

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE
FOR THE MAGISTRATE COURTS
PROPOSAL 2021-015**

March 17, 2021

The Rules of Criminal Procedure Committee has recommended amendments to Rule 6-606 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.

6-606. Subpoena.

A. Form; issuance.

- (1) Every subpoena shall^[2]
 - (a) state the name of the court from which it is issued;
 - (b) state the title of the action and action number;
 - (c) command each person to whom it is directed to attend a trial, interview, or hearing and give testimony or to produce designated books, documents, or tangible things in the possession, custody, or control of that person at a time and place therein specified; and
 - (d) be substantially in the form approved by the Supreme Court.
- (2) All subpoenas shall issue from the court ~~[for the court]~~ in which the matter is pending.
- (3) The judge or clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. The judge or clerk may issue a subpoena duces tecum to a party only if the subpoena duces tecum is completed by the party prior to issuance by the judge or clerk. Except as provided in Paragraph B of this rule, an attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court in which the case is pending.

(4) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

B. Interviews. ~~[A subpoena compelling the attendance of the witness must be signed by the judge.]~~ A subpoena to appear to give an interview under Rule 6-504(D) NMRA will be issued only after good faith efforts to secure an interview have been unsuccessful. No subpoena to appear to give an interview shall be valid unless signed by the trial judge. A witness may be required to attend an interview anywhere within jurisdiction of the court.

C. Service.

(1) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena ~~[upon]~~ on a person named ~~[therein]~~ in the subpoena shall be made by delivering a copy thereof to ~~[such]~~ that person and, if that person's attendance is commanded[;]

(a) if the witness is to be paid from funds appropriated by the ~~[legislature]~~ Legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to ~~[such]~~ the witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (1)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by ~~[Subsection A of Section 10-8-4]~~ Section 10-8-4(A) NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by ~~[Subsection D of Section 10-8-4]~~ Section 10-8-4(D) NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one (1) day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things or inspection of premises before trial, notice shall be served on each party in the manner prescribed by Rule 6-209 NMRA;

(2) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

D. Protection of persons subject to subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose ~~[upon]~~ on the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable ~~[attorney's]~~ attorney fee.

(2)

(a) Unless specifically commanded to appear in person, a person commanded to produce and permit inspection of the premises and copying of designated books, papers, documents, or tangible things need not appear in person at the hearing or trial.

(b) Subject to ~~[Subparagraph (2) of Paragraph D]~~ Subparagraph (D)(2) of this rule, a person commanded to produce and permit inspection and copying may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if ~~[such]~~ that time is less than fourteen (14) days after service, serve ~~[upon]~~ on all parties written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the

materials except ~~[pursuant to]~~ under an order of the court by which the subpoena was issued. ~~[Such an]~~ An order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it[:]

(i) fails to allow reasonable time for compliance,

(ii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iii) subjects a person to undue burden.

(b) The court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena if a subpoena[:]

(i) requires disclosure of a trade secret or other confidential research, development or commercial information,

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial.

If the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

E. Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications or things not produced that is sufficient to enable the demanding party to contest the claim.

F. Contempt. Failure by any person without adequate excuse to obey a subpoena served ~~[upon]~~ on that person may be deemed a contempt of the court punishable by fine or imprisonment.

[As amended, effective January 1, 1987; January 1, 1994; May 1, 1994; May 1, 2002; as amended, by Supreme Court Order No. 07-8300-025, effective November 1, 2007; as amended by Supreme Court Order No. _____, effective _____.]



[nmsupremecourtclerk-grp] Comments to 2021 Proposed Rule Amendments

1 message

Chief Judge Jennifer DeLaney <demdjed@nmcourts.gov>

Fri, Apr 16, 2021 at 10:04 AM

Reply-To: demdjed@nmcourts.gov

To: nmsupremecourtclerk@nmcourts.gov

Cc: "Hofacket, Jarod" <demdjkh@nmcourts.gov>, Tom Stewart <sildtfs@nmcourts.gov>, Jim Foy <sildjbf@nmcourts.gov>

Mr. Moya,

Attached are the comments from the District Judges of the Sixth Judicial District concerning the 2021 proposed rule amendments. Please let me know if I need to submit each one separately or if the attached document is sufficient to distribute to each of the rule committees. Thank you,

Chief Judge DeLaney

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Jennifer E. DeLaney

Chief Judge, Division II

Sixth Judicial District Court

[855 S. Platinum Avenue](#)

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2021 Proposed Rule Amendment Comments.docx

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Code of Professional Conduct Committee

Proposal 2021-006 – Lawyer communications and solicitation of clients

[Rules 16-701, 16-702, and 16-703 NMRA; and Withdrawn Rules 16-704 and 16-705 NMRA]

The Code of Professional Conduct Committee proposes to amend Rules 16-701, 16-702, and 16-703 NMRA to incorporate certain of the 2018 amendments to the ABA Model Rules of Professional Conduct. Because the proposed amendments to Rules 16-701, 16-702, and 16-703 also incorporate some provisions and commentary from Rules 16-704 and 16-705 NMRA, the Committee proposes to withdraw Rules 16-704 and 16-705.

