PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE
PROPOSAL 2021-004

March 17, 2021

The Appellate Rules Committee has recommended amendments to Rules 12-503, 12-505, 12-601, 12-602, and 12-603 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.

12-503. Writs of error.

A. **Scope.** This rule governs the procedure for issuance of a writ of error by the Supreme Court or Court of Appeals to the district court.

B. **Court of Appeals; authority to issue.** Under Article VI, Section 29 of the New Mexico Constitution, the Supreme Court authorizes the Court of Appeals to issue writs of error in those cases over which it would have appellate jurisdiction from a final judgment.

C. **Time.** A petition for writ of error shall be filed within thirty (30) days after the order sought to be reviewed is filed in the district court clerk's office unless a timely motion is filed that has the potential to affect the conclusiveness of the district court's order under Subparagraph (E)(2)(a) of this rule, in which event, the full time prescribed in this rule for the filing of a petition for writ of error shall commence to run and be computed from the filing of an order expressly disposing of the last such remaining motion. The three (3)-day [~~mailing~~] period set forth in Rule 12-308 NMRA does not apply to this time limit.

D. **Parties.** The first party to file a petition for writ of error, and any party joining in that petition, shall be designated an "appellant." Any opposing party, regardless of whether that party has also filed a petition, shall be designated an "appellee." The district court shall not be a party to the proceeding on a writ of error.

E. **Contents.** A party seeking a writ of error shall attach to the petition a copy of the order of the district court, with the date of filing noted on its face, and shall include in the petition

(1) a concise statement of the nature of the case, a summary of the proceedings, the disposition below, and the facts relevant to the petition;

(2) a concise statement of how the order sought to be reviewed

(a) conclusively determines the disputed question;

(b) resolves an important issue completely separate from the merits of the action; and

(c) would be effectively unreviewable on appeal from a final judgment because the remedy by way of appeal would be inadequate; and

(3) any other matters of record that will assist the appellate court in exercising its discretion.

F. **Length limitations.** Except by permission of the appellate court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:

(1) ***Body of the petition defined.*** The body of the petition consists of headings, footnotes, quotations, and all other text except any cover page, table of contents, table of authorities, signature blocks, and certificate of service.

(2) ***Page limitation.*** Unless the petition complies with Subparagraph (E)(3) of this rule, the body of the petition shall not exceed ten (10) pages.

(3) ***Type-volume limitation.*** The body of the petition shall not exceed three thousand one hundred fifty (3,150) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or three hundred forty-two (342) lines, if the party uses a monospaced type style or typeface, such as Courier.

G. **Statement of compliance.** If the body of the petition exceeds the page limitations of Subparagraph (F)(2) of this rule, then the petition must contain a statement that it complies with the limitations of Subparagraph (F)(3) of this rule. If the petition is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the petition as defined in Subparagraph (F)(1) of this rule. If the petition is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the petition. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.

H. **Filing.** The petition shall be filed in the court that would have appellate jurisdiction over a final judgment in the case along with the appellate docket fee or free process order.

I. **Service.** The party filing the petition shall serve a copy of it on all other parties to the proceeding and on the district court judge.

J. **Response.** Any party may file a response to a petition for writ of error within fifteen (15) days of service of the petition. The response shall comply with Paragraphs F and G of this rule and shall be served on all other parties and on the district court judge.

K. **Reply.** A reply is not permitted without leave of the appellate court, which may be granted [~~upon~~] on a showing of good cause. A motion seeking leave to file a reply must be filed and served within seven (7) days after service of the response and must include the proposed reply.

L. **Proceedings on issuance of writ.** The appellate court in its discretion may issue the writ. On issuance of the writ, the court shall assign the case to a calendar, and the parties shall proceed in accordance with Rule 12-210 NMRA. The district court clerk shall transmit a copy of the record proper on receipt of the notice of calendar assignment. On issuance of the writ, a copy of the writ shall be served on all persons required to be served under Rule 12-202 NMRA.

M. **Stay on issuance of the writ.** On issuance of the writ, a party seeking either a stay of the order that is the subject of the writ of error or a stay of proceedings pending appeal shall first seek [~~such an~~] that order from the district court, and any party may thereafter seek appellate review of the district court's ruling under Rule 12-205, 12-206, or 12-207 NMRA.

[As amended, effective December 1, 1993; 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 _____.]

