PROPOSED REVISIONS TO THE RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS
PROPOSAL 2022-006

March 7, 2022

The Domestic Relations Rules Committee has recommended amendments to Rules 1-053.1 and 1-053.2 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:

Sally A. Paez, Deputy Clerk of Court
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 6, 2022, 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.

1-053.1. Domestic violence special commissioners; duties.

A. **Appointment.** Domestic violence special commissioners shall be at-will positions subject to the New Mexico Judicial Branch Policies for At-will Employees. Consistent with the authority set forth in this rule, domestic violence special commissioners may perform those duties assigned by the chief judge of the district in domestic violence proceedings.

B. **Qualifications.** Any person appointed to serve as a special commissioner under this rule shall

(1) be a lawyer licensed to practice law in New Mexico with at least three (3) years of experience in the practice of law; and

(2) be knowledgeable in the area of domestic relations and domestic violence matters.

C. **Duties.** A domestic violence special commissioner shall perform the following duties in carrying out the provisions of the Family Violence Protection Act:

(1) review petitions for orders of protection and motions to enforce, modify, or terminate orders of protection;

(2) if deemed necessary, interview petitioners, provided that any interview shall be on the record;

(3) conduct hearings on the merits of petitions for orders of protection and motions to enforce, modify, or terminate orders of protection; and

(4) prepare recommendations, in the form, if any, approved by the Supreme Court, for review and final approval by the court regarding petitions for orders of protection and motions to enforce, modify, or terminate orders of protection.

D. **Removal.** On motion of any party for good cause shown, or on the court's own motion, the court may remove the domestic violence special commissioner from acting in a proceeding.

E. **Authority.** The domestic violence special commissioner's recommendations shall not become effective until reviewed and adopted as an order of the court.

F. **Recommendations.**

(1) **Recommendations concerning *ex parte* orders.** After conducting the necessary review, the domestic violence special commissioner shall promptly submit to the court recommendations concerning the entry of an *ex parte* temporary order of protection. The court shall review the recommendations and shall determine whether to enter an order consistent with the recommendations, to enter a different order, to request the commissioner to conduct further proceedings, or to request the commissioner to make additional findings and conclusions. Unless otherwise ordered by the court, an ex parte order of protection signed by the court shall remain in effect, in accordance with the provisions of Section 40-13-4 NMSA 1978, until the court enters a final order ruling on the petition for an order of protection.

(2) **Recommendations.** At the conclusion of the proceedings, the domestic violence special commissioner shall submit to the court for review and approval the commissioner's recommendations, including proposed findings and conclusions, and shall serve each of the parties with a copy together with a notice that specific objections may be filed within [~~ten (10)~~]eleven (11) days after service of the recommendations.

G. **Objections.** Any party may file timely objections to the domestic violence special commissioner's recommendations. The party filing objections shall promptly serve them on other parties. Objections must specifically identify the following: [~~specific portions of the commissioner's recommendations to which the party objects. The party filing objections shall promptly serve them on other parties.~~]

(1) the specific portions of the recommendations to which the party objects;

(2) a summary of the evidence presented at the hearing conducted by the commissioner;

(3) the specific findings of fact made by the commissioner to which the party objects; and

(4) the specific errors made by the commissioner in applying the substantive and/or procedural law to the commissioner's findings of fact.

H. **District court proceedings.** After receipt of the recommendations of the domestic violence special commissioner, the court shall take the following actions:

[~~(1) **Review of recommendations.**~~**]**

[~~(a)~~](1) The court shall review the recommendations of the domestic violence special commissioner and determine whether to adopt the recommendations. The court shall set aside the decision only if the decision is found to be: (1) arbitrary, capricious, or an abuse of discretion; (2) not supported by substantial evidence in the record as a whole; or (3) otherwise not in accordance with law.

[~~(b)~~](2) If [~~the~~]a party files timely, specific objections to the recommendations as set forth in Paragraph G, the court shall conduct [~~a hearing~~]an independent

review appropriate and sufficient to resolve the objections. The [~~hearing~~] review shall consist of a review of the record presented to the special commissioner. [~~unless the court determines that additional evidence will aid in the resolution of the objections.~~]

[~~(c)~~] (a) [~~The court shall make an independent determination of the objections.~~] The review does not require an in-person hearing before the court.

(b) If the court finds that the objections to the recommendations are not specifically stated as set forth in Paragraph G, the court may issue a general denial of the objections.

[~~(d)~~](3) The court may adopt the recommendations, modify them, reject them in whole or in part, receive further evidence, or [~~recommit~~]remand them to the domestic violence special commissioner with instructions.

[~~(2)~~](4) ***Findings and conclusions; entry of final order.*** After [~~the hearing,~~] the court reviews the objections, the court shall enter a final order. When required by Rule 1-052 NMRA, the court also shall enter findings of fact and conclusions of law.

I. **Limitations on private practice.** Full-time domestic violence special commissioners shall devote full time to their duties under the Family Violence Protection Act and shall not engage in the private practice of law or in any employment, occupation, or business interfering with or inconsistent with the discharge of their duties. Part-time domestic violence special commissioners may engage in the private practice of law so long as in the discretion of the appointing judge it does not interfere with nor is inconsistent with the discharge of their duties as a domestic violence special commissioner and subject to applicable Code of Judicial Conduct provisions, as stated in Paragraph J of this rule.

J. **Code of Judicial Conduct.** A domestic violence special commissioner is required to conform to all applicable provisions of the Code of Judicial Conduct.

