

1 **5-304. Pleas.**

2 A. **Alternatives.**

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

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

16 B. **Notice.** If a plea agreement has been reached by the parties which contemplates
17 entry of a plea of guilty or no contest it shall be reduced to writing substantially in the form
18 approved by the Supreme Court. The court shall require the disclosure of the agreement in open
19 court at the time the plea is offered and shall advise the defendant as required by Paragraph F of
20 Rule 5-303 NMRA. If the plea agreement was not made in exchange for a guaranteed, specific
21 sentence and was instead made with the expectation that the state would only recommend a
22 particular sentence or not oppose the defendant's request for a particular sentence, the court shall
23 inform the defendant that such recommendations and requests are not binding on the court.

1 Thereupon the court may accept or reject the agreement, or may defer its decision [~~as to~~] for
2 acceptance or rejection until there has been an opportunity to consider the presentence report.

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

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

17 E. [~~Time of plea agreement procedure.~~] **Plea agreement deadline.** [~~Except for~~
18 ~~good cause shown, notification to the court of the existence of a plea agreement shall be given at~~
19 ~~such time, as may be fixed by the court.~~] A plea agreement between the parties that would eliminate
20 the need for a trial shall be submitted for the court's consideration by a deadline set in the court's
21 discretion, but in any event, no plea agreement shall be entered into later than five (5) days before
22 the scheduled date for jury selection or commencement of a bench trial. The court shall set a

1 hearing within the plea deadline at which the defendant's presence is required and at which the
2 defendant has an opportunity to consider any plea offer.

3 F. **Untimely plea agreements.** A request for the court to approve an untimely plea
4 agreement less than five (5) days before the scheduled date for jury selection or commencement
5 of a bench trial shall not be granted except on a written finding by the judge of extraordinary
6 circumstances that excuse the untimely submission of the agreement. If the court denies a request
7 to accept an untimely plea agreement, the case shall proceed to trial on the scheduled date.

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

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

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

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

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

1 amendments approved as amended by Supreme Court Order No. S-1-RCR-2024-00113, effective
2 for all cases pending or filed on or after December 31, 2024.]

3
4 **Committee commentary.** — Paragraphs A through [~~F~~] G of this rule provide for a “plea
5 bargaining” procedure. They originally were taken verbatim from proposed Rule 11(e) of the
6 Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 276, 280-86 (1974). [~~Prior to~~] Before the
7 adoption of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied
8 with the interest of the individual district court judges. The propriety of judicial involvement had
9 been questioned by the Supreme Court. *See State v. Scarborough*, 1966-NMSC-009, ¶ 14, 75 N.M.
10 702, 410 P.2d 732. By the adoption of this rule, the Court specifically eliminated all judicial
11 involvement in the plea bargaining discussions. Under the rule as originally written, the judge’s
12 role was explicitly limited to acceptance or rejection of the bargain agreed to by counsel for the
13 state, defense counsel, and defendant. *See generally* 62 F.R.D. 271, 283-84 (1974). [~~Although not~~
14 ~~categorically abandoning this approach, the~~] The Court’s 2022 provisional amendment to the rule
15 temporarily [~~allows~~] allowed for some limited judicial involvement in plea discussions in order to
16 streamline the processing of criminal cases during the COVID-19 public health emergency. In the
17 2024 amendment to this rule, the Court permanently allows for limited judicial involvement in
18 plea discussions. For the administrative order issued by the Court in conjunction with the order
19 [~~provisionally~~] approving the rule amendments, *see* Supreme Court Order No. [~~22-8500-002~~] S-
20 1-AO-2024-00040.

21 Paragraph B of this rule requires the parties to reduce the agreement to writing. It may be
22 held that the defendant was denied effective assistance of counsel if he is advised to plead guilty

1 without a written plea agreement. *See State v. Lucero*, 1981-NMCA-143, 97 N.M. 346, [351,] 639
2 P.2d 1200[, 1205 (Ct. App. 1981)].

3 With the exception of Paragraph D of this rule, providing for withdrawal of the plea when
4 the court rejects the plea bargain, this rule does not govern the withdrawal of a plea. Withdrawal
5 of a voluntary plea is within the discretion of the court. *State v. Brown*, 33 N.M. 98, 263 P.
6 502 (1927); *Santobello v. New York*, 404 U.S. 257 (1971).

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

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

20 Use of the phrase “legally permissible” in Paragraph F of this rule is intended to alert both
21 the courts accepting changes of plea and the parties entering into them to avoid potential
22 illegalities. Defendants may raise legal challenges on appeal to convictions based on charges pled
23 to that conflict with constitutional protections, statutes, or caselaw; for example, when there are

1 double jeopardy concerns, conflicts with statutory intent, or issues with the underlying factual
2 basis of the plea. See *State v. Jackson*, 1993-NMCA-092, 116 N.M. 130, 860 P.2d 772; NMSA
3 1978, § 30-1-10 (1963); *State v. Gray*, 2016-NMCA-095, 384 P.3d 1083. Nothing in this
4 paragraph should be construed to undermine the ability to negotiate a plea within the express terms
5 of Paragraph A of this rule.
6 [As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as amended
7 by Supreme Court Order No. 16-8300-025, effective for all cases pending or filed on or after
8 December 31, 2016; as provisionally amended by Supreme Court Order No. 22-8300-002,
9 effective for all cases pending or filed on or after January 18, 2022; provisional amendments
10 approved as amended by Supreme Court Order No. S-1-RCR-2024-00113, effective for all cases
11 pending or filed on or after December 31, 2024.]