

1 **2-401. Parties; capacity.**

2 A. **Real party in interest.** Every action shall be prosecuted in the name of the
3 real party in interest; but an executor, administrator, personal representative, guardian,
4 trustee of an express trust, a party with whom or in whose name a contract has been made
5 for the benefit of another, or a party authorized by statute may sue in his own name without
6 joining with him the party for whose benefit the action is brought; and when a statute of
7 the state so provides, an action for the use or benefit of another shall be brought in the name
8 of the state. Where it appears that an action, by reason of honest mistake, is not prosecuted
9 in the name of the real party in interest, the court may allow a reasonable time for
10 ratification of commencement of the action by, or joinder or substitution of, the real party
11 in interest; and such ratification, joinder or substitution shall have the same effect as if the
12 action had been commenced in the name of the real party in interest.

13 B. **Capacity to sue or be sued.** The capacity of an individual, including those
14 acting in a representative capacity, to sue or be sued shall be determined by the law of this
15 state. The capacity of a corporation to sue or be sued shall be determined by the law under
16 which it was organized, unless some statute of this state provides to the contrary.

17 C. **Minors or incompetent persons.** When a minor or incompetent person
18 has a representative, such as a general guardian, or other like fiduciary, the representative
19 may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent
20 person does not have a duly appointed representative he may sue by his next friend or by a
21 guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent

1 person not otherwise represented in an action or shall make such other order as it deems
2 proper for the protection of the minor or incompetent person.

3 **D. Consumer debt claims.**

4 (1) Collection agencies may take assignments of claims in their own
5 names as real parties in interest for the purpose of billing and collection and bringing suit
6 in their own names; provided that no suit authorized by this section may be instituted on
7 behalf of a collection agency in any court unless the collection agency appears by a licensed
8 attorney-at-law; and further provided that the collection agency must plead specific facts
9 in its initial pleading demonstrating that it is the real party in interest.

10 (2) In any consumer debt claim in which the party seeking relief alleges
11 entitlement to enforce the debt but is not the original creditor, the party must file an
12 affidavit establishing the chain of title or assignment of the debt from the original creditor
13 to and including the party seeking relief. The affidavit must be based on personal
14 knowledge, setting forth those facts as would be admissible in evidence, showing
15 affirmatively that the affiant is competent to testify to the matters stated in the affidavit.
16 An affidavit based on a review of the business records of the party or any other person or
17 entity in the chain of title must establish from personal knowledge compliance with the
18 requirements of Rule 11-803(6)(a)-(c) NMRA, or demonstrate reliance on an attached
19 certification complying with Rule 11-902(11) or (12) NMRA. The business records must
20 be attached to the affidavit or certification.

1 [As amended by Supreme Court Order No. 20-8300-005, effective for all cases filed on or
2 after December 31, 2020.]

3 **Committee commentary.** — In 2016, the New Mexico Supreme Court approved
4 amendments to Rules 1-009, 1-017, 1-055, and 1-060 NMRA, and created a new civil
5 complaint form for consumer debt claims, Form 4-226 NMRA, for use in the district courts.

6 Paragraph D of this rule was added in 2020 to provide additional protections to
7 consumers in consumer debt collection cases. See Rule 2-201 NMRA, Committee
8 commentary. In addition, Rules 2-201, 2-702, 2-703, 3-201, 3-401, 3-702, and 3-704
9 NMRA, as well as Form 4-226 NMRA, were amended in 2020 to align the magistrate and
10 metropolitan court rules for consumer debt claims with the district court rules.

11 Subparagraph (D)(2)'s affidavit requirements derive from Rule 1-056(E) NMRA.
12 A proper affidavit can support the introduction of business records. See *Nader v. Blair*, 549
13 F.3d 953, 963 (4th Cir. 2008) (stating that “employees who are familiar with the record-
14 keeping practices of a business are qualified to speak from personal knowledge that
15 particular documents are admissible business records, and affidavits sworn by such
16 employees constitute appropriate summary judgment evidence.”). In like manner, an
17 affidavit from the “custodian or another qualified witness” or “a certification that complies
18 with Rule 11-902(11) or (12) NMRA” that demonstrates compliance with Rule 11-803(6)
19 NMRA suffice, if the business records accompany the affidavit or certification.

20 The business records exception allows the records themselves to be admissible, but
21 not simply statements about the purported contents of the records. See *Bank of New York*

**MAGISTRATE COURT CIVIL
RULE 2-401**

**Supreme Court Approved
November 1, 2020**

1 v. *Romero*, 2014-NMSC-007, ¶ 33, 320 P.3d 1 (holding that, based on the plain language
2 of Rule 11-803(F) NMRA (2007) (now Rule 11-803(6) NMRA), “it is clear that the
3 business records exception requires some form of document that satisfies the rule’s
4 foundational elements to be offered and admitted into evidence and that testimony alone
5 does not qualify under this exception to the hearsay rule and concluding that testimony
6 regarding the contents of business records, unsupported by the records themselves, by one
7 without personal knowledge of the facts constitutes inadmissible hearsay”) (quoting *State*
8 v. *Cofer*, 2011-NMCA-085, ¶ 17, 150 N.M. 483, 261 P.3d 1115) (internal quotation marks
9 omitted).
10 [As amended by Supreme Court Order No. 20-8300-005, effective for all cases filed on or
11 after December 31, 2020.]