

1 **5-112. Criminal contempt.**

2           A.     **Scope.** This rule establishes procedures to implement the inherent and statutory  
3 powers of the court to impose punitive sanctions for criminal contempt of court. This rule shall not  
4 apply to the imposition of other sanctions specifically authorized by these rules, statute, or the  
5 common law, or to the imposition of remedial sanctions for civil contempt of court. This rule shall  
6 not apply to any person who is less than eighteen years old.

7           B.     **Definitions.**

8                   (1)     “Contempt” or “contemptuous conduct” includes but is not limited to

9                           (a)     disorderly conduct, insolent behavior, or a breach of peace, noise,  
10 or other disturbance, if such behavior actually obstructs or hinders the administration of justice or  
11 tends to diminish the court’s authority;

12                           (b)     misconduct of court officers in official transactions; or

13                           (c)     disobedience of any lawful order, rule, or process of the court.

14                   (2)     “Direct contempt” means contemptuous conduct committed in the  
15 immediate presence of the court that is personally observed by the judge.

16                   (3)     “Indirect contempt” means contemptuous conduct that occurs outside the  
17 presence of the court, or conduct that is not personally observed by the judge and requires further  
18 fact finding.

19                   (4)     “Punitive sanction” means a sentence imposed to punish a person for  
20 committing an act of criminal contempt and may include a reprimand or unconditional fine or  
21 unconditional sentence of imprisonment.

22           C.     **Direct criminal contempt.** A direct criminal contempt may be punished  
23 summarily at the time of the contempt without further evidentiary proceedings. Except in cases of

1 flagrant contemptuous conduct, before summarily punishing a person for direct criminal contempt  
2 the judge shall give the person a warning, either orally or in writing, to no longer engage in the  
3 contemptuous behavior and shall give the person an opportunity to explain the conduct. When the  
4 judge summarily punishes a contempt defendant for direct criminal contempt, the judge shall  
5 forthwith sign and file with the clerk a written order, which shall constitute a judgment and  
6 sentence, certifying

- 7 (1) the specific facts constituting the direct criminal contempt;
- 8 (2) that the judge personally observed the contemptuous conduct committed in  
9 the presence of the judge without the need for further fact finding; and
- 10 (3) the punishment that was summarily imposed.

11 **D. Disposition of indirect criminal contempt on notice and hearing.** Indirect  
12 criminal contempt shall be punished only after notice and hearing in accordance with this  
13 paragraph.

14 (1) ***Criminal complaint.*** An indirect criminal contempt proceeding shall be  
15 initiated with a criminal complaint under Rule 5-201 NMRA, which shall be served with a  
16 summons as set forth in Rule 5-209 NMRA. The complaint shall be treated the same as an  
17 information or indictment for purposes of the Rules of Criminal Procedure for the District Courts.

18 (2) ***Appointing a prosecutor.*** The court shall appoint the district attorney to  
19 prosecute the criminal contempt for the state.

20 (3) ***Rules of Criminal Procedure.*** A charge of indirect criminal contempt shall  
21 be prosecuted in accordance with this rule and the Rules of Criminal Procedure for the District  
22 Courts, to the extent that such rules are not inconsistent with this rule.

1           (4)    ***Judgment and sentence.*** If the contempt defendant is found guilty of  
2 criminal contempt, the court shall enter a judgment and sentence.

3           E.     **Docketing.** Any criminal contempt proceeding commenced under this rule shall be  
4 docketed as a separate criminal matter with a new case number.

5           F.     **Appeal.** Any person found guilty of criminal contempt may appeal pursuant to the  
6 Rules of Appellate Procedure governing appeals from the district court in criminal cases.

7 [As amended by Supreme Court Order No. 15-8300-020, effective for all cases pending or filed  
8 on or after December 31, 2015; as amended by Supreme Court Order No. 16-8300-016, effective  
9 for all cases pending or filed on or after December 31, 2016; suspended by Supreme Court Order  
10 No. 21-8300-032, effective November 22, 2021, until further order of the Court.]

