

**PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE
PROPOSAL 2023-023**

June 30, 2023

The Appellate Rules Committee has recommended amendments to Rule 12-302 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 website at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
rules.supremecourt@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before July 31, 2023, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

12-302. Appearance, withdrawal, or substitution of attorneys; changes of address or telephone number.

A. **Signatures.** The original of each brief, motion, or other paper filed shall bear the signature of at least one of the counsel filing it, or if a party is proceeding pro se, the signature of the party. A "signature" means an original signature, a copy of an original signature, a computer generated signature, or any other signature otherwise authorized by law.

B. **Appearance.** An attorney or firm shown as participating in the filing of any brief, motion, or other paper shall, unless otherwise indicated, be deemed to have appeared in the cause. If an attorney's appearance is limited under Rule 16-102(C) NMRA, the limitation shall be specified on the cover page and in the signature block of each paper filed by the attorney under the limited appearance, and the cover page and signature block of the paper shall include an address where service may be made on the client.

C. **Motion to withdraw.**

(1) No attorney or firm that has appeared without limitation in a cause may withdraw from it without filing a motion to withdraw and obtaining an order from the appellate court. The appellate court may condition withdrawal upon substitution of other counsel, the filing by the attorney's client of an address at which service may be made on the client, or other requirements as ordered by the appellate court. Proof of service by the withdrawing attorney shall be made on all other parties. Attorneys whose appearances are limited as set forth in Paragraph B of this rule need not obtain consent of the appellate court before withdrawing or otherwise ceasing

to act in the matter, except if the purpose of the limited representation is not completed. An attorney from a firm or agency may file a withdrawal of appearance from a particular case by notice if at least one attorney of the firm or agency remains in the case.

(2) Where the Court of Appeals appoints an attorney in a proceeding involving an appeal from a judgment or disposition on a petition alleging abuse or neglect or a judgment on a motion to terminate parental rights, the attorney may file a motion to withdraw with the Court of Appeals within fifteen (15) days after the Court of Appeals issues a decision fully disposing of the issues on appeal. If an attorney files a motion to withdraw with the Court of Appeals as provided herein, then the attorney must notify the client of the filing of the motion to withdraw and inform the client when a petition for a writ of certiorari may be filed with the Supreme Court under Rule 12-502(B) NMRA. An order disposing of the motion to withdraw is the final action by the Court of Appeals for purposes of Rule 12-502(B) NMRA.

D. **Notice of change of address or telephone number.** Counsel for a party, or any party proceeding pro se, shall promptly give notice of any change of mailing address or telephone number by filing a notice with the clerk of the court in each pending cause in which counsel or the party is appearing and by serving the notice upon all other counsel and pro se parties.

E. **Nonadmitted counsel in civil cases.**

(1) Counsel not admitted to practice law in New Mexico, but who are admitted to practice law and in good standing in another jurisdiction, may, upon compliance with Rule 24-106 NMRA, sign briefs, motions, and other papers, and may orally argue before the appellate court, only in association with counsel admitted to practice law and in good standing in New Mexico. New Mexico counsel shall sign the first paper filed in the appellate court, and New Mexico counsel's name and address shall appear on all subsequent papers filed. Unless excused by the appellate court, New Mexico counsel shall also be present in person in all proceedings.

(2) Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another jurisdiction and that they have complied with Rule 24-106 NMRA. Such affidavit shall be filed with the first paper filed in the appellate court, or as soon as practicable after a party decides on representation by nonadmitted counsel. If nonadmitted counsel has already filed an affidavit in compliance with Rule 24-106 NMRA in a lower court, then a copy of that affidavit shall be filed in the appellate court. Upon filing of the affidavit, nonadmitted counsel will be deemed admitted subject to the other terms and conditions of this paragraph. Proof of service of the affidavit shall be made as provided in Rule 12-307 NMRA. A separate motion and order are not required for the participation of nonadmitted counsel.

