

nmsupremecourtclerk@nmcourts.gov

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

Dear Mr. Moya:

I am writing on behalf of Pegasus Legal Services for Children regarding the provisionally approved rules and forms concerning mental-health dispositions that affect the right to receive or possess a firearm or ammunition under federal law, specifically as applied to children.

Pegasus believes that gun violence in the United States and in New Mexico is a public health crisis and poses dire risk to children and their families. While mass shootings highlight this crisis, death by suicide, domestic violence injuries and death, as well as criminal and accidental shootings impact too many children and their families. As an organization, we believe that gun control is in the interests of our clients.

Yet, we are deeply concerned with the provisionally approved rules and forms concerning mental health dispositions that affect the right to receive or possess a firearm or ammunition under federal law as applied to minors. The proposed rules and forms go beyond the firearm-related reporting requirements in current federal regulations, which arguably do not apply to minors and do not extend to community based treatment. *Compare* 27 C.F.R. 478.11 with proposed amended definition of “adjudicated as a mental defective” and “committed to a mental institution,” and request for comment regarding application to juveniles, 79 Fed. Reg. 774 (proposed January 7, 2014).

Moreover, federal regulations focus on danger to self or others and the inability to manage personal affairs, prongs that do not align with the standard for involuntary commitment or treatment guardianship for minors in New Mexico. For minors in New Mexico, there is no legal nexus between involuntary placement for treatment and dangerousness. Even as applied to adults, some courts have scrutinized the specific findings in individual involuntary commitment cases to determine whether such findings justify infringement on an individual’s right to own a gun. *See* Congressional Research Service <https://www.fas.org/sgp/crs/misc/R43040.pdf> at p. 4-5.

In New Mexico, the Children’s Mental Health and Development Disabilities Code strives to both enable children to access services and to protect their rights. *See* NMSA 32A-6A-2. Involuntary placement of children can be ordered in New Mexico when the child

needs the treatment, is likely to benefit from the treatment and placement is consistent with the child's treatment needs and consistent with the least restrictive means principle. See NMSA 32A-6A-22. Notably absent is any requirement for finding that the child is dangerous. Nor is there any requirement for a finding that the child is unable to manage her affairs (which is not typically assumed for children unless emancipated). Current research indicates that adolescents continue to have significant brain development well into their twenties. See, <http://www.nimh.nih.gov/health/publications/the-teen-brain-still-under-construction/index.shtml> (“[T]he brain doesn't look like that of an adult until the early 20s.”) When we were revising the New Mexico Children's Code, we were cognizant of the need to balance the rights of children, parents and the state, all of whom have interests in ensuring that children's needs are correctly identified and that appropriate treatment is made available. The Children's Code does not assume dangerousness as a necessary component in determining whether a child requires treatment.

Expanding firearm related reporting to include minors challenging residential placement assumes a high risk of error under our current system of services. Placement of children is controlled by adults. By virtue of their minority status, they are not able to “voluntarily” choose what placements will be made available to them. In New Mexico, placements for children are impacted by the decimation of our children's behavioral health system, as well as CYFD's lack of foster home placements. E.g. see, http://www.santafenewmexican.com/news/local_news/balderas-last-behavioral-health-providers-cleared-of-medicaid-fraud/article_747895f7-5660-5be3-84e8-eb3439d2dd37.html (although later cleared, behavioral health providers accused of fraud were shut down); <http://www.abqjournal.com/700247/cyfd-wants-a-more-homelike-wellness-center-for-abused-kids.html> (CYFD acknowledges children are sleeping in offices). Children in New Mexico are often subject to unnecessarily restrictive placements because community based placements, even when they would be appropriate, are not available. Given the current state of resources available to meet the needs of children in New Mexico, children should not be dissuaded from challenging restrictive mental health placements.

Pegasus urges the New Mexico Supreme Court to withdraw the rules and forms related to firearm reporting as applied to minors.

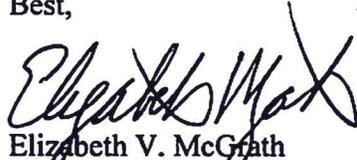
In the event that the Court determines that minors who are subject to involuntary placement and treatment guardianship orders should be included in firearm-related reporting, the gravity of the concerns raised above justify: 1) only reporting children when there is an explicit finding in an involuntary commitment procedure that the child is dangerous; and 2) there is an automatic review of the child's case upon reaching the age of majority so that the firearm disability can be lifted.

For better or worse, children in New Mexico live in families that own guns and use guns for hunting and for employment. Accessing mental health treatment as a minor should not bar legitimate gun ownership as an adult. As an alternative, we urge the court to adopt a system that only reports children when they are subject to an involuntary commitment proceeding and there has been a specific finding of dangerousness and when

there is an automatic review upon a young person's eighteenth birthday to determine whether to remove the firearm disability.

Thank you for your attention.

Best,



Elizabeth V. McGrath
Executive Director



Tara Ford
Legal Director

4622 Rimrock Drive
Las Cruces, New Mexico 88012

July 30, 2016

Mr. Joey D. Moya
Clerk, New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

SUPREME COURT OF NEW MEXICO
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AUG 1 - 2016



SUPREME COURT OF NEW MEXICO
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AUG 1 - 2016



Dear Mr. Moya:

This letter replies to the Court's call for public comments on Rule Proposal 2016-063, *Mental-health Related Dispositions That Affect the Right to Receive or Possess a Firearm or Ammunition under Federal Law [Rules 1-079, 1-131 (new), 5-123, 5-615 (new), 10-166, and 10-171 (new) NMRA and new Forms 4-940, 9-515, and 10-604 NMRA]*.

I. Civil Proceedings (Proposed Rule 1-131).

The Court proposes that six types of orders issued by trial courts in civil proceedings would be reported to the Federal Bureau of Investigation (FBI).¹ The persons subject to these orders would be prohibited from possessing a firearm or ammunition under the provisions of Title 18, United States Code, Section 922(g)(4).² While one of these would be an order of commitment under NMSA § 43-1-11, *et seq.*, triggering the "committed to a mental institution" disqualifier, the remaining five orders could qualify under the "adjudicated as a mental defective" provision.

The term "adjudicated as a mental defective" is defined in Title 27, Code of Federal Regulations, Section 478.11.³ It necessarily includes a finding by a Court that "as a

¹ "Orders requiring notice. The notice required under Paragraph A of this rule shall be in the form substantially approved by the Supreme Court and shall be attached to the following:

(1) An order appointing a guardian for an adult under Section 45-5-304(C) NMSA 1978;
(2) An order appointing a conservator for an adult under Section 45-5-407(I) NMSA 1978;
(3) An order of commitment under Sections 43-1-11, -12, or -13 NMSA 1978;
(4) An order appointing a treatment guardian under Section 43-1-15 NMSA 1978;
(5) An order for involuntary protective services or protective placement under Section 27-7-24 NMSA 1978; and
(6) An order to participate in assisted outpatient treatment under Chapter 84 of New Mexico Laws of 2016."
Proposed Rule 1-131.

² "It shall be unlawful for any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce." 18 USC § 922(g)(4).

³ "Adjudicated as a mental defective. (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease: (1) Is a danger to himself or to others; or (2) Lacks the mental capacity to contract or manage his own affairs.

result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease” the person is either “a danger to himself or to others” or “lacks the mental capacity to contract or manage his own affairs.”

In order for the trial court’s order to qualify as such an adjudication, it is essential that the Judge make these specific findings. The proposed rule presumes that if a trial court appoints a conservator or guardian, for example, that the Judge has done so. Without explicit findings on these elements, however, the record does not necessarily support that conclusion. Indeed, a conservator of property could be appointed under circumstances that do not necessarily meet the definition of “adjudicated as a mental defective.”⁴ The Court should require that trial courts make specific findings on these elements, with a sufficient factual basis on the record, for an order to qualify and be reported to the FBI under this rule.

Additionally, under some circumstances, a person subject to one of these orders may qualify as an “unlawful user of or addicted to any controlled substance” and qualify under that separate provision of law as a prohibited possessor of firearms or ammunition.⁵ The Court should consider implementing a procedure for trial courts to make that finding under appropriate facts and report it to the FBI.

II. Criminal Proceedings (Proposed Rule 5-615).

Under the proposed rule, two categories of criminal defendants would also be subject to the reporting requirement, those adjudged incompetent to stand trial and those found not guilty by reason of insanity at the time of the offense.⁶ While the Federal regulatory definition tracks with a New Mexico verdict of “not guilty by reason of

(b) The term shall include—(1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.” 27 CFR § 478.11.

⁴ “Upon petition and after notice and hearing in accordance with the provisions of the [Uniform] Probate Code, the court may appoint a conservator as follows: appointment of a conservator may be made in relation to the estate and financial affairs of a person for reasons other than minority if the court finds that the person has property that may be wasted or dissipated unless proper management is provided; that funds are needed for the support, care and welfare of the person or those entitled to be supported by him; that protection is necessary or desirable to obtain or provide funds; and that: (1) the person is incapacitated; or (2) the person is unable to manage his estate and financial affairs effectively for reasons such as confinement, detention by a foreign power or disappearance.” NMSA § 45-5-401. Further, a person may be deemed “incapacitated” under the Probate Code based upon “physical illness or disability,” not just mental incapacity. NMSA § 45-5-101(F). This would clearly not qualify under 27 CFR § 478.11.

⁵ “It shall be unlawful for any person . . . who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)) . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.” 18 USC § 922(g)(3).

⁶ “Orders requiring notice. The notice required under Paragraph A of this rule shall be in the form substantially approved by the Supreme Court and shall be attached to the following: (1) An order finding a defendant incompetent to stand trial; and (2) An order finding a defendant not guilty by reason of insanity at the time of the offense.” Proposed Rule 5-615

insanity at the time of commission of an offense”⁷, it does not align well with respect to persons found incompetent to stand trial.

In particular, New Mexico courts conduct proceedings on competency to stand trial in criminal cases under NMSA 31-9-1, *et seq.*; however, the cited portion of this Federal regulation in the commentary (“[t]hose persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility . . .”) applies specifically to court-martial proceedings under the Uniform Code of Military Justice (“[p]ursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.”).

The Federal regulation, however, provides these two categories non-exclusively. A finding that a person is not competent to stand trial by a New Mexico court may lead to prohibited person status. However, as in the civil proceedings discussed above, the Court must make findings that “as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease” the person is either “a danger to himself or to others” or “lacks the mental capacity to contract or manage his own affairs.” Only with these findings has the defendant been “adjudicated as a mental defective.” Accordingly, the final rule should require that trial courts make those particular findings, with a sufficient factual basis on the record, before reporting this determination to the FBI.

As with the civil proceedings, some criminal defendants may qualify as an “unlawful user of or addicted to any controlled substance” and qualify under that separate provision of law as a prohibited possessor of firearms or ammunition. This could potentially apply not only to incompetent defendants, but also to users and addicts who are competent to stand trial. The Court may consider providing for trial courts to enter findings and report these persons to the FBI.

III. Children’s Court Proceedings (Proposed Rule 10-171).

As with adult civil proceedings, the Court proposes designating two categories of children for reporting under this rule.⁸ While involuntary residential treatment, at least arguably, constitutes “commitment to a mental institution” within the meaning of Title 27, Code of Federal Regulations, Section 478.11⁹, the appointment of a treatment guardian is less clear. To ensure clarity, the Children’s Court should enter a finding supported by sufficient facts on the record that “as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease” the child is either “a danger to

⁷ Rule of Criminal Procedure for District Courts 5-602.

