

**PROPOSED REVISIONS TO THE UNIFORM JURY INSTRUCTIONS - CRIMINAL
PROPOSAL 2021-026**

March 17, 2020

The Uniform Jury Instructions – Criminal Committee has recommended amendments to UJI 14-4301, 14-4302, 14-4310, 14-4311, 14-4312, 14-4320, and 14-4321 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.

14-4301. Offer or sale of unregistered securities; essential elements.

For you to find the defendant guilty of the [~~offer to sell~~⁺ ~~(or) (sale of)~~][offer to sell][or][sale of]¹ unregistered securities [as charged in Count _____]², the State must prove to your satisfaction beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [~~offered to sell~~⁺ ~~(or) (sold)~~][offered to sell][or][sold]¹ a security³;
 2. The security was required by the [~~state securities law~~]New Mexico Uniform Securities Act to be registered with the State of New Mexico prior to the [~~(sale)~~⁺ ~~(or) (offer for sale)~~⁴][sale][or][offer for sale]^{1, 4};
 3. The security was not registered as required [~~by the state securities law~~]under the New Mexico Uniform Securities Act;
 4. This happened in New Mexico on or about the _____ day of _____,⁵ _____.
- [As amended by Supreme Court Order No. _____, effective _____.]

USE NOTES

1. Use only the applicable alternatives.
2. Insert the Count Number if more than one count is charged.
3. UJI 14-4310 NMRA, the definition of “security”, must also be given immediately after this instruction.

4. If the defendant claims that the security was exempt and there is a factual basis for this claim, UJI 14-4320 NMRA must be given. If the defendant claims that the sales transaction or offer to sell transaction was exempt and there is a factual basis for this claim, UJI 14-4321 NMRA must be given.

5. UJI 14-141 NMRA, General criminal intent, must also be given with this instruction.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Criminal Intent.

The sale of unregistered securities is not a specific intent crime. *State v. Sheets*, 94 N.M. 356, 365, 610 P.2d 760 (Ct. App. 1980), cert. denied 94 N.M. 675, 615 P.2d 992 (1980). UJI 14-141, general criminal intent, must be given with this instruction. Security - Question of Fact - Question of Law

The question of what constitutes a “security” is a mixed question of law and fact. *See* Modern Federal Jury Instructions, Section 57.10; *United States v. Austin*, 462 F.2d 724 (10th Cir. 1972) and *Roe v. United States*, 287 F.2d 435 (5th Cir. 1961) (cert den. 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29) (1961). There are numerous cases which state that the question of whether a specific instrument is a security is a matter of fact for the jury to determine.

Almost all cases stating that the question of what is a security is a matter of fact for the jury involve the sale of an “investment contract”. *See* for example: *State v. Shade*, 104 N.M. 710, 726 P.2d 864 (Ct.App. 1986) (cert. quashed) (sale of time-share memberships - relying on *Roe v. United States*, supra, held question whether a time-share contract was an investment contract was question of fact); *Roe v. United States*, supra; (sale of mineral lease - question whether the mineral lease was sale of real property or an investment contract was question of fact for the jury); *Ahrens v. American-Canadian Beaver Co., Inc.*, 428 F.2d 926 (10th Cir. 1970) (sale of beaver contracts by owner of beaver farm - held not error to submit to jury question of whether a beaver contract was an investment contract); *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983) (sale of gold certificate contract purporting to assign quantity of gold); *Hentzner v. Alaska*, 613 P.2d 821 (Alaska 1980) (payment to defendant to find gold - question whether investment contract was question of fact for the jury).

All other cases stating that the question of whether the instrument was a security is a question of fact also involve the sale of some other novel type security. *See: People v. Figueroa*, 224 Cal. Rptr 719, 41 Cal.3rd 714, 715 P.2d 680 (Cal., 1986) (sale of promissory note); *Miller v. Florida*, 285 So.2d 41 (Fla., 1973) (sale of joint venture in Bogota, Columbia - question of whether personal loan or an investment in a joint venture question for jury).

