

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE
DISTRICT COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE
MAGISTRATE COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE
METROPOLITAN COURT, AND THE RULES OF PROCEDURE FOR THE
MUNICIPAL COURTS
PROPOSAL 2022-012**

March 7, 2022

The Rules of Criminal Procedure for New Mexico State Courts Committee has recommended new Rules 5-502.1, 6-504.1, 7-504.1, and 8-504.1 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.

5-502.1. Discovery; redaction of witness or victim information.

A. **Scope of rule.** This rule applies documents and other materials subject to disclosure under Rules 5-501 and 5-502 NMRA.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(2) "personal contact information" means a person's home address, home phone number, personal cell phone number, or personal email address;

(3) "counsel team" means the attorneys representing the parties and their employees or contractors who are participating in the preparation of the prosecution or the defense; provided that "counsel team" does not include the defendant or any members of the public; and

(4) "public" means any person or entity except members of the counsel team or court personnel.

C. Redaction of protected personal identifier information.

(1) An attorney with an obligation to provide discovery to opposing counsel under Rule 5-501 or Rule 5-502 may redact protected personal identifying information or personal contact information if the attorney deems it appropriate under the circumstances of the case. To do so, the attorney must:

- (a) file a notice that redacted and un-redacted discovery is being provided to the opposing party;
- (b) provide two versions of documents and materials subject to disclosure as follows:

- (i) The first version may have redacted protected personal identifier information or personal contact information. For discovery provided by the state, the defense counsel team may provide the redacted version to the defendant, and the defendant may retain the redacted version in the defendant's possession.

- (ii) The second version shall be an un-redacted version of the same discovery and shall be provided to the counsel team for the opposing party to accommodate the need for any conflicts checks and background investigation of victims and witnesses.

(2) If the state has an obligation to provide discovery to a pro se defendant under Rule 5-501, the prosecutor may redact protected personal identifying information or personal contact information if the prosecutor deems it appropriate under the circumstances of the case. To do so, the attorney must file a notice that redacted discovery is being provided to the defendant.

(3) If an attorney provides redacted discovery under this rule, un-redacted discovery shall not be disclosed to the defendant or a member of the public unless the Court issues a written order finding that the defendant or member of the public has a specific compelling need for the un-redacted discovery. The court may issue an order permitting the disclosure of un-redacted discovery on motion of a party, including a defendant acting pro se, or on the court's own motion.

D. Failure to comply. An attorney receiving discovery that includes redacted protected personal identifier information or personal contact information shall take all reasonable precautions to ensure that the unreacted version of the discovery is not disclosed by the attorney or any member of the counsel team to the defendant or any member of the public. Failure to comply with the provisions of this paragraph may subject the attorney or other person to sanctions, including sanctions for contempt of court, or the initiation of disciplinary proceedings. [Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. - This rule creates a mechanism for an attorney to redact discovery as needed to protect victims and witnesses from violent crime and identity theft and to encourage their participation in criminal proceedings without compromising the needs of opposing counsel to conduct conflict checks and background investigations and otherwise fulfill counsel's duty to provide ethical, competent representation. The definition of "protected personal identifier information" in this rule is consistent with the definition set forth in Rule 5-123 NMRA (Public inspection and sealing of court records), and varies slightly from the definition of "protected personal identifier information" set forth in the Inspection of Public Records Act, NMSA 1978, Section 14-2-6(E) (2018).

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

6-504.1. Discovery; redaction of witness or victim information.

A. **Scope of rule.** This rule applies documents and other materials subject to disclosure under Rule 6-504 NMRA.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(2) "personal contact information" means a person's home address, home phone number, personal cell phone number, or personal email address;

(3) "counsel team" means the attorneys representing the parties and their employees or contractors who are participating in the preparation of the prosecution or the defense; provided that "counsel team" does not include the defendant or any members of the public; and

(4) "public" means any person or entity except members of the counsel team or court personnel.