Committee commentary.– In *Pincheira v. Allstate Ins. Co.*, 2004-NMCA-030, ¶ 7, 135 N.M. 220, 86 P.3d 645, the New Mexico Court of Appeals held that Rule 12-503(C) NMRA "does not contain any provision extending the time to appeal based upon the filing of a post-order motion seeking further review by the trial court." The 2020 amendments to Paragraph C add language acknowledging the tolling effect of post-order motions filed in the district court that could affect the "conclusiveness" of the order under Subparagraph (E)(2)(a) of the rule. In the context of a writ of error, which by definition involves review of an interlocutory order, the requirement of "conclusiveness" under Subparagraph (E)(2)(a) serves a similar function to the requirement of finality embodied in the final judgment rule. *See, e.g.*, *Capco Acquisub, Inc. v. Greka Energy Corp.*, 2007-NMCA-011, ¶¶ 17, 20, 140 N.M. 920, 149 P.3d 1017 (observing that the final judgment rule serves multiple purposes, such as the prevention of piecemeal appeals and the promotion of judicial economy, and that tolling provisions in the appellate rules serve to avoid the confusion and inefficiency resulting from having multiple courts decide the same issues at the same time). The amendments are modeled on the language of Rule 12-201(D)(1) NMRA, which sets forth tolling provisions applicable to post-trial or post-judgment motions that affect the time for filing an ordinary appeal from a final judgment.

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

12-505. Certiorari from the Court of Appeals regarding district court review of administrative decisions.

A. **Scope of rule.** This rule governs review by the Court of Appeals of decisions of the district court

(1) from administrative appeals under Rule 1-074 NMRA, Rule 1-077 NMRA, or Section 39-3-1.1 NMSA 1978; and

(2) from constitutional reviews of decisions and orders of administrative agencies under Rule 1-075 NMRA.

B. **Scope of review.** A party aggrieved by the final order of the district court in any case described in Paragraph A of this rule may seek review of the order by filing a petition for writ of certiorari with the Court of Appeals, which may exercise its discretion whether to grant the review.

C. **Time.** The petition for writ of certiorari shall be filed with the clerk of the Court of Appeals within thirty (30) days after entry of the final action by the district court. A copy of the petition shall be served immediately on the respondent. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the petition shall be accompanied by the docket fee. The three (3)-day period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph. Final action by the district court shall be the filing of a final order or judgment in the district court unless timely motion for rehearing is filed, in which event, [~~final action shall be the disposition of the last motion for rehearing that was timely filed~~] the full time prescribed in this

rule for the filing of a petition for writ of certiorari shall commence to run and be computed from the filing of an order expressly disposing of the last remaining motion.

D. **Petition.**

(1) ***Cover.*** The cover of the petition shall show the names of the parties, with the plaintiff, petitioner, or party initiating the proceeding in the administrative agency listed first (*e.g.*, State of New Mexico, Plaintiff v. John Doe), and the name, mailing address, and telephone number of counsel filing the petition, or, if a party is not represented by counsel, the name, mailing address, and telephone number of the party.

(2) ***Contents.*** The petition shall contain a concise statement showing

(a) the date of entry of the judgment or final order of the district court and any order entered by the court on a motion for rehearing;

(b) the questions presented for review by the Court of Appeals (the Court will consider only the questions set forth in the petition);

(c) the facts material to the questions presented;

(d) the basis for granting the writ, specifying where applicable

(i) the citation to any decision of the Supreme Court or Court of Appeals with which it is asserted the final order of the district court is in conflict, including a quotation from the part of the Court of Appeals or Supreme Court decision showing the alleged conflict with the district court decision;

(ii) the citation to any statutory provision, ordinance, or agency regulation with which it is asserted the final order of the district court is in conflict and appropriate quotations from the statutes, ordinances, or regulations showing the alleged conflict with the district court decision;

(iii) what significant question of law under the Constitution of New Mexico or the United States is involved; or

(iv) the issue of substantial public interest that should be determined by the Court of Appeals;

(e) a direct and concise argument amplifying the reasons relied [~~upon~~] on for granting the writ, including specific references to the statement of appellate or review issues filed in the district court, showing where the questions were presented to the district court; and

(f) a prayer for relief, including whether the case should be remanded to the district court for consideration of issues not raised in the petition if the relief requested is granted.

(3) ***Attachments.*** A copy of the final order or judgment of the district court, any district court findings or decision leading to the final order or judgment, a copy of the administrative decision under review by the district court, and a copy of the appellant's and appellee's statements of appellate or review issues filed in the district court shall be attached to the petition. Any other documentary matters of record that will assist the Court in exercising its discretion may also be attached.

