NEW MEXICO MAGISTRATE COURT

CRIMINAL PROCEDURES MANUAL

NEW MEXICO ADMINISTRATIVE OFFICE OF THE COURTS

UNM SCHOOL OF LAW JUDICIAL EDUCATION CENTER

Current through March 2014

New Mexico Magistrate Court Criminal Procedures Manual

New Mexico Administrative Office of the Courts, http://www.nmcourts.gov/
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Preface

Acknowledgements

The *New Mexico Magistrate Court Criminal Procedures Manual* was drafted by Shari Weinstein, Deputy Director of the Magistrate Court Division of the New Mexico Administrative Office of the Courts, based in part upon prior similar manuals. Ms. Weinstein acknowledges Magistrate Judge Buddy J. Hall for his expertise and assistance in reviewing portions of the manual. Nora Wilson, third year law student employee at the UNM School of Law Judicial Education Center, greatly contributed to the final manual by editing and cite-checking as well as preparing the manual for printing. Laura Bassein, Senior Attorney, managed this project for the Judicial Education Center.

Purpose

The *New Mexico Magistrate Court Criminal Procedures Manual* is intended to serve as a comprehensive resource guide for magistrate court judges and as a valuable resource for magistrate court staff. It is a current and convenient secondary source of law, policy, and practice in cases that arise in magistrate courts. **Do not rely** on the manual as legal authority. Instead, consult the New Mexico statutes, rules, forms, uniform jury instructions, case law, and court policies and procedures for specific requirements.

Style and Format

The *New Mexico Magistrate Court Criminal Procedures Manual* is written in a descriptive style. Citations to statutes, rules, and cases use the most concise style possible while still providing adequate reference information. In general, citations in the text use the following style:

- Laws: New Mexico statutes are cited as Section __-__-__, such as Section 35-8-1, without "NMSA 1978."
- Rules: New Mexico rules are cited as Rule __-___, such as Rule 6-207, without "NMRA."
- Cases: New Mexico cases are cited using the vendor-neutral citation form.

Effective Date

The information in this manual is current through March 2014. The manual may be updated periodically as funds and staffing allow. Contact the Administrative Office of the Courts at 505-476-6097 with questions about the substantive content. Contact the Judicial Education Center at the address below for information about the status and availability of updates.

Additional Copies

For information on obtaining copies of this manual, contact the Judicial Education Center. The manual is available free of charge on the Judicial Education Center website, http://jec.unm.edu/.

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Introduction

I. The Court System

There are three levels of courts in New Mexico: limited jurisdiction, general jurisdiction, and appellate.

A. Limited jurisdiction courts include the magistrate, metropolitan, municipal and probate courts. Limited jurisdiction courts have jurisdiction which has been granted to them through the legislature or the state constitution. They only have the authority to handle cases as designated in the law. Magistrate courts are not courts of record. There is at least one magistrate court in each county. All magistrate courts are full-time courts with some judges working in circuit courts in different locations (Quemado, Anthony, Hatch, Questa, Estancia, Chama, Jal).

B. The district court is a general jurisdiction court. It has appellate jurisdiction over the limited jurisdiction courts and hears cases on appeal from the magistrate court in a trial de novo (a new trial). There are 13 judicial districts statewide. The district court has general jurisdiction over civil, criminal, domestic relations, and juvenile matters.

C. The Supreme Court and the Court of Appeals are the appellate courts. They do not preside over trials. They handle appeals from decisions from the lower courts. An appeal is a review of the lower court proceedings to ensure the law was properly followed. The appellate court reviews the record or transcription of the prior proceedings, reviews briefs written by the attorneys for the parties, and often hears arguments by the attorneys. Witnesses do not testify and no new information can be presented. Generally, the Court of Appeals hears appeals of cases from the district court, and the Supreme Court hears appeals of cases from the Court of Appeals.

II. Magistrate Judges

A. Qualifications (Section 35-2-1): The qualifications for a magistrate judge are that s/he be: 1) a qualified elector and resident of the magistrate district for which s/he is elected or appointed; 2) s/he has graduated from high school or has attained the equivalent of a high school education as indicated by possession of a GED certificate; and 3) in magistrate districts with a population of more than two hundred thousand persons in the last federal decennial census, s/he is a member of the bar of this state and licensed to practice law in this state, but s/he shall not engage in the private practice of law during his or her tenure in office.

