

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE
DISTRICT COURTS
PROPOSAL 2022-026**

September 1, 2022

On January 14, 2022, the Supreme Court provisionally amended Rule 5-304 NMRA. The amended rule took effect on January 18, 2022.

If you would like to comment on the provisionally approved 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:

Elizabeth A. Garcia, 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 September 30, 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.

5-304. Pleas.

A. Alternatives.

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

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

B. Notice. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or no contest it shall be reduced to writing substantially in the form approved by the Supreme Court. The court shall require the disclosure of the agreement in open court at the time the plea is offered and shall advise the defendant as required by Paragraph F of

Rule 5-303 NMRA. If the plea agreement was not made in exchange for a guaranteed, specific sentence and was instead made with the expectation that the state would only recommend a particular sentence or not oppose the defendant's request for a particular sentence, the court shall inform the defendant that such recommendations and requests are not binding on the court. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

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

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

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

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

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

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

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

Committee commentary. — Paragraphs A through F of this rule provide for a “plea bargaining” procedure. They originally were taken verbatim from proposed Rule 11(e) of the Federal Rules of Criminal Procedure. *See* 62 F.R.D. 271, 276, 280-86 (1974). Prior to the adoption of Paragraph A of this rule, judicial involvement in plea bargaining in New Mexico varied with the interest of the individual district court judges. The propriety of judicial involvement had been questioned by the Supreme Court. *See State v. Scarborough*, 1966-NMSC-009, ¶ 14, 75 N.M. 702, [708;] 410 P.2d 732 [(1966)]. By the adoption of this rule, the Court [has] specifically eliminated all judicial involvement in the plea bargaining discussions. [The] Under the rule as originally written, the judge's role [is] was explicitly limited to

acceptance or rejection of the bargain agreed to by counsel for the state, defense counsel, and defendant. *See generally* 62 F.R.D. 271, 283-84 (1974). Although not categorically abandoning this approach, the Court’s 2022 provisional amendment to the rule temporarily allows for some limited judicial involvement in plea discussions in order to streamline the processing of criminal cases during the COVID-19 public health emergency. For the administrative order issued by the Court in conjunction with the order provisionally approving the rule amendments, see Supreme Court Order No. 22-8500-002.

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

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

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

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



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 09/28/2022, 2:17 pm

1 message

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

Wed, Sep 28, 2022 at 2:17 PM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your Name: Steven J. Forsberg

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Proposal Number: Proposal 2022-026

Comment: The committee commentary may create some confusion. Is this adoption of the "provisional" order simply in order to "streamline...criminal cases during the COVID-19 public health emergency"? Or is it the rollout of a possible permanent new settlement conference process? This ties in to questions regarding the 'ad hoc criminal review committee.' Was (is?) this a temporary body to deal specifically with Covid-19 issues, or is its purpose to be a continuing committee which will act beyond the scope of the Covid-19 "crisis."?

It is well accepted that Covid-19 necessitates some quick/non-traditional changes, but there is concern that it is being used as carte blanche in place of more formal/transparent rules processes, and will continue to be so used.