⁸ “Orders requiring notice. The notice required under Paragraph A of this rule shall be in the form substantially approved by the Supreme Court and shall be attached to the following: (1) An order appointing a treatment guardian under Section 32A-6A-17 NMSA 1978; and (2) An order for placement in involuntary residential treatment under Section 32A-6A-22 NMSA 1978.” Proposed Rule 10-171.

⁹ The term “mental institution” broadly “[i]ncludes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.” 27 CFR § 478.11.

Mr. Moya
July 30, 2016
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himself or to others” or “lacks the mental capacity to contract or manage his own affairs” before reporting this determination to the FBI.

As with adult civil proceedings, some children may qualify as an “unlawful user of or addicted to any controlled substance” and qualify under that separate provision of law as a prohibited possessor of firearms or ammunition. The Court may consider providing for Children’s Courts to enter findings and make a report to the FBI.

I appreciate the opportunity to comment on this proposed rule change.

Very truly yours,



Kevin M. Dent

Your Name
anonymous

Phone Number
5055551234

Email
none@gmail.com

Proposal Number
2016-063

Comment

I would highly recommend that a separate Adult Guardianship/Conservatorship committee be formed by the Supreme Court. This separate committee is needed since the Mental Health Rules Committee does not have the subject matter expertise to consider any rule changes to the Probate Code that deal with adult G/C issues. There are several issues that are likely to need consideration by the Supreme Court in the near future (such as changes to the annual reporting, creating a cover sheet, requiring viewing of training materials and other form changes), so creating a separate committee would be extremely beneficial for this area of the law.

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A handwritten signature in black ink, appearing to be 'J. M.', with a horizontal line extending to the right.

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AUG 3 - 2016

A handwritten signature in black ink, appearing to be 'Jonathan L. Ibarra', written in a cursive style.

Your Name
Jonathan L. Ibarra

Phone Number
5053693600

Email
jonathanl.ibarra@lopdnm.us

Proposal Number
2016-063

Comment
See attached pdf. Thank you.

AUG 3 - 2016

Mr. Moya,

I write concerning Proposal 2016-063. I have big concerns with the proposal.



I agree with what Mr. Forsberg previously sent in his comment on the rules. As he (and others) noted, the quotes in the commentary of the rules omit important language. Of more concern to me is something also addressed by Mr. Forsberg – these rules would mean that people found incompetent on cursory evaluations in Metro Court would be stripped of their constitutional rights – that is patently unreasonable. (Since Magistrate competency cases go to District Court, I assume, perhaps incorrectly, that they get a better evaluation. If they get the same cursory review that Metro cases get, then the same comment applies there.)

Though I am not crazy about the idea, I do think that there is some sense to having such orders in cases where a person has been specifically found to have “mental retardation” as defined by §31-9-1.6, as that at least requires “deficits in adaptive behavior.” But I have had clients who were incompetent because of certain types of disabilities that made them unable to properly assist in their own defense at trial, but who are not maladapted such that they shouldn’t have the right to possess a firearm for protection. And I fear that these rules do not do a sufficient job in distinguishing between those.

I don’t have an issue with enacting rules that require courts to do these types of things when the situation calls for it under the federal statutes and regulations as they actually stand. (Well, that’s not entirely true. I think this all puts defense attorneys in a difficult position of trying to protect one constitutional right [to have to be competent to stand trial] at the expense of another constitutional right [to bear arms], which is absolutely going to cause conflict between attorneys and their clients. However, at this point I’m not sure that can be helped.) But I do have an issue with trying by rule to unilaterally expand such federal requirements. Any error in the implantation of the NM statute through these rules needs to be on the side of protecting the constitutional rights of the citizens of New Mexico. Thus, we shouldn’t try to shoehorn anything into the rules. Either it clearly applies, or it doesn’t.

If the Legislature intended things to be included that aren’t included by the rules, they know how to amend statutes. We can’t, and shouldn’t, do it for them.

Thank you for your consideration.

Jonathan L. Ibarra



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August 5, 2016

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

SUPREME COURT OF NEW MEXICO
FILED

AUG - 5 2016

Dear Sir;

This letter responds to the invitation for public comment on provisionally approved amendments to the Rules of Civil Procedure for the District Courts and Civil Forms, the Rules of Criminal Procedure for the District Courts and Criminal Forms, and the Children's Court Rules and Forms, to address the implementation of House Bill 336 (2016).

The National Rifle Association of America, Inc. ("NRA") is a nonprofit, voluntary membership organization dedicated to preserving and defending the Second Amendment to the United States Constitution. Insofar as the proposed Rules and Forms represent a misapplication or overextension of the federal disqualifications in 18 U.S.C. § 922(g)(4), the NRA members in New Mexico have a clear interest in the promulgation of these amendments as they will adversely affect law-abiding citizens in contravention of the right to keep and bear arms in the New Mexico State Constitution and the Second Amendment.

Background

The federal Gun Control Act of 1968 ("GCA"), disqualifies certain persons from the receipt or possession of a firearm or ammunition. The disqualifications in 18 U.S.C. § 922 include persons who have been "adjudicated a mental defective" or "committed to a mental institution." 18 U.S.C. § 922(g)(4). A separate, distinct disqualification in Section 922 applies to any person "who is an unlawful user of or addicted to any controlled substance." The GCA does not define these terms but they are defined by federal regulation, 27 C.F.R. 478.11, discussed below. The mental health disqualification in 18 U.S.C. § 922(g)(4) is not limited in time to the period in which the person was subject to the adjudication or was actually committed, but applies permanently, regardless of whether the person has recovered or has been successfully treated, and regardless of whether the underlying illness or condition is linked to an increased likelihood of violent behavior. Once a person meets the adjudication or commitment qualifications in federal law, the disqualification attaches until the person successfully petitions for the restoration of firearm rights. For example, in *Tyler v. Hillsdale Cnty. Sheriff's Dep't*, 775 F.3d 308 (6th Cir. 2014),

vacated and reh'g en banc granted (6th Cir. Apr. 21, 2015), a man who had been institutionalized for less than one month attempted to purchase a firearm 26 years later, but remained prohibited despite having no recurrence of his depressive episode or mental illness.

New Mexico doesn't have a state-level mental health disqualification for possession of a firearm or ammunition; however, there is a state mental health disqualification for a concealed carry permit. N.M. Stat. Ann. § 29-19-4 and N.M. Code R. § 10.8.2.21. This uses language similar, but not identical, to what is found in 18 U.S.C. § 922(g)(4) – the applicant for a permit cannot have “been adjudicated mentally incompetent or committed to a mental institution.” This state law does not define “adjudicated mentally incompetent” or “committed to a mental institution.”

Information provided by state agencies regarding persons subject to relevant disqualifying court orders is entered into the National Instant Criminal Background Check System (NICS) by the Federal Bureau of Investigation (FBI). The FBI administers NICS, and in states like New Mexico that are not a “point of contact” state, the FBI conducts all background checks for firearm transactions. A background check using NICS is required by federal law before a licensed dealer or other federal licensee may transfer or sell a firearm, subject to limited exceptions. 18 U.S.C. § 922(t). Unless a matching record is returned by the NICS databases, the transaction may proceed immediately. If the NICS returns a match of the prospective transferee's information with that in records in NICS, the transaction does not proceed and there may be additional review and evaluation by a NICS Examiner. The dealer and the prospective purchaser-transferee are not given the underlying reason for why the transaction is flagged. (For more information on how NICS operates, see the FBI's webpage, *About NICS*, at <https://www.fbi.gov/services/cjis/nics/about-nics>.)

In some circumstances, persons who are subject to the mental health disqualifications may seek a restoration of their firearm rights and the removal of their identifying information from the NICS database. At this time, the restoration of firearm rights process is essentially nonexistent at the federal level. The GCA, 18 U.S.C. §§ 922(g), 922(n) and 925(c), provides that the United States Attorney General has the authority to grant relief from firearm disabilities upon a finding that the person is not likely to act in a manner dangerous to public safety and that granting relief would not be contrary to the public interest. The Attorney General has delegated this authority to the Bureau of Alcohol, Tobacco, Firearms and Explosives (“ATF”). Since 1992, the ATF no longer accepts applications to remove firearm disabilities because ATF's annual appropriation prohibits the expending of any funds to investigate or act upon such applications. See Consolidated Appropriations Act, 2014, Pub. L. No. 113–76, 128 Stat. 5, 57 (2014), and *Tyler*, 775 F.3d 308, 312 (“Since that time, Congress has affirmatively retained the bar on funding the relief-from-disabilities program.”).

Persons who are wrongfully denied their Second Amendment rights when NICS *incorrectly* determines that the person is prohibited at the time of a firearm transaction may also seek redress by initiating a Voluntary Appeal File (VAF), established to provide a way for the person to request that NICS maintain information to clarify their identity or past events to prevent future extended delays or erroneous denials on firearm transfers. The NICS Section recommends that an affected person wait at least 30 days before initiating this appeal. Early in 2016, employees handling these appeals had been redeployed to other tasks, with a reported backlog of some 7,100 denial appeals. NRA-ILA, *No Way Out: Feds Stop Processing NICS Denial Appeals*, January 22, 2016, at <https://www.nra.org/articles/20160122/no-way-out-feds-stop-processing-nics-denial-appeals>. However, according to the FBI's website, at this time the “NICS Section's Appeal Services Team is currently processing appeal cases received in June 2015 and Voluntary Appeal File (VAF) cases received in January 2015.” FBI, Criminal Justice Information Services Division,

NICS Appeals, <https://www.fbi.gov/services/cjis/nics/national-instant-criminal-background-check-system-nics-appeals>.

Besides this inoperative federal process, persons who are no longer incapacitated on mental health grounds may apply to have their firearm rights restored using a state procedure. In 2008, The NICS Improvement Amendments Act of 2007 (“NIAA”), Pub. L. 110-180, 121 Stat. 2559 (2008) (codified at 18 U.S.C. 922 note), was signed into law. This federal legislation sought to improve state-level reporting of prohibiting mental health adjudications and commitments and other prohibiting background information to NICS, and established standards for state programs to allow eligible persons to have their firearm rights restored.

Among other things, to be eligible for the NICS Improvement Act grants, a state must certify that it has implemented a program enabling persons who have been adjudicated a mental defective or committed to a mental institution to obtain relief, in appropriate circumstances, from the firearms disabilities resulting from such adjudication or commitment. NIAA, §§ 103 and 105. When a state grants a relief from disability application, the adjudication or commitment is “deemed not to have occurred” for the purposes of 18 U.S.C. §§ 922(g)(4) and (d)(4). NIAA, § 105(b). However, this process is not available in all states – indeed, until the passage of House Bill 336 in 2016, it was not an option in New Mexico.

With respect to state records and NICS, NICS does not maintain a database of medical records or information on an individual’s mental health condition, diagnosis, or treatment. “When a record of a person prohibited from possessing a firearm as a result of mental health issues (i.e., a person who has been involuntarily committed to a mental institution or adjudicated a ‘mental defective’ by a court, board, or other lawful authority) is entered in the NICS Index, the entry contains only a name, other biographic identifiers, like date of birth, and codes for the submitting entity and prohibited category. The NICS Index does not contain medical records or medical information.” See “Questions and Answers” at Bureau of Justice Statistics, *The NICS Improvement Amendments Act of 2007*, <http://www.bjs.gov/index.cfm?ty=tp&tid=49#enacted>.

New Mexico’s House Bill 336 (“HB 336”), effective as of May 18, 2016, sets up a state restoration-of-rights process based on the NIAA criteria. Both the FBI and the affected person must be given notice regarding the issuance of a state court order that qualifies as prohibiting based on the person being “adjudicated a mental defective” or “committed to a mental institution.” Because New Mexico has no state-level mental health disqualification, HB 336 uses the existing definitions and language in federal law; specifically, those in 27 C.F.R. 478.11. To the extent that HB 336 addresses mental health-related court orders that lead to disqualifications for firearm possession, it does so *exclusively* by reference to the federal law.