B. Certification of qualification (Section 35-2-3):

1. Within 15 days after each general election, the Administrative Office of the Courts (AOC) shall notify each apparently successful candidate for the office of magistrate of the requirements for qualification. Within 30 days after election or appointment, each apparently successful candidate and

each appointee shall file with the AOC an application for certificate of magistrate qualification. The application shall be in a form prescribed by the AOC and shall include: (1) the oath of office prescribed by the constitution for public officers subscribed to by the applicant; (2) the applicant's certificate of election or appointment; and (3) evidence of the applicant's possession of personal qualifications required by law.

2. Each applicant for a certificate of magistrate qualification who has not previously held such a certificate shall attend a qualification training program conducted by the AOC as a prerequisite to the issuance of his or her first certificate. The AOC shall prescribe the content of the qualification training program so as to inform applicants with reference to judicial powers and duties. This new judges training is held as soon as possible after the election.

3. Upon approval of the application and, when required, upon the applicant's attendance at a qualification training program, the AOC shall certify the applicant's initial qualification in accordance with the requirements of law by issuing to the applicant a "certificate of magistrate qualification." Each magistrate shall post the certificate in a conspicuous place in his or her courtroom.

4. Each certificate of magistrate qualification automatically expires at the end of the term to which the magistrate is elected or appointed or when his or her successor in office is qualified, whichever is later.

5. Any magistrate who fails to complete the requirements for initial qualification within 45 days of election or appointment shall be held to have resigned his or her office, and the AOC shall certify the existence of the vacancy to the governor.

C. Maintaining Qualifications (Section 35-2-4): As a qualification for continuing in office, each magistrate shall attend at least one magistrate training program each year unless excused in writing by the Chief Justice of the Supreme Court for good cause shown. Any magistrate who fails to attend and remain present through all proceedings of at least one magistrate training program during any calendar year without being excused shall be held to have resigned his/her office, and the AOC shall revoke his or her certificate of magistrate qualification and certify the existence of the vacancy to the governor.

D. Selection Process

1. Election (Section 35-1-3):

a. Except as otherwise provided by law, magistrates shall be nominated and elected at large within each magistrate district at the primary and general elections. In magistrate districts having more than one magistrate, the separate offices shall be designated by divisions and, in all appointments to fill vacancies and in all

nominations and elections to these offices, candidates shall be designated as appointed or elected to the office of magistrate of a specific division.

b. The term for a magistrate judge is four years.

2. Appointment (Section 35-2-2): The governor shall fill vacancies in the office of magistrate by appointment of persons who possess the personal qualifications established by law to serve until the next general election.

E. Jurisdiction: In addition to the jurisdiction discussed in this manual, a magistrate judge has jurisdiction to:

1. Administer oaths and affirmations and take acknowledgements of instruments in writing, but shall charge no fee. Section 35-3-1.

2. Perform marriages anywhere in the state of New Mexico, but shall charge no fee for it. Section 35-3-2. Each magistrate judge has discretion as to whether or not s/he will perform marriages for same sex couples. However, if s/he chooses not to perform same sex marriages, the judge should not perform any marriages.

F. Presiding Judge (Section 35-1-37): In magistrate districts where two or more divisions operate as a single court, the director of the AOC shall designate the magistrate of one of the divisions as "presiding magistrate" to perform administrative duties prescribed by regulation of the AOC. The duties of the presiding judge are delineated in Supreme Court Policy Directive #5. (See Appendix 1).

G. A Magistrate judge is one who holds office hours a minimum of (40) hours per week. Section 35-1-36.1. This Court regards that number as a minimum. As elected public servants, magistrate judges must be prepared to work more than forty (40) hours per week if required. Magistrates shall spend at least thirty-five (35) hours per week physically present at a court, traveling to a court, or on court-related activities such as serving on committees or attending training. Because magistrates are often contacted by law enforcement during hours when the court is not open, this Court regards the remaining five hours that magistrates are required by statute to serve every week to be satisfied by such availability.

