

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE
FOR THE MAGISTRATE AND METROPOLITAN COURTS
PROPOSAL 2020-016**

March 3, 2020

The Rules of Criminal Procedure for State Courts Committee has recommended amendments to Rules 6-108 and 7-108 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 web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 2, 2020, 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.

6-108. Non-attorney prosecutions.

A. **Law enforcement officers.** Law enforcement officers may file criminal complaints against persons in the magistrate court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the jurisdiction of the court. Law enforcement officers may prosecute misdemeanor criminal complaints they have filed in magistrate court, except that no law enforcement officer may prosecute any case that:

- (1) is tried before a jury;
- (2) involves a charge of driving under the influence of intoxicating liquor or drugs; or
- (3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, 30-3-18, or 40-13-6 NMSA 1978.

B. **Other authorized prosecutions.** A governmental entity may appear and prosecute any misdemeanor proceeding if the appearance is by an employee of the governmental entity authorized by the governmental entity to institute or cause to be instituted an action on behalf of the governmental entity, except that no governmental entity may prosecute through a non-attorney any case that:

- (1) is tried before a jury;

(2) involves a charge of driving under the influence of intoxicating liquor or drugs; or

(3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, 30-3-18, or 40-13-6 NMSA 1978.

C. **Trial procedures.** In cases where law enforcement officers and non-attorney government employees are authorized under Paragraphs A and B of this rule to prosecute complaints they have filed, those law enforcement officers and government employees shall be permitted to testify and present evidence to the court. In the court's discretion, such parties may also ask questions of witnesses, either directly or through the court, and may make statements bringing pertinent facts and legal authorities to the court's attention.

D. **Probation violations.** Persons employed as probation officers or compliance officers with a county misdemeanor compliance program or county DWI compliance program may appear and prosecute probation violations they have filed in magistrate court. Those officers may participate in any related court proceedings in the same manner as provided for law enforcement officers and non-attorney government employees under Paragraph C.

E. **Special prosecutor.** Nothing in this rule shall prevent the district attorney from appointing an attorney to act as a special prosecutor for those cases in which a law enforcement officer or an employee acting under authority of a governmental entity has been unable to resolve a case through pretrial procedures and the case must be tried before a jury.

[As amended, effective March 15, 1986; July 1, 1988; as amended by Supreme Court Order No. 08-8300-044, effective December 31, 2008; as amended by Supreme Court Order No. 13-8300-033, effective for all cases filed on or after December 31, 2013; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Although this rule requires that a jury trial must be prosecuted by an attorney, ~~[this rule]~~ it does not require the district attorney's office to enter an appearance in all cases in which the defendant is eligible for a jury trial. Until and unless the district attorney enters an appearance in the case, ~~[a] the law enforcement officer or other non-attorney government employee who initiated the matter~~ may act as a prosecutor in all respects. In situations where a district attorney's office "cannot prosecute a case for ethical reasons or other good cause," see § 36-1-23.1 NMSA 1978, Paragraph E of this rule makes explicit that the district attorney may appoint a special prosecutor to prosecute the matter through a jury trial. The rule in this respect does not expand the reach of Section 36-1-23.1, but merely clarifies that the district attorney's appointing power under the statute may be exercised in appropriate circumstances to allow a prosecution to continue even if the initiating law enforcement officer or government employee is unable to prosecute it to completion.

~~[Prior to December 31, 2008, this rule authorized private citizens to pursue criminal prosecutions in magistrate court, either on their own or through a special prosecutor. In 2013, the Court withdrew former Paragraphs D and E in recognition of the 2008 amendment, which removed the authority for such private prosecutions. Former Paragraph D was entitled "Special prosecutor" and provided that "[n]othing in this rule shall be construed to allow an attorney licensed to practice law in this state to prosecute a case for any party without first having been duly appointed as a special prosecutor by the district attorney for the judicial district in which the court is located." Former Paragraph E was entitled "District attorney" and provided that "[n]othing in this rule shall~~

~~be construed to prevent the district attorney in the judicial district in which the complaint is filed from dismissing the case or entering an appearance and assuming prosecutorial control over the case.” Paragraphs D and E are no longer necessary because they addressed the situation in which a private citizen could pursue a criminal complaint through a special prosecutor. The withdrawal of Paragraphs D and E does not preclude a district attorney from appointing a special prosecutor to prosecute.]~~

[As amended by Supreme Court Order No. _____, effective _____.]