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12 **Committee commentary.** — In 2015, the former language in this rule was withdrawn and  
13 replaced with a comprehensive rule governing criminal contempt of court proceedings. Prior to  
14 the 2015 amendments, this rule provided that “[a]n attorney who willfully fails to observe the  
15 requirements of these rules, including prescribed time limitations, may be held in contempt of  
16 court and subject to disciplinary action.” Although this former language has been replaced, the  
17 district court retains both statutory and inherent power to hold an attorney in contempt of court,  
18 and an attorney also may be subject to discipline as provided in the Rules Governing Discipline,  
19 Rules 17-101 to -316 NMRA.

20           This rule applies to criminal contempt of court proceedings that arise from conduct  
21 occurring within a criminal action in district court. This rule does not apply to civil contempt  
22 proceedings. Because a criminal contempt proceeding also can arise from conduct occurring within

1 a civil action, a similar rule exists in the Rules of Civil Procedure for the District  
2 Courts. *See* Rule 1-093 NMRA.

3 New Mexico law classifies contempts of court as either civil or criminal. *See Concha v.*  
4 *Sanchez*, 2011-NMSC-031, ¶ 24, 150 N.M. 268, 258 P.3d 1060. The classification of a contempt  
5 as civil or criminal does not depend on whether the contempt proceeding arises out of an  
6 underlying criminal action or civil action. Instead, the focus should be on the reason why the court  
7 is invoking its contempt powers. *See id.* Civil contempt sanctions are remedial and may be imposed  
8 as coercive measures to compel a person to comply with an order of the court or to enforce the  
9 rights of a private party to a lawsuit. *See id.* ¶ 25; *State ex rel. Bliss v. Greenwood*, 1957-NMSC-  
10 071, ¶ 6, 63 N.M. 156, 315 P.2d 223. A person held in civil contempt “carries the keys to his  
11 prison” and can end continuing contempt sanctions by complying with the court’s  
12 orders. *Concha*, 2011-NMSC-031, ¶ 25 (internal quotation marks and citation omitted). Criminal  
13 contempt sanctions are imposed to punish the contempt defendant for a completed act of contempt  
14 and to preserve the dignity and authority of the court. *See Concha*, 2011-NMSC-031, ¶  
15 26; *Greenwood*, 1957-NMSC-071, ¶ 6.

16 Whether a contempt proceeding is classified as criminal or civil will impact the procedures  
17 the court must follow. Because civil contempt sanctions are remedial and not intended to punish,  
18 the court may impose civil contempt sanctions “by honoring the most basic due process  
19 protections—in most cases, fair notice and an opportunity to be heard.” *Concha*, 2011-NMSC-  
20 031, ¶ 25. Criminal contempt, on the other hand, is a “crime in the ordinary sense; it is a violation  
21 of the law.” *Id.* ¶ 26. “A criminal contempt defendant is therefore entitled to due process  
22 protections of the criminal law, the specific nature of which will depend on whether the criminal  
23 contempt is categorized as direct or indirect.” *Id.* A contempt proceeding can result in both civil

1 and criminal contempt sanctions, *see State v. Pothier*, 1986-NMSC-039, ¶¶ 4-6, 104 N.M.  
2 363, 721 P.2d 1294 (recognizing that both civil and criminal sanctions can be imposed for  
3 contemptuous conduct), and this rule sets forth the procedures the court must follow if the court  
4 intends to pursue criminal contempt sanctions even if the court is also considering civil contempt  
5 sanctions.

6         The applicable procedures for a criminal contempt proceeding depend on whether the  
7 criminal contempt is direct or indirect. “Direct contempts are contemptuous acts committed in the  
8 presence of the court, while indirect contempts are such acts committed outside the presence of  
9 the court.” *Concha*, 2011-NMSC-031, ¶ 24. If the contemptuous conduct has occurred in court and  
10 the judge has personal knowledge, based on perceiving the conduct, of the facts establishing all  
11 elements of the contempt, the court may follow the summary procedures for direct criminal  
12 contempt set forth in Paragraph C of this rule. However, before holding a person in direct criminal  
13 contempt, the judge in most cases still must give such person a warning to stop engaging in  
14 contemptuous behavior and an opportunity to explain the behavior. *See id.* ¶ 27 (“If feasible, even  
15 in summary proceedings for an act of direct contempt occurring in open court, an adequate  
16 opportunity to defend or explain one’s conduct is a minimum requirement before imposition of  
17 punishment.” (internal quotation marks and citation omitted)).