(3) For good cause shown, the appellate court may revoke the privilege of any nonadmitted counsel to appear in any proceeding.

(4) New Mexico residents not admitted to practice law in this state may not appear as counsel, except pro se.

F. **Nonadmitted counsel in criminal cases.**

(1) Counsel not admitted to practice law in New Mexico but who are admitted to practice law and in good standing in another jurisdiction may, upon compliance with Rule 5-108 NMRA, sign briefs, motions, and other papers, and may orally argue before the appellate court, only in association with counsel admitted to practice law and in good standing in New Mexico. New Mexico counsel shall sign the first paper filed in the appellate court, and New

Mexico counsel's name and address shall appear on all subsequent papers filed. Unless excused by the appellate court, New Mexico counsel shall also be present in person in all proceedings.

(2) Nonadmitted counsel shall state by affidavit that they are admitted to practice law and are in good standing to practice law in another jurisdiction and that they have complied with Rule 5-108 NMRA. Such affidavit shall be filed with the first paper filed in the appellate court, or as soon as practicable after a party decides on representation by nonadmitted counsel. If nonadmitted counsel has already filed an affidavit in compliance with Rule 5-108 NMRA in a lower court, then a copy of that affidavit shall be filed in the appellate court. Upon filing of the affidavit, nonadmitted counsel will be deemed admitted subject to the other terms and conditions of this paragraph. Proof of service of the affidavit shall be made as provided in Rule 12-307 NMRA. A separate motion and order are not required for the participation of nonadmitted counsel, unless nonadmitted counsel has not previously complied with Rule 5-108 NMRA.

(3) For good cause shown, the appellate court may revoke the privilege of any nonadmitted counsel to appear in any proceeding.

(4) New Mexico residents not admitted to practice law in this state may not appear as counsel, except pro se.

G. **Capital appellate counsel.** The defendant in any appeal in a case in which a sentence of death may be imposed must be represented by at least two (2) attorneys, one (1) of whom meets the minimum standards set forth in this paragraph for first-chair capital appellate defense attorneys and another who meets the minimum standards set forth in this paragraph for first-chair or second-chair capital appellate defense attorneys.

(1) The minimum standards for first-chair capital appellate defense attorneys include the following:

- (a) membership in good standing of any state bar;
- (b) a minimum of five (5) years active trial or appellate experience in criminal cases as a licensed attorney immediately preceding appointment;
- (c) prior experience in the last three (3) years as lead counsel or co-counsel in the appeal of at least six (6) felony jury convictions in federal or state court, at least two (2) of which were murder convictions; and
- (d) completion within two (2) years prior to entry of appearance of at least twelve (12) hours of training in capital representation in a program approved by the Law Offices of the Public Defender and qualified for New Mexico MCLE credit.

(2) The minimum standards for second-chair capital appellate defense attorneys include the following:

- (a) membership in good standing of any state bar;
- (b) a minimum of three (3) years active trial or appellate experience in criminal cases as a licensed attorney immediately preceding appointment;
- (c) prior experience in the last eighteen (18) months as lead counsel in the appeal of at least four
- (4) felony convictions in state or federal court; and
- (d) completion within two (2) years prior to entry of appearance of at least twelve (12) hours of training in capital representation in a program approved by the Law Offices of the Public Defender and qualified for New Mexico MCLE credit. This requirement may be met within one (1) year after appointment as second-chair counsel in a death penalty appeal.

The district court shall require any attorney who enters an appearance to show that the attorney is a qualified capital appellate defense attorney in accordance with the requirements of this paragraph. If the district court determines that the defendant is not represented by two (2) qualified capital appellate defense attorneys, at least one (1) of whom is qualified to act as first chair, the district court, in the case of indigent defendants, shall order the Law Offices of the Public Defender to appoint one (1) or more qualified attorneys to ensure that the defendant is represented as required by this paragraph.