In *SEC v. C. M. Joiner Corp.*, 320 U.S. 344, 64 S. Ct. 120, 88 L.Ed 88 (1943), the United States Supreme Court held that:

In the Securities Act the term “security” was defined to include by name or description many documents in which there is common trading for speculation or investment. Some, such as notes, bonds, and stocks, are pretty much standardized and the name alone carries well settled meaning. Others are of more variable character and were necessarily designated by more descriptive terms, such as “transferable share”, “investment contract”, and “in general any interest or instrument commonly known as a security”. We cannot read out of the statute these general descriptive designations merely because more specific ones have been used to reach some kinds of documents. Instruments may be included within any of these definitions, as a matter of law, if

on their face they answer to the name or description. However, the reach of the Act does not stop with the obvious and commonplace. Novel, uncommon, or irregular devices, whatever they appear to be, are also reached if it be proved as matter of fact that they were widely offered or dealt in terms of courses of dealing which establish their character in commerce as ‘investment contracts’, or as ‘any interest or instrument commonly known as a ‘security’’. (Emphasis added.)

Even though an instrument may be called by a name which is commonly considered to be a type of security, the instrument may not be a security if the “context otherwise requires”. In *Marine Bank v. Weaver*, 455 U.S. 551, 71 L. Ed. 2d 409, 102 S. Ct. 1220 (1982), the United States Supreme Court held that a non-publicly traded certificate of deposit of a financial institution was not a security. The court said that profit alone is not enough.

In *United Housing Foundation Inc. v. Forman et al.*, 421 U.S. 837, 95 S. Ct. 2051, 44 L. Ed. 2d 621 (1975), the court held that even though the instruments involved were called shares of “stock”, they were not securities as they did not confer rights to receive dividends contingent upon an apportionment of profits. The United Housing case involved a massive non-profit housing cooperative constructed and financed under New York’s Private Housing Finance Law to provide low income housing. Tenants were required to purchase 18 shares of “stock” for each room of an apartment at \$25.00 per share (\$1,800 for 4 room apartment). The shares could not be pledged, encumbered or bequeathed (except to surviving spouse). Shareholders had no voter rights. When the shares were sold to a new tenant, the seller could not receive more than \$25.00 per share plus a fraction of the mortgage then paid off. No dividends were to be paid. The court held that the shares were not purchased for profit, but to participate in the project and were therefore not “securities”.

In *Landreth v. Landreth Timber Co.*, 471 U.S. 681, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985), the Supreme Court rejected the argument that the *Forman*, *Marine Bank* and *Tcherepnin v. Knight*, 389 U.S. 332, 88 S. Ct. 548, 19 L. Ed. 2d 564 (1967), cases mandated a case by case determination as to whether the economic realities call for an application of the federal securities act, holding that if the instrument involved is “traditional stock” there is no need to look beyond the characteristics of the instrument. Landreth involved the sale of 100% of the stock of a business. The Supreme Court rejected the so-called “sale of business” doctrine. (See, however, committee commentary to UJI 14-4312.) The Supreme Court distinguished *Forman*, *Marine Bank* and *Tcherepnin* stating that:

these cases, like the other cases on which respondents rely, involved unusual instruments that did not fit squarely within one of the enumerated specific kinds of securities listed in the definition. Tcherepnin involved withdrawable capital shares in a state savings and loan association, and Weaver involved a certificate of deposit and a privately negotiated profit sharing agreement.

* * *

. . . Nor does *Forman* require a different result. Respondents are correct that in *Forman* we eschewed a “literal” approach that would involve the Acts’ coverage simply because the instrument carried the label “stock.” *Forman* does not, however, eliminate the Court’s ability to hold an instrument is covered when its characteristics bear out the label.

* * *

As Professor Loss explains, “It is one thing to say that the typical cooperative apartment dweller has bought a home, not a security; or that not every installment purchase ‘note’ is a security; or that a person who charges a restaurant meal by signing his credit card slip is not selling

a security even though his signature is an ‘evidence of indebtedness.’ But stock (except for the residential wrinkle) is so quintessentially a security as to foreclose further analysis.”