[Adopted, effective October 18, 1996; as amended by Supreme Court Order No. 06-8300-019, effective October 16, 2006; as amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary for 2006 amendment. —

Authority

Former Paragraph C of Rule 1-053.1 NMRA has been amended to make clear the permissible scope of the domestic violence special commissioner's duties. Those duties include not only the review of petitions and the conducting of hearings for requests for all orders of protection, *see, e.g.*, Form 4-961 NMRA (Petition for order of protection from domestic abuse), Form 4-962A NMRA (Counter-petition for order of protection), Form 4-972 NMRA (Petition for emergency order of protection), and related proceedings, *see, e.g.*, Form 4-961B NMRA (Request for order to omit address and phone number of petitioner), but also for motions to enforce, modify, or terminate orders of protection. *See* Form 4-968 NMRA (Application to modify, terminate, or renew the order of protection).

The requirement in Rule 1-053.1(C) NMRA that interviews with the petitioner be conducted on the record is taken from NMSA 1978, Section 40-13-10(A)(2).

Form of recommendations

Rule 1-053.1(C)(4) NMRA reflects current practice by providing that where court-approved forms are available, the domestic violence special commissioner will use the forms in preparing recommendations for the court. *See* Forms 4-961 to 4-974 NMRA.
See relevant committee comments to Rule 1-053.2 NMRA for discussion of other provisions in the 2006 amendments to Rule 1-053.1 NMRA.

Committee commentary for 2017 amendment. —

The Committee notes that Rule 1-053.1(J) NMRA was amended to remove incorrect references to the Code of Judicial Conduct and clarify that domestic violence special commissioners are required to conform to all applicable Code of Judicial Conduct provisions. *See* Rule 21-004(C) NMRA.

[As amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017.]

1-053.2. Domestic relations hearing officers; duties.

A. **Appointment.** Domestic relations hearing officers shall be at-will positions subject to the New Mexico Judicial Branch Policies for At-will Employees. Consistent with the authority set forth in this rule, domestic relations hearing officers may perform those duties assigned by the judges of the district in domestic relations proceedings.

B. **Qualifications.** Any person appointed to serve as a domestic relations hearing officer shall have the same qualifications as provided in Section 40-4B-4 NMSA 1978 for a child support hearing officer.

C. **Duties.** A domestic relations hearing officer may perform the following duties in domestic relations proceedings:

(1) review petitions for indigency;

(2) conduct hearings on all petitions and motions, both before and after entry of the decree;

(3) in a child support enforcement division case, carry out the statutory duties of a child support hearing officer;

(4) carry out the statutory duties of a domestic violence special commissioner and utilize the procedures as set forth in Rule 1-053.1 NMRA;

(5) assist the court in carrying out the purposes of the Domestic Relations Mediation Act; and

(6) prepare recommendations for review and final approval by the court.

D. **Removal**. On motion of any party for good cause shown, or on the court's own motion, the court may remove the domestic relations hearing officer from acting in a proceeding.

E. **Authority.** The domestic relations hearing officer's recommendations shall not become effective until reviewed and adopted as an order of the court.

F. **Recommendations.** Within thirty (30) days after the conclusion of the proceedings, the domestic relations hearing officer shall file and submit to the court for review and approval the hearing officer's recommendations, including proposed findings and conclusions, and shall serve each of the parties with a copy together with a notice that specific objections may be filed within [~~ten (10)~~]eleven (11) days after service of the recommendations.

G. **Objections.** Any party may file timely objections to the domestic relations hearing officer's recommendations. [~~Objections must identify the specific portions of the hearing~~

~~officer's recommendations to which the party objects.~~] The party filing objections shall promptly serve them on other parties. Objections must specifically identify the following:

(1) The specific portions of the recommendations to which the party objects;

(2) A summary of the evidence presented at the hearing conducted by the domestic relations hearing officer;

(3) The specific findings of fact made by the domestic relations hearing officer to which the party objects; and

(4) The specific errors made by the domestic relations hearing officer in applying the substantive and/or procedural law to the domestic relations hearing officer's findings of fact.

H. **District court proceedings.** After receipt of the recommendations of the domestic relations hearing officer, the court shall take the following actions:

(1) [~~**Review of recommendations.**~~**]**The court shall review the recommendations of the domestic relations hearing officer and determine whether to adopt the recommendations. The court shall set aside the decision only if the decision is found to be: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record as a whole; or (3) otherwise not in accordance with law.

(2) If a party files timely, specific objections to the recommendations as set forth in Paragraph G, the court shall conduct an independent review appropriate and sufficient to resolve the objections. The review shall consist of a review of the record presented to the hearing officer.

(a) [~~The court shall review the recommendations of the domestic relations hearing officer and determine whether to adopt the recommendations.~~]The review does not require an in-person hearing before the court.

(b) [~~If a party files timely, specific objections to the recommendations, the court shall conduct a hearing appropriate and sufficient to resolve the objections. The hearing shall consist of a review of the record unless the court determines that additional evidence will aid in the resolution of the objections~~]. If the court finds that the objections to the recommendations are not specifically stated as set forth in Paragraph G, the court may issue a general denial of the objections.

~~[(c) The court shall make an independent determination of the objections.~~]

[~~(d)~~](3) The court may adopt the recommendations, modify them, reject them in whole or in part, receive further evidence, or recommit them to the domestic relations hearing officer with instructions.

[~~(2)~~](4) ***Findings and conclusions; entry of final order.*** After [~~the hearing,~~] the court reviews the objections, the court shall enter a final order. When required by Rule 1-052 NMRA, the court also shall enter findings of fact and conclusions of law.

I. **Child Support Hearing Officer Act.** The court and child support hearing officers acting under the Child Support Hearing Officer Act (Sections 40-4B-1 through 40-4B-10 NMSA 1978) and domestic relations hearing officers acting under Rule 1-053.2(C)(3) NMRA shall comply with this rule notwithstanding any contrary provision of the Child Support Hearing Officer Act.