E. **Length limitations.** Except by permission of the Court, the petition shall comply with Rule 12-305 NMRA and the following length limitations:

(1) ***Body of the petition defined.*** The body of the petition consists of headings, footnotes, quotations, and all other text except any cover page, table of contents, table of authorities, signature blocks, and certificate of service.

(2) ***Page limitation.*** Unless the petition complies with Subparagraph (E)(3) of this rule, the body of the petition shall not exceed ten (10) pages; or

(3) ***Type-volume limitation.*** The body of the petition shall not exceed three thousand one hundred fifty (3,150) words, if the party uses a proportionally-spaced type style or typeface, such as Times New Roman, or three hundred forty-two (342) lines, if the party uses a monospaced type style or typeface, such as Courier.

F. **Statement of compliance.** If the body of the petition exceeds the page limitations of Subparagraph (E)(2) of this rule, then the petition must contain a statement that it complies with the limitations of Subparagraph (E)(3) of this rule. If the petition is prepared using a proportionally-spaced type style or typeface, such as Times New Roman, the statement shall specify the number of words contained in the body of the petition as defined in Subparagraph (E)(1) of this rule. If the petition is prepared using a monospaced type style or typeface, such as Courier, the statement shall specify the number of lines contained in the body of the petition. If the word-count or line-count information is obtained from a word-processing program, the statement shall identify the program and version used.

G. **Conditional cross-petition.** Any party may, within fifteen (15) days of service of a petition for writ of certiorari, file a conditional cross-petition, to be considered only if the Court grants the petition. Subject to the provisions of Rule 12-304 NMRA and Rule 23-113 NMRA, the petition shall be accompanied by the docket fee. A conditional cross-petition shall be clearly identified as conditional on the cover. Material attached to the petition need not be attached again to a conditional cross-petition. A conditional cross-petition shall be governed by the other provisions of this rule, except Paragraph C.

H. **Notice to district court.** The petitioner shall file with the clerk of the district court a copy of the petition for a writ of certiorari.

I. **Response.** A respondent may file a response to the petition within fifteen (15) days of service of the petition. The response shall comply with Paragraphs E and F of this rule.

J. **Reply.** A reply is not permitted without leave of the Court, which may be granted on a showing of good cause. A motion seeking leave to file a reply must be filed and served within seven (7) days after service of a response and must include the proposed reply.

K. **Grant of petition; assignment.** If the petition for writ of certiorari is granted by the Court, the case may be assigned to a calendar and the appellate court clerk shall give notice of the assignment in accordance with Rule 12-210 NMRA. On receipt of the calendar assignment, the district court clerk shall transmit a copy of the record on appeal, which shall include the record on review filed in the district court by the administrative agency, as well as any other papers and pleadings filed in the district court.

L. **Oral argument.** Oral argument shall not be allowed unless directed by the Court of Appeals.

M. **Review by Supreme Court.** Within thirty (30) days after the disposition of a petition for writ of certiorari by the Court of Appeals, a party may seek further review from a decision of the Court of Appeals or a denial of certiorari by the Court of Appeals by filing a petition for writ of certiorari with the Supreme Court under Rule 12-502 NMRA.

[Approved, effective September 1, 1998; as amended effective September 1, 2002; November 1, 2003; as amended by Supreme Court Order No. 06-8300-011, effective May 15, 2006; by Supreme Court Order No. 09-8300-020, effective September 4, 2009; 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. 18-8300-016, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary.– The 2021 amendments to Rule 12-505(C) NMRA are modeled on the language of Rule 12-201(D)(1) NMRA, which sets forth tolling provisions applicable to post-trial or post-judgment motions that affect the time for filing an ordinary appeal from a district court's final judgment.

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

12-601. Direct appeals from administrative decisions where the right to appeal is provided by statute.

A. **Scope of rule.** This rule governs the procedure for filing and perfecting direct appeals to an appellate court from orders, decisions, or actions of boards, commissions, administrative agencies, or officials when the right to a direct appeal is provided by statute. This rule applies to both rulemaking and adjudicatory proceedings by the administrative entity. To the extent of any conflict, this rule supersedes any statute providing for the time or other procedure for filing or perfecting an appeal with an appellate court. This rule does not create a right of appeal and does not govern petitions for writs filed in the Supreme Court or appeals to the district court.

