

PROPOSED REVISIONS TO THE CHILDREN'S COURT RULES AND FORMS

The Children's Court Rules Committee has recommended proposed new Rule 10-325 NMRA and proposed new Form 10-570 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed new material set forth below before the Court takes final 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 April 6, 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.

[NEW MATERIAL]

10-325. Notice of child's advisement of right to attend hearing.

A. **Notice required.** Counsel assigned to represent a child fourteen (14) years of age or older shall provide written notice that the child has been advised of the child's right to attend any hearing under the Abuse and Neglect Act.

B. **Timing of Notice.** Notice shall be filed at least fifteen (15) days before each hearing, unless there is an emergency hearing that is held without fifteen (15) days notice.

C. **Content of Notice.** The notice shall be substantially in the form approved the Supreme Court and shall be provided to the following:

- (1) the children's court;
- (2) all parties;
- (3) the child's CASA; and
- (4) the child's foster parents.

D. **Written notice not required.** Written notice is not required when there is an emergency hearing scheduled without fifteen (15) days notice to the parties. Counsel for the child shall orally notify the court whether the child was advised of the child's right to attend such a hearing.

E. **Alternative method of testimony.** If the child wishes to offer information related to the substantive allegations in the petition without appearing in court, the child must file a motion for alternative testimony as provided by Rule 10-340 NMRA.

[Approved by Supreme Court Order No. _____, effective _____.]

Committee Commentary. — Under Rule 10-324(D) NMRA, a child fourteen (14) years of age or older may be excluded from a hearing “only if the court makes a finding that there is a compelling reason to exclude the child and states the factual basis for the finding.” *See also* NMSA 1978, § 32A-4-20(E). Together with Form 10-570 NMRA, this rule is intended to ensure that a child

fourteen (14) years of age or older is notified in a timely manner of the child's right to attend a hearing under the Abuse and Neglect Act.

The fifteen (15)-day notice required under this rule is consistent with the notice required under Rules 10-332 and -333 NMRA for the disclosure of evidence and witnesses before an adjudicatory hearing or termination of parental rights hearing.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

10-570. Notice of child's advisement of right to attend hearing.

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

STATE OF NEW MEXICO *ex rel.*
CHILDREN, YOUTH AND FAMILIES DEPARTMENT

No. _____

In the Matter of

_____, (a) Child(ren), and Concerning
_____, Respondent(s).

**NOTICE OF CHILD'S ADVISEMENT OF RIGHT
TO ATTEND HEARING¹**

I, _____, the attorney for _____, the child in the above cause, give notice of the following:

1. I have advised the child that the child has a right to attend the _____ (*type of hearing*) hearing on _____ (*date*) because the child is a party to the case and because the court may be making decisions regarding the child's placement, education, and case plan.

2. (*Choose one of the following:*)

The child intends to attend the hearing and [will] [will not] request the Department to arrange transportation.

[Or]

The child, being fully advised of the child's right to attend this hearing, does not intend to attend this hearing. [The child requests leave to present the child's wishes to the Court regarding _____ (*describe wishes*) and would like to present this information by _____ (*describe method of alternative participation*). The child requests leave to communicate with the court in this manner because _____ (*describe reason*).]³

3. I have talked to the child about what the child would like the court to know regarding the child's position on issues related to the child's best interests or to the child's stated position.

4. The child understands that the child has the right to attend any future hearings in this cause regardless of the child's choice to attend the hearing on _____ (date).

I certify that I have explained to the child the child's right to attend the hearing, and I am satisfied that the child understands his or her right.³

Attorney for Child

USE NOTES

1. Under Rule 10-324(D) NMRA, a child fourteen (14) years of age or older may be excluded from a hearing "only if the court makes a finding that there is a compelling reason to exclude the child and states the factual basis for the finding." *See also* NMSA 1978, § 32A-4-20(E). This form and Rule 10-325 NMRA are intended to ensure that the child's lawyer (1) notifies the child in a timely manner of the child's right to attend each hearing; (2) notifies the court and the children's court attorney of a request to arrange transportation for the child to attend the hearing; and (3) considers whether an alternative form of participation may be warranted.