C. **Redaction of protected personal identifier information.**

(1) An attorney with an obligation to provide discovery to opposing counsel under Rule 6-504 may redact protected personal identifying information or personal contact information if the attorney deems it appropriate under the circumstances of the case. To do so, the attorney must:

(a) file a notice that redacted and un-redacted discovery is being provided to the opposing party;

(b) provide two versions of documents and materials subject to disclosure as follows:

(i) The first version may have redacted protected personal identifier information or personal contact information. For discovery provided by the prosecution, the defense counsel team may provide the redacted version to the defendant, and the defendant may retain the redacted version in the defendant's possession.

(ii) The second version shall be an un-redacted version of the same discovery and shall be provided to the counsel team for the opposing party to accommodate the need for any conflicts checks and background investigation of victims and witnesses.

(2) If the prosecution has an obligation to provide discovery to a pro se defendant under Rule 6-504, the prosecutor may redact protected personal identifying information or personal contact information if the prosecutor deems it appropriate under the circumstances of the case. To do so, the attorney must file a notice that redacted discovery is being provided to the defendant.

(3) If an attorney provides redacted discovery under this rule, un-redacted discovery shall not be disclosed to the defendant or a member of the public unless the Court issues a written order finding that the defendant or member of the public has a specific compelling need for the un-redacted discovery. The court may issue an order permitting the disclosure of un-redacted discovery on motion of a party, including a defendant acting pro se, or on the court's own motion.

D. **Failure to comply.** An attorney receiving discovery that includes redacted protected personal identifier information or personal contact information shall take all reasonable precautions to ensure that the unreacted version of the discovery is not disclosed by the attorney or any member of the counsel team to the defendant or any member of the public. Failure to comply with the provisions of this paragraph may subject the attorney or other person to sanctions, including sanctions for contempt of court, or the initiation of disciplinary proceedings. [Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. - This rule creates a mechanism for an attorney to redact discovery as needed to protect victims and witnesses from violent crime and identity theft and to encourage their participation in criminal proceedings without compromising the needs of opposing counsel to conduct conflict checks and background investigations and otherwise fulfill counsel's duty to provide ethical, competent representation. The definition of "protected personal identifier information" in this rule is consistent with the definition set forth in Rule 6-114 NMRA (Public inspection and sealing of court records), and varies slightly from the definition of "protected personal identifier information" set forth in the Inspection of Public Records Act, NMSA 1978, Section 14-2-6(E) (2018). [Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

7-504.1. Discovery; redaction of witness or victim information.

A. **Scope of rule.** This rule applies documents and other materials subject to disclosure under Rule 7-504 NMRA.

B. **Definitions.** For purposes of this rule the following definitions apply:

(1) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(2) "personal contact information" means a person's home address, home phone number, personal cell phone number, or personal email address;

(3) "counsel team" means the attorneys representing the parties and their employees or contractors who are participating in the preparation of the prosecution or the defense; provided that "counsel team" does not include the defendant or any members of the public; and

(4) "public" means any person or entity except members of the counsel team or court personnel.

C. **Redaction of protected personal identifier information.**

(1) An attorney with an obligation to provide discovery to opposing counsel under Rule 7-504 may redact protected personal identifying information or personal contact information if the attorney deems it appropriate under the circumstances of the case. To do so, the attorney must:

(a) file a notice that redacted and un-redacted discovery is being provided to the opposing party;

(b) provide two versions of documents and materials subject to disclosure as follows:

(i) The first version may have redacted protected personal identifier information or personal contact information. For discovery provided by the prosecution, the defense counsel team may provide the redacted version to the defendant, and the defendant may retain the redacted version in the defendant's possession.

(ii) The second version shall be an un-redacted version of the same discovery and shall be provided to the counsel team for the opposing party to accommodate the need for any conflicts checks and background investigation of victims and witnesses.

(2) If the prosecution has an obligation to provide discovery to a pro se defendant under Rule 7-504, the prosecutor may redact protected personal identifying information or personal contact information if the prosecutor deems it appropriate under the circumstances of the case. To do so, the attorney must file a notice that redacted discovery is being provided to the defendant.