The key definitions are “adjudicated as a mental defective,” “committed to a mental institution,” and “mental institution” found in 27 C.F.R. 478.11:

- Adjudicated as a mental defective.** (a) A determination by a court, board, commission, or other lawful authority that a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition, or disease:
- (1) Is a danger to himself or to others; or
 - (2) Lacks the mental capacity to contract or manage his own affairs.
- (b) The term shall include—
- (1) A finding of insanity by a court in a criminal case; and

(2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b.

Committed to a mental institution. A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily. The term includes commitment for mental defectiveness or mental illness. It also includes commitments for other reasons, such as for drug use. The term does not include a person in a mental institution for observation or a voluntary admission to a mental institution.

Mental institution. Includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.

It is crucial to keep in mind that not every assessment regarding mental illness or incapacity is sufficient to trigger the federal disqualification. Federal law has carefully delineated the specific requirements, including the prerequisite for a formal “adjudication” or a formal “commitment” to a “mental institution.” Adjudications and commitments connote due process protections of notice, a hearing, a right to representation, and a reasoned determination based on evidence regarding whether a deprivation of liberty and other rights is justified and appropriate in the circumstances.

HB 336 directs that only the orders in state law proceedings which come within the scope of the federal definitions be reported, by the Administrative Office of the Courts (“AOC”), to the FBI for inclusion in NICS. HB 336 *does not specify* which state law orders meet this threshold for reporting, only that the orders must be disqualifying under federal law, 18 U.S.C. § 922(g)(4).

The New Mexico Supreme Court has [requested public comments](#) on provisionally approved amendments, retroactive to May 18, 2016, to the Rules of Civil Procedure for the District Courts and Civil Forms, the Rules of Criminal Procedure for the District Courts and Criminal Forms, and the Children’s Court Rules and Forms – Rules 1-079, 1-131 (new), 5-123, 5-615 (new), 10-166, and 10-171 (new) NMRA and new Forms 4-940, 9-515, and 10-604 NMRA. These proposed Rules and Forms are intended to prepare the AOC to comply with the requirements of HB 336 by permitting disclosure of orders so that NICS notification may be made, specifying the kinds of court orders that are NICS-reportable, and establishing the form of notice to the affected person.

Orders designated as “reportable” under the proposed Rules.

Proposed Rules 1-131, 5-615, and 10-171 list the kinds of orders that are reportable to NICS (and thus disqualifying for firearm purposes). Under the proposed Rule 1-131, these orders are:

- An order appointing a guardian for an adult under N.M. Stat. Ann. § 45-5-304(C);
- An order appointing a conservator for an adult under N.M. Stat. Ann. § 45-5-407(I);
- An order of commitment under N.M. Stat. Ann. §§ 43-1-11, -12, or -13;
- An order appointing a treatment guardian under N.M. Stat. Ann. § 43-1-15;
- An order for involuntary protective services or protective placement under N.M. Stat. Ann. § 27-7-24; and
- An order to participate in “assisted outpatient treatment” under Chapter 84 of New Mexico Laws of 2016.

Pursuant to proposed Rules 5-615 and 10-171, other orders that are NICS-reportable are:

- An order finding a defendant incompetent to stand trial;
- An order finding a defendant not guilty by reason of insanity at the time of the offense;
- An order appointing a treatment guardian for a child under N.M. Stat. Ann. § 32A-6A-17; and
- An order for placement in involuntary residential treatment under N.M. Stat. Ann. § 32A-6A-22.

The resulting firearm disqualification would apply retroactively, “for all orders issued on or after May 18, 2016.”

Comments

1. Rules are Overinclusive; Inconsistent with State Law.

The orders referred to in the proposed Rules and Forms must be the kinds of orders that are disqualifying under federal law, applying the definitions in 27 C.F.R. 478.11 as required by HB 336. To the extent that the proposed Rules compel the reporting of orders or judicial determinations which are not firearm-disqualifying under federal law, the Rules and Forms exceed the scope of what is authorized by HB 336.

One commenter, Steven J. Forsberg, has already pointed out that new Rule 5-615, the accompanying Form 9-515, and Commentary propose that the AOC include, as persons whose information is reportable to NICS, those found “incompetent to stand trial.” As Mr. Forsberg notes, the current federal regulation’s language regarding those found “incompetent to stand trial” has been cited in a truncated form in the various Committee Commentaries, and that proposed Rule 5-615 improperly expands the scope of the federal disqualification beyond what is actually permitted by both HB 336 and federal law.

The same kind of misapplication or overgeneralization of the federal law applies to many of the orders listed in proposed Rules 1-131, 5-615, and 10-171. While some specific orders made under the statutory provisions listed might qualify under the definitions in 27 C.F.R. 478.11, not all of these orders are invariably disqualifying. No order or finding should count unless the adjudication or commitment is based on a finding of marked subnormal intelligence or a mental illness, mental condition, or mental disease; further, commitments for observation, voluntary admissions to a mental institution, and any commitments that are not “to a mental institution” do not count.

The specific proposed disqualifying orders, and the reasons why they fail to come within the scope of HB 336/federal law, are discussed in greater detail below.

Guardianship, N.M. Stat. Ann. § 45-5-304(C). An order appointing a guardian under this section may occur because a person is “totally incapacitated or is incapacitated only in specific areas.” N.M. Stat. § 45-5-101(F) defines an “incapacitated person” as including one who demonstrates “either partial or complete functional impairment by reason of ... *physical illness or disability, chronic use of drugs, chronic intoxication or other cause*, except minority, to the extent that the person is unable” to manage the person’s personal affairs, or estate or financial affairs (emphasis added).

Clearly then, orders may be made respecting a person who is physically ill or physically disabled but who does not “lack[] the mental capacity to contract or manage his own affairs” and has no other mental impairment. Persons who are chronic users of drugs or intoxicants are not, as such, disqualified pursuant to HB 336/18 U.S.C. 922(g)(4) unless the specific requirements of 27 C.F.R. 478.11 apply. (The federal firearm disqualifications law has a separate provision regarding persons who are substance abusers.) Persons who are subject to a guardianship order are not, by virtue of that order, institutionalized. As a result, it is incorrect to equate any guardianship order with an adjudication that a person is a “mental

defective” and even more inaccurate to hold such orders as analogous to “commitment to a mental institution.”

Including guardianship orders as disqualifying may conflict with existing state law, which specifically acknowledges that an “incapacitated person” subject to an order nonetheless “retains *all* legal and civil rights except those which have been expressly limited by court order or have been specifically granted to the guardian by the court,” and any order must be limited to “only ... the extent necessitated by the person’s actual functional mental and physical limitations.” N.M. Stat. Ann. § 45-5-301.1 (emphasis added). An automatic and permanent curtailment of firearm rights on the issuance of any order under this provision was never contemplated.

Conservatorship, N.M. Stat. Ann. § 45-5-407(I). Conservatorship orders have no inherent or necessary relationship to the mental health of the person on whose behalf the order is made, and are focused on the protecting the property of the person subject to the order. For example, an order appointing a conservator “may be made in relation to the estate and financial affairs of a minor” because of the minor’s inability to manage funds or property due to his or her minority, or in relation to the estate and financial affairs of an adult, if the adult has property that may be wasted or dissipated or where funds are needed for the adult’s support. In addition to minority or physical “incapacity,” conservatorship orders may be granted due to an adult person’s “confinement, detention by a foreign power or disappearance.” N. M. Stat. Ann. § 45-5-401(B). None of these justifications is a necessary consequence of mental illness, a mental condition, or mental disease. A court making the order appointing a conservator is not first required to make any finding respecting the subject’s mental health: the underlying requisite finding is that the subject person is incapable of managing his or her estate or financial affairs, in specific areas or more generally. (And this, too, is not invariably the case: the appointment of a temporary conservator “shall not be evidence of incapacity” to manage one’s affairs under Section 45-5-408(D).) As is the case with a guardianship order, a conservatorship order neither initiates nor occasions an involuntary detention or institutionalization of the subject person.

A person for whom a conservator has been appointed expressly “retains all legal and civil rights except those that have been specifically granted to the conservator by the court.” N. M. Stat. Ann. 45-5-407(K). Because of this, and because these orders do not align with a prohibiting adjudication or commitment under federal law, it is inappropriate to include conservatorship orders as orders within the scope of the proposed Rules.

Commitment, N.M. Stat. Ann. § 43-1-13. A person may be involuntarily “committed” to “residential care” or “residential habitation.” Under HB 336/federal law, “commitment to a mental institution” excludes commitment to facilities that are not “mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.”

N.M. Stat. Ann. § 43-1-13 authorizes the involuntary provision of residential care (“residential habilitation services”) to a “developmentally disabled” adult, or a person “so greatly disabled that residential services would be in the person’s best interest.” These orders are limited to a maximum duration of six months. N.M. Stat. Ann. § 43-1-13(G). “Developmental disability” is defined separately from “mental disorder” and means “mental retardation, cerebral palsy, autism or neurological dysfunction” or a similar disorder; however, “greatly disabled” is not defined. “Residential treatment or habilitation program” includes care, treatment or “habilitation” rendered at a mental health or developmental disabilities facility, but this may also take place within a “supervisory residence or nursing home when the client resides on the premises.” To the extent that the order addresses persons who are

physically but not mentally disabled, or requires residential placement in a setting other than a “mental institution,” the order is likely outside of the scope of the disqualification in federal law, thus, under HB 336.

Quite apart from whether the order is disqualifying under federal law, N.M. Stat. Ann. § 43-1-5 indicates such orders might not be intended to be prohibiting under state law or to operate as a proxy for an adjudication of mental incompetence: “[n]either the fact that a person has been accepted at or admitted to a hospital or institutional facility, nor the receiving of mental health or developmental disability treatment services, shall constitute a sufficient basis for a finding of incompetence or the denial of any right or benefit of whatever nature which he would have otherwise.” Firearm rights fall within “a right or benefit of whatever nature.”

Treatment guardianship, N. M. Stat. §§ 43-1-15 (adult) and 32A-6A-17 (minor). A treatment guardian is appointed for an adult for a very limited purpose. When a course of treatment of psychotropic medication, psychosurgery, convulsive therapy, experimental treatment, or a certain behavior modification program is proposed, or when the adult is thought to be incapable of giving informed consent, a treatment guardian may be appointed to make treatment decisions only on behalf of the adult. Such order is limited to a maximum duration of one year.

The operative finding necessary for these orders is evidence that the person is “not capable of making” his or her own “treatment decisions.” This finding is not the functional equivalent of a person being “adjudicated a mental defective,” as it lacks the necessary elements underlying that legal finding. Further, there is no requirement that the person be confined or held in a “mental institution” to undergo any treatment imposed or agreed to by the guardian. (Indeed, § 43-1-15(G) specifically envisions clients “who are not a resident of a medical facility.”).

Regardless of whether these orders qualify as prohibiting under 27 C.F.R. 478.11, state law provides, expressly, that the fact that a person has been “receiving of mental health or developmental disability treatment services” does not constitute a sufficient basis for a finding of incompetence or the denial of any right or benefit of whatever nature which he would have otherwise.” N.M. Stat. Ann. § 43-1-5. As pointed out in the context of other orders, this supports the view that such orders are not intended as a proxy for an adjudication of mental incompetence in other settings and for other purposes.

