

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE
DISTRICT COURTS
PROPOSAL 2023-010**

March 24, 2023

The Rules of Criminal Procedure for State Courts Committee has recommended amendments to Rule 5-201 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:

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New Mexico Supreme Court
P.O. Box 848
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Your comments must be received by the Clerk on or before April 24, 2023, 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.

5-201. Methods of prosecution.

A. **Commencement of prosecution.** A prosecution may be commenced by the filing of

- (1) a complaint;
- (2) an information; or
- (3) an indictment.

B. **Complaint.** A complaint is a sworn written statement of the facts, the common name of the offense, and, if applicable, a specific section number of New Mexico Statutes which defines the offense. Complaints shall be substantially in the form approved by the court administrator.

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. 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.

D. **Indictments.** An indictment is a written statement returned by a grand jury containing the essential facts constituting the offense, common name of the offense, and, if applicable, a specific section number of the New Mexico Statutes which defines the offense. All indictments shall be signed by the foreman of the grand jury. Indictments shall be substantially in the form prescribed by the court administrator. The names of all witnesses on whose testimony an indictment is based shall appear on the indictment.

[As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020.]

Committee commentary. — The Complaint. This rule governs complaints filed in the district court. If a complaint is filed in the district court, the district court shall set a first appearance under Rule 5-301 NMRA and proceed under the Rules of Criminal Procedure for the District Courts. ~~[In almost all cases a complaint will be]~~ Most complaints are filed in either the magistrate court or the metropolitan court. ~~[and will be governed by Rule 6-201 NMRA.]~~ If the complaint charges solely a petty misdemeanor or misdemeanor, the magistrate or metropolitan court ~~[will have]~~ has jurisdiction to try the case. *See* NMSA 1978, § [Section] 35-3-4A (1985) [NMSA 1978]. If the complaint charges ~~[a]~~ at least one capital, felonious, or other infamous crime, the defendant may be held to answer only on an information or indictment. N.M. Const., art. 2, § 14[-]; ~~[See]~~ see *State v. Marrujo*, 1968-NMSC-118, 79 N.M. 363, 443 P.2d 856. If the complaint charges a crime which is not within the ~~[magistrate court]~~ jurisdiction of the magistrate or metropolitan court, the magistrate or metropolitan court may only

- (1) determine initially if there is probable cause on which to confine the defendant;
- (2) advise the defendant of his or her rights at the first appearance;
- (3) set and review conditions of release; and
- (4) conduct preliminary examinations. *See* ~~[Section]~~ § 35-3-4 [NMSA 1978].

Under this rule, Rule 6-201 NMRA, and Rule 7-201 NMRA, a complaint must state the common name of the offense, and, if applicable, the specific section number of the New Mexico Statutes which defines the offense. Two decisions of the Court of Appeals interpreting the former magistrate rule indicate that the complaint must carefully set forth the name and section number. In *State v. Raley*, 1974-NMCA-024, 86 N.M. 190, 521 P.2d 1031, cert. denied, 86 N.M. 189, 521 P.2d 1030 (1974), the Court held that the initials “D.W.I.” were insufficient to state the common name of the offense. In *State v. Nixon*, 1976-NMCA-031, 89 N.M. 129, 548 P.2d 91, the Court held that it is not necessary to charge a specific subsection of the statutes. In both cases the Court determined that the complaint must be dismissed. However, since the cases were decided under the former magistrate rules, there is no discussion of Rule 6-303 NMRA of the present magistrate rules governing technical defects in the pleadings. *See also* Rule 5-204 NMRA, an identical rule in the Rules of Criminal Procedure for the District Courts, and commentary.

The Information. 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 or metropolitan court followed by either an indictment or a preliminary hearing and information. Nothing, however, prohibits the prosecution from first filing the information. *See State v. Bailey*, 1956-NMSC-123, 62 N.M. 111, 305 P.2d 725. *See also Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965). 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. *See* Rule 5-601(C) NMRA and commentary. After the preliminary hearing, the defendant can then be tried on

the information filed prior to the preliminary hearing. *State v. Nelson*, 1958-NMSC-018, 63 N.M. 428, 321 P.2d 202.