Magistrate Judge Leave, Supreme Court Policy Directive #4 (See Appendix 1): All magistrates shall notify the presiding judge of their magistrate district, or, if there is no presiding judge, the AOC director (or designee), of any absences longer than two days from the office that cannot or will not be covered by another magistrate during the absence.

III. Judicial Agencies

A. Administrative Office of the Courts (AOC): By Supreme Court order and by statute, Section 35-7-1, the AOC is officially the administrative arm of the

Supreme Court. The AOC supervises all matters relating to the administration of the courts and is the direct supervisory agency over the magistrate courts. The AOC hires all the magistrate court employees including the court manager and clerks. It creates and administers the budget of the magistrate courts and leases all magistrate facilities.

B. Judicial Standards Commission (JSC): The JSC is an independent state commission that investigates complaints of judicial misconduct, holds hearings, and makes recommendations to the Supreme Court regarding the removal, retirement, and/or discipline of any state justice, judge or magistrate. When appropriate, the JSC may: 1) close a matter, 2) informally caution a judge or refer the judge for counseling or assistance, or 3) hold hearings or appoint masters who are justices or judges of courts of record to conduct hearings. After hearings, the JSC may recommend to the Supreme Court that a judge be removed, retired and/or disciplined. After the filing of the formal record, findings and conclusions and recommendation in the Supreme Court, the Court shall review the record and order the removal, retirement, and/or discipline of the judge or reject the JSC's recommendation.

IV. Magistrate Court Staff

A. Court Manager: The court manager of the magistrate court is charged with the administrative and clerical functions of the court. The manager is responsible for: 1) the supervision of the processing of all paper work in the court; 2) the establishment of office procedures, including setting up a master calendar to include sessions for walk-in defendants; 3) the management of the activities of all clerks; and 4) the implementation of administrative directives from the AOC. The manager shall work at the direction of the presiding judge so long as the judge's directions are not contrary to statute, Supreme Court rule, this manual, AOC's policies and directives, or other applicable law. The manager shall work with all judges in the court to maintain good communication.

B. Role of Court Clerk: The clerk is often the first contact a person has with the court, prior to seeing a judge. The clerk maintains the case files, performs court room duties, files papers for the judges and performs other duties as assigned by the court manager.

C. Clerks may also:

1. Administer oaths and affirmations, if the magistrate court has a seal, where magistrates may do so. Section 14-13-1.

2. Perform notarial acts. The clerk shall not charge notary fees for this service and shall only notarize during court hours. Section 14-14-3.

D. Records Inspection Requests (Supreme Court Policy Directive #9 (See Appendix 1); Section 14-2-1):

1. The purpose of the Inspection of Public Records Act is to make available to the public, as part of the routine duties of the courts, the greatest possible information about the affairs of the magistrate courts and the official acts of the judges and clerks.

2. The time requirements are mandated by statute. It is essential that the courts give priority to responding to written requests, including email requests, for record inspection. Penalties of $100 per day of noncompliance can be imposed.

3. All written requests are deemed denied if the records are not provided for inspection within 15 calendar days of receipt of the request; the only exception is a request that is extremely burdensome or broad. A denial of a written request requires a written explanation. If a court receives a request that is extremely burdensome, requests confidential information, or requests statistical information from the case management system, the court shall contact the AOC.

4. The general rule is that every person has a right to inspect public records of this state. There are exceptions to this rule listed in Section 14-2-1.

5. The AOC will supply the courts with an administrative form that will expedite responses to written requests. This form provides for a 3-day notice that the records are available at another location, a 3-day notice that costs must be paid in advance of mailing requested copies, a 3-day notice of the date set for records inspection, a 15-day notice that more time is needed for an extremely burdensome or broad request, and a 15-day notice of denial.