J. **Limitations on private practice.** Full-time domestic relations hearing officers shall devote full time to domestic relations matters and shall not engage in the private practice of law or in any employment, occupation, or business interfering with or inconsistent with the

discharge of their duties. Part-time domestic relations hearing officers may engage in the private practice of law so long as in the discretion of the appointing judge it does not interfere with nor is inconsistent with the discharge of their duties as a domestic relations hearing officer and subject to applicable Code of Judicial Conduct provisions, as stated in Paragraph K of this rule.

K. **Code of Judicial Conduct.** A domestic relations hearing officer is required to conform to all applicable provisions of the Code of Judicial Conduct.

[Adopted, effective January 1, 1998; as amended by Supreme Court Order No. 06-8300-019, effective October 16, 2006; as amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary for 2006 amendment. —

Introduction

Child support hearing officers acting under the Child Support Hearing Officer Act, NMSA 1978, §§ 40-4B-1 to -10, domestic relations hearing officers acting under Rule 1-053.2 NMRA, and domestic violence special commissioners acting under the Family Violence Protection Act, NMSA 1978, §§ 40-13-1 to -8, and Rule 1-053.1 NMRA, assist the court in carrying out its functions in certain domestic relations matters. In *Lujan v. Casados-Lujan*, 2004-NMCA-036, 135 N.M. 285, 87 P.3d 1067, the Court of Appeals considered the appropriate division of responsibility between domestic violence special commissioners and the court. In *Buffington v. McGorty*, 2004-NMCA-092, 136 N.M. 226, 96 P.3d 787, the Court of Appeals addressed comparable issues concerning the constitutional requirements and appropriate procedures that should govern the relationship of the court to child support hearing officers and domestic relations hearing officers.

These amendments and the 2006 amendments to Rule 1-053.1 NMRA respond to the concerns addressed in *Lujan* and *Buffington* and address additional, related matters. To the extent appropriate, given the different but sometimes overlapping tasks assigned to the three different judicial officers, the committee sought to have the same provisions apply to child support hearing officers, domestic relations hearing officers, and domestic violence special commissioners. For this reason, many of the committee comments contained here are equally applicable to the 2006 amendments to Rule 1-053.1 NMRA and will not be repeated as committee comments to that rule.

Child support hearing officers

The Legislature created the position of child support hearing officer. *See* NMSA 1978, § 40-4B-2. The statute provides that the hearing officers follow certain procedures in the course of their duties. *E.g.*, NMSA 1978, § 40-4B-7. For two reasons, the committee recommended that child support hearing officers comply with Rule 1-053.2 NMRA rather than the Child Support Hearing Officer Act when the two conflict. First, Rule 1-053.2 NMRA domestic relations hearing officers sometimes perform a dual role in the same proceeding, acting both in their regular capacity and as child support hearing officers. See Rule 1-053.2(C)(3) NMRA. To assure consistency and efficiency, the officer should not have to follow different procedures in the same proceeding. Second, some of the procedural provisions of the Child Support Hearing Officer Act are of doubtful validity. *See Buffington*, 2004-NMCA-092. Rule 1-053.2(I) NMRA therefore provides that when a hearing officer acts as a child support hearing officer, whether under authority granted by NMSA 1978, Section 40-4B-4 or by Rule 1-053.2(C)(3) NMRA, the hearing officer shall comply with the procedures set forth in Rule 1-053.2 NMRA where the rule

and the Child Support Hearing Officer Act are inconsistent. *See Albuquerque Rape Crisis Center v. Blackmer*, 2005-NMSC-032, ¶ 5, 138 N.M. 398, 120 P.3d 820 (recognizing that the Supreme Court may exercise power of superintending control to revoke or amend statutory provisions that conflict with the court's procedural rules); see also Rule 1-091 NMRA; NMSA 1978, § 38-1-1(A).

Removal of hearing officer

Each party may exercise a peremptory excusal of the district court judge assigned to a case. *See* Rule 1-088.1 NMRA. There is no equivalent provision for peremptory excusal of a domestic relations hearing officer. In some judicial districts there is only one hearing officer and the use of peremptory challenges would cause undue administrative difficulties. Peremptory challenges also might lead to severely unbalanced workloads where a judicial district has more than one hearing officer. For these reasons, the committee recommended that peremptory challenges not be available to remove hearing officers. Instead, Rule 1-053.2(D) NMRA provides the court with broad discretion to remove a hearing officer from a case for good cause shown by a party, or on the court's own motion.

Authority of hearing officer

Although the hearing officer performs a critical function within the judiciary, hearing officers are not judges, do not wear robes, and are not addressed as judge or your honor. Nonetheless, hearing officers are required to conform to the Code of Judicial Conduct and are entitled to the respect due all officers of the court as they assist the court in performing its core judicial function. It is a bedrock principle that "[t]he hearing officer assists the district court in determining the factual and legal issues, and the core judicial function is independently performed by the district judge." *Buffington*, 2004-NMCA-092, ¶ 31.

This principle was built into former Rule 1-053.2 NMRA, which provided that "all orders be signed by a district judge before the recommendations of a domestic relations hearing officer become effective." Rule 1-053.2(C) NMRA (now superseded). The 2006 amendment carries forward the rule that hearing officer recommendations are not effective until "adopted as an order of the court," Rule 1-053.2(E) NMRA, and makes explicit what was implicit in the superseded rule: The court must review the recommendations before entering an order. *See* Rule 1-053.2(E) NMRA. This provision is inconsistent with NMSA 1978, Section 40-4B-8(C), which provides that if the court fails to act on the hearing officer's recommendation within fifteen days, the recommendations have the force of a court order even if not considered or signed by the court. Because child support hearing officers, those acting as child support hearing officers, and the court, now must comply with Rule 1-053.2 NMRA where inconsistent with the Child Support Hearing Officer Act, *see* Rule 1-053.2(I) NMRA, that statutory provision is no longer valid.

