

1 **1-077.1. Expungement.**

2 A. **Scope of Rule.** This rule governs proceedings for expungement of arrest and public
3 records under the Criminal Record Expungement Act, Sections 29-3A-1 to -9 NMSA 1978.

4 B. **Commencement of Action.** An expungement proceeding is commenced by filing
5 a civil petition in the appropriate district court as follows:

6 (1) A petition seeking expungement of arrest records or public records
7 wrongfully identifying a person therein as a result of identity theft under Section 29-3A-3 NMSA
8 1978 shall be filed in the district court of the county where the charges originated, or the arrest
9 occurred, or where a conviction was entered.

10 (2) A petition seeking expungement of arrest records and public records where
11 there is no conviction under Section 29-3A-4 NMSA 1978 shall be filed in the district court for
12 the county where the charges originated or the arrest occurred.

13 (3) An action seeking expungement of records upon conviction under Section
14 29-3A-5 NMSA 1978 shall be filed in the district court in the county in which petitioner's
15 conviction was entered.

16 (4) An action seeking expungement of an arrest, release without conviction, or
17 conviction of a charge that the petitioner believes is legally invalid due to the passage of the
18 Cannabis Regulation Act and is eligible for automatic expungement under Section 29-3A-8 NMSA
19 1978, which automatic expungement has not occurred, shall be filed in the district court in which
20 the arrest occurred, the charges were originally filed, or the conviction was entered. There shall
21 be no filing fee for an action commenced under the automatic expungement provisions of Section
22 29-3A-8.

1 (5) A petition to expunge may contain a request to expunge arrest records and
2 public records pertaining to any number of arrests, criminal charges filed without arrest, and/or
3 convictions in a single judicial district.

4 **C. Sealing of Petition.** A petition for expungement of records upon release without
5 conviction shall be filed under seal and subject to the requirements of Rule 1-079 NMRA and the
6 provisions of this rule. If the petition seeks both expungement of records upon conviction and
7 expungement of records upon release without conviction, the district court shall treat the petition
8 as one filed for expungement of records upon conviction and the petition shall not be subject to
9 Rule 1-079 NMRA.

10 **D. Contents of Petition.** A petition for expungement shall conform with the
11 requirements of Form 4-951 NMRA (expungement of arrest records and public records upon
12 identity theft), Form 4-452 NMRA (expungement of arrest records and public records upon release
13 without conviction), Form 4-953 NMRA (expungement of arrest records and public records upon
14 conviction), or Form 4-954 NMRA (automatic expungement of arrest records and public records),
15 the use of which are mandatory in expungement proceedings.

16 **E. Service.** Service of the petition and attachments thereto is only required in cases
17 seeking expungement of records upon release without conviction and upon conviction.

18 (1) A petition for expungement of records upon release without conviction and
19 all attachments thereto shall be served upon:

20 (a) the district attorney for the county in which the arrest was made or
21 the criminal charge or proceeding filed; and

22 (b) the New Mexico Department of Public Safety.

1 (2) A petition for expungement of records upon conviction and all attachments
2 thereto shall be served upon:

3 (a) the district attorney for the county in which the conviction was entered;

4 (b) the New Mexico Department of Public Safety; and

5 (c) the law enforcement agency that arrested petitioner.

6 (3) Service under this section is made by first-class United States mail.
7 Petitioner shall file a certificate of service with the district court.

8 (4) Subsequent pleadings shall be served in accordance with Rules 1-005, 1-
9 005.1, or 1-005.2 NMRA.

10 **F. Court action upon insufficient petition.** If the court concludes that the initial
11 petition does not comply with the provisions of this rule and the applicable form, the court may
12 enter an order granting the petitioner leave to file a proper amended petition within sixty (60) days
13 from entry of the order. If the petition fails to comply with the order or this rule, the court may
14 dismiss the petition without prejudice.

15 **G. Response.**

16 (1) Within sixty (60) days from service of the petition, the parties entitled to
17 notice of the proceeding by way of service of the petition, as identified in Paragraph E of this rule,
18 shall file and serve specific objections (Form 4-957 NMRA) or shall file a Notice of Non-Objection
19 (Form 4-958 NMRA). A responding party filing and serving a Notice of Non-Objection shall be
20 excused from further participation in the proceeding.

