

~~[5-302A]~~5-302.2. Grand jury proceedings.

A. Notice to target; timing.

(1) **Content.** The prosecuting attorney assisting the grand jury shall notify the target of a grand jury investigation in writing that he or she is the target of an investigation. The writing shall notify the target of

- (a) the nature of the alleged crime being investigated;
- (b) the date of the alleged crime;
- (c) any applicable statutory citations;
- (d) the target's right to testify;
- (e) the target's right not to testify;
- (f) the target's right to submit exculpatory evidence to the district attorney for presentation to the grand jury; and
- (g) the target's right to the assistance of counsel during the grand jury investigation.

Target notices shall be substantially in the form approved by the Supreme Court.

(2) **Notice and time.** A prosecuting attorney shall use reasonable diligence to notify a person in writing that the person is a target of a grand jury investigation. The target and the target's attorney shall be notified in writing no later than four (4) business days before the scheduled grand jury proceeding if the target is incarcerated. The target and the target's attorney shall be notified in writing no later than ten (10) business days before the scheduled proceeding if the target is not incarcerated.

(3) **Notice not required.** Notice shall not be required if, prior to the grand jury proceeding, the prosecuting attorney secures a written order of the grand jury judge determining

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by clear and convincing evidence that notification may result in flight by the target, result in obstruction of justice, or pose a danger to another person, other than the general public.

**B. Evidence.**

(1) ***Lawful, competent, and relevant evidence.*** All evidence presented shall be lawful, competent, and relevant, but the Rules of Evidence shall not apply.

(2) ***Exculpatory evidence.*** The prosecuting attorney shall alert the grand jury to all lawful, competent, and relevant evidence that disproves or reduces a charge or accusation or that makes an indictment unjustified and ~~[which]~~ that is within the knowledge, possession, or control of the prosecuting attorney.

(3) ***Evidence and defenses submitted by target.*** If the target submits written notice to the prosecuting attorney of exculpatory evidence as defined in Subparagraph ~~[(2)]~~ 2 of this paragraph, or a relevant defense, the prosecuting attorney shall alert the grand jury to the existence of the evidence.

(a) ***Form of submission.*** The target's submission shall consist of a factual and non-argumentative description of the nature of any tangible evidence and the potential testimony of any witnesses, along with the names and contact information of any witnesses necessary to provide the evidence. The target shall provide its submission to the prosecuting attorney by letter substantially in accordance with Form 9-219 NMRA ("Grand Jury Evidence Alert Letter").

(b) ***Cover letter.*** The target's submission to the prosecuting attorney shall be accompanied by a cover letter, which will not go to the grand jury. The cover letter may include proposed questions and should include any contextual information, any arguments as to

1 the propriety or significance of the requested evidence and defenses, and any other matters that  
2 may be helpful to the prosecutor or the grand jury judge.

3 (c) *Timing.* The target's written notice of evidence shall be provided to  
4 the prosecuting attorney no less than forty-eight (48) hours in advance of the scheduled grand jury  
5 proceeding.

6 (4) *Review of prosecutor's decision not to alert grand jury to target's evidence*  
7 *or defenses.* The prosecuting attorney assisting the grand jury may only be relieved of the duty to  
8 alert the grand jury to the target's evidence or defenses by obtaining a court order prior to the grand  
9 jury proceeding. The prosecuting attorney shall file a motion under seal with the grand jury judge,  
10 with written notice to the target, stating why the target's submitted evidence is not exculpatory as  
11 defined in Subparagraph [(2)] 2 of this paragraph or stating why the grand jury should not be  
12 instructed on the target's requested defenses. A copy of the target's grand jury evidence alert letter  
13 and cover letter shall be attached to the motion. The target may file under seal a response to the  
14 motion, and, if no response is filed, the grand jury judge may ask the target for a written response,  
15 to be filed under seal, and may convene a hearing. The burden is on the prosecuting attorney to  
16 show that the proposed evidence is not exculpatory as defined in Subparagraph [(2)] 2 of this  
17 paragraph. The grand jury judge will give the prosecuting attorney clear direction on how to  
18 proceed before the grand jury, making a record of the decision.

19 C. **Instructions to grand jury.**

20 (1) *Elements and defenses.* The prosecuting attorney who is assisting the grand  
21 jury shall provide the grand jurors with instructions setting forth the elements of each offense being  
22 investigated and the definitions of any defenses raised by the evidence.

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(2) **Other instructions.** The prosecuting attorney shall provide the grand jury with other instructions ~~[which]~~ that are necessary to the fair consideration by the grand jury of the issues presented.

D. **Extensions of ~~[Time]~~ time.** The times set forth in this rule may be changed by the grand jury judge ~~[upon]~~ on written motion demonstrating that an extension is necessary in order to assure compliance with the requirements of this rule.

E. **Record.** All proceedings in the grand jury room shall be recorded, except that the deliberations of the grand jury shall not be recorded. Copies of any documentary evidence and any target's Grand Jury Evidence Alert Letter which was presented to the grand jury shall be made part of the record.

F. **Review by the district court.**

(1) **Supervisory authority.** The district court has supervisory authority over all grand jury proceedings.

(2) **Scope of review.** Failure to follow the procedures set forth in this rule shall be reviewable in the district court. The weight of the evidence ~~[upon]~~ on which an indictment is returned shall not be subject to review absent a showing of bad faith on the part of the prosecuting attorney assisting the grand jury.

[Adopted by Supreme Court Order No. 10-8300-015, effective for target notices filed on or after May 14, 2010; as amended by Supreme Court Order No. 18-8300-004, effective April 23, 2018; Rule 5-302A recompiled and amended as Rule 5-302.2 by Supreme Court Order No. 22-8300-023, effective December 31, 2022.]

**Committee commentary.** — Under Paragraph ~~[B(4)]~~ (B)(4) of this ~~[Rule]~~ rule, the grand jury judge must carefully consider any filings in the case and consider the options before ruling on

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a prosecutor's request to be relieved of the duty to alert the grand jury to the target's evidence or defenses. The options available to the grand jury judge in considering ~~[such]~~ a request under Paragraph ~~[B(4)]~~ (B)(4) include requesting a response from the defense, holding a hearing on the prosecutor's request, or ruling on the request without a hearing.

There is no pre-indictment right of appeal from a decision of the grand jury judge under NMSA 1978, Section 31-6-11(B) (2003)~~[NMSA 1978]~~. *See Jones v. Murdoch*, 2009-NMSC-002, ¶¶ 40-41, 145 N.M. 473, 200 P.3d 523. Nevertheless, "in an extreme case, a party may still seek review in [the Supreme] Court through an extraordinary writ proceeding." *Id.* ¶ 41. A party seeking an extraordinary writ should be aware of "the high standard and discretionary nature associated with granting such relief" and the writ petition should be filed without undue delay. *See id.*

[Adopted by Supreme Court Order No. 13-8300-016, effective for all cases pending or filed on or after December 31, 2013; Rule 5-302A recompiled and amended as Rule 5-302.2 by Supreme Court Order No. 22-8300-023, effective December 31, 2022.]