[As amended, effective September 1, 1993; January 1, 1997; May 1, 2003; January 20, 2005; as amended by Supreme Court Order No. 05-8300-018, effective October 11, 2005; by Supreme Court Order No. 07-8300-024, effective November 1, 2007; by Supreme Court Order No. 08-8300-016, effective June 20, 2008; by Supreme Court Order No. 09-8300-010, effective May 6, 2009; by Supreme Court Order No. 11-8300-017, effective May 16, 2011; by Supreme Court Order No. 12-8300-025, effective for all cases filed or pending on or after January 7, 2013; as amended by Supreme Court Order No. 16-8300-011, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. *See* NMSA 1978, § 14-15-4.

In 2016, Paragraph C of this rule was amended, and former Paragraph D was omitted, to more accurately reflect the procedure for attorney withdrawal or substitution in cases before the appellate courts. The 2016 revisions reflect that an individual attorney, law firm, or governmental agency may withdraw from a case only upon motion and order from the appellate court, except that an attorney of a law firm or governmental agency may withdraw from a case by filing a notice with the appellate court if at least one other attorney from the firm or agency remains in the case. When a successor attorney from a law firm or governmental agency enters an appearance in a case, the original attorney retains discretion either to stay in the case or to file a notice of withdrawal.

The 2023 amendments to Rule 12-302 NMRA allow motions to withdraw by appellate counsel whom the Court of Appeals appoints in proceedings involving appeals from adjudications of abuse or neglect or the termination of parental rights. A party's right to court-appointed counsel in such proceedings expires when the Court of Appeals fully disposes of the issues on appeal. After the Court of Appeals issues a decision fully disposing of the issues on appeal, court-appointed counsel may file a motion to withdraw and, after filing, must inform their client both of the motion to withdraw and by when a petition for a writ of certiorari may be filed with the Supreme Court. Under the 2023 amendments to Rule 12-302 NMRA, the filing of a motion to withdraw extends the time by which a party may file a petition for a writ of certiorari. The final action of the Court of Appeals for purposes of seeking certiorari review under Rule 12-502(B) NMRA is the order disposing of the motion to withdraw. Accordingly, the withdrawal of court-appointed counsel in appellate proceedings involving adjudications of abuse or neglect or the termination of parental rights does not decrease the time ordinarily allowed to a party seeking certiorari review of a judgment by the Court of Appeals.

[As amended by Supreme Court Order No. 16-8300-011, effective for all cases pending or filed on or after December 31, 2016; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]



[rules.supremecourt-grp] Rule Proposal Comment Form, 07/31/2023, 1:51 pm

1 message

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Mon, Jul 31, 2023 at 1:51 PM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your Name: Kelly P. O'Neill

Phone Number: (505) 412-8023

Email: kelly.oneill@cyfd.nm.gov

Proposal
Number: 2023-023

Comment: Comment attached.

Upload: [2023.07.31-Comment-of-CYFD-to-Proposed-Amendments-to-Rules-of-Appellate-Procedure-Proposal-2023-023.docx.pdf](#)



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**COMMENT OF THE
NEW MEXICO CHILDREN, YOUTH & FAMILIES DEPARTMENT
TO PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE
PROPOSAL 2023-023**

July 31, 2023

Elizabeth A. Garcia
Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848

Dear Ms. Garcia,

The New Mexico Children, Youth & Families Department (CYFD or the Department) submits the following comment to the Supreme Court of New Mexico regarding Rules of Appellate Procedure Proposal 2023-023, which proposes to amend Rule 12-302 with the goal of clarifying the withdrawal process for court-appointed appellate counsel in abuse or neglect or termination of parental rights cases after the Court of Appeals issues a decision fully disposing of the issues on appeal.