Opportunity to object to recommendations of hearing officer

The former version of Rule 1-053.2 NMRA did not provide a means for a party who disagreed with the recommendations of the hearing officer to voice those objections to the judge who was to consider whether to adopt the recommendations. In *Buffington*, 2004-NMCA-092, ¶ 30, the Court of Appeals held that due process requires that a party have a meaningful opportunity to present objections to the court before the court enters an order based on the recommendations. The rule now provides that opportunity.

When the hearing officer presents the recommendations to the judge, the hearing officer must serve the parties with a copy of the recommendations and with a notice informing the

parties that they may file objections with the court within ten (10) days of service of the recommendations. *See* Rule 1-053.2(F) NMRA; *see also Buffington*, 2004-NMCA-092, ¶ 30 (suggesting that ten days is an adequate time for filing objections).

Objections must be specific

The purpose of the objections is to focus the court's attention on areas of dispute concerning the recommendations. Objections should be sufficiently detailed to accomplish this purpose. General objections to the recommendations as a whole or objections that do not point out the nature of the party's disagreement with the recommendation will not suffice.

Review of recommendations

Unobjected-to recommendations

The court will review the recommendations and make an independent determination whether to adopt them even when no party presents specific objections. If the court agrees with the recommendations it shall enter an order consistent with them. If the court chooses not to adopt the recommendations, the court should consider returning the matter to the hearing officer for further proceedings. The court may instead modify or reject the recommendations and enter a different or contrary order from that recommended. When this is done, the court should consider whether it would be appropriate to give notice to the parties of the court's proposed action and order, thus allowing the parties an opportunity to present objections to the court's proposed order, even though the parties had no objection to the hearing officer's different recommendations. *Compare Buffington*, 2004-NMCA-092, ¶ 30 (due process requires a right to object to hearing officer's recommendations before adopted by court). If the court does not afford the parties the opportunity to view and object in advance of the entry of the court's modified or contrary order, a party may file a motion for reconsideration after the order is entered. *See* NMSA 1978, § 39-1-1; *In re Keeney*, 1995-NMCA-102, ¶ 10, 121 N.M. 58, 908 P.2d 751.

Objected-to recommendations

When the court receives timely, specific objections, "[t]he district court must then hold a hearing on the merits of the issues before the court, including the hearing officer's recommendations and the parties' objections thereto." *Buffington*, 2004-NMCA-092, ¶ 31. Rule 1-053.2(H)(1)(b) NMRA mandates a hearing to consider the recommendations and the objections. The *Buffington* court noted that "[t]he nature of the hearing and review to be conducted by the district court will depend upon the nature of the objections being raised." *Buffington*, 2004-NMCA-092, ¶ 31. Rule 1-053.2(H)(1)(b) NMRA provides this flexibility but creates a presumption that the hearing will consist of a review of the record rather than a de novo proceeding. However, the court has discretion in all cases to determine that a different form of hearing take place, including a de novo proceeding at which evidence is presented anew before the court, or a hearing partly on the record before the hearing officer and partly based on the presentation of new evidence not before the hearing officer. See id. The required hearing need not always consist of oral presentations before the court. When appropriate and sufficient to resolve the objections, the court may rely on written presentations of the parties. *See National Excess Insurance Co. v. Bingham*, 1987-NMCA-109, ¶ 9, 106 N.M. 325, 742 P.2d 537 (noting that summary judgment motions may be resolved without oral argument "when the opposing party has had an adequate opportunity to respond to movant's arguments through the briefing process").

Entry of findings of fact and conclusions of law

As in any case tried without a jury, the court must enter findings of fact and conclusions of law when required to do so under the terms of Rule 1-052 NMRA.

Opportunity to submit objections to report required. — While this rule contains no express provision, due process requires that the parties be given a right to object to the report and recommendations of the hearing officer. *Buffington*, 2004-NMCA-092.

Hearing officers distinguished. — This rule and the Child Support Hearing Officer Act describe both material similarities and material differences between a domestic relations hearing officer and a child support hearing officer. *Buffington*, 2004-NMCA-092.

Committee commentary for 2017 amendment. —

The Committee notes that Rule 1-053.2(K) NMRA was amended to remove incorrect references to the Code of Judicial Conduct and clarify that domestic relations hearing officers are required to conform to all applicable Code of Judicial Conduct provisions. *See* Rule 21-004(C) NMRA.

[As amended by Supreme Court Order No. 17-8300-020, effective for all cases pending or filed on or after December 31, 2017.]

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Proposed Revisions to the Rules of Appellate Procedure Proposal 2022-006; Rules 1-053.1 and 1-053.2

Jennifer Kletter <JenniferK@nmlegalaid.org> Wed, Mar 9, 2022 at 10:54 AM
Reply-To: jenniferk@nmlegalaid.org
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Hello –

My question is this – Could the rule clarify WHO is reviewing the Objections to the Commissioners' recommendations?

I feel like the rule should differentiate who is reviewing the Objections. The rule should say "A District Court Judge" But I don't know if a Judge is going to have the capacity to listen to the hearings and make that determination. I say that the rule should clarify because in the past I have had the Commissioners review objections and not overrule their previous decision (which is subsequently signed off by the Judge).