14-4302. Fraudulent practices; sale of securities; essential elements.

For you to find the defendant guilty of fraudulent practices [as charged in Count _____]¹, the State must prove beyond a reasonable doubt each of the following elements of the crime:

1. The defendant [~~offered to sell~~]² ~~(sold)~~ ~~(offered to purchase)~~ ~~(or)~~ ~~(purchased)~~ [~~offered to sell~~] [~~sold~~] [~~offered to purchase~~] [~~or~~] [~~purchased~~]² a security³;

2. In connection with the [~~offer to sell~~]² ~~(sale)~~ ~~(offer to purchase)~~ ~~(or)~~ ~~(purchase)~~ [~~offer to sell~~] [~~sale~~] [~~offer to purchase~~] [~~or~~] [~~purchase~~]² of the security, the defendant purposely and directly or indirectly:

[used a plan or scheme to deceive or cheat others;]²

[OR]

[made an untrue statement of fact that under the circumstances would have been important or significant to the investment decision of a reasonable person;]

[OR]

[omitted a fact that under the circumstances would have been misleading to the investment decision of a reasonable person;]

[OR]

[engaged in an act, practice or course of business which would cheat or would operate as a fraud or deceit upon a reasonable person;]

3. This happened in New Mexico on or about the _____ day of _____, _____.⁴

USE NOTES

1. Insert the Count Number if more than one count is charged.
2. Use only the applicable alternatives.
3. UJI 14-4310 NMRA, the definition of “security”, must also be given immediately after this instruction.
4. UJI 14-141 NMRA, General criminal intent, must also be given. [Approved, effective September 1, 1988; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Unlike general “criminal fraud”, the fraudulent sale of securities is not a specific intent crime. *State v. Ross*, 1986-NMCA-015, ¶¶ 14-18, 104 N.M. 23, [26,] 715 P.2d 471 [~~(Ct.App., 1986)~~]. UJI 14-141 NMRA, general criminal intent, must be given with this instruction.

The general rule is that the question of what constitutes a “security” is a mixed question of law and fact. *See* committee commentary to UJI 14-4301 NMRA.

14-4310. “Security”; defined.¹

A “security” is any [~~ownership right~~] [~~right to an ownership position~~] ~~(or)~~ ~~(creditor relationship)~~ [ownership right] [right to an ownership position] [~~or~~] [creditor relationship] and includes any:²

[bond. A “bond” is any interest bearing instrument that obligates the issuer to pay the bondholder a specified sum of money, usually at specified intervals, and to repay the principal amount of the loan at maturity.]

[collateral-trust certificate. A “collateral-trust certificate” is a corporate debt instrument which is used to back collateral-trust bonds held by a bank or other trustee.]

[certificate of interest or participation in a security] [~~temporary or interim certificate for~~² ~~(receipt for) (guarantee of)~~ [temporary or interim certificate for] [receipt for] [guarantee of]² the right to purchase a security.]

[~~a~~] warrant or right to subscribe to or purchase any security. A “warrant” or “subscription warrant” is a type of security which is usually issued together with a bond³ or preferred stock,⁴ that entitles the holder to buy a proportionate amount of stock, bonds or debentures at a specified price, usually higher than the market price at the time of issuance, for a period of years or to perpetuity.]

[~~a~~] right to subscribe to or purchase any security. A “right” or a “subscription right” is a privilege granted to existing shareholders of a corporation to subscribe to shares of a new issue of stock, bonds or debentures before it is offered to the public, which normally has a life of two to four weeks, is freely transferable and entitles the holder to buy the new stock, bonds or debentures below the public offering price.]

[debenture. A “debenture” is an unsecured general debt obligation or loan backed only by the integrity of the borrower and usually documented by an agreement known as an “indenture”.]

[draft. A “draft” is a signed, written order by which one party (drawer) instructs another party (drawee) to pay a specified sum to a third party (payee). The payee and drawer are usually the same person. A sight draft is payable on demand. A time draft is payable either on a definite date or at a fixed time after sight or demand.]