In the case of a child and a treatment guardianship, this order has even less relationship to a finding of mental illness or defect because “capacity” is defined relative to age rather than the presence of mental illness or disorder: “capacity” means “a child’s ability to understand and appreciate proposed health treatment, risks and alternatives, and to make and communicate an informed health care decision. N. M. Stat. Ann. § 32A-6A-4(C). These orders are limited to a one-year period.

Significantly, Section 32A-6A-5 emphasizes that the child’s treatment or having “been accepted at or admitted to a hospital or institutional facility shall not constitute a sufficient basis for a finding of incompetence or the denial of a right or benefit of any nature that the child would otherwise have,” and Section 32A-6A-16(E) provides that a “determination of lack of capacity under the Children’s Mental Health and Developmental Disabilities Act shall not be evidence of incapacity *for any other purpose.*” (Emphasis added.) State law clearly does not contemplate that the provision of such services be used as a generic proxy for any necessary findings to support a restriction of rights while the child remains a minor or in the future, after the minor attains his or her majority.

Protective services or protective placement, N. M. Stat. Ann. § 27-7-24. Protective services or placement for an incapacitated or protected person may be ordered by a court on an involuntary basis

through an emergency order or through appointment of a guardian/conservator. This is not restricted to individuals suffering from a mental illness or mental condition, but extends to abused, neglected or exploited adults, and those with physical or developmental conditions. N.M. Stat. Ann. §§ 27-7-24(L) and (O). “Protective placement” is defined as the adult’s placement in a private residence, with a health-care worker or with some other residential or nonresidential entity for “personal, custodial or health care,” or in a “hospital, nursing home, residential care facility, group home, foster care home, assisted living facility or other facility licensed by the state, other than a jail or detention facility. N. M. Stat. Ann. § 27-7-24(J), (P) and (R). “Protective services” is defined to include “social, psychiatric, health, legal and other services provided on a short-term basis” that detect, correct or eliminate abuse, neglect or exploitation. N.M. Stat. Ann. §§ 27-7-24(Q), 27-7-21(B). These orders are limited in duration to a six-month period. N.M. Stat. Ann. § 27-7-26(G).

The inclusion of these orders as reportable to NICS based on the federal mental health prohibitors raises several concerns. It is evident that these orders lack any inherent or indispensable relationship to the mental health or mental condition of the person. The orders may be made to ameliorate abuse, neglect or exploitation, or physical or developmental conditions, and the corrective measures include services unrelated to mental health treatment. Further, any “placement” may involve a variety of settings far removed from a “mental institution,” such as a private residence, group home, foster care home, assisted living facility, and residential care home. N. M. Stat. Ann. § 27-7-24 (G).

Second, orders under N. M. Stat. Ann. § 27-7-24(A) refer to and include an “emergency order.” Under Section 27-7-25, this means an ex parte order authorizing the provision of involuntary protective services or placement, limited in effect to ten days. The “issuance of an emergency ex-parte order shall not deprive the adult of any rights except those provided for in the order.” N. M. Stat. Ann. § 27-7-25(F)(4). More generally, state law restricts a court making *any* order under Section 27-7-24 to “only that intervention that it finds to be least restrictive of the adult’s liberty and rights,” pursuant to Section 27-7-24(B). The proposed Rule 1-131, however, would make these orders uniformly (and permanently) disqualifying regarding the subject’s firearm rights.

Assisted outpatient treatment, [Chapter 84 of New Mexico Laws of 2016](#). “Assisted outpatient treatment” refers to outpatient services ordered by a court based, in part, on a finding that a person has a “mental disorder.” “Mental disorder” is defined by categorically excluding persons with a “developmental disability” (“mental retardation, cerebral palsy, autism or neurological dysfunction that requires treatment or habilitation similar to that provided to persons with mental retardation”). N. M. Stat. Ann. §§ 43-1-3(O) and (H).

“Assisted outpatient treatment” services go beyond medication or medical therapies and extend to periodic blood tests, urinalysis, “day or partial-day programming activities,” “educational and vocational training or activities,” and “supervision of living arrangements.” Any court order is limited in duration to one year. Sections 10 and 13(B) state that an “assisted outpatient treatment order shall not be construed as a determination that the respondent is incompetent,” and a person’s failure to comply with an order of assisted outpatient treatment “is not grounds for involuntary civil commitment.”

In order to be disqualifying for firearm rights under federal law, treatment has to involve commitment “to a mental institution.” More than two years ago, on January 7, 2014, the ATF published in the Federal Register notice of a [proposed rulemaking](#) that sought public comments on amending the definitions in 27 C.F.R. 478.11 regarding “committed to a mental institution,” so as to apply to involuntary outpatient treatment, and to include involuntary commitments that occurred when the person was a minor. Public comments, including comments submitted by The Consortium for Citizens with Disabilities (CCD)

Rights Task Force, recommended against expanding the regulatory language to include involuntary outpatient treatment and commitments involving minors. The CCD's comments note: "Outpatient commitment, by definition, does not include individuals committed to an institution." Interpreting the statute's language "to include individuals who are not committed to an institution at all, but rather are committed to outpatient treatment," is "inconsistent with the plain meaning of the statute and thus exceeds ATF's authority." The CCD comments add, further, that "[i]n contrast to involuntary inpatient commitment standards, involuntary outpatient commitment (IOC) standards apply primarily to individuals who are *not* dangerous. Virtually all states with IOC laws authorize IOC for individuals who are not dangerous." (Emphasis in original.) *Comments Submission on ATF NPRM re NICS database & outpatient commitment*, Consortium for Citizens with Disabilities (CCD) Rights Task Force, April 7, 2014 at <http://www.regulations.gov/document?D=ATF-2014-0002-0193>.

The amendments put forward in this 2014 proposed rulemaking by the ATF have not been implemented and are not in effect.

The concept of restricting the collateral effects of involuntary outpatient treatment orders appears to be carried forward in the state law, which directs that an outpatient treatment order "shall not be construed as a determination" (adjudication) "that the respondent is incompetent." Quite apart from this, because the definition of "mental disorder" used in the "assisted outpatient treatment" state law excludes persons who would potentially come within 27 C.F.R. 478.11's definition of "adjudicated as a mental defective," these orders, if they are reportable to NICS at all, would have to rest on the "committed to a mental institution" definition. Accordingly, what is being proposed in the Rules – the blanket inclusion of "assisted outpatient treatment" orders as orders that meet the standards under HB 336 and federal law – considerably exceeds what is authorized by that legislation.

Placement in involuntary residential treatment, N. M. Stat. Ann. § 32A-6A-22. A "child" under 18 years of age may be ordered to receive treatment or habilitation because of the child's "mental disorder" or a "developmental disability." These orders extend in scope to children who are disabled, but not mentally disabled or mentally ill, because "developmental disability" includes any chronic disability attributable to a "physical impairment" that affects mobility, the capacity for independent living, or economic self-sufficiency. "Residential treatment or habitation program" includes care at a developmental disabilities facility, hospital, clinic, institution, supervisory residence or nursing home. N.M. Stat. Ann. §§ 32A-6A-4(H), (K), and (AA). Any order imposing an involuntary placement is limited to 60 days, pursuant to Section 32A-6A-22(M).

These orders are not disqualifying because they don't invariably rest on an adjudication of mental defect or mental illness, and because placement or treatment is not restricted "to a mental institution." Moreover, to the extent that these orders may be viewed as having collateral consequences, under existing state law these cannot apply as "evidence of incapacity for any other purpose," or to remove or restrict the child's rights, at that time or subsequently, given Sections 32A-6A-5 and 32A-6A-16(E). As mentioned previously, state law does not contemplate that the provision of such services be used as a generic proxy for any necessary findings in support of a restriction of rights while the child remains a minor, or to restrict rights later, when the child becomes an adult.

Order of incompetency to stand trial. Pursuant to N. M. Stat. Ann. § 31-9-1.2, a court may make various orders on incompetency in criminal proceedings. It may find that a defendant is not competent to proceed but find, also, that the defendant is not dangerous, in which case the court may dismiss the charges and "advise" (but not require) that the district attorney consider proceedings under the Mental Health and Developmental Disabilities Code. N.M. Stat. Ann. § 31-9-1.2 (A). Accordingly, findings of

incompetence to stand trial, under state law, are not the functional equivalent of an adjudication as a mental defective, still less an involuntary commitment.

More to the point, as indicated by a previous commenter, the federal definition of “adjudicated as a mental defective” applies only to those persons “found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850a, 876b,” and only those persons become prohibited with respect to firearm purchases or acquisitions. The proposed Rule and Committee Commentary instead identify *any* court determinations of incompetency to stand trial as court orders that are reportable for NICS purposes. Although changes to this federal definition have been proposed (in the notice of a [proposed rulemaking](#) amending 27 C.F.R. 478.11, referred to earlier), at this time the definition remains unchanged and is limited to only the listed findings of incompetency to stand trial.

2. Restriction, no remedy.

If these non-compliant orders are retained as firearm-prohibiting in the draft Rules, any termination, revocation or expiration of the order will still require that the subject person, by dint of separate proceedings and at the cost of their own time and money, seek a restoration of firearm rights by petitioning a court. As long as the original record remains in the NICS database, the federal prohibition is entirely unaffected by any durational restrictions or revocation of the state court order. As noted, many of the orders proposed for inclusion are statutorily limited to a relatively short time (as short as ten days), but will permanently deprive the subject person of his or her firearm rights. For this reason it is critically important that the proposed Rules and Forms be carefully drafted to ensure that only truly disqualifying orders are included.

The inclusion of overbroad categories of court orders as prohibiting for firearm rights purposes may give rise to another serious problem. Under HB 336, only a person who has been “adjudicated as a mental defective or committed to a mental institution and is therefore, pursuant to federal law, disabled from receiving or possessing a firearm or ammunition” is entitled to seek relief from the court to restore the person’s firearm rights. Persons who are subject to orders that do not qualify under this language, based on the federal law, may be barred from seeking a restoration of rights using the process established by HB 336.

3. Limitations on disclosure contrary to HB 336.

The proposed Rules, Rules 1-079(C)(9), 5-123(C)(6) and 10-166(C)(6), impose a complete ban on public disclosure regarding any “proceedings to remove a firearm-related disability under Section 34-9-19(D) NMSA 1978.” As drafted, there are no exceptions, although the definition of “public” in the existing Rules excludes “court personnel.” Rules 1-079(C)(9), 5-123(C)(6) and 10-166(C)(6).

This language fails to comply with HB 336, which requires, at Section 2(I), that court personnel make a limited disclosure of any court order granting relief from a firearm-related disability to the AOC and to any state agency that may be responsible for maintaining records regarding the petitioner. Disclosure must also be made to the U.S. Attorney General for the purpose of updating and correcting the NICS databases, to remove the disqualification imposed by the initial, disqualifying court order. This is the intent and purpose of the notification provided for in Section 2(I). Without this communication to update and correct NICS, a court order granting relief from a firearm-related disability is meaningless.

The recommendation is that the Rules and Forms indicate that any disclosure limitation applies “subject to the firearm-related reporting requirements in Section 34-9-19(I) NMSA 1978.”

4. Orders involving minors.

Federally licensed firearm dealers are prohibited from selling or disposing of a firearm to a person aged less than 18 years old pursuant to federal law, 18 U.S.C. § 922(b)(1), and minors are prohibited, in most circumstances, from possessing a handgun, 18 U.S.C. § 922(x). To the extent that the proposed Rules and Forms direct notifying NICS about, or giving notice to, a child (e.g., new Rule 10-171), transmitting the child's identifying information to the FBI for entry into the NICS databases is largely irrelevant because a child, as a matter of federal law, is already prohibited by virtue of age alone.

