

1 **5-201. Methods of prosecution.**

2 A. **Commencement of prosecution.** A prosecution may be commenced by the filing
3 of[:]

- 4 (1) a complaint;
5 (2) an information; or
6 (3) an indictment.

7 B. **Complaint.** A complaint is a sworn written statement of the facts, the common
8 name of the offense, and, if applicable, a specific section number of New Mexico Statutes which
9 defines the offense. Complaints shall be substantially in the form approved by the court
10 administrator.

11 C. **Information.** An information is a written statement, signed by the district attorney,
12 containing the essential facts, common name of the offense, and, if applicable, a specific section
13 number of the New Mexico Statutes which defines the offense. It may be filed only in the district
14 court. Informations shall be substantially in the form approved by the court administrator, and shall
15 state the names of all witnesses ~~[upon]~~ on whose testimony the information is based. On
16 completion of a preliminary examination or acceptance of a waiver thereof by the district court,
17 an [An] information shall be filed within thirty (30) days [after completion of a preliminary
18 examination or waiver thereof unless such time is extended by the court upon motion of the district
19 attorney] if a defendant is not in custody, and within ten (10) days if a defendant is in custody. If
20 an information is not filed within these deadlines, the complaint shall be dismissed without
21 prejudice by the court in which the action is pending.

22 D. **Indictments.** An indictment is a written statement returned by a grand jury
23 containing the essential facts constituting the offense, common name of the offense, and, if

1 applicable, a specific section number of the New Mexico Statutes which defines the offense. All
2 indictments shall be signed by the foreman of the grand jury. Indictments shall be substantially in
3 the form prescribed by the court administrator. The names of all witnesses ~~upon~~ on whose
4 testimony an indictment is based shall appear on the indictment.

5 [As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed
6 on or after December 31, 2020.]

7 **Committee commentary.** — The Complaint. This rule governs complaints filed in the
8 district court. In almost all cases a complaint will be filed in the magistrate court and will be
9 governed by Rule 6-201 NMRA. If the complaint charges a petty misdemeanor or misdemeanor,
10 the magistrate will have jurisdiction to try the case. *See* Section 35-3-4A NMSA 1978. If the
11 complaint charges a capital, felonious, or other infamous crime, the defendant may be held to
12 answer only on an information or indictment. N.M. Const., art. 2, § 14. *See State v. Marrujo, 1968-*
13 *NMSC-118, 79 N.M. 363, 443 P.2d 856*~~[-(1968)]~~. If the complaint charges a crime which is not
14 within the magistrate court jurisdiction, the magistrate may only~~[:]~~

15 (1) determine initially if there is probable cause ~~upon~~ on which to confine the
16 defendant;

17 (2) advise the defendant of his or her rights at the first appearance;

18 (3) set and review conditions of release; and

19 (4) conduct preliminary examinations. *See* Section 35-3-4 NMSA 1978.

20 Under this rule, Rule 6-201 NMRA, and Rule 7-201 NMRA, a complaint must state the
21 common name of the offense, and, if applicable, the specific section number of the New Mexico
22 Statutes which defines the offense. Two decisions of the ~~[court of appeals]~~ Court of Appeals
23 interpreting the former magistrate rule indicate that the complaint must carefully set forth the name

1 and section number. In *State v. Raley*, 1974-NMCA-024, 86 N.M. 190, 521 P.2d 1031[~~(Ct.~~
2 ~~App.)~~], cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974), the [court] Court held that the initials
3 “D.W.I.” were insufficient to state the common name of the offense. In *State v. Nixon*, 1976-
4 NMCA-031, 89 N.M. 129, 548 P.2d 91[~~(Ct. App. 1976)~~], the [court] Court held that it is not
5 necessary to charge a specific subsection of the statutes. In both cases the [court] Court determined
6 that the complaint must be dismissed. However, since the cases were decided under the former
7 magistrate rules, there is no discussion of Rule 6-303 NMRA of the present magistrate rules
8 governing technical defects in the pleadings. *See also* Rule 5-204 NMRA, an identical rule in the
9 Rules of Criminal Procedure for the District Courts, and commentary.

10 The Information. This rule allows a prosecution to be commenced by the filing of the
11 information. As a practical matter, the prosecution is generally commenced by the filing of the
12 complaint in the magistrate court followed by either an indictment or a preliminary hearing and
13 information. Nothing, however, prohibits the prosecution from first filing the
14 information. *See State v. Bailey*, 1956-NMSC-123, 62 N.M. 111, 305 P.2d 725[~~(1957)~~]. *See*
15 *also Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965). In that event the accused is not required to
16 plead to the information and may move the court to remand the case for a preliminary
17 hearing. *See* [Paragraph C of]Rule 5-601(C) NMRA and commentary. After the preliminary
18 hearing, the defendant can then be tried [upon] on the information filed prior to the preliminary
19 hearing. *State v. Nelson*, 1958-NMSC-018, 63 N.M. 428, 321 P.2d 202[~~(1958)~~].