B. **Initiating the appeal.**

(1) Direct appeals from final orders, decisions, or actions of boards, commissions, administrative agencies, or officials shall be taken by filing a notice of appeal with the appellate court clerk, together with the docket fee and proof of service on the agency involved and on all parties and participants entitled to notice under Paragraphs C and D of this rule in accordance with Rule 12-307 NMRA, within thirty (30) days from the date of the order, decision, or action appealed from. The time within which a notice of appeal must be filed may be tolled when a motion that has the potential to affect the finality of the underlying order, decision, or action is authorized under applicable law and is timely filed. In the event such a motion is timely filed, the full time prescribed in this rule for the filing of a notice of appeal shall commence to run and be computed from the filing of an order expressly disposing of the last remaining motion.

(2) Within thirty (30) days of the filing of the notice of appeal, the appellant shall file a docketing statement in the Court of Appeals or a statement of the issues in the Supreme Court in accordance with Rule 12-208 NMRA, and the appeal shall proceed in accordance with these rules, notwithstanding any provision of law to the contrary.

(3) The additional three (3)-day period provided in Rule 12-308(B) NMRA for certain kinds of service shall not apply to the time limits for filing set forth under this paragraph.

C. **Intervention as a party-appellee in rulemaking proceedings.**

(1) In any appeal challenging the adoption of a rule by an administrative entity, a participant in the rulemaking proceeding is entitled to notice of the appeal under Paragraph B of this rule and may move to intervene in the appeal as a party-appellee as of right if

(a) the participant was a party to the rulemaking proceeding under the applicable rules or procedures of the administrative entity;

(b) the participant initiated the rulemaking proceeding; or

(c) the participant participated actively in the rulemaking proceeding, during which it presented evidence relating to matters that the administrative entity was required to consider in deciding whether to adopt the rule at issue.

(2) Except as set forth in Subparagraph (1) of this paragraph, a participant in the rulemaking proceeding may move to intervene in the appeal as a party-appellee only at the discretion of the appellate court.

(3) The appellate court may, in its discretion, order consolidated briefing by similarly situated parties or take other measures to promote efficiency and avoid unnecessary duplication.

D. **Intervention as a party-appellee in adjudicatory proceedings.**

(1) In any appeal challenging an adjudicatory action by an administrative entity, a participant in the adjudicatory proceeding is entitled to notice of the appeal under Paragraph B of this rule and may move to intervene in the appeal as a party-appellee as of right if the participant was a party to the adjudicatory proceeding under the applicable rules or procedures of the administrative entity.

(2) Except as set forth in Subparagraph (1) of this paragraph, a participant in the proceeding may intervene in the appeal as a party-appellee only at the discretion of the appellate court.

(3) The appellate court may, in its discretion, order consolidated briefing by similarly situated parties or take other measures to promote efficiency and avoid unnecessary duplication.

E. **Substitution of administrative entity.** Whenever in these rules a duty is to be performed by, service is to be made on, or reference is made to the district court or a judge or clerk of the district court, the board, commission, administrative agency, or official whose action is appealed from shall be substituted for the district court or a judge or clerk of the district court, except that any request for extension of time must be made to the appellate court.

F. **Grace period when notice is sent by mail or commercial courier.** A notice of appeal that is sent by mail or commercial courier service to the court in which it is to be filed shall be deemed to be timely filed on the day it is received if the notice of appeal contains a certificate of service, which in addition to the information otherwise required by Rule 12-307(E) NMRA, explicitly states that the notice of appeal was sent to the appellate court by mail or commercial courier service and was postmarked by the United States Postal Service or date-stamped by the commercial courier service at least one (1) day before the due date for the notice of appeal otherwise prescribed by this rule. The clerk's office shall file-stamp a notice of appeal with the date on which it is actually received regardless of any postmark date set forth in the certificate of service.

[As amended, effective July 1, 1990; April 1, 1998; June 15, 2000; as amended by Supreme Court Order No. 07-8300-019, effective August 13, 2007; as amended by Supreme Court Order No. 13-8300-032, effective for all cases pending or filed on or after December 31, 2013; 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. 18-8300-016, effective for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — New Paragraphs C and D were added in 2013 in response to the New Mexico Supreme Court's opinion in *New Energy Economy, Inc. v. Vanzi*, 2012-NMSC-005, 274 P.3d 53, which addresses what level of participation in an administrative proceeding is required before a participant may be considered a "party" that is entitled to notice of an appeal challenging the administrative action and is permitted, but not required, to intervene as an appellee

for the purpose of defending the action. The Court held that those who participated in a "legally significant manner" in a rulemaking proceeding before the administrative tribunal have the right to participate as parties to an appeal. *Id.* ¶ 47. Providing technical testimony or the kind of evidence that directly informs the inquiries of the rulemaking tribunal in reaching its decision are listed as non-exclusive examples of the types of evidence that support finding a "legally significant" contribution to a rulemaking proceeding. *Id.* ¶¶ 37-39. In an adjudicatory proceeding, the general rule is that only parties to the administrative proceeding are entitled to notice or have a right to participate in an ensuing appeal. *Id.* ¶ 56.