21 (2) If a party objects to a petition for expungement of arrest records or public
22 records without conviction on the basis of the contents of petitioner's Federal Bureau of

1 Investigation's record of arrests and prosecutions, the objecting party shall provide petitioner with
2 a copy of the FBI Rap sheet, at no charge, at the time of filing the objection.

3 **H. Notice of Completion of Briefing.** For petitions seeking expungement of records
4 upon release without conviction and upon conviction, petitioner must file a notice of completion
5 of briefing (Form 4-959 NMRA (upon release without conviction) or Form 4-960 NMRA (upon
6 conviction)) after expiration of the objection period set forth in Paragraph G of this rule. Petitioner
7 shall serve the notice of completion of briefing on all parties that have filed an objection.

8 Petitioner shall attach completed Form 4-960.2 NMRA (affirmation in support of
9 expungement of records, upon release without conviction) or Form 4-960.3 NMRA (affirmation
10 in support of expungement of records, upon conviction) to the notice of completion of briefing. If
11 Form 4-960.2 or Form 4-960.3 contains information regarding arrests, charges without arrest,
12 and/or convictions that occurred subsequent to the filing of the petition, the parties shall have
13 twenty (20) days after service of the notice of completion of briefing and attachments thereto to
14 file additional objections to the petition for expungement.

15 **I. Burden of Proof.** Petitioner bears the burden of proving the requirements for
16 statutory expungement.

17 **J. Hearings.** No hearing on the merits will be set in an expungement action prior to
18 the filing and service of the notice of completion of briefing as set forth in Paragraph H of this
19 rule.

20 If the petition is filed under Section 29-3A-3 NMSA 1978 (expungement of records upon
21 identity theft) or Section 29-3A-4 NMSA 1978 (expungement of records upon release without

1 conviction) and no objections to the petition are filed, the court may decide the petition on the
2 pleadings and affirmation (if applicable) without a hearing.

3 If the petition is filed under Section 29-3A-8 NMSA 1978, the court may decide the petition
4 on the pleadings without a hearing.

5 If the petition is filed under Section 29-3A-5 NMSA 1978 (expungement of records upon
6 conviction), the court shall hold a hearing to determine whether petitioner has established that the
7 requirements of Section 29-3A-5(C) NMSA 1978 have been met.

8 Any party wishing to participate in any hearing by telephonic or other electronic means,
9 may do so by giving notice to the court and the other parties as provided for in the petition and
10 objection forms. A motion and order for telephonic or electronic appearance shall not be required.
11 The court may order any party to attend a hearing in-person.

12 **K. Orders.** When there is a hearing on a petition for expungement, the court shall
13 issue an order within sixty (60) days of the hearing. Any order requiring the expungement of arrest
14 and public records shall allow a minimum of sixty (60) days to complete the expungement. Any
15 order granting a petition shall require that the civil expungement proceeding be expunged. The
16 court shall not expunge court records earlier than 30-days from entry of its order of expungement.

17 **L. Service of Orders on the Merits.** On granting a petition for expungement, the
18 court shall cause a copy of an order on a petition for expungement to be delivered to all relevant
19 law enforcement agencies and courts. The order shall prohibit all relevant law enforcement
20 agencies and courts from releasing copies of the records to any persons, except as authorized by
21 the Criminal Records Expungement Act, or on order of the court.

1 **M. Mandatory Forms.** The use of Forms 4-951 to -960.3 NMRA, as appropriate, is
2 mandatory in expungement proceedings.