20 If the prosecution has been commenced by the filing of a complaint in the magistrate court
21 and a preliminary hearing has been held, Paragraph C of this rule requires that the information be
22 filed within thirty (30) days after completion of the preliminary examination. The information must
23 conform to the bind-over order of the magistrate. *State v. Melendrez*, 1945-NMSC-020, 49 N.M.

1 181, 159 P.2d 768[~~(1945)~~]. It does not have to conform to the complaint which initiated the
2 prosecution in the magistrate court. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d
3 838[~~(Ct. App. 1968)~~].

4 The provision of Paragraph C of this rule requiring the information to contain the essential
5 facts was taken from Rule 7 of the Federal Rules of Criminal Procedure. *See generally*, 1 Orfield,
6 Criminal Procedure under the Federal Rules § § 7:83-7:87 (1966). The United States Supreme
7 Court has indicated that the pleading under Federal Rule 7 must be tested by two general criteria:
8 (1) whether the pleading contains the elements of the offense to sufficiently apprise the defendant
9 of what he or she must be prepared to meet; (2) whether he or she is accurately apprised of the
10 charge so as to know if he or she is entitled to plead a former acquittal or conviction under the
11 double jeopardy clause of the fifth amendment to the United States constitution. *Russell v. United*
12 *States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046-49, 8 L. Ed. 2d 240, 250 (1962). *Compare State*
13 *v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88[~~(Ct. App. 1973)~~], with *State v.*
14 *Foster*, 1974-NMCA-150, 87 N.M. 155, 530 P.2d 949[~~(Ct. App. 1974)~~].

15 This rule must also be read in conjunction with Rule 5-204 NMRA and [~~Paragraphs A and~~
16 ~~B of~~] Rule 5-205(A) and (B) NMRA. [~~Paragraphs A and B of~~] Rule 5-205(A) and (B) identify
17 certain allegations which need not be included in the pleading. Rule 5-204 indicates that the
18 pleading is not invalid because of defects, errors, and omissions. In addition, the [~~court of appeals~~]
19 Court of Appeals has held that any asserted failure of the pleading to allege essential facts must be
20 accompanied by a showing of prejudice due to that failure. *State v. Cutnose*, 1974-NMCA-130, 87
21 N.M. 307, 532 P.2d 896[~~(Ct. App.)~~], cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

22 Paragraph C of this rule requires that the information be signed by the district
23 attorney. *See* N.M. Const., art. II, § 14. This requirement can be met by the signature of an assistant

1 district attorney. *See* Section 36-1-2 NMSA 1978. The constitution also indicates that the
2 information may be filed by the attorney general. *See also* Section 8-5-3 NMSA 1978. The deputy
3 or an assistant attorney general would have the same authority as the attorney
4 general. *See* Section 8-5-5 NMSA 1978.

5 Section 20 of Article 20 of the New Mexico Constitution contains language which would
6 indicate that the accused must waive an indictment if the state proceeds by information. However,
7 it has been held that Section 14 of Article 2 of the ~~[constitution]~~ Constitution, the section allowing
8 prosecution by information, eliminated the necessity of a waiver of a grand jury indictment. *See*
9 *State v. Flores*, 1968-NMCA-057, 79 N.M. 420, 444 P.2d 605[~~-(Ct. App. 1968)~~].

10 For interpretation of the common name and specific statute section provisions of the
11 information, see the discussion of the elements of a complaint, above.

12 The Indictment. For the law governing the grand jury procedure and return of
13 indictments, *see* Section 31-6-1 NMSA 1978 et seq. The elements of an indictment are the same
14 as required for an information and would be interpreted by the same criteria. *See e.g.*, [~~*State v.*~~
15 ~~*Cutnose*, 1974-NMCA-130[~~87 N.M. 307, 532 P.2d 896 (Ct. App.)~~, cert. denied, 87 N.M.~~
16 ~~299, 532 P.2d 888 (1974)~~]. The state may proceed by indictment in the district court even if the
17 prosecution was initiated originally by the filing of a complaint in the magistrate court. *See State*
18 *v. Peavler*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387[~~-(1975)~~]; *State v. Ergenbright*, 1973-
19 NMSC-024, 84 N.M. 662, 506 P.2d 1209[~~-(1973)~~]; *State v. Burk*, 1971-NMCA-018, 82 N.M.
20 466, 483 P.2d 940[~~-(Ct. App.)~~], cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971).
21 This practice was recognized by the ~~[supreme court]~~ Supreme Court in the adoption of [~~Paragraph~~
22 ~~E-of~~] Rule 6-202(E) NMRA, which provides that if the defendant is indicted prior to the
23 preliminary examination, the magistrate shall take no further action.

- 1 [As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed
- 2 on or after December 31, 2020.]