

**PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE
PROPOSAL 2021-005**

March 17, 2021

The Supreme Court is considering amendments to Rule 12-209 NMRA and the adoption of new Rules 12-208.1 and 12-211.1 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 16, 2021, 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.

[NEW MATERIAL]

12-208.1. Statement of appeal for direct criminal appeals in the Supreme Court.

- A. **Scope.** This rule applies to appeals from the district courts in which a sentence of death or life imprisonment has been imposed, as set forth in Rule 12-102(A)(1) NMRA.
- B. **Attorney responsible.** Unless otherwise ordered by the Supreme Court, appellate counsel shall be responsible for preparing and filing a statement of appeal in the Supreme Court.
- C. **When filed.** Within sixty (60) days after filing the notice of appeal in all appeals except those under Rules 12-203, 12-204, 12-603, and 12-604 NMRA, the appellant shall file a statement of appeal. But, if the notice of appeal was filed before the express disposition by order or the automatic denial or the withdrawal of any timely filed post-trial or post-judgment motion listed in Subparagraphs (1) or (2) of Rule 12-201(D) NMRA, then the statement of appeal shall be filed within sixty (60) days after the notice of appeal becomes effective under Rule 12-201(D)(4) NMRA.
- D. **Service.** The appellant shall serve a copy of the statement of appeal on the district court clerk and on those persons who are required to be served with a notice of appeal under Rule 12-202 NMRA.
- E. **Statement of appeal; contents.** A statement of appeal shall contain the following information:
- (1) a statement of the court's jurisdiction and a reference to all related or prior appeals of which the party is aware, including an appropriate citation, if any;

(2) a statement specifying whether the entire proceedings were audio recorded, and if not, identifying the portion of the proceedings, other than the record proper, not audio recorded;

(3) a statement certifying that the transcript of proceedings and all depositions and documentary exhibits are ready to be transmitted from the district court to the Supreme Court; and

(4) a copy of the order appointing appellate counsel, where applicable.

F. **Cross-appeals.** A party who files a cross-appeal in accordance with Rule 12-201(B) NMRA shall file a statement of appeal in accordance with this rule within thirty (30) days after the notice of appeal is filed by the cross-appellant and shall pay a docket fee as provided in Paragraph F of this rule.

G. **Docket fee.** Except where free process has been granted on appeal, the docket fee shall accompany the filing of a statement of appeal in the Supreme Court unless the party filing the statement of appeal has already paid a docket fee.

H. **Response not permitted.** No response to a statement of appeal is allowed.

I. **Failure to serve statement of appeal.** On a monthly basis, the district court clerk shall forward to the Supreme Court a list of all criminal cases in which a notice of appeal has been on file for at least ninety (90) days but in which the district court has not been served with a copy of a statement of appeal.

[Adopted by Supreme Court Order No. _____, effective _____.]

12-209. The record proper (the court file).

A. **Composition.** The papers and pleadings filed in the district court (the court file), or a copy thereof, shall constitute the record proper. Depositions shall not be copied. The original, if contained in the court file, shall be filed with the appellate court and shall not be sealed except on the order of the district court or appellate court. The record proper shall be prepared in the manner provided by Rule 22-301 NMRA [~~of the Rules Governing the Recording of Judicial Proceedings~~].

B. **Transmission.** On receipt of a copy of the docketing statement for appeals brought in the Court of Appeals, or statement of [issues] appeal for appeals brought in the Supreme Court, the district court clerk shall number consecutively the pages of the record proper and send it to the appellate court so that it will be filed in the appellate court not later than [fourteen (14) days] five (5) days from the date the docketing statement or statement of [issues] appeal is received by the district court. The first page, after the title page, of the record proper shall consist of a copy of the district court clerk's docket sheet with references to the page of the record proper for each entry. The district court clerk shall send a copy of this docket sheet to all counsel of record. The district court clerk shall include a statement of the costs of the record proper. The appellant shall pay for the record proper within ten (10) days of the filing of the docketing statement or statement of [issues] appeal.

C. **Correction or modification of the record proper.** If anything material to either party is omitted from the record proper by error or accident, the parties by stipulation, or the district court or the appellate court on motion or on its own initiative, may direct that the omission be corrected^[5] and a supplemental record proper transmitted to the appellate court. The appellate court shall notify the parties when it has ordered supplemental material on its own accord.

D. **Documents filed during pendency of appeal.** Copies of all documents filed in the district court during the pendency of the appeal shall be transmitted to the appellate court for inclusion in the record proper, unless otherwise ordered by the appellate court.

~~[E. **Return of record proper.** After final determination of the appeal, if the original of the record proper has been filed under Paragraph A of this rule, the appellate court clerk shall return the record proper to the district court clerk.]~~

[As amended, effective July 1, 1990; January 1, 2000; July 29, 2005; as amended by Supreme Court Order No. 06-8300-021, effective December 18, 2006; as amended by Supreme Court Order No. 16-8300-011, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

12-211.1. Transcript of proceedings, depositions, and exhibits in direct criminal appeals in the Supreme Court.

A. **Transcript of proceedings.** As used in these rules

(1) “transcript of proceedings” includes audio recordings of the proceedings and stenographic transcripts of the proceedings; and

(2) “audio recording” includes any tape, digital or other electronic recording of the proceedings. Audio recordings must comply with standards established by the Supreme Court.