If the prosecution has been commenced by the filing of a complaint in the magistrate or metropolitan court and a preliminary hearing has been held, Paragraph C of this rule requires that the information be filed within thirty (30) days after completion of the preliminary examination. The information must conform to the bind-over order of the magistrate. *State v. Melendrez*, 1945-NMSC-020, 49 N.M. 181, 159 P.2d 768. It does not have to conform to the complaint which initiated the prosecution in the [magistrate] lower court. *State v. Vasquez*, 1969-NMCA-082, 80 N.M. 586, 458 P.2d 838.

The provision of Paragraph C of this rule requiring the information to contain the essential facts was taken from Rule 7 of the Federal Rules of Criminal Procedure. *See generally*, 1 Orfield, Criminal Procedure under the Federal Rules § § 7:83-7:87 (1966). The United States Supreme Court has indicated that the pleading under Federal Rule 7 must be tested by two general criteria: (1) whether the pleading contains the elements of the offense to sufficiently apprise the defendant of what he or she must be prepared to meet; (2) whether he or she is accurately apprised of the charge so as to know if he or she is entitled to plead a former acquittal or conviction under the double jeopardy clause of the fifth amendment to the United States constitution. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S. Ct. 1038, 1046-49, 8 L. Ed. 2d 240, 250 (1962). *Compare State v. Vigil*, 1973-NMCA-089, 85 N.M. 328, 512 P.2d 88, with *State v. Foster*, [-]1974-NMCA-150, 87 N.M. 155, 530 P.2d 949.

This rule must also be read in conjunction with Rule 5-204 NMRA and Rule 5-205(A) and (B) NMRA. Rule 5-205(A) and (B) identify certain allegations which need not be included in the pleading. Rule 5-204 indicates that the pleading is not invalid because of defects, errors, and omissions. In addition, the Court of Appeals has held that any asserted failure of the pleading to allege essential facts must be accompanied by a showing of prejudice due to that failure. *State v. Cutnose*, 1974-NMCA-130, 87 N.M. 307, 532 P.2d 896, cert. denied, 87 N.M. 299, 532 P.2d 888 (1974).

Paragraph C of this rule requires that the information be signed by the district attorney. *See* N.M. Const., art. II, § 14. This requirement can be met by the signature of an assistant district attorney. *See* [Section] NMSA 1978, § 36-1-2 (1984) [NMSA-1978]. The constitution also indicates that the information may be filed by the attorney general. *See also* [Section] NMSA 1978, § 8-5-3 (1933) [NMSA-1978]. The deputy or an assistant attorney general would have the same authority as the attorney general. *See* [Section] NMSA 1978, § 8-5-5 (1988) [NMSA-1978].

Section 20 of Article 20 of the New Mexico Constitution contains language which would indicate that the accused must waive an indictment if the state proceeds by information. However, it has been held that Section 14 of Article 2 of the Constitution, the section allowing prosecution by information, eliminated the necessity of a waiver of a grand jury indictment. *See State v. Flores*, 1968-NMCA-057, 79 N.M. 420, 444 P.2d 605.

For interpretation of the common name and specific statute section provisions of the information, see the discussion of the elements of a complaint, above.

The Indictment. For the law governing the grand jury procedure and return of indictments, see [Section] NMSA 1978, § 31-6-1 to -15 (1969, as amended through 2003). [NMSA-1978 et seq.] The elements of an indictment are the same as required for an information and would be interpreted by the same criteria. *See e.g.*, *Cutnose*, 1974-NMCA-130. The state may proceed by indictment in the district court even if the prosecution was initiated originally by the filing of a

complaint in the [~~magistrate~~] lower court. *See State v. Peavler*, 1975-NMSC-035, 88 N.M. 125, 537 P.2d 1387; *State v. Ergenbright*, 1973-NMSC-024, 84 N.M. 662, 506 P.2d 1209; *State v. Burk*, 1971-NMCA-018, 82 N.M. 466, 483 P.2d 940, cert. denied, 404 U.S. 955, 92 S. Ct. 309, 30 L. Ed. 2d 271 (1971). This practice was recognized by the Supreme Court in the adoption of Rule 6-202(E) NMRA and Rule 7-202(E) NMRA, which provides that if the defendant is indicted prior to the preliminary examination, the magistrate or metropolitan court shall take no further action. [As amended by Supreme Court Order No. 20-8300-008, effective for all cases pending or filed on or after December 31, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

**No Comments
Received**