No issues regarding this proposed change.

Rules of Civil Procedure for State Courts Committee

Proposal 2021-007 – Production of documents and things

[Rule 1-034 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-034 NMRA to: (1) clarify that in answering a request for production, the responding party shall permit inspection in its entirety unless the responding party files a proper objection; (2) require the responding party to state the specific reasons for an objection to a request for production; (3) require the responding party to state whether the response includes all responsive materials; and (4) if the responding party withholds any responsive materials based on an objection, the objection must clearly describe with reasonable particularity the materials withheld for each objection. The Committee also added committee commentary to further explain the amendments.

No issues regarding this proposed change.

Proposal 2021-008 – Electronic filing and service fees as recoverable costs

[Rules 1-054, 2-701, and 3-701 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 1-054, 2-701, and 3-701 NMRA to clarify that electronic filing and service fees are recoverable costs.

This rule change helps to clarify what is included in fees and that is helpful to the Court.

Proposal 2021-009 – Court trust account requirements

[Rule 1-102 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1-102 NMRA to clarify that district courts must deposit litigant funds within two (2) business days of receipt in a bank that is a member of the Federal Deposit Insurance Corporation and in an account that is distinct from the court's accounts for general funds. The Committee additionally proposes to amend Rule 1-102 NMRA to specify that funds deposited in a court trust fund checking account

must be invested and maintained in a financial institution located within the court's judicial district and in accordance with governing statutes and any regulation prescribed by the Director of the Administrative Office of the Courts. The Committee also replaced the references to "social security number" and "employer identification number" with the more-inclusive term "taxpayer identification number," and also cited Form W-9 (Request for Taxpayer Identification Number and Certification) by name.

No comment.

Proposal 2021-010 – Tribal court personal representative
[Rule 1B-102 NMRA; and Forms 4B-801 and 4B-802 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rule 1B-102 NMRA, and Forms 4B-801 and 4B-802 NMRA, to clarify that a domiciliary foreign personal representative includes a tribal court appointee designated by a tribal court or the Bureau of Indian Affairs. The Committee further proposes to amend Forms 4B-801 and 4B-802 NMRA to recognize tribal court appointments. Finally, the Committee proposes to amend Form 4B-801 NMRA to allow "equivalent indicia of authority from a tribal court or the Bureau of Indian Affairs" to serve as a substitute for Letters of Administration or Letters Testamentary, recognizing that tribal courts may title documents differently than probate courts.

No comment.

Proposal 2021-011 – Summons and order for free process
[Rules 2-202 and 3-202 NMRA; and Forms 4-204 and 4-223 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Rules 2-202 and 3-202 NMRA by replacing "incapacitated" with "incompetent" for consistency with Rules 1-004(I) and 1-017(D) NMRA applicable to the district courts.

The Committee also proposes to amend Rules 2-202 and 3-202 NMRA, as well as Form 4-204 NMRA, to permit *pro se* parties to serve a summons by mail.

Finally, the Committee proposes to amend Form 4-223 NMRA to specify the methods of service a person seeking free service of process must first attempt in the district, magistrate, and metropolitan courts.

The revisions are helpful in making the rule more clear.

Proposal 2021-012 – Title page of transcript of civil proceedings
[Form 4-708 NMRA]

The Rules of Civil Procedure for State Courts Committee proposes to amend Form 4-708 NMRA for consistency with the comparable criminal form, Form 9-608 NMRA, to reflect that the court clerk, rather than the judge, issues the title page of a transcript of civil proceedings.

No objections to the new forms as proposed.

Rules of Criminal Procedure for State Courts Committee

Proposal 2021-013 – Order of trial

[Rule 5-607 NMRA; and New Rules 6-603.1 and 7-603.1 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 5-607 NMRA to clarify and make housekeeping changes to its text and committee commentary, and to adopt new Rules 6-603.1 and 7-603.1 NMRA that import Rule 5-607's sequence of trial events into jury trial practice in the magistrate and metropolitan courts.

No objections to the new rules as proposed.

Proposal 2021-014 – Time limits for filing citations

[Rules 6-201, 7-201, and 8-201 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-201, 7-201, and 8-201 NMRA to incorporate an express time limitation for the filing of a citation and an explicit remedy—the potential dismissal of the citation with prejudice—for a late-filed citation.

This is a necessary amendment to each of the above listed rules.