More broadly, the ATF's [proposed rulemaking](#) in 2014 regarding amendments to the definitions in 27 C.F.R. 478.11 regarding "adjudicated as a mental defective" and "committed to a mental institution" sought comments on whether to amend the existing definitions to add, for purposes of a NICS background check, commitments of persons under the age of 18 as qualifying commitments "to a mental institution," and whether "adjudicated as a mental defective" should include an adjudication that occurred when the person was under the age of 18. Considerable arguments were made against this proposal. Children may be subjected to a mental health adjudication or committed involuntarily with the consent of someone else – a parent or legal guardian – thus bypassing any due process opportunity to challenge the adjudication or commitment. A child is less likely than an adult to have the resources to contest any such proceedings and less likely to appreciate the serious collateral consequences that may ensue.

Another entity, Pegasus Legal Services for Children, has already submitted comments advising against interpreting HB 336 to extend to orders made with respect to minors, and requesting that the Court "withdraw the rules and forms related to firearm reporting as applied to minors."

For these reasons – in addition to the specific state law language on the limited effect of orders involving children – orders made with respect to a child should not be included in the proposed Rules and Forms.

5. Notice and retroactivity.

Rule 1-131 states the notice requirement would be "effective for all orders issued on or after May 18, 2016." Given the December 31, 2016 date by which the Committee must make a final recommendation (and an actual implementation date sometime in 2017), persons may be subject to orders made in 2016 without being informed of the resulting firearm disqualification at the time the restriction is imposed. Had the person been aware of the potential disqualifying effect of the order, it may have changed whether the person contested the order or taken other steps (such as agreeing to voluntary, rather than involuntary, commitment). This has potential for creating a trap, as the notice isn't contemporaneous and the order concerned may not be one that aligns with those effecting a firearm prohibition under federal law.

6. Opportunity to correct records.

HB 336, at Section 2(K), guarantees that a person who is the subject of information compiled or transmitted by the AOC has a right to correct information compiled or transmitted. This opportunity does not appear to be addressed in the proposed Rules and Forms.

Conclusion

Individuals that pose a real danger to themselves or others should not have access to firearms. However, the "overall contribution of mental disorders to the total level of violence in society is exceptionally small," and most mental health professionals agree that the federal law's mental health prohibitors are not based on evidence linking commitment or mental deficiency to an increased risk of violence. U.S. Department of Health and Human Services, *Mental Health: A Report of the Surgeon General*, National

Institute of Mental Health, 1999, at <https://profiles.nlm.nih.gov/ps/access/NNBBHS.pdf>. Overreporting of court orders for inclusion in the NICS database because there may be a link between the process used and mental incompetence in some specific cases ignores the requirements of HB 336 and the underlying federal law. It will give rise to real problems for persons who are wrongfully or incorrectly reported.

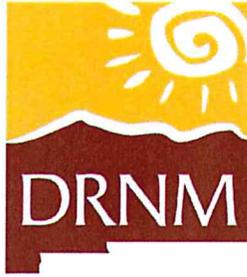
Under the proposed Rules, AOC personnel have no discretion as to which orders are included as appropriate for submission into the NICS databases. The information reported to NICS is limited to information necessary to identify the person. It's unclear whether and the extent to which FBI Examiners conduct an in-depth review of incoming state records to ensure the records comply with the relevant federal standards on mental health prohibitions. A person inappropriately reported into NICS who later seeks to purchase a gun (or who simply acquires guns through inheritance) may face federal felony charges for being a prohibited person in possession of a firearm (punishable, under 18 U.S.C. § 924(a)(2), by a fine of up to \$250,000 and/or imprisonment of up to ten years). At the very least, he or she effectively loses their Second Amendment rights and has to navigate a time-consuming federal appeal procedure, currently addressing appeals filed more than 18 months ago.

Increasing the kinds of orders that have this prohibiting effect has other consequences. It creates a disincentive to seek voluntary treatment, under the apprehension that seeking to remedy any mental condition results in a federal and state gun prohibition. Any disparity between what is prohibited federally and how this prohibition is interpreted in terms of the state law generates confusion and uncertainty. Overinclusion perpetuates the notion that all mentally ill persons are liable to be dangerous and violent, and are appropriately denied their civil rights without any justification other than this perception. Lastly, it affords no meaningful opportunity, from a policy standpoint, for reducing gun violence.

Thank you for this opportunity to participate and provide comments on the proposed Rules and Forms.

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August 5, 2016

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SUPREME COURT OF NEW MEXICO
FILED

AUG - 5 2016

RE: Rules and Forms Concerning Mental-Health Related Dispositions that Affect the Right to Receive or Possess Firearm of Ammunition Under Federal Law

Dear Mr. Moya:

I am writing on behalf of Disability Rights New Mexico (DRNM). DRNM has been the state's designated protection and advocacy system since 1979; its mission is to protect, promote and expand the rights of New Mexicans with disabilities. DRNM hereby submits its comments regarding the Rules and Forms Concerning Mental-Health Related Dispositions that Affect the Right to Receive or Possess Firearm of Ammunition Under Federal Law that the Court approved provisionally on May 18, 2016.

This Rule implicates difficult issues, as gun violence in the United States generally and New Mexico in particular has reached crisis proportions. According to an article from a local media outlet, citing "numbers from The Centers for Disease Control Prevention, [24/7 Wall Street](#) found that New Mexico was ninth for gun violence. According to the website, "the firearm death rate in 2013 was 15.4 per 100,000. Fatalities include homicides, suicide and accidents..." <http://krqe.com/2015/06/12/new-mexico-ranked-in-top-10-of-national-gun-violence-list/>. However, it has not been within the purview of Disability Rights New Mexico to take a position on gun control issues.

DRNM agrees with this Court that the federal definitions "...do not align perfectly with the findings required in state proceedings." Bar Bulletin – July, 2016 - Volume 55, No. 27 at p. 15. DRNM is gravely concerned that the provisionally approved rules and forms concerning mental health dispositions affecting the right to receive or possess a firearm or ammunition are overbroad. All the statutes but the civil commitment statute make findings and conclusions that are narrower than the federal definition of "adjudicated as a mental defective" or contain no basis at all for a finding that an individual is an "adjudicated as a mental defective". DRNM is concerned that the breadth of the reporting requirements of this rule perpetuates the myth that all people with mental illness are dangerous and further stigmatizes anyone who has ever been

identified as having a mental illness or other cognitive impairment. DRNM believes the notice and reporting requirements of the provisional rule must be more narrowly tailored to fit within the scope of each New Mexico statute from which the listed orders originate.

ADULTS

1. An order appointing a guardian for an adult under Section 45-5-304(C)

In New Mexico, “[g]uardianship for an incapacitated person shall be used only as is necessary to promote and protect the well being of the person...and shall be ordered only to the extent necessitated by the persons’ actual functional mental and physical limitations.” In addition, “the individual retains all legal and civil rights except those which have been expressly limited by court order or have been granted to the guardian by the court.” See NMSA 1978, § 45-301.1. Further, a court is supposed to make specific findings about the nature and scope of an individual’s functional limitations in order to craft a guardianship order narrowly tailored to address the individual’s functional limitations, and to do so by clear and convincing evidence. See Definitions, § 45.5-101 C, F, G and H, 45-5 5-24 A and C.

In DRNM’s experience, the findings and conclusions required by this section often do not examine the scope of the individual’s functional impairments. This occurs in spite of the clear demand imposed by Section 45-5-304(C), which requires specific findings and this Court’s recognition that individuals have capacity to do or decide some things and not others. , 1980-NMGA-096, 94 N.M. 656, 615 P.2d 271. DNRM frequently *In the Matter of Estate of William Grady Head* sees so called “plenary” or full guardianships (in which the court gives the guardian the power to exercise all legal rights and duties on behalf of a protected person).¹ DRNM sees far fewer guardianship orders that find a person is “incapacitated only in specific areas as alleged in the petition.” § 45-1-301 C (1). Without specific findings that the court should use to narrowly tailor a guardianship order, it is not possible to identify what a person can manage on his/her own and what the person cannot manage alone. Thus, a guardianship order under § 45-5-304 C will likely will not address whether the person’s functional limitations include those that implicate the ability to own a firearm or ammunition. Each order would need an individualized assessment to determine whether the scope of the order included restrictions impacting the person’s Second Amendment right to bear arms.

2. An order appointing a conservator for an adult under section 45-5-407(I)

The statute governing conservatorships is structured similarly to the guardianship statute. Like the guardianship statute, even when a conservator is appointed, the individual “retains all civil rights except those specifically granted to the conservator by the court.”DRNM does not see how an order appointing a conservator, whether limited or full, in any way implicates an individual’s right to receive or possess a firearm or ammunition.

¹ DRNM has considerable experience with the guardianship process in New Mexico. DRNM receives Civil Legal Services funds to provide representation to “protected persons” in circumstances when that individual alleges the guardianship is no longer needed, the guardianship is more restrictive than necessary, or the guardian appears to abuse his/her authority.

The conservatorship statute requires specific findings about the particular areas in which a person is unable to manage his or her affairs. But here, of course, the affairs in question are the person's estate or finances, not whether the person has the ability to manage any other kind of personal matter. *See generally*, §45-5-407. The process requires a court visitor to assess which financial affairs the individual can handle independently, those that the individual can manage with support or assistance, and those financial affairs the person cannot manage even with support. *Id* at D. If the court appoints a conservator based on these findings, the court is required to specify the scope of conservatorship based on the identified functional limitations related to the person's ability to manage financial affairs. This narrow finding of functional limitation does not address any capacity other than the ability to manage finances.

The federal government itself is not consistent about whether a person "adjudicated as a mental defective" should be reported to the NICS when a determination is made that the individual lacks capacity to manage their financial affairs. When the Veterans Administration appoints a fiduciary when a person is found to lack capacity to manage his/her affairs, it reports to the NICS. However, the Social Security Administration has no such reporting requirement for a person determined to need a representative payee to manage the individual's social security check. Submission of Mental Health Records to NICS and the HIPAA Privacy Rule, Congressional Research Service, <https://www.fas.org/sgp/crs/misc/R43040.pdf> at p. 3.

There are three inconsistencies that make a NICS reporting requirement improper for New Mexico conservatorship proceedings. First, the law regarding conservatorship requires specific findings related to capacity to handle finances. The findings are related to managing money only, nothing else.

Second, whether a report is made to NICS depends on if a finding about capacity to manage money is made by a court, the Veterans Administration or the Social Security Administration. Many DRNM clients have representative payees rather than conservators. Occasionally, an individual has a fiduciary through the Veterans Administration. An individual should not be stripped of a constitutional right based on which tribunal made the decision about the person's capacity to handle financial matters.

Third, DRNM has not seen a clearly established link between the ability to manage one's financial affairs and the capacity to safely receive or possess a firearm or ammunition. For these reasons, DRNM believes Rule 1-131B (2) should be struck from the list of the types of orders requiring notice.

3. An order of commitment under sections 43-1-11, -12, or 13.

This is New Mexico's civil commitment statute where under specific and limited circumstances a court can order an individual to remain involuntarily in a psychiatric treatment facility (subparagraphs 11 or 12), or a facility providing residential care for those with intellectual disabilities (subparagraph 13). This is likely the only statute listed in provisional Rule 1-131 that may fit within the federal definition of "adjudicated as a mental defective." When a court orders an involuntary civil commitment, the court must find by clear and convincing evidence that "as a result of a mental disorder, the client presents a likelihood of serious harm to the client's own self or others." NMSA 1978, § 43-1-11 E (1). The federal rules requires reporting an order to

the NICS if the person is “a danger to himself or to others...”, 27 C.F.R. §478.11. The New Mexico civil commitment statute does not use the term “dangerous.” That term has a specific meaning in the law governing competency to stand trial. A defendant is considered to be dangerous only if he or she is alleged to have committed one or more of the enumerated crimes. §31-9-1.2 D. DRNM understands that in the vernacular, likelihood of serious harm to self or others is considered to be “dangerous” behavior.