[evidence of indebtedness]

[~~any~~] interest or instrument commonly known as a security]

[investment contract. An “investment contract” means a contract:

1. where an individual invests his money;
2. in an undertaking or venture of two or more people or entities;
3. with an expectation of profit;
4. based primarily on the efforts of others.

An “investment” is the use of capital or money to create more money.]

[limited partnership interest. A “limited partnership” is an organization made up of a general partner, who manages a project, and limited partners, who invest money but have limited liability.]

[note. A “note” is a written promise to pay a specified amount to a certain person or entity on demand or on a specified date.]

[interest in oil, gas or other mineral rights other than a landowner royalty interest in the production of oil, gas or other minerals created through the execution of a lease of the lessor’s mineral interest.]

[promissory note. A “promissory note” is a written promise committing the maker to pay the payee a specified sum of money either on demand or at a fixed or determined future date, with or without interest.]

[~~(put)~~⁵ ~~(call)~~⁵ ~~(straddle)~~⁵ ~~(or)~~ ~~(option)~~⁵] [put] [call] [straddle] [or] [option]⁵ entered into on a national securities exchange relating to foreign currency.]

~~[[put]⁵ (call)⁵ (straddle)⁵ (or) (option)⁵] [put] [call] [straddle] [or] [option]⁵ on any [(security)² (group or index of securities including any interest therein or based on the value thereof)] [security] [group or index of securities including any interest therein or based on the value thereof]².]~~

[subscription. A “subscription”⁶ is an agreement of intent to buy newly issued securities.]

[stock. “Stock” is the ownership of a corporation represented by shares that are a claim on the corporation’s earnings and assets.]

[treasury stock. “Treasury stock” is stock reacquired by the issuing company and available for retirement or resale.⁴]

[voting-trust certificate. A “voting trust certificate” is a transferable certificate of beneficial interest in a voting trust, a limited-life trust set up to permit control of a corporation by a few individuals, called voting trustees. The certificates, which are issued by the voting trust to stockholders in exchange for their common stock⁴, represent all the rights of common stock except voting rights. The common stock is then registered on the books of the corporation in the names of the trustees.]

USE NOTES

1. It is generally a question of law as to whether or not a specific instrument is a security. If the instrument is a novel, uncommon or irregular device, the jury must be instructed on underlying factual disputes. An “investment contract” is a type of security which almost always requires a factual determination to be made. This instruction contains definitions of the common types of securities. It does not contain a definition of all of the terms set forth in the ~~[New Mexico Securities Act of 1986]~~ New Mexico Uniform Securities Act to describe a security. If a term is not provided in this instruction or Section 58-13C-102(DD) of the Act, the court may draft an appropriate definition for the jury.

2. Use only the applicable alternatives.

3. The definition of “bond” as set forth in this instruction should also be given with this definition.

4. The definition of “stock” as set forth in this instruction should also be given with this definition.

5. The definitions of “put”, “call”, “call option”, “option”, and “certificate” are set forth in UJI 14-4311 NMRA and should be given when any of these terms are used.

6. *See also* the definitions of “subscription rights” and “subscription warrants” set forth above.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The question of whether a specific instrument is a “security” is a mixed question of law and fact. *See* committee commentary to UJI 14-4301; Modern Federal Jury Instructions, Section 57.10; *United States v. Austin*, 462 F.2d 724 (10th Cir. 1972) and *Roe v. United States*, 287 F.2d 435 (5th Cir. 1961) (*cert. denied* 368 U.S. 824, 82 S. Ct. 43, 7 L. Ed. 2d 29 (1961)). There are numerous cases which state that the question of whether a specific instrument is a security is a matter of fact for the jury to determine. These are usually cases involving an investment contract or a unique or novel type of instrument. *See State v. Shade* and *State v. Vincent*, 104 N.M. 710, 726 P.2d 864 (Ct. App. 1986) (sale of time-share memberships - question whether a time-share contract was an investment contract).