6. Procedure for requesting records (Section 14-2-8):

a. Any person wishing to inspect public records may submit an oral or written request to the person in charge of records, called the records custodian. However, the procedures set forth in this section shall be in response to a written request. The failure to respond to an oral request shall not subject the custodian to any penalty.

b. A written request shall provide the name, address and telephone number of the person seeking access to the records and shall identify the records sought with reasonable particularity. No person requesting records shall be required to state the reason for inspecting the records.

c. A custodian receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances,

but not later than 15 days after receiving a written request. If the inspection is not permitted within three business days, the custodian shall explain in writing when the records will be available for inspection or when the public body will respond to the request. The three-day period shall not begin until the written request is delivered to the office of the custodian.

d. In the event that a written request is not made to the custodian, the person receiving the request shall promptly forward the request to the custodian of the requested public records, if known, and notify the requester. The notification to the requester shall state the reason for the absence of the records from that person's custody or control, the records' location and the name and address of the custodian.

7. Records custodian in the magistrate court

a. Each presiding judge/court manager may designate a clerk to serve as records custodian.

b. The records custodian shall receive and respond to written requests for records inspection according to the time frame set out in policy and statute.

c. The presiding judge may appoint a clerk to respond to oral requests for records inspection. The records custodian may also be responsible for oral requests. To expedite records inspection upon oral request, the courts are encouraged to allow any available clerk to respond to the request when the demand is made.

d. The clerk should charge the appropriate fee for copying and certification.

8. Responding to written requests for inspection

a. A written request is received when it is delivered to the court, not when the records custodian receives it.

b. If the records cannot be provided immediately, the custodian shall make the records available within 3 business days.

c. If the records cannot be made available for inspection within 3 business days after receipt, the custodian shall give written notice of when the records will be available.

d. The custodian shall provide records for inspection no later than 15 calendar days after receipt of the request unless the request is extremely burdensome or broad.

e. If a request is extremely burdensome or broad, the custodian shall give written notice within 15 calendar days of receipt that additional time is needed. The records must be provided within a reasonable time.

f. If the court manager or the judge believes the request to be burdensome, the court shall contact the AOC for assistance and direction.

9. Requests for Electronic Information (statistics): All requests for electronic transfer of information, for statistics derived from the court's database, or for any other request to be derived from information in the court's electronic database not addressed in this section shall be referred to the Chief Information Officer at the Judicial Information Division.

V. Destruction of Records

A. The presiding judge of each Magistrate Court will designate a Records Liaison Officer (RLO) in each court and circuit court. This must be done every fiscal year. The RLO may be a magistrate, the chief clerk, or another clerk. The RLO will mail the original designation to the AOC who will forward it to Records and Archives (R & A).

B. The person designated by the magistrate must take the Records and Information Management Training (RIM Training) class offered by R & A in order to become certified as an RLO.

C. The RLO will be in charge of identifying and processing documents to be destroyed, requesting destruction, tracking progress of the request, arranging for the documents to be destroyed, and certifying the destruction.

D. In the request for destruction of documents (Destruction Request Letter), the RLO shall mark both civil and criminal files "Confidential," as they may contain sensitive identification information such as social security numbers and birth dates.

E. The RLO will submit the court's destruction request on the Records and Archives designated form to the Field Services Supervisor Fiscal Services Division (FSD). Fill out the Request for Disposition form completely and make sure the RLO has signed it.

F. The Field Services Supervisor will recommend approval or disapproval of the request, based on the court's bond report, to the Assistant Director at the FSD.

G. The Assistant Director will approve or deny the request. If approved, the Assistant Director will send the original Request for Disposition form to R & A and the RLO will receive a copy. If the request is denied, the Assistant Director will explain why.

H. The FSD will create a spreadsheet to track destruction requests.

I. R & A will notify the RLO whether the RLO's request is approved or disapproved.

J. R & A's letter may include instructions as to the appropriate methods of destruction.

K. The RLO is responsible for sending copies of all correspondence received from R & A to the Assistant Director of the FSD.

L. The RLO shall insure that the records are destroyed in the approved manner. The RLO should be careful to follow any instructions in R & A's approval letter as to the methods of destruction. The RLO shall insure that the quantity of boxes destroyed is the same as the quantity of boxes identified in the request.