B. **Preparation of audio-recording transcript.**

(1) Upon service of the notice of appeal on the district court, the entire proceedings are deemed designated, meaning that the transcript of proceedings shall include pretrial, trial, and post-trial proceedings. Where the transcript of proceedings is an audio recording, within fifteen (15) days after service of the notice of appeal, the district court clerk shall prepare an original recording, two (2) duplicates of the recording, and an index log for transmission to the Supreme Court. The district court clerk shall retain one (1) duplicate. The district court clerk shall include a statement of the cost of the audio recordings. After final determination of the appeal, the Supreme Court shall preserve the original audio recording for storage in accordance with applicable administrative regulations of the New Mexico State Records Center and Archives.

(2) The appellant shall make satisfactory arrangements with the district court clerk for the cost of the duplicate copies of the audio recording. Proof that satisfactory arrangements have been made shall be filed in the district court within five (5) days after service of the notice of appeal. Such proof of satisfactory arrangements shall be by certificate of the district court clerk.

C. **Preparation of non-audio recording transcript.**

(1) Upon service of the notice of appeal on the district court, the entire proceedings are deemed designated, meaning that the transcript of proceedings shall include pretrial, trial, and post-trial proceedings. The court reporter shall, within thirty (30) days after service of the notice of appeal, file three (3) copies of the transcript of the proceedings in district court with a certificate of the court reporter that the copies of the proceedings are true and correct. The transcript shall be in the form required by Rules 12-305 and 22-302 NMRA. The district court clerk shall serve notice on all parties of the filing of the transcript.

(2) The appellant shall make satisfactory arrangements with the court reporter for payment of the transcript. Proof that satisfactory arrangements have been made shall be filed with the district court clerk within fifteen (15) days of the filing of the transcript. Such proof of satisfactory arrangements shall be by certificate of the reporter.

(3) Within fifteen (15) days after service of the notice of filing of the transcript of proceedings, any party may file with the district court clerk, and serve on the opposing party, objections to the stenographic transcript. A hearing on the objections shall be held by the district court within fifteen (15) days after the filing of the objections. At the hearing the district court shall resolve the objections and, if necessary, order appropriate corrections to be made.

D. **Disagreements over cost.** In case of disagreement over the cost of a stenographic transcript or duplicates of an audio recording, a party may file with the district court a motion for determination by the district court of the amount of compensation to be paid. The district court may order the payment or collateral to be deposited in the registry of the district court to secure payment of the cost.

E. **Extensions of time.** The appellant shall be responsible for the timely preparation and filing of the transcript of proceedings. Any extension of time for filing a transcript of proceedings may be granted only by Supreme Court. Any motion for extension of time must be supported by an affidavit from the responsible court reporter, court monitor, district court clerk or other party whose duty it is to prepare the transcript of proceedings or to duplicate the master audio recording unless this affidavit is waived by the Supreme Court for good cause shown. The affidavit shall set forth the pending cases in which the reporter or court monitor has transcripts ordered, the estimated dates on which such transcripts will be completed, and the reasons an extension is necessary in this case.

F. **Depositions and documentary exhibits.** All depositions and exhibits that are documents, maps, charts, photographs, recordings, videotapes, or the like, are deemed designated at the filing of the notice of appeal, and shall be included in the record on appeal. The district court clerk shall send to the Supreme Court all depositions and documentary exhibits with the transcript of proceedings.

G. **Non-documentary exhibits.** Any non-documentary exhibits shall be submitted to the Supreme Court under Rule 12-212(B) NMRA within five (5) days after the filing of the statement of appeal.

H. **Certification of appeal readiness.** An appellant's statement of appeal filed under Rule 12-208.1 NMRA shall include a statement certifying that the transcript of proceedings and all depositions and documentary exhibits are ready to be transmitted from the district court to the Supreme Court. Within five (5) days after service of appellant's statement of appeal and certification, the district court clerk shall send the transcript and all depositions and documentary exhibits to the Supreme Court.

I. **Filing in Supreme Court.** Upon receipt of the transcript of proceedings, depositions, and documentary exhibits, the Supreme Court clerk shall serve notice of the filing on all parties and the district court clerk.

J. **Failure to file transcript of proceeding.** If the appellant shall fail to cause the transcript of proceedings, depositions, and documentary exhibits to be filed in the Supreme Court within the time limit prescribed by this rule, the district court or the Supreme Court, upon motion, shall make such orders as will prevent such default from prejudicing any other party's appeal in the same case.

K. **Unavailability or inaudibility of transcript; statement of proceedings.**

(1) If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript of proceedings is unavailable or inaudible, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection and file it in the district court within thirty (30) days after filing the notice of appeal.

(2) The statement shall be served on the appellee, who may file objections or propose amendments thereto within fifteen (15) days after service.

(3) If there are any objections or proposed amendments thereto, the objections or amendments shall be submitted to the district court for settlement and approval.

(4) Within fifteen (15) days after filing of the objections or amendments, the district court shall settle and approve the transcript of proceedings.

(5) In lieu of the foregoing, the parties may agree upon a statement of facts and proceedings and stipulate that they deem the statement sufficient for purposes of review, and the statement shall be filed in the district court as a transcript of proceedings within thirty (30) days after the filing of the notice of appeal, unless otherwise ordered by the Supreme Court.

L. **Separate appeals.** When separate appeals are taken by more than one party, only one transcript of proceedings shall be required.

M. **Supplemental transcript of proceedings.** After the transcript of proceedings has been filed, the Supreme Court may, upon its own motion or upon motion of either party and for good cause shown, order or allow a supplemental transcript of proceedings. The Supreme Court shall set the time for filing the supplemental transcript of proceedings in the Supreme Court.

[Adopted by Supreme Court Order No. _____, effective _____.]