

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE
DISTRICT COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE
MAGISTRATE COURTS, AND THE RULES OF CRIMINAL PROCEDURE FOR THE
METROPOLITAN COURTS**

PROPOSAL 2024-010

March 13, 2024

The Rules of Criminal Procedure for State Courts Committee has recommended amendments to Rules 5-304, 6-302, and 7-302 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's website at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
rules.supremecourt@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 12, 2024, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

5-304. Pleas.

A. Alternatives.

(1) In general. The attorney for the state and the attorney for the defendant, or the defendant when acting pro se, may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser or related offense, the attorney for the state will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. A judge who presides over any phase of a criminal proceeding shall not participate in plea discussions. A judge, or judge pro tempore, not presiding over the criminal proceeding, may be assigned to participate in plea discussions to assist the parties in resolving a criminal case in a manner that serves the interests of justice.

(2) With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or no contest, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pre-trial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea.

B. Notice. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest it shall be reduced to writing substantially in the form

approved by the Supreme Court. The court shall require the disclosure of the agreement in open court at the time the plea is offered and shall advise the defendant as required by Paragraph F of Rule 5-303 NMRA. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was instead made with the expectation that the state would only recommend a particular sentence or not oppose the defendant's request for a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

C. **Acceptance of plea.** If the court accepts a plea agreement that was made in exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement. If the court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence, the court may inform the defendant that it will embody in the judgment and sentence the disposition recommended or requested in the plea agreement or that the court's judgment and sentence will embody a different disposition as authorized by law.

D. **Rejection of plea.** If the court rejects a plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford either party the opportunity to withdraw the agreement and advise the defendant that if the defendant persists in a guilty plea or plea of no contest the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement. This paragraph does not apply to a plea for which the court rejects a recommended or requested sentence but otherwise accepts the plea.

E. ~~[Time of plea agreement procedure.]~~ **Plea agreement deadline.** ~~Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at such time, as may be fixed by the court.]~~ A plea agreement between the parties that would eliminate the need for a trial shall be submitted for the court's consideration by a deadline set in the court's discretion, but in any event, no plea agreement shall be entered into later than five (5) days before the scheduled date for jury selection or commencement of a bench trial. The court shall set a hearing within the plea deadline at which the defendant's presence is required and at which the defendant has an opportunity to consider any plea offer.

F. **Untimely plea agreements.** A request for the court to approve an untimely plea agreement less than five (5) days before trial shall not be granted except on a written finding by the judge of good cause that excuses the untimely submission of the agreement. If the court denies a request to accept an untimely plea agreement, the case shall proceed to trial on the scheduled date.

Notwithstanding the denial of a request to accept an untimely plea agreement, a defendant may elect to plead guilty to all charges leaving full sentencing discretion with the court, or the prosecution may elect to dismiss any and all charges any time before or during trial.

~~[F.]~~ G. **Inadmissibility of plea discussions.** Evidence of a plea of guilty, later withdrawn, a plea of no contest, or of an offer to plead guilty or no contest to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

~~[G.]~~ H. **Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

~~[H.]~~ **I. Form of written pleas.** A plea and disposition agreement or a conditional plea shall be submitted substantially in the form approved by the Supreme Court.

[As amended, effective August 1, 1989; January 15, 1998; as amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as provisionally amended by Supreme Court Order No. 22-8300-002, effective for all cases pending or filed on or after January 18, 2022; as amended by Supreme Court Order No. _____, effective for all cases filed on or after _____.]

Committee commentary. — Paragraphs A through ~~[F]~~ G of this rule provide for a “plea bargaining” procedure. They originally were taken verbatim from proposed Rule 11(e) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 276, 280-86 (1974). Prior to the adoption of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied with the interest of the individual district court judges. The propriety of judicial involvement had been questioned by the Supreme Court. *See State v. Scarborough*, 1966-NMSC-009, ¶ 14, 75 N.M. 702, 410 P.2d 732. By the adoption of this rule, the Court specifically eliminated all judicial involvement in the plea bargaining discussions. Under the rule as originally written, the judge’s role was explicitly limited to acceptance or rejection of the bargain agreed to by counsel for the state, defense counsel, and defendant. *See generally* 62 F.R.D. 271, 283-84 (1974). Although not categorically abandoning this approach, the Court’s 2022 provisional amendment to the rule temporarily allows for some limited judicial involvement in plea discussions in order to streamline the processing of criminal cases during the COVID-19 public health emergency. For the administrative order issued by the Court in conjunction with the order provisionally approving the rule amendments, *see* Supreme Court Order No. 22-8500-002.

