

1 **5-106. Peremptory challenge to a district judge; recusal; procedure for exercising.**

2 A. **Definition of parties.** “Party,” as used in this rule, shall mean a defendant, the
3 state, or an attorney representing the defendant or the state. A party may not excuse a judge after
4 the party has requested that judge to perform any discretionary act.

5 B. **Extent of excuse or challenge.** No judge may be excused from conducting an
6 arraignment or first appearance, setting initial conditions of release, reviewing a lower court’s
7 order setting or revoking conditions of release, or presiding over a detention hearing. No party
8 shall excuse more than one judge.

9 C. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more
10 pending cases are reassigned contemporaneously.

11 D. **Procedure for excusing a district judge.** The statutory right to excuse the judge
12 before whom the case is pending must be exercised by a party filing a peremptory election to
13 excuse with the clerk of the district court within ten (10) days after the later of

14 (1) arraignment or the filing of a waiver of arraignment;

15 (2) service by the clerk of notice of assignment or reassignment of the case to
16 a judge;

17 (3) completion of publication of notice of reassignment in the case of a mass
18 reassignment; or

19 (4) filing of a notice of appeal from a lower court.

20 E. **Notice of reassignment.** After the arraignment or the filing of a waiver of
21 arraignment, if the case is reassigned to a different judge, the clerk shall give notice of
22 reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the
23 reassignments to all parties by publishing notice for four (4) consecutive weeks on the State Bar

1 web site and in two (2) consecutive New Mexico Bar Bulletins. Service of notice by publication
2 is complete on the date printed on the second issue of the Bar Bulletin.

3 F. **Service of excusal.** Any party electing to excuse a judge shall serve notice of that
4 election on all parties.

5 G. **Misuse of peremptory excusal procedure.** Peremptory excusals [~~without cause~~
6 ~~are intended to allow litigants an expeditious method of avoiding assignment of a judge whom the~~
7 ~~party has a good faith basis for believing will be unfair to one side or the other, and they~~] are not
8 to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an
9 attorney or group of attorneys may be using peremptory excusals for improper purposes or with
10 such frequency as to impede the administration of justice, the Chief Judge of the district shall send
11 a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written
12 notice to the attorney or group of attorneys believed to be improperly using peremptory excusals.
13 The Chief Justice may take appropriate action to address any misuse, including issuance of an
14 order providing that the attorney or attorneys or any party they represent may not file peremptory
15 excusals for a specified period of time or until further order of the Chief Justice.

16 H. **Recusal.** No district judge shall sit in any action in which the judge's impartiality
17 may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code
18 of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of
19 notification of recusal from a district judge, the clerk of the court shall give written notice to each
20 party.

21 I. **Disability during trial.** If by reason of death, sickness, or other disability the judge
22 before whom a jury trial has commenced is unable to proceed with the jury trial, any other judge
23 regularly sitting in or assigned to the court, upon certifying familiarity with the record of the jury

1 trial, may proceed with and finish the jury trial or, if appropriate, may grant a mistrial. In a nonjury
2 trial, upon motion of the defendant, a mistrial shall be granted upon disability of the trial judge.

3 **J. Disability after verdict or finding of guilt.** If by reason of death, sickness, or
4 other disability the judge before whom the defendant has been tried is unable to perform the duties
5 to be performed by the court after a verdict or finding of guilt, any other eligible judge may perform
6 those duties upon certifying familiarity with the record of the trial.

7 [As amended, effective August 1, 1989; September 1, 1990; June 1, 1994; as amended by Supreme
8 Court Order No. 08-8300-039, effective December 15, 2008; as amended by Supreme Court Order
9 No. 15-8300-019, effective for all cases pending or filed on or after December 31, 2015; as
10 amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or
11 after July 1, 2017; as amended by Supreme Court Order No. 19-8300-008, effective for all cases
12 pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020,
13 effective for all cases pending or filed on or after December 31, 2020.]

14 **Committee commentary.** — This rule governs the exercise of the statutory right to excuse
15 the judge before whom the case is pending. *See* NMSA 1978, § 38-3-9. Paragraph B precludes a
16 party from exercising this right in certain pretrial proceedings, including arraignment and pretrial
17 release and detention hearings. Paragraph B does not prevent a judge from recusing under the
18 provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's
19 own motion or on motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

20 Reassignment of a judge usually occurs in individual cases in which a party has excused
21 the trial judge or the judge recuses himself or herself. When this happens, the clerk easily can and
22 does provide individual notice of the reassignment to the parties by mail.

1 When a judge retires, dies, is disabled, or [~~the judge~~] assumes responsibility for different
2 types of cases (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and
3 parties who have not previously exercised a peremptory recusal may choose to recuse the successor
4 judge. Providing individual notice by mail to every party in each such case is administratively
5 difficult, expensive, and time consuming. Clerks sometimes provide notice of reassignment in an
6 alternative manner—usually through publication in the Bar Bulletin, on the State Bar’s web site,
7 or both.

8 The 2008 amendment formally incorporates into Rule 5-106 NMRA the use of notice by
9 publication in such a situation—now identified as a “mass reassignment.” The amended rule
10 requires that the specified notice be published on the State Bar’s web site for four (4) consecutive
11 weeks and in two (2) consecutive issues of the New Mexico Bar Bulletin, and provides that a party
12 who has not yet exercised a peremptory recusal may do so within ten (10) days after the date of
13 the second Bar Bulletin.

14 When a judge’s entire caseload is reassigned, the publication notice need not contain the
15 caption of each affected case, but must contain the names of the initially-assigned judge and the
16 successor judge.

17 There may be occasions when many, but not all, of a judge’s cases are reassigned; for
18 example when an additional judge is appointed in a judicial district and a portion of other judges’
19 cases are assigned to the new judge. When this occurs, if the number of pending cases reassigned
20 from any judge exceeds one hundred (100), the 2008 amendment authorizes notice by publication.
21 To assure that the parties have notice of which cases were reassigned, the court should either make
22 a list available containing the title of the action and file number of each case reassigned, or not
23 reassigned, whichever is less. The court may publish such a list in the Bar Bulletin, publish a notice

1 in the Bar Bulletin that directs the reader to the court’s web site where such a list will be posted,
2 or post notice on the State Bar’s web site.

3 Substituting publication for individual notice increases the chance that a party will not
4 receive actual notice of a reassignment. Where actual notice is not achieved through publication,
5 the trial court has ample authority to accept a late recusal. *See* Rule 5-104(B) NMRA (providing
6 that the court may permit act to be done after deadline has passed for cause shown).

7 [Adopted by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended
8 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July
9 1, 2017; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or
10 filed on or after July 1, 2019; as amended for stylistic compliance by Supreme Court Order No.
11 20-8300-020, effective for all cases pending or filed on or after December 31, 2020.]