If a Commissioner reviews the objections, should it not be called a "Motion to Reconsider" and then if that is overruled, then it becomes "Objections to the District Court?"

Just some thoughts. Thanks! Jennifer K.

Jennifer Rose Kletter

Staff Attorney - Domestic Violence Group

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New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 03/11/2022, 12:02 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Fri, Mar 11, 2022 at 12:02 PM
Reply-To: "ratdmak@nmcourts.gov" <ratdmak@nmcourts.gov>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name:	Judge Melissa Kennelly
Phone Number:	5757796342
Email:	ratdmak@nmcourts.gov
Proposal Number:	2022-006
Comment:	I agree with each of the proposed changes to these rules and thank the committee for providing much needed clarification of the district judge's role and duties with regard to objections. These changes will conserve valuable judicial resources and discourage parties from attempting to seek that second bite at the apple with the judge when they did not like the hearing officer's recommendation. These changes will also contribute to stability for families, since they are likely to result in fewer instances of delay in final approval of recommendations.

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 04/05/2022, 2:19 pm

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov> Tue, Apr 5, 2022 at 2:19 PM
Reply-To: "socdmcm@nmcourts.gov" <socdmcm@nmcourts.gov>
To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your Name:	Judge Mercedes Murphy
Phone Number:	5758350050
Email:	socdmcm@nmcourts.gov
Proposal Number:	2022-006
Comment:	I would like to thank the committee for looking at the rule considering revisions. I agree with the proposed revisions. These changes clarify the judge's role and discourages parties from trying to get a second bite at the apple with the district judge just because they did not like the hearing officer's decision. Additionally, this allows the district judge to proceed and review the record, etc. without holding a hearing.

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments regarding Proposal 2022-06

1 message

'Darin McDougall' via nmsupremecourtclerk <nmsupremecourtclerk-grp@nmcourts.gov> Wed, Apr 6, 2022 at 1:12 PM
Reply-To: dmcdougall@newmexicolegalgroup.com
To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

To Whom It May Concern,

With regards to the proposed rule change 2022-06 regarding domestic violence special commissioners and domestic relations hearing officers. I am opposed to the proposed changes.

In particular the proposed changes shorten the amount of time to object, from 10 business days (approximately 2 weeks) to 11 calendar days, while at the same time adding in more burdensome (though clearer) requirements of what the objections must entail. The combination of the two changes creates a high burden on counsel and objecting parties to organize the objections, draft good coherent pleadings, and then execute and serve the same. A rule change should at most do one or the other, shorten the time *or* create a higher burden – to do both at the same time is major hindrance to good advocacy.

Further, the proposed changes take away an objecting parties day in Court when it further loosens the rules of the requirement to hold a hearing and instead makes it discretionary. While there are outlying cases where a hearing would be a waste of time, our rules should instead be leaning towards due process instead of convenience.

My opposition to these changes is strongest in the case of the changes regarding the DV special commissioners, due to the quick process needed to make sure parties that need protection are protected, in my experience DV hearings contain some of the most egregious events of trial by surprise, undisclosed exhibits, short turnarounds from service to evidentiary hearings, and other curtailments of due process and fairness. While as a public policy I understand those curtailments are often necessary, the protection from those curtailments of due process has been the objections process which these proposed changes limit, make harder, shorten timelines, and make the requirement for a fair hearing optional. These proposed changes harm the cure.

Sincerely,

Darin Kyle McDougall

Attorney

New Mexico Legal Group

2701 Arizona St. NE

Albuquerque, New Mexico 87110

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New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments to provisionally approved amended rules

1 message

Rachel Kolman <taodrck@nmcourts.gov> Wed, Apr 6, 2022 at 1:53 PM
Reply-To: taodrck@nmcourts.gov
To: nmsupremecourtclerk <nmsupremecourtclerk-grp@nmcourts.gov>

Please see attached.

Thank you,
Rachel Kolman
Domestic Violence / Domestic Relations Hearing Officer
Eighth Judicial District Court
105 Albright, Suite N
Taos, NM 87571
575.758.3173 phone
taodrck@nmcourts.gov

Response to proposed revisions to Rules.docx
20K

Response to proposed revisions to Rules.

April 6, 2022

To the Rules Committee:

I am currently the Domestic Relations Hearing Officer / Domestic Violence Special Commissioner in the Eighth Judicial District, Taos County. I have been an attorney in NM for 29 years specializing in children and family issues. My comments today come from my practice during the past year as a DRHO/DVSC.

In response to the proposed revisions the rules of appellate procedure, proposal 2022-006:

I request that the rules committee clarify whether district judges review and determine approval of DVSCs' recommended orders before or after the objection period. The issue balances providing the parties an opportunity to formally object to recommendations of a DVSC before the recommendations become orders versus the need for immediately enforceable orders in domestic abuse/family violence cases.

In the Eighth Judicial, we have three District Judges and two DRHO/DVSC hearing officers. Practice has been in the Eighth, as I believe it is statewide, that DVSCs draft both TROs and OOPs and submit to the district judges for immediate review, approval, filing and serving on the respondent. The practice has been that after the hearing on a petition for order of protection or other motion filed under the FVPA, the DVSC immediately drafts the order from the hearing and submits to the judge for review. These orders include stipulated OOPs, OOPs as recommended by the DVSC after an evidentiary hearing, default OOPs, orders on motions for extension, termination or modification and dismissals.

Both practice and the Supreme Court form OOP indicate that the court enters OOPs immediately with the objection period to follow entry of the order. However, Rule 1-053.1(F) as well as rule 1-053.1(G) as proposed indicates that Judges do not adopt a DVSC recommendation, after a hearing on a petition or motion filed under the Family Violence Protection Act, until after the objection period and resolution of any objections.

