

**PROPOSED REVISIONS TO THE CRIMINAL FORMS
PROPOSAL 2021-017**

March 17, 2021

The Rules of Criminal Procedure Committee has recommended amendments to Forms 9-401, 9-403, 9-403A, and 9-403B NMRA, and the withdrawal of Form 9-401A 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.

9-401. Waiver of Counsel.

[For use with District Court Rule 5-301 NMRA, Magistrate Court Rule 6-501 NMRA, Metropolitan Court Rule 7-501 NMRA, and Municipal Court Rule 8-501 NMRA]

STATE OF NEW MEXICO
COUNTY OF _____
_____ COURT

No. _____

STATE OF NEW MEXICO

v.

_____, Defendant

WAIVER OF COUNSEL

(To be used only if, upon conviction, the
defendant may be ~~[deprived of liberty]~~ sentenced to jail or prison)

~~[I understand that I am charged with the following offense(s):~~

~~— which (strike inapplicable words or parts) (is) (are) misdemeanors under the law and that if I am found guilty I can be given a severe punishment, including imprisonment in (the New Mexico state penitentiary) (in the _____ (city) (county) jail) and a fine.~~

~~I understand that under the Constitutions of the United States and the State of New Mexico, I have the right to be represented by a lawyer at all stages of the criminal case—before trial, at the trial itself, during proceedings to determine what sentence should be imposed if I am found guilty, and any appeal.~~

~~I understand that if I am unable, without undue hardship, to pay for all or a part of the expense of legal representation from available present income and assets, a lawyer will be furnished for me free of charge.~~

~~After reading and understanding all of the above, I hereby give up my rights to a lawyer in this case, and to have a lawyer furnished for me free of charge if I cannot afford one.~~

~~DO NOT SIGN THIS FORM IF YOU WANT AN ATTORNEY. DO NOT SIGN THIS FORM UNLESS YOU HAVE READ IT AND UNDERSTAND IT.~~

Defendant

~~I find that the defendant, knowingly, voluntarily and intelligently with full awareness of the right to counsel, has waived the right to counsel.]~~

1. You have told the Court that you do not want to be represented by an attorney in this case.

2. You understand that you are charged with the following offense(s);

3. You understand that the maximum penalty as to each count is as follows:

4. You understand that if you are found guilty of the offense(s) you can be sentenced to a term of imprisonment and may be required to pay fines and court costs.

5. You understand that under the Constitutions of the United States and of the State of New Mexico, you have the right to be represented by an attorney at all critical stages of this criminal case. This includes before trial, at the trial itself, and during proceedings to determine what sentence should be imposed if you are found guilty. You understand that if you are unable to obtain the services of an attorney and are determined to be indigent, an attorney will be provided to you free of charge.

6. You understand that the services of an attorney can be of great value in determining whether the charges against you are sufficient as a matter of law, whether the procedures used in investigating the charges and obtaining evidence against you, including any statements you may have made, were lawful, whether an act you may have committed actually amounts to the offense(s) of which you are charged, whether you have any other valid defense to the charge(s), and, if you are found guilty, whether you should be placed on probation, required to pay a fine, or sentenced to a term of imprisonment.
7. You understand that the prosecution may be represented by an experienced attorney and that a person unfamiliar with legal procedures may allow the prosecutor an advantage by failing to make timely and valid objections; and because of this you may make tactical decisions that produce unintended consequences that are prejudicial to your defense.
8. You understand that the effectiveness of your defense may be diminished by your dual role as attorney and accused.
9. You understand that if you are found guilty of the offense(s) charged the Court may sentence you to a term of imprisonment even though you have given up your right to an attorney.
10. You understand that if you are convicted you will have a right to appeal your case but that you will not be allowed to complain on appeal about the effectiveness of your own representation.
11. You understand that if you choose to represent yourself the Court will hold you to the same rules of evidence and procedure that an attorney must follow.
12. You understand that your lack of knowledge of these rules will not prevent the Court from enforcing them.
13. You have been informed by the Court of the charge(s) against you, the possible punishments for the charge(s), and your right to have an attorney represent you, even if you cannot afford one.
14. You understand your rights and have had the opportunity to ask the Court any questions you might have about waiving your right to an attorney.
15. By signing this Waiver of Counsel Advisement you hereby knowingly, intelligently, and voluntarily waive your rights to an attorney.

