

5-209. Service of summons; failure to appear.

A. **Service.** A summons shall be served in accordance with ~~[the rules governing service of process in civil actions]~~ Rule 1-004 NMRA unless the court directs service by mail. A copy of the complaint, indictment, or information shall be attached to the summons. Service shall be made at least ten (10) days before the defendant is required to appear. If service is made by mail an additional three (3) days shall be added under Rule 5-104 NMRA. Service by mail is complete ~~[upon]~~ on mailing.

B. **Failure to appear.** If a defendant fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may issue a warrant for the defendant's arrest, and thereafter the action shall be treated as if the warrant had been the first process in the action.

(1) Exception for initial appearance; returned mail.

(a) For a defendant's initial appearance in court, if a mailed summons has been returned as not delivered and the defendant has failed to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may either

(i) direct service to be made by a person authorized by Rule 1-004(D) NMRA; or

(ii) issue a warrant for the defendant's arrest with the directive that the defendant be released on the defendant's own recognizance, unless the court makes a finding of fact that supports the imposition of an appropriate bond.

(b) If the summons is returned as not delivered after a warrant has been issued under Paragraph B of this rule, the court may cancel or quash the warrant, waive or suspend the administrative bench warrant fee, and proceed under Subparagraph (1)(a) of this paragraph.

[As amended by Supreme Court Order No. 22-8300-026, effective for all cases pending or filed on or after December 31, 2022.]

Committee commentary. — Paragraph A of this rule incorporates Rule 1-004 NMRA as the procedure for service of summons on a defendant. This procedure is more often used in misdemeanor than felony cases. ~~[An identical rule is provided in the magistrate court rules. See Rule 6-205 NMRA.]~~ Paragraph B of this rule, providing for arrest if the defendant fails to respond and appear to the summons, was derived from Rule 4(a) of the Federal Rules of Criminal Procedure. *See generally*, 1 Wright, Federal Practice and Procedure, § 51 (1969).

Subparagraph (B)(1) was added in 2022 to address situations in which a defendant is mailed a summons for the defendant's first appearance in a criminal case and the summons is returned to the court as undelivered or undeliverable. In these instances, the defendant has not received notice to appear. Subparagraph (B)(1) applies only to the first appearance, i.e., bond arraignment, and not to subsequent appearances as the defendant is under an obligation to keep the court apprised of a current mailing address after the defendant's first appearance.

Courts should avoid issuing a warrant or leaving a warrant in place when facts indicate that the defendant did not receive proper notice. In deciding whether facts indicate that an appropriate bond should be imposed, the judge should consider factors such as the defendant's failure to appear history and whether there was contact between the defendant and law enforcement that indicates the defendant received notice.

Warrants issued under Subparagraph (B)(1) of this rule are not bench warrants for failure to appear. Rather, these warrants are arrest warrants issued on the underlying charge as prescribed in Rules 5-208 and 5-210 NMRA.

- 1 [As amended by Supreme Court Order No. 22-8300-026, effective for all cases pending or filed
- 2 on or after December 31, 2022.]