Proposal 2021-015 – Interview subpoenas

[Rule 6-606 NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rule 6-606 NMRA to provide that a judge-issued subpoena in magistrate court will lie “only after good faith efforts to secure an interview . . . have been unsuccessful[,]” the same criterion that governs the issuance of interview subpoenas in metropolitan court under Rule 7-606 NMRA

The changes help to clarify and will reduce the procedure where litigants come straight to the court to obtain an interview subpoena.

Proposal 2021-016 – Time limits for probation violation hearings

[Rules 6-802, 7-802, and 8-802 NMRA]

6-802 (C)(2), 7-802 (C)(2), and 8-802(C)(2) With our current use of technology, there is no reason that a hearing should take two days longer to set if the person is in custody in an out of district detention center. It should be 3 days regardless if the defendant is in detention.

8-802 (D). Municipal ordinances are generally very low-level offenses and allowing someone to remain in custody for 18 days (3 before initial hearing and 15 from that date) seems extremely severe. There should be limited reasons why this kind of case could not be adjudicated with seven days from the initial appearance. The time should be reduced.

The Rules of Criminal Procedure for State Courts Committee proposes to amend Rules 6-802, 7-802, and 8-802 NMRA to provide explicit time limits for the holding of a probation violation hearing in the limited jurisdiction criminal courts.

[Proposal 2021-017](#) – Waiver of counsel and other public defender forms
[Forms 9-401, 9-403, 9-403A, and 9-403B NMRA; and Withdrawn Form 9-401A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Forms 9-401, 9-403, 9-403A, and 9-403B NMRA, and to withdraw Form 9-401A NMRA, to adopt a single, detailed “Waiver of Counsel Advisement” for use in all courts of criminal jurisdiction, align the form provisions governing the appointment of defense counsel with the current policies of the Law Offices of the Public Defender, and clarify the form provisions governing appeals of indigency determinations.

In the Waiver of Counsel form, the language is definitely much clearer than the previous form; however, there is still a lot of legalese especially in paragraphs six and seven. Additionally, there should be added language that the prosecutor has not duty to assist a self-represented criminal defendant and has no duty of loyalty to him/her.

[Proposal 2021-018](#) – Dismissal of criminal charges on completion of deferred sentence
[Form 9-603A NMRA]

The Rules of Criminal Procedure for State Courts Committee proposes to amend Form 9-603A NMRA to make clear the mandatory nature of the dismissal remedy available to a defendant upon the defendant’s completion of the terms of a deferred sentence without revocation.

No comment.

UJI-Civil Committee

[Proposal 2021-019](#) – Insurance has no bearing
[UJI 13-208 NMRA]

The UJI-Civil Committee proposes to amend UJI 13-208 NMRA to align the instruction with jurors’ current understanding of the role played by insurance and to provide for possible use of the instruction prior to the commencement of a trial.

The amendments appear to clarify the UJI, which is helpful.

[Proposal 2021-020](#) – Request for admission
[New UJI 13-215 NMRA]

The UJI-Civil Committee proposes to adopt new UJI 13-215 NMRA to address the introduction of admitted facts at trial. The proposed instruction provides jurors with the definition of a request for admission and informs them of the effect of an admitted fact at trial.

These amendments help to streamline the UJI and increase clarity.

Proposal 2021-021 – Unfair Practices Act claims

[New UJI 13-25 Introduction NMRA; New UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and New UJI 13-25 Appendix NMRA]

The UJI-Civil Committee proposes to adopt a new Chapter 25 to the Civil Uniform Jury Instructions to use with Unfair Practices Act (UPA) claims. Proposed Chapter 25 includes new UJI 13-25 Introduction NMRA; new UJI 13-2501, 13-2502, 13-2503, 13-2504, 13-2505, and 13-2506 NMRA; and new UJI 13-25 Appendix NMRA. The proposed Introduction orients practitioners and judges to Chapter 25 and explains how the instructions in the chapter may be used with other UJI chapters. Proposed UJI 13-2501 sets out the elements that a plaintiff alleging a UPA violation must prove and is intended for use in all cases alleging a UPA violation. Proposed UJI 13-2502 instructs the jury on the proof required to establish that a defendant engaged in an unconscionable trade practice under the UPA. Proposed UJI 13-2503, -2504, and -2505 are definitional instructions to be used as appropriate in a given case. Proposed UJI 13-2506 provides a damages framework for UPA claims. The proposed Appendix provides a sample set of jury instructions for a hypothetical case containing UPA violations.

The new UJI will help to give the parties a better framework for proceeding in these cases and assisting jurors in their role as fact finders.

UJI-Criminal Committee

Proposal 2021-022 – Explanation of trial procedure

[UJI 14-101 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-101 NMRA to simplify instructions on outside communications and internet use and to clarify that jurors ordinarily will not receive transcripts of witness testimony.

This seems like an excellent rule change. This has always been a challenging part of the jury script.