The new paragraphs are largely based [~~upon~~] on the particular factual and procedural setting of *New Energy Economy* and, in other cases, should be applied with consideration of the factors that the Supreme Court considered important to determining whether participation in a rulemaking process was "legally significant."

The appellate court hearing the appeal may take reasonable steps to encourage efficiency and avoid unnecessary duplication in the event of a considerable number of intervening parties, *e.g.*, by ordering consolidated briefing from similarly situated parties. *Id.* ¶¶ 48-50.

The 2021 amendments to Rule 12-601(B) NMRA divide the paragraph into three subparagraphs for clarity. New language is added to subparagraph (B)(1) recognizing the tolling effect of motions filed in the administrative agency, such as motions to reconsider or motions for rehearing, which have the potential to affect the finality of the underlying order, decision, or action, but only when the motions are already authorized under applicable law. Subparagraph (B)(1) does not create new procedural rights, but instead recognizes the tolling effect of certain existing procedures. The amendments to subparagraph (B)(1) are modeled on the language of Rule 12-201(D)(1) NMRA, which sets forth tolling provisions applicable to post-trial or post-judgment motions that affect the time for filing an ordinary appeal from a district court's final judgment.

[Adopted by Supreme Court Order No. 13-8300-032, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. _____, effective _____.]

12-602. Appeals from a judgment of criminal contempt of the Court of Appeals.

A. **How taken.** A notice of appeal from an appealable judgment of criminal contempt of the Court of Appeals shall be filed with the Court of Appeals clerk within thirty (30) days after filing of the judgment appealed from unless a timely motion for rehearing is filed, in which event, final action shall be the disposition of the last motion for rehearing that was timely filed. The three (3)-day [~~mailing~~] period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph.

B. **Statement of the issues; further procedure.** Within thirty (30) days of the filing of the notice of appeal, the appellant shall file a statement of the issues in the Supreme Court in accordance with Rule 12-208 NMRA. Thereafter, the appeal shall proceed in accordance with these rules.

C. **Duties of clerk.** The duties required by these rules to be performed by the district court and the clerk thereof shall be performed by the Court of Appeals clerk.

[As amended, effective April 1, 1998; 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 _____.]

Committee commentary. – The 2021 amendments to Rule 12-602(A) NMRA add language acknowledging the tolling effect of a motion for rehearing filed in the Court of Appeals. The amendments are modeled on the language of Rule 12-502(B) NMRA, which sets forth tolling provisions applicable to petitions for writ of certiorari from the Supreme Court to the Court of Appeals.

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

12-603. Appeals to the Supreme Court in actions challenging candidacies or nominating petitions; primary or general elections; school board recalls and recalls of elected county officials.

A. **Scope.** This rule governs the following:

(1) appeals taken under Section 1-8-18 NMSA 1978, Section 1-8-35 NMSA 1978, Section 1-14-5 NMSA 1978, Section 22-7-9.1 NMSA 1978, and Section 22-7-12 NMSA 1978; and

(2) appeals from final orders of the district court in election recall proceedings involving elected county officials initiated under Article X, Section 9 of the New Mexico Constitution.

B. **Notice of appeal; preparation of record.**

(1) Notice of appeal, with proof of service on the district court and all parties to the action, shall be filed in the Supreme Court with the certificate of counsel or certificate of appellant required by Paragraph D of this rule. The notice of appeal and certificate shall be filed in the Supreme Court within the time period specified by the statute [~~pursuant to~~] under which the appeal is taken or within thirty (30) days of the date the district court's final decision under Article X, Section 9 of the New Mexico Constitution is filed in the district court clerk's office unless a timely motion that has the potential to affect the finality of the district court's order or judgment is filed, in which event, the full time prescribed in this rule for the filing of a notice of appeal shall commence to run and be computed from the filing of an order expressly disposing of the last remaining motion. The three (3)-day [~~mailing~~] period set forth in Rule 12-308 NMRA does not apply to the time limits set by this paragraph.