7-108. Non-attorney prosecutions.

A. **Law enforcement officers.** Law enforcement officers may file criminal complaints against persons in the metropolitan court that has jurisdiction over the alleged offense. Criminal complaints shall be limited to charges within the jurisdiction of the court. Law enforcement officers may prosecute misdemeanor criminal complaints they have filed in metropolitan court, except that no law enforcement officer may prosecute any case that:

- (1) is tried before a jury;
- (2) involves a charge of driving under the influence of intoxicating liquor or drugs; or
- (3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, 30-3-18, or 40-13-6 NMSA 1978.

B. **Other authorized prosecutions.** A governmental entity may appear and prosecute any misdemeanor proceeding if the appearance is by an employee of the governmental entity authorized by the governmental entity to institute or cause to be instituted an action on behalf of the governmental entity, except that no governmental entity may prosecute through a non-attorney any case that:

- (1) is tried before a jury;
- (2) involves a charge of driving under the influence of intoxicating liquor or drugs; or
- (3) involves a charge of domestic violence under Sections 30-3-12, 30-3-15, 30-3-16, or 40-13-6 NMSA 1978.

C. **Trial procedures.** In cases where law enforcement officers and non-attorney government employees are authorized under Paragraphs A and B of this rule to prosecute complaints they have filed, those law enforcement officers and government employees shall be permitted to testify and present evidence to the court. In the court’s discretion, such parties may also ask questions of witnesses, either directly or through the court, and may make statements bringing pertinent facts and legal authorities to the court’s attention.

D. **Probation violations.** Persons employed as probation officers or compliance officers with a county misdemeanor compliance program or county DWI compliance program may appear and prosecute probation violations they have filed in metropolitan court. Those officers may participate in any related court proceedings in the same manner as provided for law enforcement officers and non-attorney government employees under Paragraph C.

E. **Special prosecutor.** Nothing in this rule shall prevent the district attorney from appointing an attorney to act as a special prosecutor for those cases in which a law enforcement

officer or an employee acting under authority of a governmental agency has been unable to resolve a case through pretrial procedures and the case must be tried before a jury.

[As amended, effective March 15, 1986; July 1, 1988; as amended by Supreme Court Order No. 08-8300-010, effective May 8, 2008; as amended by Supreme Court Order No. 13-8300-033, effective for all cases filed on or after December 31, 2013; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Although this rule requires that a jury trial must be prosecuted by an attorney, ~~[this rule]~~ it does not require the district attorney's office to enter an appearance in all cases in which the defendant is eligible for a jury trial. Until and unless the district attorney enters an appearance in the case, [a] the law enforcement officer or other non-attorney government employee who initiated the matter may act as a prosecutor in all respects. In situations where a district attorney's office "cannot prosecute a case for ethical reasons or other good cause," see § 36-1-23.1 NMSA 1978, Paragraph E of this rule makes explicit that the district attorney may appoint a special prosecutor to prosecute the matter through a jury trial. The rule in this respect does not expand the reach of Section 36-1-23.1, but merely clarifies that the district attorney's appointing power under the statute may be exercised in appropriate circumstances to allow a prosecution to continue even if the initiating law enforcement officer or government employee is unable to prosecute it to completion.

~~[Prior to December 31, 2008, this rule authorized private citizens to pursue criminal prosecutions in metropolitan court, either on their own or through a special prosecutor. In 2013, the Court withdrew former Paragraphs D and E in recognition of the 2008 amendment, which removed the authority for such private prosecutions. Former Paragraph D was entitled "Special prosecutor" and provided that "[n]othing in this rule shall be construed to allow an attorney licensed to practice law in this state to prosecute a case for any party without first having been duly appointed as a special prosecutor by the district attorney for the judicial district in which the court is located." Former Paragraph E was entitled "District attorney" and provided that "[n]othing in this rule shall be construed to prevent the district attorney in the judicial district in which the complaint is filed from dismissing the case or entering an appearance and assuming prosecutorial control over the case." Paragraphs D and E are no longer necessary because they addressed the situation in which a private citizen could pursue a criminal complaint through a special prosecutor. The withdrawal of Paragraphs D and E does not preclude a district attorney from appointing a special prosecutor to prosecute on behalf of the state.]~~

[Adopted by Supreme Court Order No. 13-8300-033, effective for all cases filed on or after December 31, 2013; as amended by Supreme Court Order No. _____, effective _____.]