(3) If an attorney provides redacted discovery under this rule, un-redacted discovery shall not be disclosed to the defendant or a member of the public unless the Court issues a written order finding that the defendant or member of the public has a specific compelling need for the un-redacted discovery. The court may issue an order permitting the disclosure of un-redacted discovery on motion of a party, including a defendant acting pro se, or on the court's own motion.

D. Failure to comply. An attorney receiving discovery that includes redacted protected personal identifier information or personal contact information shall take all reasonable precautions to ensure that the unreacted version of the discovery is not disclosed by the attorney or any member of the counsel team to the defendant or any member of the public. Failure to comply with the provisions of this paragraph may subject the attorney or other person to sanctions, including sanctions for contempt of court, or the initiation of disciplinary proceedings. [Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. - This rule creates a mechanism for an attorney to redact discovery as needed to protect victims and witnesses from violent crime and identity theft and to encourage their participation in criminal proceedings without compromising the needs of opposing counsel to conduct conflict checks and background investigations and otherwise fulfill counsel's duty to provide ethical, competent representation. The definition of "protected personal identifier information" in this rule is consistent with the definition set forth in Rule 7-113 NMRA (Public inspection and sealing of court records), and varies slightly from the definition of "protected personal identifier information" set forth in the Inspection of Public Records Act, NMSA 1978, Section 14-2-6(E) (2018).

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

8-504.1. Discovery; redaction of witness or victim information.

A. Scope of rule. This rule applies documents and other materials subject to disclosure under Rule 8-504 NMRA.

B. Definitions. For purposes of this rule the following definitions apply:

(1) "protected personal identifier information" means all but the last four (4) digits of a social security number, taxpayer-identification number, financial account number, or driver's license number, and all but the year of a person's date of birth;

(2) "personal contact information" means a person's home address, home phone number, personal cell phone number, or personal email address;

(3) "counsel team" means the attorneys representing the parties and their employees or contractors who are participating in the preparation of the prosecution or the defense; provided that "counsel team" does not include the defendant or any members of the public; and

(4) "public" means any person or entity except members of the counsel team or court personnel.

C. Redaction of protected personal identifier information.

(1) An attorney with an obligation to provide discovery to opposing counsel under Rule 8-504 may redact protected personal identifying information or personal contact information if the attorney deems it appropriate under the circumstances of the case. To do so, the attorney must:

(a) file a notice that redacted and un-redacted discovery is being provided to the opposing party;

(b) provide two versions of documents and materials subject to disclosure as follows:

(i) The first version may have redacted protected personal identifier information or personal contact information. For discovery provided by the prosecution, the defense counsel team may provide the redacted version to the defendant, and the defendant may retain the redacted version in the defendant's possession.

(ii) The second version shall be an un-redacted version of the same discovery and shall be provided to the counsel team for the opposing party to accommodate the need for any conflicts checks and background investigation of victims and witnesses.

(2) If the prosecution has an obligation to provide discovery to a pro se defendant under Rule 8-504, the prosecutor may redact protected personal identifying information or personal contact information if the prosecutor deems it appropriate under the circumstances of the case. To do so, the attorney must file a notice that redacted discovery is being provided to the defendant.

(3) If an attorney provides redacted discovery under this rule, un-redacted discovery shall not be disclosed to the defendant or a member of the public unless the Court issues a written order finding that the defendant or member of the public has a specific compelling need for the un-redacted discovery. The court may issue an order permitting the disclosure of un-redacted discovery on motion of a party, including a defendant acting pro se, or on the court's own motion.