The Department's comment addresses the addition of the following language to Rule 12-302:

Where the Court of Appeals appoints an attorney in a proceeding involving an appeal from a judgment or disposition on a petition alleging abuse or neglect or a judgment on a motion to terminate parental rights, the attorney may file a motion to withdraw with the Court of Appeals within fifteen (15) days after the Court of Appeals issues a decision fully disposing of the issues on appeal. If an attorney files a motion to withdraw with the Court of Appeals as provided herein, then the attorney must notify the client of the filing of the motion to withdraw and inform the client when a petition for a writ of certiorari may be filed with the Supreme Court under Rule 12-502(B) NMRA. An order disposing of the motion to withdraw is the final action by the Court of Appeals for purposes of Rule 12-502(B) NMRA.

Regarding the Application of Proposed Amendments to Rule 12-302

The proposed draft includes the following language: "an appeal from a judgment or disposition on a petition alleging abuse or neglect." The adjudicatory judgment is a final, appealable order. *State ex rel. Child., Youth and Fams. Dep't v Frank G.*, 2005-NMCA-026, ¶¶ 39–42, 137 N.M. 137,108 P.3d 543, *aff'd on other grounds*, *In re Pamela A.G.*, 2006-NMCA-019, 139 N.M. 459,134 P.3d 746. However, to the Department's knowledge, our appellate courts have not held that the dispositional order is a final, appealable order. The adjudicatory hearing and dispositional hearing are separate hearings. *See* NMSA 1978, § 32A-4-22(A) (2022) ("If not held in conjunction with the adjudicatory hearing, the dispositional hearing shall be commenced within thirty days after the

conclusion of the adjudicatory hearing.”); *see also In re Grace H.*, 2014-NMSC-034, ¶¶, 335 P.3d 746 (includes a discussion of the timeline of an abuse/neglect proceeding and purpose of hearings); *State ex rel. Child., Youth and Fams. Dep’t v. Maria C.*, 2004-NMCA-083, ¶¶ 18, 21, 136 N.M. 53, 94 P.3d 796 (includes a discussion on timeline of an abuse/neglect proceeding).

The proposed amendments exclude appeals from custody hearings, NMSA 1978, §32A-4-18(A) (2022). An order from a custody hearing is an appealable order. NMSA 1978, § 32A-4-18(I) (2022) (“Notwithstanding any other provision of law, a party aggrieved by an order entered pursuant to this section shall be permitted to file an immediate appeal as a matter of right.”)

Regarding Representation of Respondents by Court-Appointed Counsel in Appeals from Abuse/Neglect Proceedings

The proposed amendments permit attorneys who have been appointed to represent respondents in appeals before the New Mexico Court of Appeals to move the Court to withdraw from representation “after the Court of Appeals issues a decision fully disposing of the issues on appeal.” It appears that the proposed amendments contemplate a scenario in which the respondent—either *pro se* or with the assistance of private counsel—is the party who files a petition for writ of certiorari with the Supreme Court. Thus, the onus is on the indigent respondent to assess the merits of filing a petition for writ of certiorari or to finance the filing a petition for writ of certiorari by private counsel. The proposed amendments do not appear to contemplate a scenario in which the party that files a petition for writ of certiorari is the Department or the child. For instance, if the respondent is the prevailing party on appeal in the Court of Appeals, the Department or the child may wish to file a petition for writ of certiorari. Should court-appointed counsel for the respondent be permitted to withdraw from representation, the respondent would be placed in a situation where the respondent is self-represented in the Supreme Court. Thus, an indigent party who was previously represented by court-appointed counsel would be required to represent his own interests even though he never asked the Court to represent himself. *See* NMSA 1978, § 32A-4-10(A) (2005) (“At the inception of an abuse or neglect proceeding, counsel shall be appointed for the parent, guardian or custodian of the child. The appointed counsel shall represent the parent, guardian or custodian who is named as a party until an indigency determination is made at the custody hearing.”); *see also State ex rel. Child., Youth and Fams. Dep’t v. Maisie Y.*, 2021-NMCA-023, ¶¶ 12–15, 489 P.3d 964 (a respondent may waive his or her right to counsel so long as the respondent affirmatively states he or she wishes to waive the right to counsel and the waiver is done in an intelligent and knowing manner). Additionally, if a respondent is self-represented in the Supreme Court, the respondent’s lack of knowledge regarding court procedures could lead to a delay in proceedings, undermining the Supreme Court’s order that expedites procedures when it grants a petition for writ of certiorari in an appeal from a children’s court case. *See In the Matter of the Adoption of a Policy to Expedite the Process for Specific Categories of Cases upon the Issuance of a Writ of Certiorari*, S. Ct. Order No. 13-8500 (June 5, 2013) (adopting procedures to certain appeals, including appeals arising from abuse/neglect proceedings, to expedite the appellate process).