2. The bracketed language is intended to allow the child to request leave to submit information to the court that is unrelated to the substantive allegations of abuse and neglect in the petition. Such information may include updating the court about the child's well-being, including recreational, extracurricular, or school-related activities and interests, and may be presented via letter, video or audio recording, or any other manner that does not require the child's presence in the courtroom. If the child wishes to offer information related to the substantive allegations in the petition without appearing in court, the child must file a motion for alternative testimony as provided by Rule 10-340 and Form 10-571 NMRA.

3. This form describes the minimum efforts necessary to effectively communicate with the child before a hearing and does not supplant the lawyer's continuing duty to communicate with the child. *See* Rule 16-104 NMRA (defining a lawyer's duty to communicate with a client); *see also* NMSA 1978, § 32A-1-7.1(A) ("The attorney [retained or appointed to represent a child] shall provide the same manner of legal representation and be bound by the same duties to the child as is due an adult client, in accordance with the rules of professional conduct."). Additional communication may be necessary after this notice is filed to ensure that the child's rights are protected. For example, a lawyer should review with the child the predisposition study and report required under NMSA 1978, § 32A-4-21, which is not due to the court until five (5) days before a dispositional hearing, to determine whether the report affects the child's position about attending the hearing.

[Approved by Supreme Court Order No. _____, effective _____.]

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April 6, 2016

Sent via email to
nmsupremecourtclerk@nmcourts.gov

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

RE: Comment on proposed Rule 10-325

My name is William C. Herring. I am a Youth Attorney and Guardian ad Litem in the 2nd Judicial District Children's Court and have been for many years. My comments on proposed Rule 10-325 are set forth below:

The advice and consultation with the 14+ year old client is supposed to have taken place in time for the form to be filed no later than 15 days before the hearing in question. Committee Commentary justifies this proposed "15 days in advance" rule by citing the existing Rules 10-332 and -333 which require a proponent to disclose his/her witnesses and evidence 15 days before an adjudicatory hearings and termination of parental rights trials.

The purpose of those existing rules is to prevent unfair surprise witnesses or evidence at trial and to give the parties the opportunity before trial to interview witnesses or examine evidence. The information contained in the proposed Rule 10-325 are neither witnesses nor evidence. There is no connection between 15 days in advance in the proposed rule and existing Rules 10-332 and -333. To justify the proposed rule's time limit with the existing Rules 10-332 and -333 is

nonsensical and arbitrary. Indeed, if the youth wishes to offer information related to the substantive allegations of the abuse/neglect petition (*i.e.*, evidence, which can only occur at the Adjudicatory Hearing or TPR trial) without appearing in court, the youth must file a motion for alternative testimony pursuant to proposed Rule 10-340, presumably 15 days in advance.

A much more logical and common sense approach would be to require the proposed Notice of Advise ment form to be filed 5 days before the hearing. This 5 day in advance rule would be tied to the issuance of the report that is required before every Judicial Review, Permanency Hearing, or Adjudicatory Hearing. This pre-hearing report (which is due 5 days before the hearing) is frequently a deciding factor on the youth's decision to attend the hearing or not. To require the youth's attorney to advise the youth of his right to attend the hearing and to file a pleading attesting to that fact 15 days before the hearing and then have to revisit the issue 10 days later after going over the pre-hearing report is a waste of time and duplicative effort.

Likewise, a 5 day in advance rule would provide a much more accurate picture of the youth's transportation needs. Most foster families and youths have very, very busy lives with schedules that are often hard to predict 15+ days in advance.

Finally, this proposed Rule cannot apply to a Custody Hearing, which is not "an emergency hearing" but a regularly scheduled hearing that occurs on very short notice.