D. Failure to comply. An attorney receiving discovery that includes redacted protected personal identifier information or personal contact information shall take all reasonable precautions to ensure that the unreacted version of the discovery is not disclosed by the attorney or any member of the counsel team to the defendant or any member of the public. Failure to comply with the provisions of this paragraph may subject the attorney or other person to sanctions, including sanctions for contempt of court, or the initiation of disciplinary proceedings. [Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. - This rule creates a mechanism for an attorney to redact discovery as needed to protect victims and witnesses from violent crime and identity theft and to

encourage their participation in criminal proceedings without compromising the needs of opposing counsel to conduct conflict checks and background investigations and otherwise fulfill counsel's duty to provide ethical, competent representation. The definition of "protected personal identifier information" in this rule is consistent with the definition set forth in Rule 8-112 NMRA (Public inspection and sealing of court records), and varies slightly from the definition of "protected personal identifier information" set forth in the Inspection of Public Records Act, NMSA 1978, Section 14-2-6(E) (2018).

[Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

Rule Proposal Comment Form, 03/07/2022, 11:35 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Mon, Mar 7, 2022 at 11:35 AM

Reply-To: "leon.richter-freund@lopdm.us" <leon.richter-freund@lopdm.us>

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov, supajf@nmcourts.gov, supsap@nmcourts.gov, supkld@nmcourts.gov

Your
Name: Leon Richter-Freund
Phone
Number: 505-835-2239
Email: leon.richter-freund@lopdm.us
Proposal
Number: Proposal 2022-012

Comment: This rule as written does not address the common issues with redactions:

In practice here is how things have played out 95% of the time in the situation this rule is intended to cover: State, after receiving protective order for redactions, discloses redacted and unredacted versions of paper discovery (police reports, CADs, photo copies of documents). State then also discloses un-redacted officer body camera or audio recordings. Then Defense provides redacted written discovery and un-redacted labels to their client.

Under this -most common- scenario will the Defense attorney be sanctioned for providing unredacted officer recordings. If the State doesn't provide the redacted officer recordings how long is the Defense to withhold discovery from client or how is this intended to be resolved?

What happens when the State provides "redacted" discovery where they forget to redact something? Does the defense attorney withhold discovery? Is the defense attorney obligated to check the State's work or can they trust the "redacted" version is in fact redacted? Will a disciplinary proceeding be initiated against the State for failing to comply by failing to redact or just the Defense attorney for sharing such information? Is the Defense attorney obligated to fix the State's mistake in redaction and do their own redactions?

Also, are there any standards for how redactions are to be made or does the State get to pick what they feel like? (Does video recording go silent? Get bleeped out? Is the portion of the recording omitted entirely?)

How will personal contact information redaction square with the requirement of witness lists? Especially under LR2-308?



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Metro Court Comments on Proposed Rule Amendments 2022-009 and 2022-012

1 message

Amber Garcia <metramg@nmcourts.gov>
Reply-To: metramg@nmcourts.gov
To: nmsupremecourtclerk@nmcourts.gov
Cc: Artie Pepin <aocawp@nmcourts.gov>

Wed, Apr 6, 2022 at 11:47 AM

Greetings,

Please see the attached letter from Metropolitan Court Chief Judge Maria I. Dominguez.

Respectfully,

Amber Garcia, Paralegal
Office of General Counsel
Bernalillo County Metropolitan Court
[401 Lomas Blvd NW](#)
[Albuquerque, NM 87102](#)
[PH: 841-8103](#)

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Comment on Proposal 2022-009 to Supreme Court 4-6-22.pdf
108K



Chambers of
Judge Maria I. Dominguez
Chief Judge
Metropolitan Court
Division VI

State of New Mexico
Bernalillo County
Metropolitan Court

401 Lomas Blvd NW
Albuquerque, New Mexico 87102
Telephone (505) 841-8289
Fax (505) 222-4806

April 6, 2022

VIA EMAIL

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

Re: Comment on Proposal 2022-009: Preliminary examination timing and witness testimony (amendments to Rule 7-202 NMRA); Proposal 2022-012: Redaction of Witness Information (new Rule 7-504.1 NMRA)

Dear Ms. Garcia:

On behalf of the Metropolitan Court, we appreciate the opportunity to comment on the proposed amendments to Rules 7-202 and new Rule 7-504.1 NMRA.