18         “When the judge has not personally witnessed the defendant’s contemptuous behavior in  
19 the course of a court proceeding,” the court must follow the Rules of Criminal Procedure for the  
20 District Courts and the procedures set forth in Paragraph D of this rule for indirect criminal  
21 contempt. *See id.* ¶ 28. The court shall appoint the district attorney to prosecute the contempt  
22 charge. *See* NMSA 1978, § 36-1-18(A) (2001) (“Each district attorney shall . . . prosecute . . . for  
23 the state in all courts of record of the counties of his district all cases, criminal and civil, in which

1 the state or any county in his district may be a party or may be interested.”). In no case shall the  
2 court both serve as the prosecutor of the indirect contempt charge and preside as judge over the  
3 indirect contempt proceeding. *See* Rule 21-211(A)(2)(b) NMRA (providing that the “judge shall  
4 disqualify himself or herself in any proceeding” in which the judge is “acting as a lawyer”).

5 The defendant may exercise a peremptory election to excuse the judge under Rule 5-  
6 106 NMRA. In addition, a judge may be required to recuse for cause in appropriate cases under  
7 Rule 5-106(G) NMRA. *See State v. Stout*, 1983-NMSC-094, ¶ 12, 100 N.M. 472, 672 P.2d  
8 645 (providing that a judge is precluded from presiding over a contempt proceeding if the “judge  
9 has become so embroiled in the controversy that he cannot fairly and objectively hear the case, or  
10 when he or one of his staff will necessarily be a witness in the proceeding”).

11 If incarcerated, the contempt defendant is entitled to bail as provided by Rule 5-  
12 401 NMRA. The defendant has a right to assistance of counsel. And, if the defendant is indigent  
13 and the court contemplates the imposition of any sentence of imprisonment, the defendant is  
14 entitled to representation by an attorney at the state’s expense. *See* NMSA 1978, § 31-15-10(C)  
15 (“The district public defender shall represent every person without counsel who is financially  
16 unable to obtain counsel and who is charged in any court within the district with any crime that  
17 carries a possible sentence of imprisonment.”). In addition, the defendant may be entitled to a jury  
18 trial as provided by law. *See, e.g.,* NMSA 1978, § 34-1-4 (1965) (“In all proceedings in the district  
19 courts for indirect criminal contempt arising out of written publications made out of court, the  
20 contemnor shall have the right to a trial by jury.”); *In re Herkenhoff*, 1997-NMSC-007, ¶ 15, 122  
21 N.M. 766, 931 P.2d 1382 (“If the punishment to be imposed is imprisonment for less than six  
22 months or a fine of less than \$ 1000, . . . no jury trial is required.”).

1           If the defendant is found guilty of direct or indirect criminal contempt, the judge must enter  
2 a judgment and sentence. An adjudication of guilt on a charge of criminal contempt constitutes a  
3 criminal conviction, which may result in collateral consequences and may have other implications  
4 for the defendant. The court may defer or suspend a criminal contempt sentence as permitted by  
5 law.

6           Whether the defendant is found guilty of direct or indirect criminal contempt, the defendant  
7 has a right to appeal under the rules governing appeals from district court in criminal  
8 cases. *See* N.M. Const. art. VI, § 2; NMSA 1978, § 39-3-3(A)(1) (1972); *State v. Watson*, 1971-  
9 NMCA-104, ¶¶ 20-28, 82 N.M. 769, 487 P.2d 197. Under NMSA 1978, § 39-3-15(A) (1966), “In  
10 any case of criminal contempt, the taking of an appeal operates to stay execution of the judgment  
11 without bond.”

12 [As amended by Supreme Court Order No. 15-8300-020, effective for all cases pending or filed  
13 on or after December 31, 2015; suspended by Supreme Court Order No. 21-8300-032, effective  
14 November 22, 2021, until further order of the Court.]