DO NOT SIGN THIS FORM IF YOU WANT AN ATTORNEY. DO NOT SIGN THIS FORM UNLESS YOU HAVE READ IT AND UNDERSTAND IT.

Defendant

The Court FINDS the following:

1. Defendant has been fully informed of the charge(s) filed and of the right to have counsel appointed if indigent;
2. Defendant has executed a waiver of counsel and signed this waiver of counsel advisement after their terms and effects have been fully explained;
3. After inquiry into Defendant's background, education, and experience, Defendant is capable of self-representation; and,
4. Defendant has knowingly, intelligently, and voluntarily waived the right to counsel.

Judge: _____

Date: _____

[As amended, effective January 1, 1999; as amended by Supreme Court Order No. _____, effective _____.]

9-403. Eligibility determination for indigent defense services.

[Section 31-15-7 NMSA 1978. For use in the District Court, Magistrate Court and Metropolitan Court]

STATE OF NEW MEXICO
COUNTY OF _____
_____ COURT

KEY _____

[STATE OF NEW MEXICO]
[COUNTY OF _____]

v. _____ No.
_____, Defendant

ELIGIBILITY DETERMINATION FOR INDIGENT DEFENSE SERVICES

Name: _____ DOB: _____ Age: _____

AKA: _____ Sex: Male Female SSN: _____

Address: _____ Phone: _____

Charges: _____

Lives alone: _____ Lives with: Spouse _____ Children _____ Parent _____ Friend _____ Other _____

Marital status: Single _____ Married _____ Divorced _____ Separated _____ Widowed _____

Number of dependents in household: _____

[] Defendant is in jail. [] Defendant is not in jail.

PRESUMPTIVE ELIGIBILITY:

_____ I currently DO NOT receive public assistance.

_____ I currently receive the following type of public assistance in _____ County:

DEPARTMENT OF HEALTH CASE MANAGEMENT SERVICES (DHMS) \$ _____

TANF/GA \$ _____ Food Stamps \$ _____ Medicaid \$ _____

Public Housing \$ _____ SSI/SSDI \$ _____

VA Disability _____

_____ Unable to complete application because of possible Mental Health/Developmental Issue of applicant.

NET INCOME:

SELF

SPOUSE

Employer's Name _____

Employer's Phone _____

Pay Period _____

(weekly, every second week,
twice monthly, monthly)

Net take home pay (salary
wages minus deductions
required by law)

\$ _____

\$ _____

Other income sources
(please specify)

\$ _____

\$ _____

SCREENING USE ONLY

TOTAL ANNUAL INCOME

\$ _____

+

_____ = ____ / ____ / ____ **A**

ASSETS:

CASH ON HAND

\$ _____

\$ _____

BANK ACCOUNTS

\$ _____

\$ _____

REAL ESTATE (equity)

\$ _____

\$ _____

\$ _____

\$ _____

MOTOR VEHICLES (equity)

\$ _____

\$ _____

\$ _____

\$ _____

OTHER PERSONAL PROPERTY

(equity):

(describe and set forth equity)

\$ _____ \$ _____

\$ _____ \$ _____

TOTAL ASSETS \$ _____ + _____ = ____ / ____ / ____ **B**

SCREENING USE ONLY

EXCEPTIONAL EXPENSES (total exceptional expenses of dependents):

MEDICAL EXPENSES (not covered by insurance) \$ _____
MEDICAL INSURANCE PAYMENTS (receipts required) \$ _____
COURT-ORDER SUPPORT PAYMENTS/ALIMONY \$ _____
CHILD-CARE PAYMENTS (e.g. day care) \$ _____
OTHER (describe) _____ \$ _____
_____ \$ _____

TOTAL EXCEPTIONAL EXPENSES \$ _____ =
____ / ____ / ____ **C**

SCREENING USE ONLY

I UNDERSTAND THAT IF IT IS DETERMINED THAT I AM NOT INDIGENT, I MAY APPEAL TO THE COURT WITHIN TEN (10) DAYS AFTER THE DATE I AM ADVISED OF THIS DECISION.