Paragraph B of this rule requires the parties to reduce the agreement to writing. It may be held that the defendant was denied effective assistance of counsel if he is advised to plead guilty without a written plea agreement. *See State v. Lucero*, 97 N.M. 346, 351, 639 P.2d 1200, 1205 (Ct. App. 1981).

With the exception of Paragraph D of this rule, providing for withdrawal of the plea when the court rejects the plea bargain, this rule does not govern the withdrawal of a plea. Withdrawal of a voluntary plea is within the discretion of the court. *State v. Brown*, 33 N.M. 98, 263 P. 502 (1927); *Santobello v. New York*, 404 U.S. 257 (1971).

A prosecutor’s dismissal of charges under Paragraph F of this rule does not change or alter the law on double jeopardy.

In *State v. Pieri*, 2009-NMSC-019, ¶ 29, 146 N.M. 155, 207 P.3d 1132, the Court overruled *Eller v. State*, 92 N.M. 52, 582 P.2d 824 (1978), and held that “if the court rejects a sentence recommendation or a defendant’s unopposed sentencing request, and the defendant was aware that the court was not bound to those recommendations or requests, the court need not afford the defendant the opportunity to withdraw his or her plea.” But within the context of a plea that leads to a subsequent request by the state to enhance the sentence for the crime that was the subject of the plea, the Court in *Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, 146 N.M. 556, 212 P.3d 1110, held that if the defendant is not advised of the possible sentence enhancements at the time of the plea “the court should conduct a supplemental plea proceeding to advise the defendant of the likely sentencing enhancements that will result, and determine whether the defendant wants to withdraw the plea in light of the new sentencing enhancement information.”

[As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as amended by Supreme Court Order No. 16-8300-025, effective for all cases pending or filed on or after December 31, 2016; as provisionally amended by Supreme Court Order No. 22-8300-002,

effective for all cases pending or filed on or after January 18, 2022; as amended by Supreme Court Order No. _____, effective for all cases filed on or after _____.]

6-302. Pleas allowed.

A. **Pleas and defenses.** The plea shall be one of the following: guilty, not guilty, or no contest. No other pleas shall be permitted. A plea of not guilty shall not operate as a waiver of any defense or objection. Defenses and objections not raised by the plea shall be asserted in the form of motions to dismiss or for appropriate relief. In actions not within magistrate trial jurisdiction, no plea shall be entered.

B. **Failure or refusal of defendant to enter a plea.** If the defendant fails to enter a plea, or stands mute, the court shall enter a plea of not guilty on behalf of [~~such~~] the defendant.

C. **Rejection of pleas.** The court shall reject a plea of guilty or no contest if justice would not be served by acceptance of [~~such~~] the plea.

D. **Plea agreement deadline.** Except in non-attorney prosecutions, a plea agreement between the parties that would eliminate the need for a trial shall be submitted for the court's consideration by a deadline set in the court's discretion, but in any event, no plea agreement shall be entered into later than five (5) days before the scheduled date for jury selection or commencement of a bench trial. The court shall set a hearing within the plea deadline at which the defendant's presence is required and at which the defendant has an opportunity to consider any plea offer.

E. **Untimely plea agreements.** A request for the court to approve an untimely plea agreement less than five (5) days before trial shall not be granted except on a written finding by the judge of good cause that excuses the untimely submission of the agreement. If the court denies a request to accept an untimely plea agreement, the case shall proceed to trial on the scheduled date.

Notwithstanding the denial of a request to accept an untimely plea agreement, a defendant may elect to plead guilty to all charges leaving full sentencing discretion with the court, or the prosecution may elect to dismiss any and all charges any time before or during trial.

[As amended, effective January 1, 1987; as amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. _____, effective for all cases filed on or after _____.]

Committee commentary. — A prosecutor's dismissal of charges under Paragraph E of this rule does not change or alter the law on double jeopardy.

[Adopted by Supreme Court Order No. _____, effective for all cases filed on or after _____.]

7-302. Pleas allowed.