However, it is necessary to analyze and compare HB 336, which mandates disclosing to NICS the name of the individual and the fact that they were the subject of a civil commitment order with the confidentiality requirements of the New Mexico Mental Health and Developmental Disabilities Code, NMSA 1978, § 43-1-19 and the Health Insurance Portability and Accountability Act (HIPAA) of 1996.

The HIPAA Privacy Rule preempts state law about sharing confidential health information unless a state law offers more protection, or is more stringent, than HIPAA. 45 C.F.R. § 160.203, 45 C.F.R. §160.202. The New Mexico Mental Health and Developmental Disabilities Code section covering disclosures is more protective of mental health information than HIPAA is because identifies only four circumstances under which protected mental health information may be disclosed without the individual’s consent. § 43-1-19 B. In other words, the New Mexico Mental Health Code provisions about disclosure of protected mental health information offer stringent protections recognized by federal law. The disclosure provisions were amended by SB 113, the Assisted Outpatient Treatment Act, which was signed on March 9, 2016. The new provision permits disclosure without the patient’s consent when the disclosure is made pursuant to the Assisted Outpatient Treatment Act. Section 16 B (3). No other amendment was made to the section of the Mental Health Code governing disclosure of information.

HB 336, which mandates disclosure of mental health information protected by the New Mexico Mental Health Code, was signed on February 28, 2016. It did not expressly amend the Mental Health Code to permit disclosure of the fact of a civil commitment order without the individual’s consent.

The result of this analysis shows that provisional Rule 1-131 A (3), which orders the court to provide notice to NICS that a civil commitment order was entered against a named individual directly conflicts with the confidentiality provisions of an existing statute. As such, DRNM believes subsection A (3) of the provisional Rule is unenforceable.²

4. An order appointing a treatment guardian under Section 43-1-15.

The purpose of the treatment guardianship provision of the Mental Health and Developmental Disabilities Code addresses only one issue: to assure that **no mental health treatment is administered without informed consent**. The treatment guardian only has those “powers and duties enumerated in the [mental health] code, unless the treatment guardian has also been

² The publication “Submission of Mental Health Records to NICS and the HIPAA Privacy Rule, Congressional Research Service”, <https://www.fas.org/sgp/crs/misc/R43040.pdf> is a useful guide for this analysis.

appointed a guardian under the Uniform Probate Code pursuant to provisions of Section 5-5-303 NMSA 1978.” § 43-1-15 L.

When assessing a person’s capacity to consent to treatment, the court examines whether the individual is “capable of understanding the proposed nature of treatment to be administered and its consequences and is capable of informed consent.” § 43-1-15 A.³ It is the only assessment the court is making. In addition, there is no presumption of incapacity to make mental health treatment decisions solely because an individual has been involuntarily committed to a treatment facility. *Id.*

It is important to note that while a petition for involuntary civil commitment requires a finding that an individual “as a result of a mental disorder...presents a likelihood of serious harm to the client’s own self or others.” *Id.* at E, the treatment guardian provisions in § 43-1-15 require no such finding. All that is required is for a court to find that the individual does not have the capacity to make mental health treatment decisions.

Further, it is not necessary for a person to be committed to a treatment facility to be the subject of a treatment guardian petition. See § 43-1-15 G. When this Court appointed its Ad Hoc Committee on Rules for Mental Health Proceedings in August 2013, the first assignment was to draft rules governing the treatment guardianship process because the process is not articulated in the statute.⁴ The Committee drafted and this Court approved the procedure for those seeking appointment of a treatment guardian regardless of whether the person was the subject of civil commitment proceeding due to a likelihood of serious harm to self or others or in the community. Rule 1-130 NMRA.

There is no requirement that a person be found likely to harm him or herself or others to be the subject of a treatment guardian order. Further, the order is expressly limited to a determination that a person lacks capacity to make mental health treatment decisions which does not otherwise implicate the person’s ability to contract or generally manage his or her personal affairs. § 43-1-15 L. DRNM asks the Court to eliminate treatment guardianship orders from the list for which NICS reporting is required.

5. An order for involuntary protective services or protective placement under Section 27-7-24.

An order for involuntary protective services or placement through the Adult Protective Services Act is a limited order issued in emergency circumstances when the individual doesn’t have the ability to consent to receive protective services or protective placement. § 27-7-24 A. Protective services or placements must be short term with an express termination date. § 27-7-19 A (6). The Aging and Long Term Services Department must make arrangements for follow up care as

³ The Mental Health Care Treatment Decisions Act , enacted in 2006 , defines “capacity” as “an individual’s ability to understand and appreciate the nature and consequences of proposed mental health treatment, including significant benefits and risks and alternatives to the proposed mental health treatment and to make and communicate an informed mental health treatment decision.” § 24-7B-3 C NMSA 1978.

⁴ The undersigned has been a member of the Ad Hoc committee since its inception.

required. *Id.* After the emergency order is entered, the Department may seek the appointment of a guardian or conservator. *Id.* at F.

The structure of this statute demonstrates several things. First, an order for involuntary services or placement is an emergency short term order with a specific termination date. This could be viewed similarly to a temporary restraining order or preliminary injunction that gives emergency relief, but requires a hearing on the merits. There is nothing in the statute that says a finding of incapacity for emergency services is a general finding of incapacity. The statute does not appear to require that the individual be represented by counsel in an emergency protective proceeding. The law appears to recognize that when the emergency is over, there may no longer be a question of incapacity. This analysis is further supported by the requirement that the Department file a separate petition for guardianship or conservatorship if it believes the person still lacks capacity to take care of personal or financial matters. Only with the due process protections afforded by these proceedings may a court find by clear and convincing evidence that an individual lacks capacity for certain decisions or activities. *See generally* § 45-5-301 et seq. It is reasonable to conclude that a temporary order for emergency placement is not an order in which a finding has been made that a person lacks capacity for any purpose other than the circumstances of that emergency. Otherwise, there would be no need for a subsequent guardianship or conservatorship proceeding. DRNM asks the Court to eliminate treatment guardianship orders from the list for which NICS reporting is required.

6. An order to participate in assisted outpatient treatment under Chapter 84 of New Mexico Laws of 2016.

The recently passed assisted outpatient treatment act was hotly contested for approximately ten years before it was enacted in March of this year. A person for whom such an order has been entered has neither been “adjudicated as a mental defective” nor “committed to a mental institution.” DRNM believes there is absolutely no basis in either federal law or regulation or state law to require such an order to be reported to the NICS.

First and foremost, the assisted outpatient treatment act does not require a court to make a finding about a person’s capacity. 2016 New Mexico Laws Ch. 84 (S.B. 113), Section 3. The primary criterion for a court to order participation in assisted outpatient treatment is that the individual has “demonstrated lack of compliance with treatment for a mental disorder.” *Id.* There is absolutely no requirement that a court evaluate an individual’s capacity to make mental health treatment decisions. In fact “[a]n assisted outpatient treatment order shall not be construed as a determination that the respondent is incompetent.” Section 10.

Second, an assisted outpatient treatment order cannot meet the federal reporting requirement as the individual has not been “adjudicated a mental defective [because he or she] lacks the mental capacity to contract or manage his own affairs.” 27 CFR. §478.11(2) and has not been determined to be “incompetent.” Section 10. Orders issued pursuant to this act cannot be used to strip someone of his/her Second Amendment rights thus must be eliminated from the list of orders this Court requires to be reported to NICS .

Though DRNM believes the Court needs no further reasons to delete orders issued pursuant to this act from the list, DRNM wishes to inform the Court about other problematic provisions of this act as they relate to the federal reporting requirements.

First, by design, this is an unenforceable order. *See* Section 13 B. The proponents of this act rely on the so called “black robe effect” – a judge telling a person to go to treatment - for compliance with a court’s order. “A respondent’s failure to comply with an order of assisted outpatient treatment is not grounds for involuntary civil commitment or a finding of contempt of court, or for the use of physical force or restraints to administer medication to the respondent.” *Id.* A court has absolutely no authority to order a respondent to do anything. If there is a concern that the “respondent’s condition is likely to result in serious harm to self or likely to result in serious harm to others and that immediate detention is necessary to prevent such harm, *the qualified professional shall certify the need for detention and transport of the respondent for emergency mental health evaluation and care pursuant to the provisions of Paragraph (4) of Subsection A of Section 43–1–10 NMSA 1978.*” (requiring use the provisions of the long standing Mental Health and Developmental Disabilities Act, with emphasis added). A qualified mental health professional is empowered to act, not a court. Yet, this unenforceable order can be used to strip someone of his/her Second Amendment rights.

Second, the assisted outpatient treatment act does not require a court to find that a person is likely to seriously harm himself or inflict serious harm to others, which would arguably meet the federal requirement of being “a danger to self or others. 27 C.F.R. § 478.11. It is one of three possible alternative criteria, not a required one. 2016 New Mexico Laws Ch. 84 (S.B. 113), Section 3.

Third, this act cannot be used statewide at this time, and may never be. The act permits implementation only in jurisdictions where “a district court is a party to a memorandum of understanding with a participating municipality or county.” SECTION 4. Implementation requires a financial commitment from the municipality or county to pay for court costs, including the cost of counsel for the respondent, associated with the proceeding. Upon information and belief, only the second and third judicial districts are considering such memoranda at this time. If, for example, the second judicial district enters into the required memorandum, a person living in Bernalillo County may be subject to such an order in the future, but someone residing just across the county line won’t be.

For the foregoing reasons DRNM asks the court to delete assisted outpatient treatment orders from the list of those required to be reported to the NICS.

CHILDREN

Disability Rights New Mexico had the opportunity to review the comments submitted by Pegasus Legal Services for Children (Pegasus) regarding the provisional rules and forms applicability to children. DRNM worked with Pegasus and other stakeholders to substantially amend the Children’s Mental Health and Developmental Disabilities Code in 2007. DRNM is thus very familiar with the scope and intent of that statute and wholeheartedly agrees with

Pegasus' analysis and conclusions. DRNM joins Pegasus and urges this Court to withdraw the rules and forms related to firearm reporting as applied to minors.

Thank you for your consideration.

Respectfully submitted,

A handwritten signature in cursive script that reads "Nancy Koenigsberg". The signature is written in black ink and is positioned above the typed name.

Nancy Koenigsberg
Senior Attorney



STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

JAMES A. NOEL
COURT EXECUTIVE OFFICER
CLERK OF THE COURT

SUPREME COURT OF NEW MEXICO
FILED

AUG 10 2016

Joey D. Moya, Clerk of Court and Chief Counsel
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504

Re: Proposal 2016-063-Mental-Health Related Dispositions That Affect the Right to Receive or Possess a Firearm or Ammunition under Federal Law [Rules 1-079, 1-131 (new), 5-123, 5-615 (new), 10-166, and 10-171 (new) NMRA and new Forms 4-940, 9-515, and 10-604 NMRA].

Dear Mr. Moya:

The Second Judicial District Court (“SJDC”) respectfully submits its comments regarding legal considerations of the provisionally approved rules and forms concerning mental-health dispositions that affect the right to receive or possess a firearm or ammunition under federal law. As mental health and firearms law are emerging areas of American jurisprudence, this Court’s meaningful review of Rule 2016-063 through the commentary process is warranted. SJDC presents these comments in an effort to address due process considerations, judicial discretion, and confidentiality.

