

1 **5-504. Videotaped depositions; testimony of certain minors who are victims of sexual**
2 **offenses.**

3 A. **When allowed.** Upon motion, and after notice to opposing counsel, at any time
4 after the filing of the indictment, information, or complaint in district court charging a criminal
5 sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, the district
6 court may order the taking of a videotaped deposition of the victim, upon a showing that the child
7 may be unable to testify without suffering unreasonable and unnecessary mental or emotional
8 harm. The district judge must attend any deposition taken [~~pursuant to~~] under this paragraph and
9 shall provide such protection of the child as the judge deems necessary.

10 B. **Use at trial.** At the trial of a defendant charged with criminal sexual penetration or
11 criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped
12 deposition of a child under sixteen (16) years of age taken [~~pursuant to~~] under Paragraph A of this
13 rule, may be shown to the trial judge or the jury and admitted as evidence as an additional exception
14 to the hearsay rule of the Rules of Evidence if:

15 (1) the child is unable to testify before the court without suffering unreasonable
16 and unnecessary mental or emotional harm;

17 (2) the deposition was presided over by a district judge and the defendant was
18 present and was represented by counsel or waived counsel; and

19 (3) the defendant was given an adequate opportunity to cross-examine the child,
20 subject to such protection of the child as the judge deems necessary.

21 C. **Additional use at trial.** [~~In addition to the use of a videotaped deposition as~~
22 ~~permitted by Paragraph B of this rule, a videotaped deposition may be used for any of the reasons~~

1 ~~set forth in Paragraph N of Rule 5-503.]~~ In addition to Paragraph B of this rule, the Rules of
2 Evidence shall govern the admissibility of evidence from videotaped depositions.

3 [As amended, effective July 1, 1988; as amended by Supreme Court Order No. S-1-RCR-2024-
4 00094, effective for all cases pending or filed on or after December 31, 2025.]

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6 **Committee commentary.** — This rule was drafted by the rules committee in response to House
7 Memorial 26, Second Session of the Thirty-Third Legislature, 1978 and Section 30-9-17 NMSA
8 1978. The purpose of 30-9-17, *supra*, is to protect a child who has been allegedly sexually abused
9 from further mental stress. The committee explored several alternatives prior to preparing this
10 draft.

11 First of all, the committee explored the possibility of removing all spectators from the courtroom
12 during the child's testimony. This was rejected as it may not be constitutionally permissible to bar
13 wholly the public and the press from the courtroom without the concurrence of the defendant under
14 either the New Mexico Constitution or the United States Constitution. *See Gannett Co. v.*
15 *DePasquale*, 99 S. Ct. 2898 (1979); *Estes v. Texas*, 381 U.S. 532, 587, 85 S. Ct. 1628, 1662, 14 L.
16 Ed. 2d 543, 583 (1965). Prior to the *Gannett* decision, it was generally recognized that the right to
17 a public trial under the United States Constitution could not even be waived by the
18 defendant. *See Constitution of the United States*, congressional research service, 1973. There is
19 also a right to a public trial under the New Mexico Constitution; however, there are no decisions
20 relating to the waiver of this right.

21 Next, the committee considered further protections which could be afforded to the child. It was
22 noted that the present rules already provide for the court to protect the child during
23 discovery. *See Rule 5-507 NMRA.*

1 Several members of the committee had grave concerns about the constitutionality of not requiring
2 an available witness to confront the accused. Section 30-9-17 NMSA 1978 provides only that good
3 cause must be shown for the taking of the videotaped deposition. The rule sets forth specifically
4 what is required to make a showing of good cause for a deposition of an alleged rape victim. Under
5 the rule, the child must be under the age of sixteen and unable to testify without suffering
6 unreasonable and unnecessary mental or emotional harm.

7 In 1988, the committee was requested to consider proposing amendments to Rule 5-504 NMRA
8 which would further protect the child from unnecessary psychological harm. The committee was
9 advised that in order to show good cause, some children have been subjected to two or three
10 psychological evaluations. These evaluations in themselves have, in some cases, created
11 unnecessary psychological harm to the child defeating the purpose of the statute and court rule.
12 Since the present rule does not require a psychological examination, the committee did not believe
13 that further amendments were necessary. Further, the committee is of the opinion that in the rare
14 case that a psychological examination is necessary to show good cause, the trial judge should
15 appoint an independent psychiatrist or psychologist to examine the child and the report to the court.
16 No other examination should be required. The court's determination that psychological harm may
17 result should be made outside the adversarial process.

18 The committee is of the opinion that the court should consider the following factors in determining
19 whether a videotaped deposition should be taken to avoid a victim child from suffering
20 unreasonable and unnecessary mental or emotional harm:

- 21 (1) the child is unable to testify because of fear;
- 22 (2) there is a substantial likelihood, established by expert testimony, that the child would suffer
23 emotional trauma from testifying;

- 1 (3) the child suffers a mental or other infirmity; or
- 2 (4) conduct by defendant or defense counsel causes the child to be unable to continue testifying.
- 3 [Revised, effective May 1, 2002.]