____ I wish to appeal.
____ I do not wish to appeal.

STATE OF NEW MEXICO
COUNTY OF _____

This statement is made under oath. I hereby state that the above information regarding my financial condition is correct to the best of my knowledge. I hereby authorize the screening agent, district defender and the court to obtain information from financial institutions, employers, relatives, the federal internal revenue service and other state agencies.

Date Signature of applicant

State of _____)
_____) ss
County of _____)

Signed and sworn to (or affirmed) before me on _____ (date) by
_____ (name of applicant).

(Seal, if any)

Notary

My commission

expires: _____

**COLUMN "A" (net income) plus COLUMN "B" (assets) SCREENING USE ONLY
minus COLUMN "C" (exceptional expenses) AVAILABLE FUNDS
equals AVAILABLE FUNDS = / _____**

- _____ The applicant is indigent.
- _____ The applicant is *not* indigent.
- _____ The applicant [has] [has not] paid the \$10.00 application fee.
- _____ Receipt number: _____

Based on the above answers and information, I find that the applicant [is] [is not] indigent.

Signature of screening agent

Title

(Complete the following only if the court has determined that the applicant is unable to pay the \$10.00 application fee).

_____ I find that the applicant is unable to pay the \$10.00 indigency application fee, due to the following reason _____ and I therefore waive the payment of the \$10.00 application fee.

Signature of Screening Agent

GUIDELINES FOR DETERMINING ELIGIBILITY

Pursuant to Section 31-15-7 NMSA 1978, the following guidelines are established for determination of indigency and eligibility for public defender services.

I. APPLICATION FEE

A person shall pay a non-refundable application fee for each case in the amount set in Section 35-15-12 NMSA 1978 at the time the person applies with the public defender for representation. *The interviewer will determine if the financial circumstances of the applicant are such that the fee would pose an exceptional hardship, and will recommend to the District office*

Administrator or Eligibility Supervisor if the fee should be waived. The interviewer will document on the application the reason for the fee waiver.

II. PRESUMPTION OF INDIGENCY

An applicant is presumed indigent if the applicant is a current recipient of state or federally administered public assistance programs for the indigent: temporary assistance for needy families (TANF), general assistance (GA), supplemental security income (SSI), social security disability income (SSDI), Veteran's disability benefits (VA) if the benefit is the sole source of income, food stamps, medicaid, public assisted housing or Department of Health, Case Management Services (DHMS). Proof of assistance must be attached to the application and no further inquiry is necessary. The document submitted as proof must clearly identify the applicant as currently receiving the qualifying benefit. Benefit cards without other supporting documents will not be accepted as proof of benefit. If the applicant is not receiving Medicaid benefits, but has [~~dependants~~] dependents in the household for whom Medicaid eligibility has been determined, the applicant will be presumed indigent. Home equity, *etc.* is not to be taken into account if the applicant is a current recipient of one of the six programs described above.

If the interviewer is unable to complete the indigency application or believes the information to be unreliable because of communication or other problems associated with a mental or developmental disability of the applicant, indigency will be presumed. When this is the case the *Mental Health/Communication* section of the application should be checked. Where available, the designated attorney for mental health issues is to be immediately notified, and if that person is not available the duty attorney is to be immediately notified.

III. FINANCIAL RESOURCES

If the applicant is not presumptively indigent, the screening agent shall examine the financial resources of the applicant with consideration given to:

Net Income, Paragraph A;
Assets, Paragraph B; and
Exceptional Expenses, Paragraph C.

A. **Net Income.** The screening agent shall include total salary and wages for the applicant and the applicant's spouse minus deductions required by law (*FICA, state and federal withholding*). Child support deductions and *medical* insurance deductions will also be considered if already deducted from salary, but will not be recounted in the *Exceptional Expenses* section if counted here. Savings deductions and non-mandatory retirement deductions will be added to the net income. In order to calculate the salary of an individual, the screening agent shall use one of the two methods:

(1) if the individual is presently unemployed, the screening agent shall ask about employment during the twelve (12) months preceding the interview date and calculate the

amount of money earned during such twelve (12) months. Proof of this income must be attached to the application; or