(2) The appellant shall make all arrangements necessary to ensure that the district court clerk prepares the record for transmission to the Supreme Court clerk. The record shall include a complete copy of all documents filed in the district court and any available audio recording or stenographic transcript of any hearings held in the district court. The district court clerk shall file the record required under this subparagraph with the Supreme Court no later than two (2) days after the notice of appeal and certificate are filed with the Supreme Court. If necessary, the transcript of any hearings in the district court may be supplemented in accordance with the provisions in Subparagraphs (I)(1) and (I)(2) of this rule.

C. **Content of notice of appeal.** The notice of appeal shall state that the appeal is taken to the Supreme Court and shall specify that the appeal is one of the following:

(1) a candidacy appeal under Section 1-8-18 NMSA 1978;

(2) a nominating petition appeal under Section 1-8-35 NMSA 1978;

(3) an election contest appeal under Section 1-14-5 NMSA 1978;

(4) an appeal from a district court decision in an election recall proceeding under Article X, Section 9 of the New Mexico Constitution;

(5) a school board member recall appeal under Section 22-7-9.1 NMSA 1978; or

(6) an appeal challenging a school board member recall petition under Section 22-7-12 NMSA 1978.

D. **Certificate of counsel or appellant.** At the same time that the notice of appeal is filed in the Supreme Court, the appellant shall pay the appropriate docket fee, subject to the provisions of [~~Rule~~] Rules 12-304 NMRA and 23-114 NMRA, and shall file a certificate of counsel, or if the appellant is not represented by counsel, a certificate of the appellant, with proof of service on all parties and the district court. Either certificate shall include the following:

(1) the name or names of the real parties in interest, if any, when the respondent is a justice, judge, or other public officer or employee, court, board, or tribunal, purporting to act in the discharge of official duties;

(2) the names, business addresses, and telephone numbers of all counsel appearing in the district court and of those parties not represented by counsel;

(3) a statement of the nature of the proceeding;

(4) the date of entry of the decision appealed from and an acknowledgment that the notice of appeal was timely filed with the Supreme Court at the same time as the certificate;

(5) a concise statement of the facts material to consideration of the questions presented; and

(6) a concise statement of the points relied [~~upon~~] on for reversal, including a concise, accurate statement of the case summarizing all facts material to a consideration of the points presented, but without unnecessary detail. General conclusory statements such as "the judgment of the trial court is not supported by the law or facts" will not be accepted.

E. **Involuntary dismissal.** If the appellant fails to file a timely notice of appeal or certificate in accordance with the requirements of this rule, the appeal shall be dismissed forthwith by the Supreme Court.

F. **Notice of proceedings.**

(1) Immediately [~~upon~~] on the filing of the notice of appeal and certificate, the Supreme Court clerk shall notify the Court of the docketing of the appeal.

(2) If it appears to a majority of the Court that the appeal is without merit, the decision of the district court may be summarily affirmed in accordance with Paragraph J of this rule.

(3) If the appeal is not summarily affirmed, the Court may order one or more of the following:

(a) direct the other parties to the appeal to file a response;

(b) request briefs under Paragraph H of this rule; or

(c) set a hearing.

(4) If the Court decides to set a hearing, notwithstanding the provisions of Rule 23-102(D) NMRA, the Supreme Court clerk shall give notice of the setting in the most expeditious manner practicable and the hearing shall proceed in accordance with Paragraph I of this rule.

G. **Stay.** The appellant may seek a stay pending appeal in accordance with the provisions of Rule 12-207 NMRA.

H. **Briefs.** Briefs may be filed only [~~upon~~] on, and in accordance with, the directions of the Supreme Court.

I. **Hearing.** At the hearing appellant shall be limited to arguing the points specified in the certificate filed under Paragraph D. Appellee may present any grounds for affirmance of the trial court's decision. For the purpose of making available [~~such~~] any portions of the district court proceedings as may not appear in the record filed with the Supreme Court under Subparagraph (B)(2) of this rule, the appellant shall, unless a complete transcript of proceedings is available, have present at the hearing the following:

(1) the court reporter who reported the district court proceedings, with the reporter's notes; and

(2) any audio recording of the district court proceedings or any part thereof made by the court monitor or other court-designated official, together with equipment and personnel necessary to play back [~~such~~] any portions as may be required.