Respectfully submitted:



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To: The New Mexico Supreme Court
Re: Proposed Children's Court Rule 10-325 ("Notice of child's advisement of right to attend hearing") and proposed Form 10-570 ("Notice of Child's

Advisement of Right to Attend Hearing").
Date: 6 April 2016

SUPREME COURT OF NEW MEXICO
FILED

APR 06 2016

To the Honorable Court:

I am currently serving as a contractor with Advocacy, Inc. providing guardian ad litem and youth attorney services in the Second Judicial District Children's Court. I am concerned about the proposed rule and form on several grounds, as follows:

1. The advice and consultation with the client is supposed to have taken place in time for the form to be filed no later than 15 days before the hearing in question, matching the deadlines for disclosure of witnesses and evidence before an adjudicatory hearing or a hearing on termination of parent rights. There is nothing that requires or even suggests the utility of a matching deadline for this item. Comment 3 to the proposed form points out that the predisposition report, which should be reviewed with the child and may frequently be a major factor in the child deciding to attend the hearing (or not), is not due until five days before the hearing. Requiring the filing of the form ten days before the predisposition report is filed guaranties that counsel and the client will have to revisit the issue in each instance in which the hearing addresses the predisposition report. Respectfully, this is a waste of time.

2. Another reason given for the 15-day notice is so that the CCA and CYFD can arrange transportation. The drafters of the rule and form have assumed a fact not in evidence: most of the time there is no CYFD transportation because the governor and the legislature have not appropriated sufficient funds for that purpose. Most of the time, children (of all ages) attend hearings because foster parents bring them. (As a contractor with Advocacy, I am strictly forbidden to transport children in my vehicle, a very useful restriction from more than one perspective.) And also most of the time, the foster parents, because of work schedules and sometimes other reasons, simply cannot transport the children, so the children do not attend the hearings. In other words, the child attendance *diktat*, particularly for younger children but also for children 14 and older, is an unfunded mandate which the Court needs to have addressed prior to issuing the attendance rule for all children.

3. I recognize the wording of the rule concerning children who are 14 and older would seem to require more focus on the child attending a hearing as opposed to a child under the age of 14 (and that is indeed the focus of the proposed rule and form). Nonetheless, the relatively recent imposition by this Court of a general mandate that all children attend all hearings (e.g., a two-week

old attending a custody hearing) except for good cause comes close to effectively obliterating the age distinction made by the Children's Court rules.

4. More than that, the general mandate has added an extra layer of work for each guardian ad litem or youth attorney for every hearing. I am not arguing the issue of compensation (though Advocacy counsel are compensated at close to token rates), but rather that before every hearing now, as a guardian ad litem or youth attorney, I must in addition to my other duties determine if I can arrange to have the child at the hearing, whether or not I even think it is in the child's best interest. That subject is also one which the Court could have usefully offered up for discussion before imposing the mandate.

5. There is no evidence except in the most extreme cases involving older children who have seldom or never seen their counsel, that there is a genuine benefit in having children, particularly younger children, attend hearings on a routine basis, unless of course the child wants to attend a hearing. It rather beggars the imagination to assume that the trial court, or counsel, have somehow in law school or in practice developed the forensic skills to be able to tell whether a child that embraces a biological parent in the artificial ambience of the courtroom does so out of genuine and healthy affection or, for example, out of a long history of violence that has ingrained in the child the notion that he or she had better demonstrate affection convincingly or risk severe punishment. Even more is that applicable when the issue is sexual abuse. What judges and lawyers learn to do well over the years is apply the law and rules to factual situations; they do not learn to be therapists or forensic examiners.

In offering these comments, I do not wish to denigrate the work of the committee. Given what I assume its instructions were, I think the committee did an excellent job of putting into writing what the Court wanted.

Thank you for considering these comments.

Respectfully submitted,

/s/

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