1. Proposal 2022-009: Preliminary examination timing and witness testimony (amendments to Rule 7-202 NMRA)

Because Metropolitan Court does not have jurisdiction to dispose of a felony case, the Court recommends the following amendment to Rule 7-202(A) NMRA:

A. Time

- (1) **Time limits.** A preliminary examination shall be scheduled and held with findings of the Court issued within a reasonable time but in any event no later than ten (10) days if the defendant is in custody, and no later than sixty (60) days if the defendant is not in custody...

While not part of the proposed amendments, we note that Rule 7-202 NMRA does not address the continuation of Metropolitan Court's conditions of release during the period of time between when a preliminary hearing is held or waived and the filing of a bind-over order and information in the district court. Therefore, Metropolitan Court proposes the following amendment to Rule 7-202(E) NMRA:

Elizabeth A. Garcia, Clerk of the Court
New Mexico Supreme Court
April 6, 2022
Page 2

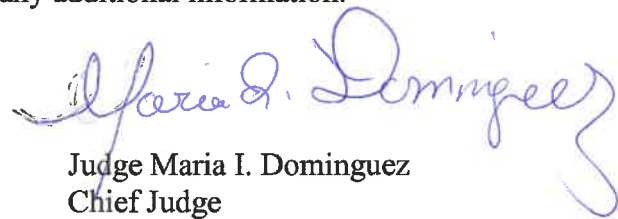
E. Transfer to district court.

(2) When a copy of the information is filed in the district court, the condition of release set by the metropolitan court shall continue in effect unless amended by the district court. When the copy of the information filed in district court is filed in the metropolitan court, the metropolitan court shall at that time transfer the metropolitan court record, along with the bind-over order, to the district court.

2. Proposal 2022-012; Redaction of Witness Information (new Rule 7-504.1 NMRA)

The proposed definition of “protected personal identifier information” in new Rule 7-504.1 NMRA mirrors the definition in Rules 3-112 and 7-113 NMRA on the Public Inspection and Sealing of Court Records. But, with the stated goal in the committee commentary of protecting victims and witnesses from identify theft, we propose that consistent with Section 14-2-6(E), NMSA 1978 (“Inspection of Public Records Act”), the definition of protected personal identifier information include the entire social security number.

We appreciate the opportunity to share these concerns and our suggestions for changes. As always, please feel free to contact us if we can provide any additional information.



Judge Maria I. Dominguez
Chief Judge

cc: Judges of the Metropolitan Court
Robert Padilla, Court Executive Officer
Arthur W. Pepin, Director, Administrative Office of the Courts



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Proposed Amendments to Supreme Court Rules of Practice and Procedure

1 message

Richard Flores <RFlores@da.state.nm.us>

Wed, Apr 6, 2022 at 1:36 PM

Reply-To: rflores@da.state.nm.us

To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Good afternoon. Below please find comments regarding some of the proposed amendments. Thank you.

Proposal 2022-009-Preliminary examination timing.

- We are in agreement with the proposed amendment because it is clear that the time for commencement of the preliminary hearing "starts again" for new time. This will help when State is unable to proceed on a particular day.
- It seems, though, that the issue of time on a refiled criminal complaint requiring preliminary examination in Magistrate Court has not been addressed. This omission results in the application of the default magistrate time rule 6-506.1 (D), which treats refiled felony complaints as a continuation of the original case, rather than a new case, which means that if the time ran on the 60 day rule, the case cannot be refiled in Magistrate Court.
- *Findings of court.*
 - This is great. If a case is not bound over at the Magistrate level, the State can continue the case in District Court, i.e., a second chance to present evidence before a District Court Judge.

Proposal 2022-009-Witness testimony.

- We are in agreement with the proposed amendment. Defendants do not have confrontation rights at preliminary hearings, and the burden can be oppressive for victims and witnesses, especially, in stolen vehicle cases, for example, where the victims may live far away and have been deprived of transportation. Further, it will likely help in cases involving the elderly and costs associated with out of state witnesses.

Proposal 2022-010-Evidence at Preliminary Examination.