J. **Disposition.** Disposition of the appeal shall be by order of the Supreme Court, which may, but need not be, accompanied by a written opinion. The order of the Supreme Court shall be effective [~~upon~~] on filing the [~~same~~] order with the Supreme Court clerk, and there shall be no rehearing. Upon filing the order, the Supreme Court clerk shall forthwith furnish to each party to the appeal and the district court a certified copy of the order. The order shall constitute the mandate of the Supreme Court.

[As amended effective October 11, 2005; as amended by Supreme Court Order No. 09-8300-020, effective September 4, 2009; by Supreme Court Order No. 12-8300-010, effective March 5, 2012; as amended by Supreme Court Order No. 15-8300-021, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The 2009 amendments to this rule are intended to bring within the scope of Rule 12-603 NMRA the appeal of election recall proceedings involving elected county officials under Article X, Section 9 of the New Mexico Constitution. The Court of Appeals in *Sparks v. Graves*, 2006-NMCA-030, 139 N.M. 143, 130 P.3d 204, accepted jurisdiction to consider an appeal from an election recall proceeding involving an elected county official under Article X, Section 9 of the New Mexico Constitution because no constitutional provision, statute, or court rule specifically vested appellate jurisdiction in the Supreme Court. *See* Rule 12-102(B) NMRA (providing that the Court of Appeals shall have appellate jurisdiction over all appeals except those enumerated in [~~Paragraph A of Rule 12-102~~] Rule 12-102(A) NMRA).

By the 2009 amendments to this rule, appellate jurisdiction over election recall proceedings under Article X, Section 9 of the New Mexico Constitution is now specifically vested in the Supreme Court. *See Graves*, 2006-NMCA-030, ¶ 11 ("Consistent with Section 34-5-8(A) [NMSA 1978], Rule 12-102(A)(4) NMRA requires appeals to be taken to the Supreme Court when jurisdiction has been specifically reserved to the Supreme Court by the New Mexico Constitution or by Supreme Court order or rule.")[~~(emphasis added)~~]. *See also State v. Arnold*, 1947-NMSC-043, ¶ 11, 51 N.M. 311, [~~314,~~] 183 P.2d 845[~~, 846 (1947)~~] ("The creating of a right of appeal is a matter of substantive law and outside the province of the court's rule making power. Nevertheless, once the legislature has authorized the appeal, reasonable regulations affecting the time and manner of taking and perfecting the same are procedural and within this court's rule making power."); Seth D. Montgomery & Andrew S. Montgomery, Jurisdiction as May Be Provided by Law: Some Issues of Appellate Jurisdiction in New Mexico, 36 N.M. L. Rev. 215, 219, 237-241 (2006) (noting the Supreme Court's statutory authority under NMSA 1978, Section 34-5-8(B)

[~~NMSA~~] to transfer cases wholesale from the Court of Appeals to the Supreme Court as a means of case management).

Consistent with the Court's rule-making authority, and to provide continuity with the time requirements for other election recall appeals governed by this rule, these amendments provide that Article X, Section 9 appeals are commenced by filing a notice of appeal with the district court within five (5) days of the district court's final decision. *See Maples v. State*, 1990-NMSC-042, ¶ 10, 110 N.M. 34, [~~36,~~] 791 P.2d 788[~~, 790 (1990)~~] (recognizing that the Supreme Court has "the power to set the time for all appeals from final orders").

Although the Legislature has authorized municipalities to adopt election recall procedures for municipal officials, there are no express statutory provisions authorizing judicial review of municipal election recalls proceedings. *See, e.g.*, [~~Section 3-14-16 NMSA 1978 and Section 3-15-7 NMSA 1978~~] NMSA 1978, §§ 3-14-16 and 3-15-7. Accordingly, these amendments do not purport to encompass municipal election recall proceedings that may be authorized by local ordinance.

The 2021 amendments to Rule 12-603(B)(1) NMRA are modeled on the language of Rule 12-201(D)(1) NMRA, which sets forth tolling provisions applicable to post-trial or post-judgment motions that affect the time for filing an ordinary appeal from a district court's final judgment.

[Adopted by Supreme Court Order No. 09-8300-020, effective September 4, 2009; as amended by Supreme Court Order No. _____, effective _____.]