I believe that it is the intent of the Family Violence Protection Act for OOPs to be entered and served on Respondents immediately after a hearing with an objection period to follow. The unique nature of domestic abuse/ family violence warrants that orders take effect immediately.

If the intent of the rules committee is for the objection period and resolution of all objections to occur before adoption of OOPs as recommended by DVSCs, then a lag time is created between the hearing and the entry of the OOP of at least 22 days: 11 days for filing objections 11 days for filing response to objections and then if warranted, time for the court to schedule a hearing on the objections. As we struggled with this issue as a district last year, the following questions arose: During the objection period, is the OOP or other order from a hearing under the FVPA in effect or in limbo? If the TRO remains in effect until the court enters the OOP, what happens if a Respondent violates during the objection period? Is a violation during this period an immediate arrestable offense? What happens when the DVSC makes a credible threat finding at the hearing? The intent of the FVPA as well as federal law is for Respondents to turn over firearms immediately, and for the court to have a hearing within 72 hours of a finding of credible threat to ensure that the Respondent has so turned over all firearms. If

the proposed Rule 1-053.1(G) provides for the objection period to occur before the court enters the OOP, does this 72-hour period occur after the objection period?

In addition, I suggest that a supreme court approved form be created for objections under this rule that outlines the requirements in Rule1-053.1(G).

In response to the proposed revision to the rules for the Kinship Guardianship Act 2022-07:

I present these comments as one of the drafters of the initial Kinship Guardianship Act, as an attorney who represented clients petitioning for kinship guardianship, as a CCA who worked for CYFD when the fostering connections procedures were added to the KGA, and now as a DRHO reviewing, hearing and making recommendations in kinship guardianship cases.

As background, the Kinship Guardianship Act was adopted into law over twenty years ago. At that time, the intent was to create a path for creation of a legal guardianship for relatives and other adults who were providing parental care to children in their custody without the help or presence of either parent. It was clear at the time of creation, the KGA was not creating a path for citizens to remove children from parents' custody or to litigate abuse and neglect cases. It was clear, twenty years ago, that only law enforcement or the courts had the authority to remove children from parents' custody and only the state, through CYFD, had the authority and jurisdiction to bring forward an abuse and neglect case requesting suspension or termination of parental rights. A few years ago when the voluntary placement in foster care to kinship guardianship path was created in New Mexico and added to the Kinship Guardianship Act, frankly it mixed apples and bananas into the same act. Although a Voluntary Placement Agreement is a specific agreement that CYFD uses, to the layperson who has a child "placed" by CYFD through a safety plan, the law can be confusing. Although the rules committee cannot revise the law, I would like to see a separate set of rules and forms for cases on the VPA to KGA pathway and cases where the child is not in CYFD custody.

Currently I often see as a DRHO, families filing under the KGA and arguing under the extraordinary circumstance provision that children, who have not lived with petitioners for at least 90 days, are unsafe with their parents. These families are asking the court to suspend parental rights, temporarily at first, and keep the children with the guardians. Often, the proposed guardians tell the court that CYFD was involved in "placing the children" with them under a safety plan or upon initial investigation. The proposed guardians often allege that CYFD after "placing the children" with them, instruct them to file for a kinship guardianship and then CYFD closes their investigation because the children are safe with family. This creates what was essentially a removal of a child from a parent and a case based on an argument that the child is not safe with a parent, in a KGA case where there are no attorneys for the parents, the guardians, or the children and there are no caseworkers to create and monitor case plans for parents. Often, the caregivers file these petitions within a few days of the children coming to live with the petitioners, requesting immediate ex parte attention from the court to stabilize a situation and keep the children from returning to a dangerous situation. I bring this to the attention of the rules committee to understand the current context of the cases to which we are applying these rules.

The definition of "parent" in the KGA is not consistent with the definition of "parent" in the children's code or the domestic relations code. It is unclear in the KGA whether notice is required for all biological parents or only for those parents who have a created protected liberty interest. For example, with fathers, does the act require notice to all alleged fathers who may be biological fathers or only for those men who have acknowledged paternity and established a protected liberty interest in the custody of the child? This question can be gender neutral with the same question about notice to second parents, for example second mothers.

Rule 1-154 (B)(5): There is a specific statute for youth who are 14 years and over to nominate a guardian. That section was created initially believing that youth often find safe places for themselves

and when they do so, the court shall appoint that guardian unless contrary to the youth's best interest. The legislature when creating this section had an understanding that youth who are refusing to live with a parent, if forced to return to parents home often will run away and be in unsafe situations. With that context, when there is a youth 14 or older, does section 40-10B-8 apply or just section 40-10B-11? These sections provide different elements of proof needed for appointment of a guardianship. If a 17 year old, leaves home and goes to grandparents and the grandparents file for kinship guardianship and the mother is at the grandparents' home demanding the return of the child, does the grandparent need to wait 90 days to have standing under the KGA or can the KGA be used to stabilize the situation for this youth? The act is not clear whether the 90-day requirement applies for youth over 14 who refuse to live with a parent. Does section 1-154 (B)(8) apply to youth over 14 who have recently left their parents home? Underlying question, does a court need to find that the parent is unable or unwilling to parent for youth 14 and over or can the court just find that the child is in need of stability and is likely to run if returned to the parent?

Rule 1-152 Appointment of GAL. There is no clarity of whether the role of an appointed attorney for a youth 14 and over is a youth attorney or a GAL. We should have youth attorneys for youth 14 and over. The KGA was created initially before youth attorneys were statutorily created in abuse and neglect cases.