BACKGROUND

SJDC currently reports data to the Administrative Office of the Court’s (“AOC”) Judicial Information Division (JID) on felony convictions, domestic violence protective orders, and involuntary commitments for federal reporting requirements to the National Instant Criminal Background Check System (NICS) as required by the Brady Handgun Violence Prevention Act of 1993, 18 U.S.C. § 922(g). The federal statute, 18 U.S.C. § 922(g)(4), prohibits any person “who has been adjudicated as a mental defective or who has been committed to a mental institution” from possessing firearms or ammunition. Newly enacted New Mexico law, HB 336, focuses upon ensuring that dispositions regarding mental health are reported, in particular those adjudicating a person to be a “mental defective” and dispositions committing a person to a mental institution. NMSA 1978, § 34-9-19(B). In New Mexico, the terms “adjudicated as a

defective” and “committed to a mental institution” have the same meaning as those terms are defined in federal regulations. 27 C.F.R. 478.11.¹

SJDC is developing the relevant data points to enter into Odyssey regarding “each person who has been adjudicated as a mental defective” as defined by federal law. 27 C.F.R. 478.11. What it means to be “adjudicated as a mental defective,” though, is not clear enough for consistent application. HB 336 permits a “person adjudicated as a mental defective” or “committed to a mental institution” to petition the court to remove that person’s firearm-related disabilities and restore the person’s right to receive and possess a firearm and ammunition and the right to be eligible for a concealed handgun license. NMSA 1978, § 34-9-19 (D). HB 336, however, does not afford individuals notice upon the filing of a case that a person, “adjudicated mental defective” or a person “committed to a mental institution,” will be prohibited from receiving or possessing a firearm or ammunition. Notification to all interested parties upon the filing of a case will comport with due process and provide a balanced process to all parties. The rule as written limits judicial discretion in determining which cases are reported. SJDC comments that judges should have the discretion to decide what persons should be “adjudicated as a mental defective” or “committed to a mental institution” for purposes of NICS firearm reporting as defined by NMSA 1978, § 34-4-19(M) and 27 C.F.R. § 478.11, and such cases should be reported after notice and an adjudicative hearing. Accordingly, notices and corresponding Orders are appropriate solely in cases for registry. SJDC provides comments in the following areas: (1) notice to affected persons; (2) judicial discretion, and (3) confidentiality.

NOTICE TO AFFECTED PERSONS

The Second Amendment of the United States Constitution protects the right of individuals to keep and bear arms. This right is limited, however, to the extent that it applies to persons with mental illness. The United States Supreme Court has previously suggested in dicta that the mentally ill have a limited Second Amendment right that is not afforded the strict constitutional scrutiny typical of fundamental rights. *District of Columbia v. Heller*, 554 U.S. 570 (2008). There is a split of authority as to which level of scrutiny applies to statutes that affect mentally ill Americans’ right to bear arms. See Fredrick E. Vars & Amanda Adcock Young, *Do the Mentally Ill Have a Right to Bear Arms?*, 48 Wake Forest L. Rev. 1, 3 (2013) (noting judicial disagreement following *Heller* and analyzing gun control laws under the various constitutional standards of review). Nevertheless, firearm restrictions pertaining to mental illness have been upheld.

¹ Under federal law, a court, board, commission or other lawful authority must make a determination that “a person, as a result of marked subnormal intelligence, or mental illness, incompetency, condition or disease: (1) is a danger to himself or others; or (2) lacks the mental capacity to contract or manage his own affairs.” Adjudicated as a mental defective also includes: (1) A finding of insanity by a court in a criminal case; and (2) Those persons found incompetent to stand trial or found not guilty by reason of lack of mental responsibility pursuant to articles 50a and 72b of the Uniform Code of Military Justice, 10 U.S.C. 850 a, 876b.” See 27 CFR § 478.11.

This Court should consider what procedures due process requires for the purposes of disqualifying a person from gun purchase or possession. It is in the interest of all affected parties that notification should occur upon the filing of the case. An adjudication for deprivation of property should be preceded by notice and opportunity for hearing to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

There is a due process component to future considerations of firearms rights revocations, and that the rights conferred by the Second Amendment cannot be “withdrawn by government on a permanent and irrevocable basis without due process.” *United States v. Rehlander*, 666 F.3d 45, 48 (1st Cir. 2012). In *Rehlander*, the First Circuit held that the procedure involved in the involuntary hospitalization did not include an opportunity to contest allegations against an individual in front of a neutral third party to test whether the individual was mentally ill or dangerous. *Rehlander* held that a firearms disability may not be imposed on an individual unless he actually suffers involuntary commitment by a court. Because the procedure involved in the involuntary hospitalization did not include an adversarial proceeding to test whether the subject was mentally ill or dangerous, no due process was provided. *Rehlander*, 666 F.3d at 49. There was no effective post-hospitalization means to recover the right to bear arms if the subject had in fact never been mentally ill or dangerous. If the same logic is applied to the “adjudicated as a mental defective” language, an adversarial proceeding seems likely, satisfying the concerns expressed in *Rehlander*.

Additionally, guardians/conservators must be notified of their obligations regarding disposition of firearms. Under federal law, a person who has been “adjudicated as a mental defective or committed to a mental institution” is prohibited by law from receiving or possessing firearms or ammunition. 18 U.S.C. § 922(g)(4). HB 336 focuses on firearms reporting for individuals adjudicated to be a “mental defective” or “committed to an institution”. If the protected person meets the definition of a “mental defective” or “committed to an institution”, a guardian/conservator appointed to represent the protected person has a responsibility to determine whether the protected person owns or has access to firearms, and to take appropriate steps to prevent access by the protected person.

JUDICIAL DISCRETION

Rule 2016-063 includes a new mental health rule, Rule 1-131 NMRA. The rule mandates notification whenever an order is issued to commit an individual or protect an individual under proceedings from the following: NMSA 1978, § 45-5-3-4(C) (order appointing guardian for an adult); NMSA 1978, § 45-5-407(I) (order appointing conservator for an adult); NMSA 1978, §§ 43-1-11, -12, or -13 (order of commitment); NMSA 1978, § 43-1-15 (order appointing treatment guardian); NMSA 1978, § 27-7-24 (order for involuntary protective services); and Chapter 84 of the New Mexico Laws of 2016 (order to participate in assisted outpatient treatment). The rule

should be modified to allow for reporting and notification when a judge has determined that adjudication meets the reporting requirements.

The question remains whether individuals who are appointed a guardian, a conservator, or for involuntary protective services or protective placement under New Mexico law fall within the federal definitions of “adjudicated as a mental defective” or “committed to a mental institution.” Courts must continue to strive for clarity on what is meant by “adjudicated as a mental defective.” Rule 2016-063 could be perceived as limiting judicial discretion and automatic blanket reporting of every mental health disposition for firearms reporting purposes. In law, a distinction has usually been made between those persons who are adjudicated as mentally defective and dangerous on the one hand, and those who are in need of a conservatorship or guardianship due to incapacity. A finding that an individual is requiring treatment because of mental illness is not adjudication of mental defectiveness. *United States v. Vertz*, 102 F. Supp. 2d 787 (W.D. Mich. 2000).

Attached please find an addendum of a few representative sample cases heard by the Second Judicial District Court, which demonstrate that judges should have discretion over cases involving guardianships, conservatorships, and involuntary protective services or protective placement. It is necessary to individualize each case, to give careful, humane, and comprehensive consideration to the particular situation of each protected person which would be possible only in the exercise of a broad discretion. The prudent exercise of judicial discretion is particularly significant given the important stakes of these dispositions. *See Keyes v. Lynch*, No. 1:15-CV-457, 2016 WL 3670852, at *8 (M.D. Pa. July 11, 2016) (Under federal law, “once a person “*has been* adjudicated as a mental defective” or “*has been* committed to a mental institution,” the prohibition applies for the rest of one’s life.”). Only after deciding whether the burden has been met under Rule 2016-63 can the judge exercise judicial discretion and provide the necessary due process to the parties. Notably, HB 336 provides a relief process where a person, who has been “adjudicated as a mental defective” or “committed to a mental institution” and disabled from receiving or possessing a firearm, may petition the court to remove that person’s firearm-related disabilities and restore the person’s right to received and possess a firearm.

CONFIDENTIALITY

Rule 2016-063 contains revisions to Rule 1-079(C) NMRA providing for an exception to confidentiality requirements for proceedings under the Adult Protective Services Act (NMSA 1978, §§ 27-7-14 et seq.), the Mental Health and Developmental Disabilities Code (NMSA 1978, §43-1-19), for the appointment of a guardian (NMSA 1978, §45-5-303) and for the appointment of a conservator (NMSA 1978, §45-5-407). The revision to the rule does not specify the exact information that will be transmitted to the Federal Bureau of Investigation’s National Instant Criminal Background Check System. The AOC must transmit “...only that information necessary to identify the person for the sole purpose of inclusion in the national instant criminal check system.” NMSA 1978, §34-9-19(C). Any release of information should be narrowly tailored to protect the privacy of the protected person. Any exception to confidentiality should be very

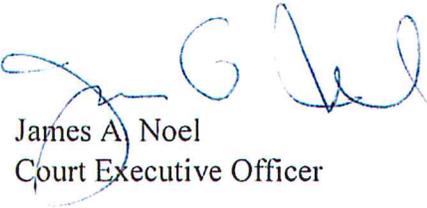
Joey D. Moya, Clerk of Court and Chief Counsel
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August 10, 2016

specific in identifying the exact information that will be transmitted in compliance with the requirements of NMSA 1978, §34-9-19(C), i.e. name, date of birth, address. The above referenced proceedings do not currently require personal identifying information about the protected person.

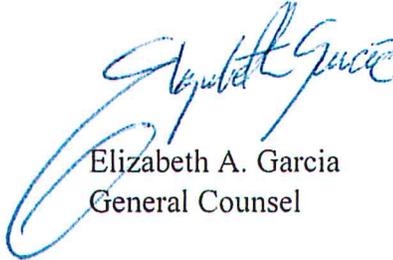
Given the importance of Rule 1-063, it would be beneficial for AOC to establish a steering committee to assist the district courts in determining the protocol for identifying information necessary to meet the reporting requirements set forth in Rule 2016-063.

Thank you for the opportunity to comment on Rule 2016-063.

Respectfully submitted,



James A. Noel
Court Executive Officer



Elizabeth A. Garcia
General Counsel

REPRESENTATIVE SAMPLE OF SJDC GUARDIAN AND CONSERVATORSHIP CASES

RL is a 38 year old, obese woman with developmental disability; she has mental retardation, diabetes, and attention deficit hyperactivity disorder. She lives currently in a group home. She attends a day program for the mornings (she makes jewelry and does arts and crafts and sewing projects). She works 4 hours per week with children in a daycare for \$8 per hour, with a job coach. She is very vulnerable, child-like with perhaps the temperament/intelligence of a 7 year old child. She is active in the Special Olympics. She requires 24/7 supervision; she is able to walk around the block alone, with a phone with GPS activated.

CJ is a 43 year old man with a traumatic brain injury resulting from an auto accident when he was 15. He has the intelligence and social acumen of an 8-10 year old. He requires 24/7 supervision; he can dress and wash himself. He is able to read only signs and simple notes. He has recently been allowed to go to a local coffee shop on his own for 1 hour. He spends his days smoking cigarettes and drinking coffee. He goes on trips with the local ARC (association of retarded citizens) group. He suffers from partial paralysis, continual pain in his foot and leg; he is ambulatory. He cannot drive.