(2) if the individual is presently employed, the screening agent shall project the current income for twelve (12) months into the future. Proof of this income must be attached to the application. If the applicant is unemployed and has no income, the screening agent shall inquire as to how the applicant "gets by". Proof of income is not required but responses must be documented on the eligibility form (*i.e.* eats on soup line, street person, sleeps in car, *etc.*) and some proof of how the individual lives must be provided if available, *i.e.*, lives with someone providing support, lives on the street (*must provide some proof of assistance from homeless shelters or other street assistance providers*). If the applicant gets by on "odd jobs", the income from the odd jobs must be verified. Zeros will not be accepted for income. If there is no income, an explanation is needed as to why there is no income and documentation is needed that sets forth the reason for no income.

(3) Any person that has been incarcerated for six (6) months or more is also presumed to be indigent. Proof must be provided, *i.e.*, proof of incarceration, jail release form. An individual incarcerated in a Department of Corrections facility in any state automatically qualifies.

Net income shall include, but is not limited to social security payments, union funds, veteran's benefits, worker's compensation, unemployment benefits, regular support from any absent family member, public or private employee pensions, or income from dividends, interests, rents, estates, trusts or gifts. If the applicant lives alone but receives rent from a family member, the rent shall be considered as regular support from the applicant's family and shall be included as income.

The income of a spouse must be included in the calculation of income even though the applicant and the applicant's spouse are not living in the same household unless:

- (a) the applicant and the spouse are legally separated (*must provide proof of legal separation*);
- (b) the applicant and the spouse have not resided together within the last 12 months and the applicant can provide a notarized statement from an adult family member verifying that fact; or
- (c) the spouse is an alleged victim of the applicant or complaining witness against the applicant.

B. Assets. The screening agent shall consider all assets of the applicant and the applicant's spouse that are readily convertible into cash within a reasonable period of time. Assets include all cash on hand as well as in checking and savings accounts, stocks, bonds, certificates of deposit and tax refunds. Real estate other than the primary residence shall be valued at the current full valuation on the county property tax rolls less any outstanding obligations against the property. Written documentation of both the value and the outstanding obligations will be attached to the application.

C. **Exceptional Expenses.** The screening agent shall consider any unusual expenses of the applicant and the applicant's legal dependents that would, in all probability, prohibit the applicant from being able to secure private counsel. The following expenses are *not* exceptional expenses: rent, food, utilities, gas money, consumer loans and student loans. Exceptional expenses shall include, but not be limited to, costs for medical care or medical insurance, family support obligations and child care payments.

In order to be included as an exceptional expense:

- (1) the cost of medical care cannot be covered by insurance;
- (2) family support expense obligations must be verified by court order or a notarized statement from the person to whom the support is paid. The support must actually be paid on a regular basis; and must be verified by written documentation such as receipts or cancelled checks;
- (3) child care must be paid on a regular basis. If the applicant says that child support is paid when the applicant can, the payments do *not* qualify as exceptional expenses.

The applicant must provide proof of the exceptional expense incurred and proof that payment is being made on a regular basis. If proof is provided, the regular monthly payment for the exceptional expense is multiplied by twelve (12) months and the calculated amount can be deducted from total income.

Other exceptional expenses shall include: payroll garnishments, internal revenue service claims, court ordered attorney fees or other court ordered payments and funeral expenses not covered by insurance.

An approved filing from a pending bankruptcy proceeding of a potential client can be considered in determining indigency.

IV. INDIGENCY FORMULA

An applicant is indigent if the applicant's available funds do not exceed one hundred fifty percent (150%) of the current federal poverty guidelines established by the United States Department of Labor.

The screening agent shall calculate the amount of available funds by adding the total for net income for the household (Column A) together with the total for assets for the household (Column B) and subtracting the total for exceptional expenses (Column C). If the available funds exceed one hundred fifty percent (150%) of the applicable federal poverty level guideline, the applicant is not indigent.

If the applicant does not know the applicant's spouse's income or assets the applicant is presumed not indigent and is not eligible for free representation unless the applicant produces the necessary information within two (2) working days after the interview.