A. **Pleas and defenses.** The plea shall be one of the following: guilty, not guilty, or no contest. No other pleas shall be permitted. A plea of not guilty shall not operate as a waiver of any defense or objection. Defenses and objections not raised by the plea shall be asserted in the form of motions to dismiss or for appropriate relief.

B. **Failure or refusal of defendant to enter a plea.** If the defendant refuses to enter a plea, or stands mute, the court shall enter a plea of not guilty on behalf of [~~such~~] the defendant.

C. **Rejection of pleas.** The court shall reject a plea of guilty or no contest if justice would not be served by acceptance of [~~such~~] the plea.

D. **Plea agreement deadline.** Except in non-attorney prosecutions, a plea agreement between the parties that would eliminate the need for a trial shall be submitted for the court's consideration by a deadline set in the court's discretion, but in any event, no plea agreement shall be entered into later than five (5) days before the scheduled date for jury selection or commencement of a bench trial. The court shall set a hearing within the plea deadline at which the defendant's presence is required and at which the defendant has an opportunity to consider any plea offer.

E. **Untimely plea agreements.** A request for the court to approve an untimely plea agreement less than five (5) days before trial shall not be granted except on a written finding by the judge of good cause that excuses the untimely submission of the agreement. If the court denies a request to accept an untimely plea agreement, the case shall proceed to trial on the scheduled date.

Notwithstanding the denial of a request to accept an untimely plea agreement, a defendant may elect to plead guilty to all charges leaving full sentencing discretion with the court, or the prosecution may elect to dismiss any and all charges any time before or during trial.

[As amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. _____, effective for all cases filed on or after _____.]

Committee commentary. — A prosecutor's dismissal of charges under Paragraph E of this rule does not change or alter the law on double jeopardy.

[Adopted by Supreme Court Order No. _____, effective for all cases filed on or after _____.]

**New Mexico
Courts**

Alyssa Segura <supams@nmcourts.gov>

[rules.supremecourt-grp] Open for Comment Form submitted on Supreme Court

Supreme Court <noreply@nmcourts.gov>

Fri, Mar 22, 2024 at 4:33 PM

Reply-To: noreply@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Name ZacharyKolodny

**Phone
Number** 5053693598

Email zachary.kolodny@lopdm.us

**Proposal
Number** 2024-010

Comment I am a public defender in the Metropolitan Court. However, I only speak for myself and not for LOPD. I support changing the rules so that the standard for accepting an untimely plea is changed from "extraordinary circumstances" to "good cause", as the "extraordinary circumstances" places too high a burden for a late plea. There are numerous reasons that can come up, such as a defendant having a change of circumstances in their life, that are not extraordinary but which could constitute good cause for taking a plea past the deadline. I also support the change allowing the state to dismiss any selection of charges it wishes instead of dismissing all of the charges or going to trial. The current choice theoretically forces either the state to pursue undesirable charges or to dismiss meritorious charges. This could potentially encourage the state to pursue charges that are not in the interest of justice or even frivolous. The proposed rule change is superior and gives needed flexibility.



[rules.supremecourt-grp] Open for Comment Form submitted on Supreme Court

1 message

Supreme Court <noreply@nmcourts.gov>

Wed, Apr 10, 2024 at 1:52 PM

Reply-To: noreply@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

| | |
|-----------------|--|
| Name | Todd |
| | Farkas |
| Phone Number | 505-369-3597 |
| Email | todd.farkas@lopdm.us |
| Proposal Number | 2024-010 |

Comment As a practitioner in NM for 45 years in criminal and civil cases in both state and federal court, I dislike plea deadlines. I am the managing attorney for the state public defender's major crimes defense unit. We handle primarily homicide and child abuse resulting in death cases.

I understand that the Court wants people to pay attention to their cases early on so as not to waste court time or money. In a serious case, I don't see that being an issue as we work up these cases, usually on track 3 for more than a year. I have pled homicides on the morning of trial. I have tried plea bargaining while a jury is out deliberating. I think there should be an exception to the time limits for capital, first and second degree felonies. Any time one of these cases can be resolved, it saves the government time, resources and money, first on juries for the rest of a trial. Then there is saving resources on appeals and sometimes shortens a period of incarceration (saving money and resources). It would also help to attempt to define "good cause." Thank you for your time and attention to this matter.