- Very good changes. Would even like to see it go further; for example, allow written reports from medical professionals as well at preliminary hearings.

Proposal 2022-012-Redaction of witness information.

- Proposed rule is meant to protect victims and witnesses and is a step in the right direction; however, as we understand the proposal, it relies on the defense attorney to redact the protected information prior to its release to the defendant. We have doubt that said redaction will occur prior to release.

Proposal 2022-019-Aggravated fleeing a law enforcement officer.

- Definitely in favor of this amendment to the UJIs. With this amendment, no other person(s) have to be put in specific danger. Previously, "others" had to be present to prosecute. With this change, prosecution for this charge can be based on the driving and failing to stop and possible endangerment.

Thank you for your time and attention to these matters.

Sincerely,

Richard D. Flores

4th Judicial Chief Deputy District Attorney

PO Box 2025

Las Vegas, NM 87701



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on proposed Criminal Rules

Chief Judge Marie Ward <albdmcw@nmcourts.gov>

Wed, Apr 6, 2022 at 5:12 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

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2 attachments



Letter to Ms. Gacia commentary Criminal Rules.pdf

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Letter.Supreme.Court.Rule.Comments.Judge Loveless.pdf

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STATE OF NEW MEXICO
SECOND JUDICIAL DISTRICT

MARIE C. WARD
CHIEF JUDGE

April 6, 2022

505-841-7392
POST OFFICE BOX 488
ALBUQUERQUE, NEW MEXICO 87103

Elizabeth Garcia, Chief Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
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Re: Comments on Proposed Rule Changes regarding Preliminary Examinations and the Redaction of Witness or Victim Information
[Rule 5-201 NMRA (Methods of Prosecution); Rule 5-302 NMRA (Preliminary Examination); Rule 6-202 and 7-202 NMRA (Preliminary Examinations); Proposed Rule 5-302.1 NMRA (Exceptions to the Rules of Evidence for Preliminary Examinations); Proposed Rule 5-5-02-1 NMRA (Discovery; Redaction of Witness or Victim Information)].

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. The Second Judicial District Court Criminal Court Division consists of eleven (11) District Court Judges. The Criminal Division of the SJDC (the "Second" or "District Court") has identified certain portions of the amended and proposed Rules which it suggests could be revised or clarified going forward. Presiding Criminal Division Judge Brett Loveless has provided thoughtful and detailed commentary on the proposed rules changes.

On behalf of the Second, please consider the suggestions and commentary set forth in more detail in the letter from Judge Brett Loveless included herein.

Thank you for your consideration.

Respectfully,

Marie Ward
Chief Judge, Second Judicial District



State of New Mexico
Second Judicial District

BRETT R. LOVELESS
DISTRICT JUDGE

POST OFFICE BOX 488
ALBUQUERQUE, NEW MEXICO 87103
505-841-7499
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April 6, 2022

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

Re: *Comments on Proposed Rule Changes regarding Preliminary Examinations and the Redaction of Witness or Victim Information*

Dear Ms. Garcia:

The Criminal Division of the Second Judicial District Court (the “Second” or “District Court”) appreciates the New Mexico Supreme Court’s opportunity to provide comments on the proposed changes to the Rules.

The Second has identified certain portions of the amended and proposed Rules which it suggests could be revised or clarified going forward.

1. Comments on Amended Rule 5-201 NMRA (Methods of Prosecution)

The Second suggests that Rule 5-201(C) should clarify the process regarding the filing of an Information and holding the subsequent preliminary hearing.

C. Information. An information is a written statement, signed by the district attorney, containing the essential facts, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. It may be filed only in the district court. Informations shall be substantially in the form approved by the court administrator, and shall state the names of all witnesses on whose testimony the information is based. On completion of a preliminary examination or acceptance of a waiver thereof by the district court, an information shall be filed within thirty (30) days if a defendant is not in custody, and within ten (10) days if a defendant is in custody. Any offenses that are included in the bindover order but not set forth in the criminal

information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses. If an information is not filed within these deadlines, the complaint shall be dismissed without prejudice by the court in which the action is pending.