As a general rule, if the jury requests an instruction on the definition of a term used in UJI Criminal, the judge is to give a Webster's Dictionary definition of the term, however, the committee believed that because of the technical nature of many of the types of securities, definitions should be prepared by the committee for the more commonly used terms. In preparing the definitions found in UJI 14-4310, the committee relied upon numerous sources, including Barron's, Dictionary of Finance and Investment Terms, Barron's, Finance and Investment Handbook and securities decisions.

14-4311. Securities; additional definitions.

"Call". A "call" is the right to buy a specific number of shares at a specified price by a fixed date.

"Call Option". A "call option" is an option that gives the owner the right to buy a specified number of shares at a definite price within a specified period of time.

"Certificate". A "certificate" is a formal declaration that can be used to document a fact. Examples of types of certificate include: a birth certificate, a stock certificate, a partnership certificate and a certificate of deposit.

"Option". An "option" is a right to buy or sell property within an agreed upon time in exchange for an agreed-upon sum.

"Put option". A "put option" is an option that gives the owner the right to sell a particular stock at a certain price within a designated period.

USE NOTES

The definitions in this Instruction may be used with the definitions set forth in UJI 14-4310 NMRA.
[Approved, effective September 1, 1988; as amended by Supreme Court Order No. _____, effective _____.]

14-4312. "Isolated transaction"; definition.

An "isolated transaction" is a transaction which is unique, occurs only once or sporadically.
[Approved, effective September 1, 1988.]

Committee commentary.— Certain securities transactions are not required to be registered prior to sale. One common defense to the sale of unregistered securities is that the sale was an isolated sale. The Court of Appeals in a civil case held that the sale of all of the stock of a business by a non-issuer may sell as an "isolated sale" a whole business by selling 100% of the securities without registration if the purpose of the sale is to pass complete ownership, including managerial control, of the business of the corporation to the buyer. *See White v. Solomon*, 1986-NMCA-136, 105 N.M. 366, 732 P.2d 1389 [~~(Ct. App. 1986)~~]; *see also State v. Sheets*, 1980-NMCA-041, 94 N.M. 356, [364,] 610 P.2d 760 [~~(Ct. App. 1980)~~ (*cert. denied* 94 N.M. 675, 615 P.2d 992)] for the definition of "isolated sale".

White v. Solomon, supra, adopts the sale of business doctrine. The New Mexico Court of Appeals [~~improperly~~] relies upon the United States Supreme Court decision of *Tcherepnin v. Knight*, 389 U.S. 332[~~, 88 S. Ct. 548, 19 L. Ed. 2d 564~~] (1967) in holding that the sale of 100% of the stock of a business is not the sale of securities for purposes of registration. This interpretation of [~~Tcherepnin~~] *Tcherepnin*, was specifically rejected by the United States Supreme Court

in *Landreth v. Landreth*, 471 U.S. 681[, 105 S.Ct. 2297, 85 L. Ed. 2d 692] (1985). See committee commentary to UJI 14-4301 NMRA for a discussion of the [~~Tcherepnin~~] *Tcherepnin* and [~~Landreth~~] *Landreth* decisions.

[It is noted that even though the sale of 100% of the stock of a business may not have to be registered in New Mexico, the transaction is still subject to the fraud provisions of the the New Mexico Securities Act of 1986. See *State v. McCall*, 101 N.M. 616, 629, 686 P.2d 958 (Ct. App. 1983).]

14-4320. Defense; exempt security.¹

An issue in this case is whether the security which was [~~(sold)~~² [~~offered for sale~~]] [sold] [offered for sale]² [as charged in Count _____]³ was an exempt security and was not required to be registered under the [~~State Securities Act~~] New Mexico Uniform Securities Act. A security which is

[[~~(issued by)~~² [~~insured by~~] [~~guaranteed by~~]] [issued by] [insured by] [guaranteed by]² a _____,⁴²
[an option issued by _____,⁴] [a _____,⁴]
is an exempt security and is not required to be registered [~~by the state securities law~~] under the New Mexico Uniform Securities Act.