Rule 1-152(A)(2) to be consistent with 40-10B-12 should reference *"Any person"* who petitions for revocation of a guardianship and that revocation is contested rather than just if a parent petitions for revocation.

Rule 1-152(D) Payment: How are GALs paid out of "the funds of the court?" Is this an AOC fund or a district court fund? Often guardians are indigent. Sometimes guardians have income but not enough to pay an attorney and certainly not enough to pay for an attorney for themselves as well as to pay a guardian ad litem. Can you set a percentage of federal poverty rate for eligibility for court subsidized GALs?

Rule 1-153 Advisement of Rights: this section needs a subsection on advisement of rights to parents when the child is an Indian child.

Rule 1-153 (E) Advisement of Rights: the advisement of the consequences if the allegations in the petition are found to be true should include an explanation of what it means to have parental rights suspended.

Rule 1-155 committee commentary. The commentary refers to protecting sensitive information about the parents. The commentary should also reference protecting sensitive information about children.

Rule 1-156 Successor Guardianship. This section is specific to the subsidy for VPA to KGA paths.

Section C of the proposed Petition form: information about child's parents should clarify "including anyone with a custodial right to the child, including previously appointed guardians."

Adding the VPA to KGA path cases to one Petition is confusing and lengthy. Can the committee create two form petitions, one for VPA to KGA cases and one for other cases?

Use note 11. The rules need to be clear that when CYFD has custody of a child, only CYFD can petition for KGA or does the KGA now allow foster parents to file for KGA and serve CYFD when CYFD has custody of a child.

When CYFD is working with a family in investigations or in-home services, and the investigation is at a place where CYFD is about to file a case I have seen a rush to the courthouse by family. In those situations, a family member will file a KGA case, the parent files a consent to the guardianship and requests emergency custody through an ex-parte temporary order. At the same time, law enforcement may have issued a 48- hour hold on the children granting emergency custody to CYFD. In tehse situations, there are two competing custody orders, the 48- hour hold and the ex parte kinship guardianship order. Then there is a mess. If the rules committee can do anything to help clarify who can file when there is a CYFD investigation in process, that would be helpful.

The parental consent form references understanding that the purpose of the guardianship is to create a legal relationship between the guardian and the child. The consent form should also reference an understanding by the parent that his/her parental rights to the child will be suspended if the court enters an order appointing a guardianship.

New Mexico Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments to Proposed Rule 1-053.1 1-053.2/proposal 2022-006

2 messages

Chief Judge Marie Ward <albdmcw@nmcourts.gov> Wed, Apr 6, 2022 at 5:10 PM
Reply-To: albdmcw@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov

Attached are correspondence regarding the above referenced proposed Rules on behalf of the Second Judicial District Court.

--
Marie C. Ward
Chief Judge
Second Judicial District Court
5100 2nd Street NW
Albuquerque, NM 87107
(505)841-7392

2 attachments

Letter from Judge Ramirez.comments proposed rules 1-053.pdf
102K

Letter to Ms. Garcia Rules 1-053.1 Proposal 2022-006.pdf
69K

Chief Judge Marie Ward <albdmcw@nmcourts.gov> Wed, Apr 6, 2022 at 5:21 PM
Reply-To: albdmcw@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov

My apologies, attached is a signed copy. Have a good evening
[Quoted text hidden]

2 attachments

Letter to Ms. Garcia Rules 1-053.1 Proposal 2022-006.signed.pdf
123K

Letter from Judge Ramirez.comments proposed rules 1-053.pdf
102K

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

MARIE C. WARD
CHIEF JUDGE

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ALBUQUERQUE, NEW MEXICO 87103

April 6, 2022

Elizabeth Garcia, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
nmsupremecourtclerk@nmcourts.gov

Re: Request for comment on proposed amendments to Rules 1-053.1 and 1-053.2 NMRA (Proposal 2022-006)

Dear Ms. Garcia:

Thank you for the opportunity to provide commentary on the proposed changes to the above-referenced rules. I am the Chief Judge of the Second Judicial District Court ("SJDC") and the Presiding Judge of the Children's Court Division. The SJDC Children's Court Division consists of four (4) District Court Judges and three (3) hearing officers/special masters. The SJDC Family Court Division consists of four (4) District Court Judges and eight (8) hearing officers/special commissioners. Children's Court hearing officers preside over a myriad of hearing types, including, but not limited to, custody hearings, detention hearings, motion hearings, permanency hearings, and regular judicial reviews. The Judges and Family Court hearing officers/special commissions conduct work pursuant to Rules 1-053.1 and 1-053.2 NMRA.

On behalf of the SJDC, please accept the New Mexico Domestic Relations Rules Committee's (the "Committee") recommendations to modify Rule 1-053.1 and 1-053.2 NMRA. The SJDC agrees with the comments provided by Judge Debra Ramirez, and refers you to her letter rather than restating all of the same herein.

While the proposed amendments to Rules 1-053.1 and 1-053.2 NMRA relate specifically to domestic violence special commissioners and domestic relations hearing officers, the issues the proposed amendments aim to address exist in the Children's Court as well. *See* Rule 10-163 Special Masters. Rules 1-053.1 and 1-053.2 NMRA, as they exist now and as they are proposed to be amended, could influence the interpretation of the role of Children's Court special master/hearing officers and the process of judicial review of Children's Court special

master/hearing officer decisions. This is especially true as domestic relations issues are often entangled in Children's Court matters.

It is the request of the Second Judicial District Court that a similar amendment to those proposed for Rules 1-053.1 and 1-053.2 NMRA be adopted in the Children's Court Rules, or in the alternative, amendments to Rule 10-163 NMRA consistent with the current proposed modifications to Rule 1-053.1 and 1-053.2 NMRA be referred to the Children's Court Rules Committee for consideration.