V. APPEAL

If the applicant is found by the screening agent or the court not to be indigent, the applicant may appeal the decision to the district defender in those districts with public defender offices. If the applicant wishes to appeal the decision of the district defender, the applicant shall appeal to the district court. In those districts without public defender offices, the applicant may appeal directly to the district court. If the applicant wishes to appeal a finding that the applicant is not indigent:

(1) in those districts with district public defender offices, the screening agent shall notify the public defender of the appeal;

(2) in those districts without public defender offices, the screening agent shall notify the district court of the appeal.

~~[All appeals]~~ Any appeal regarding indigency shall be filed within ten (10) working days after the date of the decision and must be disposed of by the district court within thirty (30) days of the filing.

~~[VI. REIMBURSEMENT~~

~~Any applicant who is ineligible for free representation but is unable to hire private counsel may sign a contract for public defender representation on a reimbursement basis. The reimbursement cost shall cover all charges for legal fees, expert witness, and private investigation costs. Reimbursement fees shall be governed by the schedule adopted by the Public Defender Department.~~

~~First payment under a reimbursement contract shall be due thirty (30) days from the date of execution of the contract. If the applicant is incarcerated on the date of execution of the contract, the date of payment shall be thirty (30) days from the date of the applicant's release from incarceration.~~

~~If a court enters an order appointing the Public Defender Department to represent a defendant and ordering the defendant to reimburse the state for representation, the defendant shall execute a contract for reimbursement in the appropriate amount under the department's schedule. If the defendant fails to execute a reimbursement contract, the order of appointment shall be forwarded to Public Defender administration for collection along with the documentation stating the amount owing for representation. If the defendant refuses to provide information necessary to determine net income or eligibility, the reimbursement fee shall be the maximum contract rate allowable for the crimes charged under the schedule set by the department.]~~

~~[VH]~~VI. **NEW CHARGES**

If an applicant has applied for public defender services within six (6) months prior to the filing of new charges or a probation violation, completion of a new eligibility determination form is not necessary, but the applicant shall be required to pay the application fee. A printout of the CDMS entry for the original application with the new referral should be placed in the new file being opened. If an applicant has applied for public defender services and been found eligible more than six (6) months prior to the filing of new charges or a probation violation, completion of a new eligibility determination form is necessary. An applicant must pay the application fee for each case for which the applicant seeks representation regardless of whether completion of a new eligibility documentation form is required, unless the fee has been waived.

[Adopted, effective September 24, 1986; as amended, effective August 1, 1989; December 1, 1993; February 14, 1997; November 1, 2004; as amended by Supreme Court Order No. 09-8300-039, effective October 26, 2009; as amended by Supreme Court Order No. _____, effective _____.]

9-403A. Conditional order of appointment.

[Sections 34-6-46, 34-8A-11
and 35-5-8 NMSA 1978]

STATE OF NEW MEXICO
COUNTY OF _____
_____ COURT

STATE OF NEW MEXICO
COUNTY OF _____,

v.

No. _____

_____, Defendant.

CONDITIONAL ORDER OF APPOINTMENT

This matter having come before the court, the court finds:

(please check appropriate box or boxes)

THE COURT FINDS THAT:

- The defendant is incarcerated.
- The defendant is not incarcerated.

THE COURT FURTHER FINDS THAT the defendant is unable to obtain counsel and desires representation by the Law Offices of the Public Defender.

IT IS THEREFORE ORDERED THAT the defendant shall make application to the Law Offices of the Public Defender for representation within _____ days of the issuance of this Order. ~~If the defendant is determined not to be indigent under the Law Offices of the Public Defender's indigency guidelines as approved by the New Mexico Supreme Court, the defendant shall execute a contract to reimburse the State of New Mexico for legal representation and related expenses in the amount determined in accordance with the Law Offices of the Public Defender's guidelines.]~~

IT IS FURTHER ORDERED THAT the Law Offices of the Public Defender is hereby appointed to represent the defendant in the above-entitled cause contingent upon the defendant making application to the Law Offices of the Public Defender for representation as set forth herein.

IT IS FURTHER ORDERED THAT:

- the application fee is waived.
- the application fee is not waived.

Judge

CERTIFICATE OF MAILING

I certify that I mailed a copy of this order to the above-named defendant at _____ (set forth address), and to the public defender on the _____ day of _____, _____.

