

1 **5-304. Pleas.**

2 A. **Alternatives.**

3 (1) In general. The attorney for the state and the attorney for the defendant, or  
4 the defendant when acting pro se, may engage in discussions with a view toward reaching an  
5 agreement that, upon the entering of a plea of guilty or no contest to a charged offense or to a lesser  
6 or related offense, the attorney for the state will move for dismissal of other charges, or will  
7 recommend or not oppose the imposition of a particular sentence, or will do both. [~~The court shall~~  
8 ~~not participate in any such discussions.~~] A judge who presides over any phase of a criminal  
9 proceeding shall not participate in plea discussions. A judge, or judge pro tempore, not presiding  
10 over the criminal proceeding, may be assigned to participate in plea discussions to assist the parties  
11 in resolving a criminal case in a manner that serves the interests of justice.

12 (2) With the approval of the court and the consent of the state, a defendant may  
13 enter a conditional plea of guilty or no contest, reserving in writing the right, on appeal from the  
14 judgment, to review of the adverse determination of any specified pre-trial motion. A defendant  
15 who prevails on appeal shall be allowed to withdraw the plea.

16 B. **Notice.** If a plea agreement has been reached by the parties which contemplates  
17 entry of a plea of guilty or no contest it shall be reduced to writing substantially in the form  
18 approved by the Supreme Court. The court shall require the disclosure of the agreement in open  
19 court at the time the plea is offered and shall advise the defendant as required by Paragraph F of  
20 Rule 5-303 NMRA. If the plea agreement was not made in exchange for a guaranteed, specific  
21 sentence and was instead made with the expectation that the state would only recommend a  
22 particular sentence or not oppose the defendant's request for a particular sentence, the court shall  
23 inform the defendant that such recommendations and requests are not binding on the court.

1 Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance  
2 or rejection until there has been an opportunity to consider the presentence report.

3       **C. Acceptance of plea.** If the court accepts a plea agreement that was made in  
4 exchange for a guaranteed, specific sentence, the court shall inform the defendant that it will  
5 embody in the judgment and sentence the disposition provided for in the plea agreement. If the  
6 court accepts a plea agreement that was not made in exchange for a guaranteed, specific sentence,  
7 the court may inform the defendant that it will embody in the judgment and sentence the disposition  
8 recommended or requested in the plea agreement or that the court's judgment and sentence will  
9 embody a different disposition as authorized by law.

10       **D. Rejection of plea.** If the court rejects a plea agreement, the court shall inform the  
11 parties of this fact, advise the defendant personally in open court that the court is not bound by the  
12 plea agreement, afford either party the opportunity to withdraw the agreement and advise the  
13 defendant that if the defendant persists in a guilty plea or plea of no contest the disposition of the  
14 case may be less favorable to the defendant than that contemplated by the plea agreement. This  
15 paragraph does not apply to a plea for which the court rejects a recommended or requested sentence  
16 but otherwise accepts the plea.

17       **E. Time of plea agreement procedure.** Except for good cause shown, notification to  
18 the court of the existence of a plea agreement shall be given at such time, as may be fixed by the  
19 court.

20       **F. Inadmissibility of plea discussions.** Evidence of a plea of guilty, later withdrawn,  
21 a plea of no contest, or of an offer to plead guilty or no contest to the crime charged or any other  
22 crime, or of statements made in connection with any of the foregoing pleas or offers, is not  
23 admissible in any civil or criminal proceeding against the person who made the plea or offer.

1           G.     **Determining accuracy of plea.** Notwithstanding the acceptance of a plea of guilty,  
2 the court should not enter a judgment upon such plea without making such inquiry as shall satisfy  
3 it that there is a factual basis for the plea.

4           H.     **Form of written pleas.** A plea and disposition agreement or a conditional plea shall  
5 be submitted substantially in the form approved by the Supreme Court.

6 [As amended, effective August 1, 1989; January 15, 1998; as amended by Supreme Court Order  
7 No. 10-8300-028, effective December 3, 2010; as provisionally amended by Supreme Court Order  
8 No. 22-8300-002, effective for all cases pending or filed on or after January 18, 2022.]

9           **Committee commentary.** — Paragraphs A through F of this rule provide for a “plea  
10 bargaining” procedure. They originally were taken verbatim from proposed Rule 11(e) of the  
11 Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 276, 280-86 (1974). Prior to the adoption  
12 of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied with  
13 the interest of the individual district court judges. The propriety of judicial involvement had been  
14 questioned by the Supreme Court. *See State v. Scarborough*, 1966-NMSC-009, ¶ 14, 75 N.M. 702,  
15 [708;] 410 P.2d 732 [(1966)]. By the adoption of this rule, the Court [~~has~~] specifically eliminated  
16 all judicial involvement in the plea bargaining discussions. [~~The~~] Under the rule as originally  
17 written, the judge’s role [~~is~~] was explicitly limited to acceptance or rejection of the bargain agreed  
18 to by counsel for the state, defense counsel, and defendant. *See generally* 62 F.R.D. 271, 283-84  
19 (1974). Although not categorically abandoning this approach, the Court’s 2022 provisional  
20 amendment to the rule temporarily allows for some limited judicial involvement in plea  
21 discussions in order to streamline the processing of criminal cases during the COVID-19 public  
22 health emergency. For the administrative order issued by the Court in conjunction with the order  
23 provisionally approving the rule amendments, see Supreme Court Order No. 22-8500-002.

1 Paragraph B of this rule requires the parties to reduce the agreement to writing. It may be  
2 held that the defendant was denied effective assistance of counsel if he is advised to plead guilty  
3 without a written plea agreement. *See State v. Lucero*, 97 N.M. 346, 351, 639 P.2d 1200, 1205 (Ct.  
4 App. 1981).

5 With the exception of Paragraph D of this rule, providing for withdrawal of the plea when  
6 the court rejects the plea bargain, this rule does not govern the withdrawal of a plea. Withdrawal  
7 of a voluntary plea is within the discretion of the court. *State v. Brown*, 33 N.M. 98, 263 P. 502  
8 (1927); *Santobello v. New York*, 404 U.S. 257 (1971).

9 In *State v. Pieri*, 2009-NMSC-019, ¶ 29, 146 N.M. 155, 207 P.3d 1132, the Court overruled  
10 *Eller v. State*, 92 N.M. 52, 582 P.2d 824 (1978), and held that “if the court rejects a sentence  
11 recommendation or a defendant’s unopposed sentencing request, and the defendant was aware that  
12 the court was not bound to those recommendations or requests, the court need not afford the  
13 defendant the opportunity to withdraw his or her plea.” But within the context of a plea that leads  
14 to a subsequent request by the state to enhance the sentence for the crime that was the subject of  
15 the plea, the Court in *Marquez v. Hatch*, 2009-NMSC-040, ¶ 13, 146 N.M. 556, 212 P.3d 1110,  
16 held that if the defendant is not advised of the possible sentence enhancements at the time of the  
17 plea “the court should conduct a supplemental plea proceeding to advise the defendant of the likely  
18 sentencing enhancements that will result, and determine whether the defendant wants to withdraw  
19 the plea in light of the new sentencing enhancement information.”

20 [As amended by Supreme Court Order No. 10-8300-028, effective December 3, 2010; as amended  
21 by Supreme Court Order No. 16-8300-025, effective for all cases pending or filed on or after  
22 December 31, 2016; as provisionally amended by Supreme Court Order No. 22-8300-002,  
23 effective for all cases pending or filed on or after January 18, 2022.]