Thank you for your time and consideration in this matter.

Respectfully,

Marie C. Ward, Chief Judge
Second Judicial District Court

STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

DEBRA RAMIREZ
DISTRICT JUDGE

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March 31, 2022

Ms. Sally A. Paez
Deputy Clerk of the Court
New Mexico Supreme Court
PO Box 848
Santa Fe NM 87504—0848

Re: Request for comment on proposed amendments to Rules 1-053.1 and 1-053.2 NMRA

Dear Ms. Paez:

Thank you for the opportunity to provide commentary on the proposed changes to the above referenced rules. At the Second Judicial District Court, the Family Court Division consists of four (4) District Court Judges and eight (8) hearing officers all of whom work pursuant to Rules 1-053.1 and 1-053.2 NMRA.

Clearly, the New Mexico Domestic Relations Rules Committee proposes changes to these rules as a result of the decision of the Court of Appeals in *Rawlings v. Rawlings*, A-1-CA-37662 filed November 2, 2021. The *Rawlings* decision mandates that a district court judge must, under all circumstances, hold an in-person hearing to address the merits of the objections. *Rawlings*, p.15-16.

Changes recommended to Section G. advise litigants to address objections with specificity identifying which recommendation(s) is objected to, provide a summary of the evidence presented to the hearing officer and/or a identify a specific finding of fact that is objected to and the specific errors of law made by the hearing officer. These specific directions to the litigants and attorneys require them to articulate why the recommendation(s) should be modified or rejected. Additionally, the litigant and attorneys would be required to advise the court to receive further evidence or what evidence should have taken into consideration that the hearing officer rejected.

Changes recommended to Section H. clarifies the duties of the district court when reviewing hearing officer recommendations and set forth the standard by which the recommendations will be reviewed by the judge in a semi-appellate role; that is, was the decision

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of the hearing officer arbitrary or capricious, supported by substantial evidence in the record or were the recommendations are not in compliance with the law. This statement not only further informs district court judges on the review process, but also advises litigants what the court is looking at in making its decision to modify or reject the recommendations or whether to ask for additional evidence.

Finally, and perhaps most importantly for district court judges, the proposed changes to Section H. specify the ruling in *Buffington v McGorty*, 2004-NMCA-092, that the nature of the "hearing" and "review" required by the district court is dependent upon the nature of the objections being raised. The proposed changes support *the discretion of judges* reviewing the work of hearing officers they have trained and trust to listen to evidence and make recommendations about that evidence. The litigants and attorneys would be advised that review of objections does not require an in-person hearing, rather that the judge is going to be looking critically at recommendations for arbitrary decision-making, decisions that are not supported by the evidence or errors in the application of the law.

Since the decision in *Buffington*, district court judges have known that the filing of objections does not mean that there will be an oral presentation to the court or a de novo evidentiary hearing. Under the rules of civil procedure not every decision made by a judge requires a hearing such as summary judgment, judgement on the pleading, or motions for default judgment. When counsel files a notice of completion of briefing, it is a statement that the case is ready for a decision, not necessarily a hearing on the record.

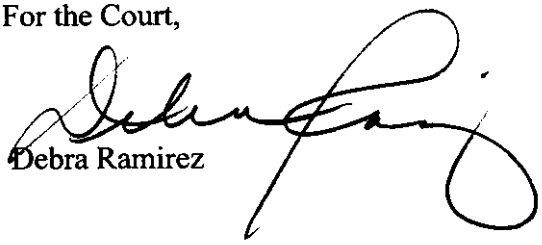
The proposed changes to Rules 1-053.1and 1-053.2 NMRA serve the public and judges well because Sections G and H clarify the duties of the objecting litigant and the procedural necessities for judges in reviewing those objections. For the objecting litigant or attorney, the proposed changes inform them how the objections will be reviewed by the court and the standard by which the recommendations will be reviewed. It clarifies the standards the court applies when reviewing objections and the underlying recommendations from the hearing officer or commissioner.

On a related matter, the ruling in *Rawlings* references the undue burden the ruling may place on the district courts dockets if an in-person hearing is required to be held by the district court when objections to a hearing officer report are filed. *Rawlings*, p.16. The court notes that it had no data before it to know if this would be the case and left the matter to the rulemaking process. In the Second Judicial District Court's Family Court Division, in calendar year 2021, with pending new, and reopened cases, judges were responsible for 13,154 legal matters. The hearing officer pool is automatically assigned domestic violence and child support enforcement cases which in 2021 was 5,714 cases. They are also assigned cases from individual judges in domestic relations matters. The domestic violence judge supervises the administration of the 3,500 Order of Protection cases and the remainder of the domestic relations cases are divided between the family court judges. Even if only 10% of all hearing officer cases draw objections, the *Rawlings* ruling would add hundreds of hours back into the judge's dockets which are strained as it is and will cause significant delay in resolving often urgent matters while objections wait for a hearing. *See*, 2021 Statistical Addendum to the New Mexico Supreme Court Annual Report.

As a practical matter, the *Rawlings* ruling ensures that one group of litigants is entitled to two evidentiary hearings on the same legal issue, while another group of litigants whose cases are heard by the district court judge are not afforded two evidentiary hearings. The ruling also allows a party to fail to appear for a hearing in front of a hearing officer, file objections, and get the matter heard by the judge.

In conclusion, the Family Court supports the recommended changes to Rules 1-053.1 and 1-053.2 so that the role of the litigants and the duties of district court judges are clarified. Thank you for your consideration in this matter.

For the Court,



Debra Ramirez