M. The RLO may request that the AOC send a vendor to destroy the files on site or to pick them up for appropriate destruction by contacting the FSD.

N. When the boxes for destruction are picked up, the RLO shall complete R & A's certificate of destruction. A vendor may have its own form which the RLO shall sign as a courtesy to the vendor, but the RLO shall ensure that the vendor also signs the R & A form.

O. The RLO shall send the original certificate of destruction, original invoice and original receipt from the vendor to the Assistant Director of the FSD who will make copies and then send the originals to R & A. The RLO should also retain copies.

VI. Court Management Responsibilities

Presiding Judge	***Associate Judge***	***Court Manager***
Informed by court manager of major decisions made by court manager; decisions to be made by presiding judge; or issues to be discussed.	Informed of decisions and issues which cannot wait for judges' meetings by presiding judge or court manager.	Informs presiding judge of major decisions made by court manager; decisions to be made by presiding judge; or issues to be discussed.

Presiding Judge	***Associate Judge***	***Court Manager***
Calls judges meetings at regularly set times and as needed. At these meetings, among other things, the judges and the court manager discuss the court business processes; how Odyssey forms and capabilities are being utilized by the court; and other issues raised by any of the judges or the court manager.	Attends judges meetings at regularly set times and when called by the presiding judge. At these meetings, among other things, the judges and the court manager discuss the court business processes; how Odyssey forms and capabilities are being utilized by the court; and other issues raised by any of the judges or the court manager.	Attends judges meetings at regularly set times and when called by the presiding judge. At these meetings, among other things, the judges and the court manager discuss the court business processes; how Odyssey forms and capabilities are being utilized by the court and other issues raised by any of the judges or the court manager. Puts requests for changes in Odyssey into HelpDesk.
Sets rules for case processing for all judges to follow, after discussion with associate judges. For example: How many continuances will be granted to each litigant without good cause shown? How is the court going to select juries? What schedule should be established for the judges to be responsible for making 48-hour-determinations on the weekends?	Gives input before rules established. Follows rules announced by presiding judge.	Gives input from clerk standpoint before rules established. Designs business practice in clerks' office so rules can be implemented smoothly.
Follows and enforces local rules and policies, on the part of the associate judges and among litigants and court customers.	Follows and enforces local rules and policies among litigants and court customers.	Clerks may inform the public and litigants of policies, but they have no authority to enforce the policies.
Enforces the Supreme Court's policy that the court will use Odyssey forms where available with the least possible manual modification by clerks.	Follows the Supreme Court policy.	Ensures that the clerks are adequately trained in Odyssey. Assigns clerks to the courtroom for appropriate sessions except in very small courts.

Presiding Judge	***Associate Judge***	***Court Manager***
Makes adjudicatory and discretionary decisions with regard to what happens in a case.	Makes adjudicatory and discretionary decisions with regard to what happens in a case.	Does not make adjudicatory or discretionary decisions with regard to what happens in a case; makes decisions regarding staff assignments and use of case management system. Has files ready for judge. Organizes files so they can be found. Sees that judicial decisions are reflected in case management system.
Elected; appointed presiding judge by AOC Director.	Elected.	Employed by AOC. Hired, evaluated by AOC with input from judges, and (if necessary) fired by AOC.
Cooperates with AOC in supervising court manager. Approves court manager's leave and timesheet. Communicates with AOC regarding the need for and administration of any discipline of the court manager.	Does not supervise court manager.	Supervised by AOC magistrate division director in cooperation with presiding judge.
Does not supervise clerk staff. Informs court manager of clerk performance issues. Informs magistrate division director if serious performance issues persist or if the court manager does not address issues. Informed by court manager of discipline issues among staff.	Does not supervise clerk staff. Informs court manager of clerk performance issues. Informs presiding judge and magistrate division director if serious performance issues persist. Informed of discipline issues among staff on as-needed basis.	Supervises clerk staff. Schedules and approves leave of staff; sees that staff are trained; responsible for discipline of staff if necessary. Keeps presiding judge informed of major staff issues.
May sit on interview panels.	May sit on interview panels.	Sits on interview panels; fills out hiring packet making recommendations on hiring subordinate staff to AOC.