This Rule has historically seemed to suggest that complaints may also be filed in District Court. *See* Rule 5-201 Committee Commentary on the Complaint. However, complaints are used to open felony cases in magistrate and metropolitan courts and the Committee Commentary seems to recognize that fact by discussing the procedures in magistrate courts throughout the commentary.

Informations—or Indictments—are used to open cases in district courts. As noted in the commentary on the Information section to the Rule:

This rule allows a prosecution to be commenced by the filing of the information. As a practical matter, the prosecution is generally commenced by the filing of the complaint in the magistrate court followed by either an indictment or a preliminary hearing and information. Nothing, however, prohibits the prosecution from first filing the information. In that event the accused is not required to plead to the information and may move the court to remand the case for a preliminary hearing. After the preliminary hearing, the defendant can then be tried on the information filed prior to the preliminary hearing. (Internal citations omitted.)

Taken together, the commentary and Rule suggest that the standard course of the preliminary examination will be either: (1) that a Complaint is filed in magistrate or metropolitan court and the preliminary examination will be held in that court which will then file a bind-over order and an Information will then be filed to open the district court case; or (2) that an Information will be filed in district court and the district court will remand the case to magistrate or metropolitan court for preliminary examination which will then enter a bind-over order.

However, there is a third possibility that the Rule does not seem to contemplate but which regularly happens—that the Information is filed in district court and district court holds the preliminary examination and files a bind-over order.

The Second has been voluntarily conducting preliminary examinations using this process since 2015. After the changes in Rule 5-409 NMRA, the Second is now required to hold more preliminary examinations because upon the transfer from magistrate or metropolitan court, the lower court loses jurisdiction, and a detention case transfer cannot be remanded for preliminary examination. Instead, that preliminary examination takes place in district court and occurs after the filing of the Information rather than before the filing of the Information.

While the Second has submitted commentary on Amended Rule 5-409 that suggests that the lower court should not lose jurisdiction to hold the preliminary examination in cases where a detention motion is filed and the Second reiterates that suggestion, as it stands now, the lower court does not have jurisdiction to hold the preliminary examination upon the filing of a detention motion. If that is to remain true, then the Second suggests that Rule 5-201 and its commentary should be modified to recognize the process for cases that remain in district courts for preliminary examinations. The Rule, as written, could be read to require two Informations be filed in this instance—one before the preliminary examination (as complaints are not used to open district court cases) and one after the preliminary examination (as the Rule requires an Information to be filed after the preliminary examination).

2. Comments on Amended Rule 5-302 NMRA (Preliminary Examination)

The Second suggests several revisions to Rule 5-302.

First, the Amended Section A(1) adds the language “with a disposition entered” to the time provisions requiring the preliminary examination be held within 10 or 60 days. Especially in 10-day cases, there are good reasons why a preliminary examination might start on day 10 but not be concluded until day 11. For example, the preliminary examination might run longer than expected or the court’s prior docket could necessitate a later start because other settings run over; in either instance, the court would likely continue the proceeding the following day. In essence, this change would require the court to schedule preliminary hearings to happen at least a couple days prior to the deadline to ensure that there was no possibility that the proceeding would run over. While this is not necessarily an issue in 60-day cases, it can become a problem in 10-day cases, especially as District Court is now required to hear all preliminary examinations where a detention motion was filed.

Second, Section A(1)(f) appears to delete necessary language (“the date the conditions of release”).

Third, Section B(4) adds the following language: “The court may under compelling circumstances allow witnesses to appear by two-way visual attendance provided that the witness is able to see, and can be seen by, the defendant, counsel for the prosecution and the defendant, and the judge.” The Second suggests that the compelling circumstance language be deleted; instead, the court should have discretion to make that determination without having to find a compelling circumstance, a standard which is unclear. Alternatively, the Second suggests revising this section to require the party requesting a remote appearance to provide notice and the reasons for it and allowing the parties to litigate that issue before the judge.

