

5-106. Peremptory challenge to a district judge; recusal; procedure for exercising.

A. **Definition of parties.** “Party,” as used in this rule, shall mean a defendant, the state, or an attorney representing the defendant or the state. A party may not excuse a judge after the party has requested that judge to perform any discretionary act.

B. **Extent of excuse or challenge.** No judge may be excused from conducting an arraignment or first appearance, setting initial conditions of release, reviewing a lower court’s order setting or revoking conditions of release, or presiding over a pretrial detention hearing or a preliminary examination in a case where a pretrial detention motion has been filed. No party shall excuse more than one judge.

C. **Mass reassignment.** A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

D. **Procedure for excusing a district judge.** The statutory right to excuse the judge before whom the case is pending must be exercised by a party filing a peremptory election to excuse with the clerk of the district court within ten (10) days after the later of

- (1) arraignment or the filing of a waiver of arraignment;
- (2) service by the clerk of notice of assignment or reassignment of the case to a judge;
- (3) completion of publication of notice of reassignment in the case of a mass reassignment; or
- (4) filing of a notice of appeal from a lower court.

E. **Notice of reassignment.** After the arraignment or the filing of a waiver of arraignment, if the case is reassigned to a different judge, the clerk shall give notice of reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the

1 reassignments to all parties by publishing notice for four (4) consecutive weeks on the State Bar
2 [~~web site~~] website and in two (2) consecutive issues of the New Mexico Bar [~~Bulletins~~] Bulletin.
3 Service of notice by publication is complete on the date printed on the second issue of the Bar
4 Bulletin.

5 F. **Service of excusal.** Any party electing to excuse a judge shall serve notice of that
6 election on all parties.

7 G. **Misuse of peremptory excusal procedure.** Peremptory excusals are not to be
8 exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or
9 group of attorneys may be using peremptory excusals for improper purposes or with [~~such~~] a
10 frequency [~~as to impede~~] that impedes the administration of justice, the Chief Judge of the district
11 shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the
12 written notice to the attorney or group of attorneys believed to be improperly using peremptory
13 excusals. The Chief Justice may take appropriate action to address any misuse, including issuance
14 of an order providing that the attorney or attorneys or any party they represent may not file
15 peremptory excusals for a specified period of time or until further order of the Chief Justice.

16 H. **Recusal.** No district judge shall sit in any action in which the judge's impartiality
17 may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code
18 of Judicial Conduct, and the judge shall file a recusal in [~~any such~~] that action. [~~Upon~~] On receipt
19 of notification of recusal from a district judge, the clerk of the court shall give written notice to
20 each party.

21 I. **Disability during trial.** If by reason of death, sickness, or other disability the judge
22 before whom a jury trial has commenced is unable to proceed with the jury trial, any other judge
23 regularly sitting in or assigned to the court, [~~upon~~] on certifying familiarity with the record of the

jury trial, may proceed with and finish the jury trial or, if appropriate, may grant a mistrial. In a nonjury trial, ~~[upon]~~ on motion of the defendant, a mistrial shall be granted ~~[upon]~~ on disability of the trial judge.

J. **Disability after verdict or finding of guilt.** If by reason of death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other eligible judge may perform those duties on certifying familiarity with the record of the trial.

[As amended, effective August 1, 1989; September 1, 1990; June 1, 1994; as amended by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended by Supreme Court Order No. 15-8300-019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — This rule governs the exercise of the statutory right to excuse the judge before whom the case is pending. *See* NMSA 1978, § 38-3-9 (1985). Paragraph B precludes a party from exercising this right in certain pretrial proceedings, including arraignment and pretrial release and detention hearings. Paragraph B does not prevent a judge from recusing under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or on motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

1 Reassignment of a judge usually occurs in individual cases in which a party has excused
2 the trial judge or the judge recuses himself or herself. When this happens, the clerk easily can and
3 does provide individual notice of the reassignment to the parties by mail.

4 When a judge retires, dies, is disabled, or assumes responsibility for different types of cases
5 (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and parties who
6 have not previously exercised a peremptory ~~[recusal]~~ excusal may choose to ~~[recuse]~~ excuse the
7 successor judge. Providing individual notice by mail to every party in each ~~[such case]~~ of those
8 cases is administratively difficult, expensive, and time consuming. Clerks sometimes provide
9 notice of reassignment in an alternative manner—usually through publication in the Bar Bulletin,
10 on the State Bar’s ~~[web site]~~ website, or both.

11 The 2008 amendment formally incorporates into Rule 5-106 NMRA the use of notice by
12 publication in ~~[such a]~~ that situation—now identified as a “mass reassignment.” The amended rule
13 requires that the specified notice be published on the State Bar’s ~~[web site]~~ website for four (4)
14 consecutive weeks and in two (2) consecutive issues of the New Mexico Bar Bulletin, and provides
15 that a party who has not yet exercised a peremptory ~~[recusal]~~ excusal may do so within ten (10)
16 days after the date of the second Bar Bulletin.

17 When a judge’s entire caseload is reassigned, the publication notice need not contain the
18 caption of each affected case, but must contain the names of the initially-assigned judge and the
19 successor judge.

20 There may be occasions when many, but not all, of a judge’s cases are reassigned; for
21 example, when an additional judge is appointed in a judicial district and a ~~[portion]~~ part of other
22 judges’ ~~[cases]~~ caseloads are assigned to the new judge. When this occurs, if the number of pending
23 cases reassigned from any judge exceeds one hundred (100), the 2008 amendment authorizes

1 notice by publication. To assure that the parties have notice of which cases were reassigned, the
2 court should either make a list available containing the title of the action and file number of each
3 case reassigned, or not reassigned, whichever is less. The court may publish [~~such a~~] that list in
4 the Bar Bulletin, publish a notice in the Bar Bulletin that directs the reader to the court's [~~web site~~]
5 website where [~~such a~~] the list will be posted, or post notice on the State Bar's [~~web site~~] website.

6 Substituting publication for individual notice increases the chance that a party will not
7 receive actual notice of a reassignment. [~~Where~~] When actual notice is not achieved through
8 publication, the trial court has ample authority to accept a late recusal. *See* Rule 5-104(B) NMRA
9 (providing that the court may permit an act to be done after a deadline has passed for cause shown).

10 [Adopted by Supreme Court Order No. 08-8300-039, effective December 15, 2008; as amended
11 by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July
12 1, 2017; as amended by Supreme Court Order No. 19-8300-008, effective for all cases pending or
13 filed on or after July 1, 2019; as amended by Supreme Court Order No. 20-8300-020, effective for
14 all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order
15 No. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]