IMS is in her late eighties; she has been disabled from a stroke 14 years ago. She is currently in a coma. She is unable to do anything for herself. Her husband is devoted to providing her personal care as he does not want her to be in a nursing home. She is fed through a tube and has around the clock nurses aides to tend to her.

NA is a woman in her late sixties who suffers from dementia. She manages her activities of daily living; she needs assistance with her medications and paying her bills. She is under guardianship/conservatorship at her daughter's reluctant request/petition as her daughter feared that the men that she dates may try to take advantage of her. She still wants to be involved in paying her bills so her daughter tries to include her in this task. She still lives alone but was forgetting to pay utilities. She enjoys visiting the senior center. Her daughter is concerned that she will give away valuable pieces of jewelry as she has lost her ability to understand who to trust.

Matthew S. is 36 years old with cerebral palsy. He is tube fed and a total care patient; his mother stays with him full time, she prepares meals that must be ground up for him to eat; when she needs respite his 32 year old brother comes to stay with him. Matthew spends his days in a wheelchair and watches TV or plays on a keyboard. He is incontinent as to bowel and bladder and requires 24/7 care. He is unable to transfer from his wheelchair to his bed; his weight is down to about 70 pounds. He suffers also from osteoporosis, scoliosis, severe allergies, low testosterone; he is unable to speak.

P is a young man with autism, high functioning (he can drive), but needs guardianship. He likes to work and his mom would like him to get a job at a game store, or with a political campaign. However, being on the NICS list may give potential employers a reason to not hire him.

D is an older man who took early retirement from high-level professional work due to memory problems. He is still very physically active, very personable, informs people he comes in contact with that he has a memory problem, and that he has a guardian. He stays in touch with his grown children, gardens and keeps lists to help him know how his football team is doing during the season. He was put under guardianship/conservatorship because he would pay his rent each week, rather than monthly, due to his memory problems. He has no history of violence, everyone speaks highly of his kindness, which made him vulnerable to exploitation.

S is a young woman with Down's syndrome. Every summer she flies to visit her sister in another state, which is more than a day's drive. Her visits with her sister are very important to the entire family. Her mother works and is unable to drive her to visit. She would be unable to fly if no-buy/no-fly lists are cross-referenced as is being discussed at a national level.

A is a young woman with mental health and anger management issues. She wants to work as a security guard, but has been turned down. She is repeatedly turned down for all sorts of jobs, likely because she has a history of domestic violence and criminal assault; these charges mean that she is already in the NICS database because of her propensity to violence.



STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

JAMES A. NOEL
COURT EXECUTIVE OFFICER
CLERK OF THE COURT

SUPREME COURT OF NEW MEXICO
FILED

AUG 10 2016

Joey D. Moya, Clerk of Court and Chief Counsel
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504

Re: Proposal 2016-063-Mental-Health Related Dispositions That Affect the Right to Receive or Possess a Firearm or Ammunition under Federal Law [Rules 1-079, 1-131 (new), 5-123, 5-615 (new), 10-166, and 10-171 (new) NMRA and new Forms 4-940, 9-515, and 10-604 NMRA].

Dear Mr. Moya:

The Second Judicial District Court ("SJDC") respectfully submits its comments regarding implementation considerations of the provisionally approved rules and forms concerning mental-health dispositions that affect the right to receive or possess a firearm or ammunition under federal law. As mental health and firearms law are emerging areas of American jurisprudence, this Court's meaningful review of Rule 2016-063 through the commentary process is warranted. SJDC presents these comments to address effective court operations in this area.

IMPLEMENTATION CONSIDERATIONS

The Court should consider court operations considerations in the implementation of Rule 2016-063 to meet National Instant Criminal Background Check System (NICS) Index entry requirements. The recently approved rules and forms are intended to allow the Administrative Office of the Courts ("AOC") to meet two requirements imposed by HB 336: (1) to allow AOC to meet the reporting requirements to the Federal Bureau of Investigations; and (2) to provide notice to the person that, as an adjudicated mental defective or as a person committed to a mental institution, the person is prohibited from receiving or possessing a firearm or ammunition pursuant to federal law. *See* NMSA 1978, §34-9-19(C). SJDC endeavors to ensure that its Clerk's Office accurately inputs the relevant data points and event codes in Odyssey and that AOC has the ability to extract the relevant data points. The Second Judicial District Court Clerk's Office has a number of cases that are captured in the following categories of dispositions,

comprehensive and collaborative effort to accurately report data in accordance with Rule 2016-063. *See* SJDC Clerk's Office Statistical Data Report on Mental Health Related Dispositions that Affect the Right to Receive or Possess Firearm or Ammunition under Federal Law, August 8, 2016, attached as Exhibit 1.

The SJDC Clerk's Office has compiled statistical data regarding the number of filed cases in the following categories of cases from 2013-to the present date as contemplated by the rule for reporting requirements.

- (1) Guardianship or conservatorship under the Uniform Probate Code and the Adult Protective Services Act;
- (2) Competency determination;
- (3) Involuntary residential treatment, Appointment of a Treatment Guardian under the Children's Mental Health and Developmental Disabilities Act;
- (4) Commitment, Appointment of a Treatment Guardian under the Mental Health and Developmental Disabilities Code;
- (5) Assisted Outpatient Treatment -newly enacted law (SB 113) allowing treatment provider or family member to seek an order directing a respondent to receive outpatient treatment services; requires finding of a primary diagnosis of a mental disorder.¹

The data contains information about mental health dispositions in the Second Judicial District Court, with a particular emphasis on the number and types of mental health dispositions that are filed and disposed of in SJDC. As with any data, the numbers in Exhibit 1 represent a snapshot of the most complete and reliable information available at the time of this compilation. SJDC strives to assess case-processing practices and ensure efficient allocation of resources. Mental health dispositions require judicial and staff resources. There will be additional staff time required to capture this data to meet the firearm-related reporting requirements under NMSA 1978, §34-9-19(D). SJDC estimates that it might take another court clerk to assist in capturing this data.

Other practical considerations for the Court to consider:

- Documentation used for NICS Index entry must contain the name and date of birth or name and social security number (or other miscellaneous number as listed in the Interface Control Document) at a minimum and be made available upon request to support an appeal or audit. *See* NICS Index Submissions Reference Guide for Contributors. There is a logistical issue in collecting date of birth/social security number(s) in guardianship/conservatorship cases. This data is not routinely collected in guardianship/conservatorship cases at the Second Judicial District Court. There will

¹ SJDC has partnered with the City of Albuquerque and Bernalillo County for an Assisted Outpatient Treatment grant proposal through the Substance Abuse and Mental Health Services Administration.

need to be extensive outreach to the private bar and petitioning parties to collect this data. Clerks will have to comb through files to get such information to meet the reporting requirements as provisionally enacted to the time frame of May 18, 2016. A possible solution to obtaining this information prospectively is the cover sheet as contemplated in Rule 1.003.2 and Form 4 as recommended by this Court's Ad hoc Committee on Rules for Mental Health Proceedings. The cover sheet would assist district court clerks in obtaining DOB's, SSN's, and other required data points.

- If there is judicial discretion in this area, the Court should consider the implementation of a stand-alone Order to NICS that is a Notice and Order of Registration with a tied event registry code in Odyssey for accuracy of reporting cases. District courts would docket the Notice and Order of Registration after adjudication that the person has been found to be a "mental defective" or "committed to a mental institution."
- If there is no judicial discretion in this area, the Court should consider the following proposed language in Orders:

This protected person meets/does not meet the requirements of NMSA 1978, §34-4-19.

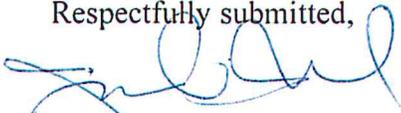
- There is no mechanism for automatic removal from the firearm reporting list. Individuals under treatment guardianship terminate due to time limits in the initial order without further order issued by the Court.
- Prospective guardians and protected persons should be advised before the hearing granting guardianship that protected persons information will be reported to the NICS and their burden to remove the firearms reporting disability.
- AOC can assist the district courts in establishing standard event codes for firearm reporting. SJDC would like opportunities to work with AOC to train court staff on the standards for the classification, entry and reporting of data.
- There will be the need to modify existing New Mexico statutes, including the New Mexico Uniform Probate Code, 45-1-101 *et. seq.*, the Mental Health and Developmental Disabilities Code, NMSA 1978, § 43-1-2 *et. seq.*, the Adult Protective Services Act (NMSA 1978, §§ 27-7-14 *et seq.*), proceedings to determine competency under NMSA 1978, § 31-9-1, Children's Mental Health and Developmental Disabilities Code, NMSA 1978, 32A-6A-1 *et seq.*, for the appointment of a guardian (NMSA 1978, §45-5-303) and for the appointment of a conservator (NMSA 1978, §45-5-407), regarding notice of firearm-related reporting requirements.

Joey D. Moya, Clerk of Court and Chief Counsel
SJDC Comments to Rule 2016-063
August 10, 2016

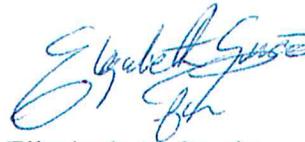
Given the importance of Rule 1-063, it would be beneficial for AOC to establish a steering committee to assist the district courts in determining the protocol for identifying information necessary to meet the reporting requirements set forth in Rule 2016-063.

Thank you for the opportunity to comment on Rule 2016-063.

Respectfully submitted,

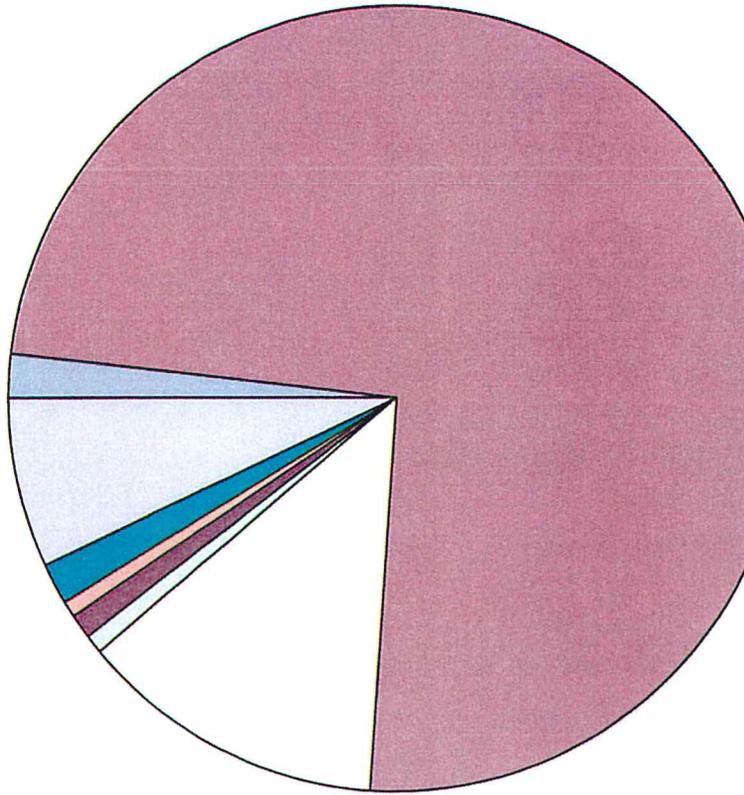


James A. Noel
Court Executive Officer



Elizabeth A. Garcia
General Counsel

SJDC Mental Health Cases Filed from January 1, 2013 through August 9, 2016



1. SJDC has partnered with the City of Albuquerque and Bernalillo County for an Assisted Outpatient Treatment grant proposal through the Substance Abuse and Mental Health Services Administration.
2. The Sequestered Mental Health cases encompass adult and juvenile involuntary commitments.