Fourth, the Second suggests that Section E be revised to allow remand to the lower court for preliminary examination without motion. This provision is especially important now that district

courts must currently hear the preliminary examinations on all detention cases. District courts need the ability to *sua sponte* remand non-detention cases to lower courts for preliminary examination.

3. Commentary to Amended Rules 6-202 and 7-202 NMRA (Preliminary Examination)

The Second, after conferring with some of its justice partners, suggests that some clarifying language be added regarding conditions of release into sections Rules 6-202 and 7-202.

One issue that has arisen in this jurisdiction is the question of conditions of release between the time of the bind-over from metropolitan court, the filing of the Information in District Court, and the arraignment. While Section F (Effect of Indictment) states that “conditions of release set by the metropolitan court shall continue in effect unless amended by the district court,” after an Indictment is filed, no such provision is currently in the Rule regarding cases that proceed via Information rather than Indictment. That has led to some confusion surrounding what conditions of release, if any, apply after the filing of the Information and prior to arraignment.

The Second suggests that language be added to Section E (Transfer to District Court) that mirrors the language in Section F on conditions of release. Section E(4) could read: “On the filing of an information in district court, the metropolitan court’s conditions of release shall continue in effect unless amended by the district court.”

4. Commentary to Proposed Rule 5-302.1 NMRA (Exceptions to the Rules of Evidence for Preliminary Examinations)

This new proposed Rule outlines exceptions to the rules of evidence in preliminary examinations and the Second’s commentary primarily concerns Section A(1) of that Rule.

The Second suggests that the terms “forensic” and “safe house” in Section A(1) will invite a significant amount of litigation extremely early in the case, prior to the preliminary examination. Because these terms are not defined in the Rule, parties will make arguments about what constitutes a forensic interview and what qualifies as a safe house. Are there standards that apply to render something a forensic interview? Would an interview by a school counselor, treating psychologist, CYFD social worker, or police officer qualify as a forensic interview? Would testimony in another court proceeding—such as abuse and neglect—be admissible? Often child abuse cases involve a parent and defense might have access to the child to interview them in a safe environment. Would a defense investigator’s interview of the child be admissible under this Rule? The Second notes that the problem of defining what constitutes a safe house may also be exacerbated in smaller jurisdictions that may not have a dedicated and validated space for children to be interviewed.

While the Second understands that the intent of this Rule is to avoid requiring children who have been traumatized to testify at preliminary examinations, the lack of definitions in the Rule could result in children being required or encouraged to give multiple statements. It therefore suggests that the Rule be modified to provide specific definitions.

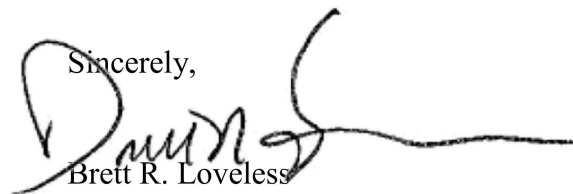
5. Commentary to Proposed Rule 5-502.1 NMRA (Discovery; Redaction of Witness or Victim Information)

The Second already uses a process somewhat similar to what is outlined in proposed Rule 5-502.1 through the filing of a temporary order because the issue of redaction of personal information had become an on-going source of contention between the parties.

While the Second has no substantive comments in terms of suggested changes to this proposed Rule, it does note that this Rule conflicts with some other Rules besides Rules 5-501 and 5-502 NMRA, which this Rule modifies. For example, Rule 5-503(E) NMRA requires that the notice of deposition state the name and address of each person to be examined. Rule LR2-308(C)(1) NMRA also requires witness information including address and phone number to be provided and requires a motion to withhold contact information be filed. Rule 5-508 NMRA requires that the parties provide each other with witness lists that contain addresses of the witnesses. Finally, generally, subpoenas—which include the address of the witness—are filed with the court.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett R. Loveless", with a long horizontal flourish extending to the right.

Brett R. Loveless
Presiding Criminal Court Judge
Second Judicial District Court