Name Todd Farkas

Phone Number 505-369-3597

Email todd.farkas@lopdm.us

Proposal Number 2024-010

Comment

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[rules.supremecourt-grp] Comments by NMJC Legislation and Rules Subcommittee

Judge Emilio Chavez <taodejc@nmcourts.gov>

Thu, Apr 11, 2024 at 9:49 AM

Reply-To: taodejc@nmcourts.gov

To: rules.supremecourt@nmcourts.gov, Angie Schneider <aladaks@nmcourts.gov>, Thomas Pestak <tpestak@sierraco.org>, Jennifer Attrep <coajla@nmcourts.gov>

Attached is NMJC L&R Subcommittee's comments regarding the current proposed rule changes.
Please kindly confirm receipt.

Thank you,

Emilio J. Chavez

Chief Judge

Eighth Judicial District

[105 Albright Street, Suite N](#)

[Taos, NM 87571](#)



NEW MEXICO JUDICIAL COUNCIL LEGISLATION AND RULES SUBCOMMITTEE COMMENTS (1).docx

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NEW MEXICO JUDICIAL COUNCIL LEGISLATION AND RULES SUBCOMMITTEE COMMENTS

1. Proposal 2024-002 – Permanency Review Hearings [comments begin on p. 4]
 - The proposed changes to Rules 10-345 NMRA and 10-346 are mostly stylistic and appropriate.
2. Proposal 2024-003 – Child’s First Appearance on a Delinquency Petition
 - The proposed changes to Form 10-711 NMRA: The form is for use with Rule 10-224 NMRA and should indicate at the top of the form similar to other delinquency forms. It makes sense to change arraignment to first appearance.
 - However, in the comparable criminal forms the language indicates “I understand that I am charged with the following criminal offense or offenses.” *See e.g.* 9-405 NMRA. Although the suggested change “I understand the allegations in the petition” is correct, it insert “allegations” rather than “offense,” which is the language indicated in Rule 10-224(A) NMRA. A suggestion might be to amend the language to “I understand that I am charged with the following ~~criminal~~ offense or offenses” to track the language of the rule and to be consistent with the criminal form.
 - Rule 10-224(G) NMRA reads, “the right to remain silent, and that any statement made by the respondent child may be used against the respondent child.” The proposed change to Form 10-711 regarding right to remain silent is appropriate but the change should omit “in court”. The proposed changed language might be modified as follows “the RIGHT to remain silent with the understanding that any statement I make may be used against me ~~in court~~, except any “**confidential**” statements I make to my attorney.”
See e.g. Rules 11-503 NMRA; 6-501 NMRA.
3. Proposal 2024-004 – Water Settlement Agreements
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4. Proposal 2024-005 – Garnishment [comments begin on p. 50]
 - Rule 1-065.1(E): The word “filed” is missing in the following sentence: “Notwithstanding the foregoing, for cases **filed** on or after July 1, 2023, it shall not be necessary for a judgment debtor to assert an exemption to the first two thousand four hundred dollars (\$2,400.00) held in a [depository or investment] account.”
 - Rule 2-802(B): The phrase “certificate of service shall be filed by the judgment creditor indicating” is missing in the following sentence: “A separate **certificate of**

service shall be filed by the judgment creditor indicating transmission of the writ on the judgment debtor.”

5. Proposal 2024-006 – Political Activity and Elections

- The proposed changes are stylistic and appropriate. The inclusion in 21-401(C)(7) of the language “express and implied” is superfluous.

6. Proposal 2024-007 – Lawyer Succession Rule [comments begin on p. 4]

- The proposed changes are necessary and appropriate.

7. Proposal 2024-008 – Surreptitious Recordings of Clients, Third Parties

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8. Proposal 2024-009 – Providing Financial Assistance to Clients

- The proposed change to Rule 16-108 NMRA is a much needed exception, but perhaps modest gift should be defined.