New Mexico Courts

Terri Saxon <suptls@nmcourts.gov>

[nmsupremecourtclerk-grp] Comment on proposed amendment to Rule 12-503(C) NMRA

1 message

Boyd, Walker, NMSEC <Walker.Boyd@state.nm.us> Fri, Apr 16, 2021 at 10:55 AM
Reply-To: walker.boyd@state.nm.us
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

To whom it may concern:

I write to comment on the Appellate Rules Committee's proposed amendment to Rule 12-503(C) NMRA (dated March 17, 2021), which would toll the 30-day deadline for filing a petition for a writ of error upon filing of "a timely motion . . . [that has] the potential to affect the conclusiveness of the district court's order . . ." Amending Rule 12-503(C) to allow a party to toll the time for filing a petition for a writ of error in the same way that a party can toll the time for noticing an appeal will not serve any of the purposes identified by the commentary in justification of the amendment. As the Court of Appeals has repeatedly remarked, "[a]bsent statutory authority or supreme court rule, appellate courts may not extend the time for appeal, even to relieve against mistake, in advertence or accident." *Candelaria v. Middle Rio Grande Conservancy Dist.*, 1988-NMCA-065, ¶ 6, 107 N.M. 579, 761 P.2d 457; *See also State v. Terra S.*, No. A-1-CA-37263, mem. op. at 2 (N.M. Ct. App. July 9, 2019) (non-precedential) (quoting *Candelaria* for this proposition). Under the proposed amendment to Rule 12-503(C), a party could seek appellate review of an interlocutory order at any time after the order's entry; per the text of the proposed amendment, review by writ of error would include both the original order and any subsequent order on a motion affecting the finality of the original order. *Cf.* Rule 1-054(B) NMRA ("any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities."). The proposed amendment goes too far by allowing a party to file a perfunctory motion to reconsider an early interlocutory order and then appealing both the original order and the subsequent denial of the motion to reconsider to the Court of Appeals. The proposed amendment would encourage, not deter, piecemeal appeals: for example, a party seeking to avoid a trial could seek reconsideration of earlier, interlocutory rulings on discovery, and then petition the Court of Appeals for a writ of error for review of the district court's denial of the motion to reconsider on the eve of trial.

The committee's proposal to include a tolling provision in Rule 12-503 appears to be the result of a mistaken analogy between appeals as of right under Rule 12-201 and interlocutory appeals, which should be pursued only with leave of the district court or the court of appeals. *See* Committee commentary to proposed amendment to Rule 12-503(C) ("The amendments are modeled on the language of Rule 12-201(D)(1) NMRA, which sets forth tolling provisions applicable to post-trial or post-judgment motions that affect the time for filing an ordinary appeal from a final judgment."). A party taking an appeal under Rule 12-201 has a right to do so; permitting a party to toll the deadline for filing an appeal as of right therefore does not modify substantive rights. In contrast, and as the commentary acknowledges, a petition for a writ of error "by definition involves review of an interlocutory order." Ordinarily, a party seeking review of an interlocutory order must ask the district court for leave to take an appeal of that order pursuant to NMSA 1978, Section 39-3-4, and Rule 1-054 NMRA. Under Section 39-3-4 or Rule 1-054, the party seeking leave to take an interlocutory appeal must convince the district court or the Court of Appeals that the order in question "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order or decision may materially advance the ultimate termination of the litigation, " *see* Section 39-3-4(A), (B), or that there is "no just reason for delay[ing]" appellate review of a judgment on one or more, but less than all, claims in an action. *See* Rule 1-054(B) NMRA. Allowing a party to unilaterally toll the deadline for filing a petition for a writ of error by filing a motion to reconsider an earlier, interlocutory ruling allows the party to perfect an otherwise forfeited interlocutory appeal and avoid satisfying the requirements of Section 39-3-4 or Rule 1-054. Moreover, it would add more burden to an already overburdened Court of Appeals by requiring it to review trial court proceedings in the first instance to determine whether interlocutory review is appropriate.

A better approach would be to allow either the district court or the court of appeals to extend the time for seeking interlocutory review by way of a writ of error. This way, the onus would remain with the party seeking review to either comply with Rule 12-503(C)'s 30-day deadline or convince the district court or the Court of Appeals that an extension of time is appropriate, whether to allow the district court more time to determine whether to grant a motion to reconsider an earlier order, or for some other reason (such as a stipulation by the parties). If an extension of time is denied, subsequent review by the Court of Appeals would be limited to a district court's denial of a motion to reconsider, rather than the original interlocutory order, encouraging parties to timely seek appellate review of meritorious issues and discouraging gamesmanship by parties seeking to derail trial settings.

The proposed amendment would undermine the final judgment rule and would not serve the interests of judicial economy. The proposed amendment should be rejected or modified to address the concerns above.

Very truly yours,

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