Presiding Judge	***Associate Judge***	***Court Manager***
May give court manager feedback on performance of court staff.	May give court manager feedback on performance of court staff.	Evaluates performance of court staff.
Does not yell at staff.	Does not yell at staff.	Does not yell at staff.
Coordinates with the AOC and the court manager regarding the use of space, equipment, and facilities of the court.	Makes suggestions to presiding judge regarding the use of space, equipment, and facilities of the court.	Coordinates with the AOC and the presiding judge regarding the use of space, equipment, and facilities of the court.
Communicates with the court manager and if necessary with the landlord on building issues. Contact AOC if issues not being addressed.	Communicates with presiding judge on building issues and with AOC if critical issues are not being addressed.	Should have primary responsibility for initial communication with landlord on building issues. If landlord does not respond, inform AOC. Keep judges informed.
Must not order any clerk or clerks to wait alone with defendant until law enforcement arrives to arrest defendant, to make a sweep of the building, or to put defendant in a holding cell.	Must not order any clerk or clerks to wait alone with defendant until law enforcement arrives to arrest defendant, to make a sweep of the building, or to put defendant in a holding cell.	Must contact AOC as soon as possible if judge orders any clerk or clerks to wait alone with defendant until law enforcement arrives to arrest defendant, to make a sweep of the building, or to put defendant in a holding cell.
May contact AOC.	May contact AOC.	May contact AOC.

Major Sources: Chief Justice Petra Jimenez Maes; Supreme Court Order No. 09-8200, In the Matter of Superintending Control Over Magistrate Courts; New Mexico Judicial Branch Personnel Rules; Court Manager Job Description; New Mexico Statutes Annotated Section 35-1-1 *et. seq.*

Karen Janes[*], April 24, 2013
Approved by Chief Justice Petra Jimenez Maes, April 26, 2013

[*] Former Magistrate Court Division Director

Section 1 Misdemeanors: General; Procedures before Trial

1.1 General

A. Definitions

1. A crime is a misdemeanor if it is a crime punishable by imprisonment in the county jail for a definite term more than six months but less than one year. Section 30-1-6(B).

2. A crime is a petty misdemeanor if it is a crime punishable by imprisonment in the county jail for a definite term not to exceed six months or such lesser term as authorized by statute. Section 30-1-6(C).

B. Jurisdiction

1. Jurisdiction refers to the judicial power to hear and determine a criminal prosecution, whereas venue relates to and defines the particular county or territorial area within a state or district in which the prosecution is to be brought or tried. *State v. Ramirez*, 1976-NMCA-101, *overruled on other grounds, Sells v. State*, 1982-NMSC-125.

2. The Magistrate Courts have jurisdiction in:

   a. All cases of misdemeanors, including petty misdemeanors and county ordinances. Section 35-3-4.

   b. Any other non-felony criminal actions where jurisdiction is specifically granted by law. For example, see game and fish violations in Section 17-2-9.

3. A magistrate judge also has jurisdiction in any motor vehicle related criminal action arising in any magistrate district bordering on the district in which s/he serves. Section 35-3-6(A). The defendant is entitled to a change of venue to the district where the cause of action arose if the defendant moves for such change within 15 days after arraignment. Sections 35-3-5(A)(1) & 35-3-6(A). This is also true for game and fish violations, where the magistrate court has jurisdiction over cases arising in any magistrate district bordering on the district in which s/he serves with the consent of the defendant. Section 17-2-9.

C. Venue

1. Venue in criminal actions is the magistrate district where the crime is alleged to have been committed, unless the crime is a violation of a law relating to motor vehicles. Sections 35-3-5(A)(2) & 35-3-6(A). In that case, venue lies in any adjoining county as well unless the defendant timely moves for a change of venue to the county where the offense occurred. Section 35-3-6(A). This is also true of game and fish cases with the consent of the accused.

2. If a crime is committed partly in one county and partly in another county, venue lies in either county where a material element of the crime was committed. Section 30-1-14.