9. Proposal 2024-010 – Incorporation of Plea Deadlines [comments begin on p. 6]

- The proposed change to Rule 5-304(E) NMRA is important to define a set timeframe for plea deadlines. Instead of creating (F), the new proposed (E) might read no plea agreement shall be entered into later than five (5) days before the scheduled date for jury selection or commencement of a bench trial **unless a written finding of good cause is made by the judge that excuses the untimely submission of the agreement.**
- (F) might also include language “In addition, to finding good cause excusing the untimely plea agreement, the court may consider sanctions against the state and defense counsel.”
- In (F), the phrase “the scheduled date for jury selection or commencement of a bench” might be added in the following sentence for consistency: “A request for the court to approve an untimely plea agreement less than five (5) days before **the scheduled date for jury selection or commencement of a bench** trial shall not be granted except on a written finding by the judge of good cause that excuses the untimely submission of the agreement.”
- In the “Notwithstanding” sentence the committee may want to consider including “a defendant may plead guilty to all **legally permissible** charges . . .” There are often times where a criminal information implicates double jeopardy or there is not a factual basis supporting the allegation.

10. Proposal 2024-011 – Filing of Criminal Complaint Upon Arrest

- The proposed change to Rule 5-210 NMRA providing a definitive timeframe is a much needed change.

11. Proposal 2024-012 – Consolidated Cases [comments begin on p. 5]

- The proposal seeks to create Rule 5-305 NMRA. The proposed new rule is generally accomplished under Rule 5-203(A) or filing a superseding indictment. Rather than creating a new rule, the same purpose might be done by amending in 5-203(A) NMRA to include similar language to 5-203(B) NMRA.
- For example after separate count “**or a separate complaint, indictment or information may be consolidated on motion of a party.**” The language “whether felonies or misdemeanors or both:” is likely unnecessary and could be removed.

12. Proposal 2024-013 – Plea Deadlines, Suppression Hearings, and Extensions for Trial [comments begin on p. 14]

- The proposed change to the committee commentary to Rule 5-212 NMRA should be included in the substantive part of the rule under (D) rather than commentary. The committee may want to consider 7-10 day requirement to allow the court time to rule and the parties to timely enter a plea after the ruling under the new proposed deadline for Rule 5-304 NMRA.

13. Proposal 2024-014 – Kinship Guardianship Forms

- The proposed changes to the forms appear to be appropriate and add consistency.

14. Proposal 2024-015 – Parentage Forms

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15. Proposal 2024-016 – Human Rights Act Intentional Discrimination

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16. Proposal 2024-017 – Firearm Enhancement

- The proposed change to UJI Special Verdict Form 14-6013 NMRA is needed to track the language of NMSA 1978 §31-18-16. The definitions are likewise clear and important for the determination. Likewise, the use note is necessary to provide clarification regarding the changes to the statute. The committee may want to consider an additional sentence to the firearm instruction that the defendant can use a gun without brandishing it

- On the sample verdict form, the committee may want to consider that there may be cases where the jury needs to determine if the firearm was either used, brandished, or discharged.
- Depending on the facts of the case the form might have Used _____ (Yes or No; Brandished _____ (Yes or No); or Discharged _____ (Yes or No)

The sentencing judge would use the highest of the three alternatives to sentence.

17. Proposal 2024-018 – Multiple Defendants

- Prior to changing UJI 14-6003 NMRA the committee should consider if the instruction is necessary? UJI 14-6005 NMRA is short and simple and illustrates the point that the counts should be considered separately as to each defendant. Also, the committee may want to look at UJI's 14-6010 and 14-6012 that include some of the proposed language.
- If a change is necessary, the proposed change to UJI 14-6003 NMRA might be clearer if the instruction read, "In this case, involving multiple defendants, you must consider separately whether each defendant is guilty or not guilty. The state must prove to your satisfaction beyond a reasonable doubt each of the elements of a crime against a defendant to render a verdict of guilty. You should analyze what the evidence in the case shows with respect to each individual defendant. [[Both] [All] defendants are charged with the same crimes.] [The defendants are charged with different offenses. Please review the verdict forms to clarify the offense(s) that [is][are] applicable to each defendant.
- The last two proposed sentences for 14-6003 are redundant as to instructions UJI 14-6010 "If you have agreed upon one verdict [as to a particular charge] [as to a defendant], that form of verdict is the only form to be signed [as to that charge] [as to that defendant] and UJI 14-6012.

Respectfully submitted,

New Mexico Judicial Council Legislation and
Rules Subcommittee

Hon. Jennifer Attrep
Hon. Emilio Chavez
Hon. Thomas Pestak
Hon. Angie Schneider