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 . . . [l]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 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

SUPREME COURT OF NEW MEXICO
FILED

JUL -6 2016

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 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 cause 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.

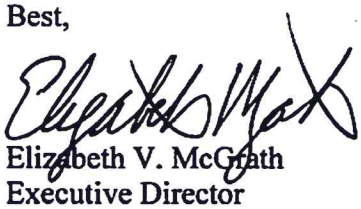
In the event that the Court determines that minors who are subject to involuntary placement and treatment guardianship orders should be included in firearm-related reporting, the gravity of the concerns raised above justify: 1) only reporting children when there is an explicit finding in an involuntary 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

3201 4th St. NW, Albuquerque, NM 87107 (505) 244-1101 (505) 244-0060 Fax

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

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SUPREME COURT OF NEW MEXICO
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AUG 1 - 2016

SUPREME COURT OF NEW MEXICO
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AUG 1 - 2016

July 30, 2016

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

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

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[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

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(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 478.11[9], 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

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[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.

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