(Judge) (Clerk)

Date

[Adopted, effective July 1, 1988; as amended, effective January 1, 1996; as amended by Supreme Court Order No. 12-8300-028, effective for all cases filed on or after January 7, 2013; as amended by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. _____, effective _____.]

9-403B. Conditional order of appointment; contract defense counsel.

[Section 35-5-8 NMSA 1978]

STATE OF NEW MEXICO
COUNTY OF _____
_____ COURT

STATE OF NEW MEXICO
COUNTY OF _____,

v.

No. _____

_____, Defendant.

**CONDITIONAL ORDER OF APPOINTMENT¹
CONTRACT DEFENSE COUNSEL**

This matter having come before the court, the court finds:

(please check appropriate box or boxes)

THE COURT FINDS THAT:

- The defendant is incarcerated.
- The defendant is not incarcerated.

THE COURT FURTHER FINDS THAT:

- The defendant is indigent and unable to obtain counsel.
- ~~[The defendant is not indigent, but is unable to obtain counsel.]~~

IT IS THEREFORE ORDERED THAT:

- The Law Offices of the Public Defender is appointed to represent the defendant in the above-entitled case.
- _____, an attorney on contract with the [Law Offices of the Public Defender] [City of _____], shall represent the defendant in the above-entitled case.
- ~~[The defendant shall reimburse the [State of New Mexico] [City of _____] in an amount of no less than \$ _____ for legal representation and related expenses.]~~

IT IS FURTHER ORDERED THAT

- The application fee is waived.
- The application fee is required.

Judge

CERTIFICATE OF MAILING

I certify that I mailed a copy of this order to the above-named defendant at _____ (set forth address), and to the Law Offices of the Public Defender on the _____ day of _____, _____.

Date

(Judge) (Clerk)

USE NOTES

1. This form may be used in municipal courts and in magistrate court jurisdictions where the Law Offices of the Public Defender does not have a physical office and relies on appointed contract attorneys to represent indigent defendants. In jurisdictions where the Law Offices of the Public Defender has a physical office, magistrate courts should use Form 9-403A NMRA.

[Adopted by Supreme Court Order No. 15-8300-006, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. _____, effective _____.]

WITHDRAWN

~~**9-401A. Waiver of counsel.**~~

~~[For use with Magistrate Court Rule 6-501 NMRA, Metropolitan Court Rule 7-501 NMRA and Municipal Court Rule 8-501 NMRA]~~

STATE OF NEW MEXICO

[COUNTY OF _____]
[CITY OF _____]
_____ COURT

No. _____

[STATE OF NEW MEXICO]
[COUNTY OF _____]
[CITY OF _____]

v.

_____, Defendant

WAIVER OF COUNSEL

(To be used only if, upon conviction, the defendant may be deprived of liberty)

_____ I understand that I am charged with the following offense(s): _____ which *(strike inapplicable words or parts)* [is] [are] [misdemeanor(s)] under the law and that if I am found guilty I can be given a severe punishment, including imprisonment in the [New Mexico state penitentiary] [_____ [city] [county] jail] and a fine.

_____ I understand that under the constitutions of the United States and the State of New Mexico, I have the right to be represented by a lawyer at all stages of the criminal case—before trial, at the trial itself, during proceedings to determine what sentence should be imposed if I am found guilty, and any appeal.

_____ I understand that if I am unable, without undue hardship, to pay for all or a part of the expense of legal representation from available present income and assets, a lawyer will be furnished for me free of charge.

_____ After reading and understanding all of the above, I hereby give up my rights to a lawyer in this case.

DO NOT SIGN THIS FORM IF YOU WANT AN ATTORNEY. DO NOT SIGN THIS FORM UNLESS YOU HAVE READ IT AND UNDERSTAND IT.

Defendant

_____ I find that the defendant, knowingly, voluntarily and intelligently with full awareness of the right to counsel has waived this right.

Judge

Date: _____]

[Adopted, effective September 15, 1997; withdrawn 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

--

Jennifer E. DeLaney

Chief Judge, Division II

Sixth Judicial District Court

[855 S. Platinum Avenue](#)

[Deming, New Mexico 88030](#)

(575) 543-1546

(575) 543-1606 facsimile



2021 Proposed Rule Amendment Comments.docx

21K

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.