3 [Provisionally adopted by Supreme Court Order No. 21-8300-033, effective for all cases pending
4 or filed on or after January 28, 2022.]
5

6 **Committee Commentary.—**

7 **2021 Amendment to Rule 1-004 NMRA**

8 The Supreme Court has concluded that in the context of proceedings under the Criminal
9 Record Expungement Act, NMSA 1978, Sections 29-3A-1 to -9 (2019, as amended 2021), if the
10 petitioner serves notice of the petition as required by Paragraph F of Rule 1-077.1 NMRA and
11 subsequently affirms that service was made in accordance with this rule, *see* Form 4-955 NMRA
12 (certificate of service, expungement of records upon release without conviction) or Form 4-956
13 NMRA (certificate of service, expungement of records upon conviction), such service satisfies the
14 requirements of due process because the recipients of the notice must either file objections or file
15 a “Notice of Non-Objection” before the district court holds a hearing pursuant to Section 29-3A-
16 4(E) or Section 29-3A-5(C).

17 **Section 29-3A-3(D) (expungement of records upon identity theft); due process issue**

18 Section 29-3A-3(D) provides that “After notice to and a hearing for all interested parties
19 and in compliance with all applicable law, the court shall insert in the records the correct name
20 and other identifying information of the offender, if known or ascertainable, in lieu of the name of
21 the person wrongly identified.” Identity theft is a crime. *See, e.g.*, NMSA 1978, § 30-16-24.1
22 (2009) (theft of identity; obtaining identity by electronic fraud). It would be a violation of due
23 process for the court in a civil proceeding to publicly declare that it found a person guilty of the

1 crime of identity theft and to identify in public records the name and identifying information of
2 the offender, particularly when the statute does not require notice of the proceeding be given to
3 the alleged wrongdoer. For this reason, Rule 1-077.1 omits requirements related to the statutory
4 provision quoted above.

5 **Rule 1-077.1(G)**

6 Rule 1-077.1(G) provides that parties entitled to notice of these proceedings must file and
7 serve specific objections or a Notice of Non-Objection within sixty days of service of the petition.
8 This time limit is contrary to Section 29-3A-4(B), which provides for a thirty-day response time
9 for filing objections to a petition seeking expungement of records upon release without conviction.
10 Rule 1-077.1(G) controls because the Supreme Court can modify a procedural provision in a
11 statute by adopting a contrary rule. *Lovelace Med. Ctr. v. Mendez*, 1991-NMSC-002, ¶ 15, 111
12 N.M. 336, 805 P.2d 603 (“[L]egislative rules relating to pleading, practice and procedure in
13 the courts, particularly where those rules relate to court management or housekeeping functions,
14 may be modified by a subsequent rule promulgated by the Supreme Court.”); *see also id.* ¶ 10
15 (“[T]here are good reasons for construing [statutory time limits] simply as the legislative adoption
16 of a housekeeping rule to assist the courts with the management of their cases, [which] have effect
17 unless and until waived by a court in a particular case or modified by a rule of this Court on the
18 same subject.”).

19 **Rule 1-077.1(J)**

20 Rule 1-077.1(J) provides that if no objections are filed, the district court may decide a
21 petition for expungement of records upon identity theft, § 29-3A-3, or for expungement of records
22 upon release without conviction, § 29-3A-4, without a hearing. This conflicts with Section 29-3A-

1 3(B), which provides that the district court shall issue an order “after a hearing” on a petition for
2 expungement of records upon identity theft and with Section 29-3A-4(E), which provides likewise
3 in the context of a petition for expungement of records upon release without conviction. Rule 1-
4 077.1(J) controls because the Supreme Court can modify a procedural provision in a statute by
5 adopting a contrary rule. *Lovelace Med. Ctr.*, 1991-NMSC-002, ¶ 15 (“[L]egislative rules relating
6 to pleading, practice and procedure in the courts, particularly where those rules relate to court
7 management or housekeeping functions, may be modified by a subsequent rule promulgated by
8 the Supreme Court.”).

9 **Rule 1-077.1(K)**

10 Rule 1-077.1(K) provides that the district court shall issue an order within sixty (60) days
11 of an expungement hearing. This time limit is contrary to Section 29-3A-4(E) and Section 29-3A-
12 5(C), which require the district court to issue an order within thirty (30) days of certain
13 expungement hearings. For the reasons stated above in the committee commentary to Rule 1-
14 077.1(G), the time limits in Rule 1-077.1(K) control.

15 [Provisionally adopted by Supreme Court Order No. 21-8300-033, effective for all cases pending
16 or filed on or after January 28, 2021.]