Proposal 2021-023 – Procedure for instructing on uncharged offenses

[UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378, 14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA]

The UJI-Criminal Committee proposes to amend the Use Notes to UJI 14-202, 14-213, 14-221A, 14-308, 14-309, 14-310, 14-311, 14-312, 14-313, 14-360, 14-361, 14-362, 14-363, 14-378,

14-379, 14-380, 14-381, 14-382, 14-383, 14-403, 14-403A, 14-601, 14-954, and 14-971 NMRA to reference the procedure for instruction on uncharged offenses outlined in UJI 14-140 NMRA.

This seems like a helpful correction to make the use of 14-140 mandatory instead of referencing it. I think the old rule was adequate. This is more clear.

Proposal 2021-024 – Stalking and aggravated stalking
[UJI 14-331 and 14-333 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-331 and 14-333 NMRA to conform more closely to the language of NMSA 1978, Section 30-3A-3 (2009), defining the crime of stalking, and NMSA 1978, Section 30-3A-3.1 (1997), defining the crime of aggravated stalking.

I think this change is a reach. The statute changed in 2009. No case has interpreted the statute the way the committee is attempting to, namely that proving that the Defendant was acting without lawful authority is an element for the State to prove. I do not believe the rules committee should be making this fundamental change to the law so long after the statute they are referencing changed.

Proposal 2021-025 - Reliance in fraud
[UJI 14-1640 NMRA]

The UJI-Criminal Committee proposes to amend the committee commentary to UJI 14-1640 NMRA to reference the definition of reliance provided in *State v. Garcia*, 2016-NMSC-034, 384 P.3d 1076, and to remove outdated citations.

No problem with this change. Nice update.

Proposal 2021-026 – Securities offenses
[UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA]

The UJI-Criminal Committee proposes to amend UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 NMRA to update statutory references and style conventions.

No problem with this change. Nice update.

Proposal 2021-027 – Life without possibility of release or parole
[UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029, 14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA]

Good clarity to provide the Court and practitioners guidance on these cases. No issues.

The UJI-Criminal Committee proposes to amend UJI 14-7010, 14-7011, 14-7012, 14-7014, 14-7015, 14-7016, 14-7017, 14-7018, 14-7019, 14-7022, 14-7023, 14-7026, 14-7027, 14-7029,

14-7030, 14-7030A, 14-7031, 14-7032, 14-7033, and 14-7034 NMRA to provide instructions for sentencing proceedings for life imprisonment without possibility of release or parole in response to the repeal of the death penalty and in conformity with *State v. Chadwick-McNally*, 2018-NMSC-018, 414 P.3d 326, Rule 5-705 NMRA, and proposed changes to Rule 14-101 NMRA.



Rule Proposal Comment Form, 04/16/2021, 4:23 pm

1 message

Supreme Court <mailservices@sks.com>

Fri, Apr 16, 2021 at 4:23 PM

Reply-To: "brendan.hicks@lopdm.us" <brendan.hicks@lopdm.us>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

Your
Name: Brendan Hicks

Phone
Number: (575) 887-0224

Email: brendan.hicks@lopdm.us

Proposal
Number: Proposal 2021-015 – Interview subpoenas [Rule 6-606 NMRA]

Comment: Salutations,

The proposed amendment is problematic due to a variety of reasons. The first is that the requirement that good faith efforts be made prior to requesting a subpoena is nebulous.

On a number of occasions prior to the rule change, I have had a number of Magistrate Judges order my defendants to waive their rights afforded under 6-506 (Time of Commencement of Trial). I would request that the case be set for Final Pre-Trial and Jury Trial . At that point, the State would request that my client waive his rights under 6-506, and the Trial Judge would grant the request, ordering my client to waive their rights.

This experience gives me concern about potential abuses of this added language. Without a clear guideline on what constitutes a good faith effort to secure an interview, and what it means for it to be unsuccessful, I foresee this being used to help shield the State from making their witnesses available for pre-trial interviews, or allowing them to continue pursuit of a case where their victim is unavailable, moved away without leaving contact information, or outright uncooperative with prosecution.

Another issue I foresee is the rule would require contact with witnesses of cases from Defense. While such claims are divorced from reality, on a number of occasions I have heard law enforcement claim that Defense attorneys will tell witnesses they shouldn't come to court. I can see a defense attorney, who was acting in good faith to procure a pre trial interview, getting accused of harassing a State's witness by an unethical officer, or Prosecutor.

In terms of Pre trial interviews, on a number of occasions, I have had them set up, ready to interview the witness, only to have them tell me that refuse to cooperate with the prosecution.

Further, such a rule would likely cause further congestion in the courts, as it would necessitate a multitude of hearings, either to show that a good faith attempt has been made to set the interview, or to appeal a denial of said interview.

As such, this proposed rule change should not be adopted.

Thank you for your consideration,
Brendan Hicks