If you find that the security was
[[~~(issued by)~~² [~~insured by~~] [~~guaranteed by~~]] [issued by] [insured by] [guaranteed by]² a _____,⁴²
[an option issued by _____,⁴] [a _____,⁴]
you must find the defendant not guilty of the sale of an unregistered security [as charged in Count _____]³.

The burden is on the state to prove beyond a reasonable doubt that the security [~~(sold)~~² [~~offered for sale~~]] [sold] [offered for sale]² was not an exempt security.

USE NOTES

1. For use if there is an issue that the sale or offer for sale was an exempt security under the [~~State Securities Act~~] New Mexico Uniform Securities Act, Section 58-13C-201 NMSA 1978.

2. Use only the applicable alternative.

3. Insert the count number if more than one count is charged.

4. See Section [~~58-13B-26~~] 58-13C-201 NMSA 1978 for the types of exempt securities. Many of the terms set forth in Section [~~58-13B-26~~] 58-13C-201 NMSA 1978 have been defined in UJIs 14-4310 and 14-4311 NMRA.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 20-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Certain securities are not required to be registered prior to sale or offer for sale. It is a defense to the offense of selling or offering to sell an unregistered security if the security transaction is an exempt transaction or the security is an exempt security. Other defenses, such as “mistake of fact” and good faith reliance on the advice of counsel are not available to the charge of offer to sell or sale of unregistered securities. See *State v. Shafer*, [~~et al.~~] 1985-NMCA-018, 102 N.M. 629, 698 P.2d 902 [(Ct. App., 1985) (~~cert. denied 102 N.M. 613~~)].

14-4321. Defense; exempt transaction.¹

An issue in this case is whether the security which was [~~(sold)~~² ~~(offered for sale)~~] [sold] [offered for sale]² [as charged in Count _____]³ was an exempt transaction and was not required to be registered under the [~~state securities law~~] New Mexico Uniform Securities Act.

[An isolated transaction⁴,]²

[OR]

[A transaction [~~(by)~~² ~~(between)~~ ~~(in)~~] [by] [between] [in]² _____⁵,] is an exempt transaction which is not required to be registered [~~under the state securities law~~] under the New Mexico Uniform Securities Act.

If you find that the [~~(sale)~~² ~~(offer to sell)~~] [sale] [offer to sell]² of the unregistered security was

[an isolated transaction,]²

[OR]

[a transaction [~~(by)~~² ~~(between)~~ ~~(in)~~] [by] [between] [in]² _____⁵,] you must find the defendant not guilty of the sale of an unregistered security as charged in [Count _____]³.

The burden is on the state to prove beyond a reasonable doubt that the security [~~(sold)~~² ~~(offered for sale)~~] [sold] [offered for sale]² was not an exempt transaction.

USE NOTES

1. For use if there is an issue that the sale or offer for sale was an exempt transaction. *See* Section [~~58-13B-27~~] 58-13C-202 NMSA 1978 for exempt transactions.

2. Use only the applicable alternative.

3. Insert the count number if more than one count is charged.

4. The definition of “isolated transaction”, UJI 14-4312 NMRA, is to be given immediately following this alternative.

5. Set forth the elements of the exempt transaction. *See* Section [~~58-13B-27~~] 58-13C-202 NMSA 1978 for the type of exempt securities transactions.

[Approved, effective September 1, 1988; as amended by Supreme Court Order No. 2020-8300-004, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — Although the sale of all of the stock of a business is a transaction subject to the [~~New Mexico Securities Act of 1986~~] New Mexico Uniform Securities Act, apparently a non-issuer may sell as an “isolated sale” a whole business by selling 100% of the securities without registration if the purpose of the sale is to pass complete ownership, including managerial control, of the business of the corporation to the buyer. *See White v. Solomon*, [105 N.M. 366, 732 P.2d 1389 (Ct. App., 1986); *State v. Sheets, supra*; and *State v. Shafer*, for the definition of “isolated sale” 1986-NMCA-136, 105 N.M. 366, 732 P.2d 1389-. *See also* the Committee commentaries to UJIs 14-4301 and 14-4312 NMRA.



[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.