The Department is concerned that the filing of a motion to withdraw could lead to unnecessary delay in children’s court proceedings. When a motion is filed in the Court of Appeals, there is no deadline by which the Court of Appeals must decide the motion. In the Department’s experience,

the Court of Appeals often takes months to decide motions that are filed. For example, the Department sometimes files motions in which it asks the Court of Appeals for assistance in requiring trial counsel to file a docketing statement. The Department filed two such motions in March 2021. The Court of Appeals did not rule on the motions for seven (7) months. Abuse/neglect proceedings involve children who are placed out of home and in foster care. Time is of the essence in abuse/neglect proceedings, which is why the Court of Appeals and Supreme Court have developed procedures for expediting the appellate process in appeals arising from abuse/neglect proceedings. See *In the Matter of the Adoption of a Policy to Expedite the Process for Specific Categories of Cases upon the Issuance of a Writ of Certiorari*, S. Ct. Order No. 13-8500 (June 5, 2013) (adopting procedures to certain appeals, including appeals arising from abuse/neglect proceedings, in order to expedite the appellate process); Rule 12-210(F) NMRA (2017) (adopting expedited bench decision program for certain appeals and is often applied to abuse/neglect appeals); *In re Court of Appeals Caseload*, No. 1-21 (Oct. 17, 1995) [reprinted as Appendix to *State v. Curley*, 1997-NMCA-038, 123 N.M. 295, 939 P.2d 1103] (discussing procedure for appeals assigned to the Expedited Bench Decision Program, which is often utilized by the Court of Appeals in appeals from abuse/neglect proceedings); New Mexico Court of Appeals Policies as Adopted May 23, 2023, Section V(f) (May 23, 2023) (giving highest priority to several categories of cases, including appeals from children's court). However, none of these rules or procedures addresses the length of time by which the Court of Appeals must rule on a motion to withdraw filed in an appeal from an abuse/neglect proceeding. Further, the Department has no means to expedite the Court's decision on a motion to withdraw. Our appellate courts have developed rules and policies for prioritizing appeals from children's court because children should not linger in foster care.

[I]n balancing the interests of the parents and children, the court is not required to place the children indefinitely in a legal holding pattern. To do so would force the children to wait for the uncertain possibility that the natural parents, despite their persistent and longstanding disregard of the children's interests, may remedy past faults which have rendered the children neglected.

In re Reuben O., 1986-NMCA-031, ¶ 36, 104 N.M. 644, 725 P.2d 844. To the extent that it is able, the Department also has an interest in making sure that proceedings in the appellate court are not delayed.

It cannot be disputed that the state has a substantial interest in protecting children. Also, particularly in these economic times, it bears remembering that government resources are limited, and the state has a legitimate interest in making the best use of its limited resources.

State ex rel. Child., Youth and Fams. Dep't v. Amy B., 2003-NMCA-017, ¶ 17, 133 N.M. 136, 61 P.3d 845 (internal quotation marks and citation omitted).

The Department appreciates the work of the Appellate Rules Committee and hopes that the Committee can address the concerns raised by CYFD.

Sincerely,

/s/ Kelly P. O'Neill

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