D. Statute of Limitations

1. A criminal complaint must be filed within the following time frames to be within the statute of limitations (Section 30-1-8):

   a. for a misdemeanor, within two years from the time the crime was committed;

   b. for a petty misdemeanor, within one year from the time the crime was committed;

   c. for any other crime not in the Criminal Code or where a limitation is not otherwise provided, within three years from the time the crime was committed. However, if the crime can be characterized as either a petty misdemeanor or misdemeanor, the appropriate statute of limitations would apply. See the discussion regarding penalty assessment misdemeanors and DWI in *State v. Trevizo*, 2011-NMCA-069 (reckless driving and DWI first offense were determined to be treated like petty misdemeanors and each has a one-year statute of limitations).

2. When computing the statute of limitations, the following periods of time are not included in the calculations (Section 30-1-9):

   a. when the defendant hides or leaves the state after the alleged crime has been committed. The time in which to file a complaint begins when the crime is committed and the time the defendant is in hiding or has left the state is not included when determining the end of the statute of limitations.

   b. when the complaint is lost, mislaid, or destroyed.

   c. when the complaint is quashed, for any defect or reason; or

   d. when the prosecution is dismissed because of a variance between the allegations of the complaint and the evidence, and a new complaint is thereafter presented.

   When either subsection (b), (c), or (d) (listed above) occurs and a new complaint is subsequently filed, the time period between the old complaint and the new complaint is not used in determining the end of the statute of limitations.

3. A defendant can waive his or her substantive right to the statute of limitations only after consultation with counsel and the waiver must be knowing, intelligent, and voluntary. The violation of the statute of limitations may be raised at any time. *State v. Kerby*, 2007-NMSC-014, ¶¶ 17-18.

1.2 Initiating a Misdemeanor Case

A. Initial Pleading.

1. A criminal case is started in the court by filing a complaint which includes a sworn statement of facts, the name of the offense charged, and the specific statute number; a traffic citation pursuant to Sections 66-8-130 and 131; or a non-traffic citation pursuant to Section 31-1-6 for petty misdemeanors or game and fish violations and Section 66-8-123(F) for misdemeanors. The criminal complaint, non-traffic citation, or uniform traffic citation is the basis for:

    a. issuing a criminal summons or arrest warrant; and

    b. beginning a criminal action against the defendant. Rule 6-201.

2. The criminal complaint or citation is normally filed by a law enforcement officer or the district attorney. Rule 6-108. When a uniform traffic citation is issued by a police officer, the officer delivers a copy of the citation to the alleged offender. The citation copy directs the alleged offender to appear in court at a certain date and time. Section 66-8-123.

3. If the defendant is arrested without a warrant, a copy of the complaint is given to the defendant prior to transferring the defendant to the custody of a detention facility. If the defendant is in custody, the complaint shall be filed with the magistrate court at the time it is given to the defendant. If the court is not open at the time the copy of the complaint is given to the defendant, and the defendant remains in custody, the complaint shall be filed the next business day of the court. If the defendant is not in custody the next business day of the court, the complaint shall be filed with the court as soon as practicable. Rule 6-201(D).

4. Charging Decisions:

    a. "Accessory Liability" and "Parties to a Crime" are not charges. Both of these are theories of how the defendant is responsible for the crime. There are two ways a defendant may be criminally responsible: s/he may be the primary or the accessory. An accessory or party to a crime is someone who aids, abets, or encourages another to commit a crime; a primary is the person who directly committed the crime. Even if the primary has not been prosecuted, has been convicted of a different crime, has been acquitted, or is a child under the Children's Code, the accessory can be charged with the crime s/he aided in committing. Sections 30-1-13 and 66-8-120. The Parties to a Crime statute is only to be used in cases under the Motor Vehicle Code or in crimes pertaining to motor vehicles. The Accessory statute applies to criminal cases. The case should be opened on the underlying charge. For example, if someone is charged with Parties to a Crime, DWI, the case should be opened as a DR case with a note that it is a party to a crime. It is not correct to file the charge of Parties to a Crime, DWI, but it is often done. The same is true for a criminal case. If

defendant aided or abetted the principal to shoplift by acting as a lookout, then the charge for the accessory is the same as it would be for the principal: shoplifting with a note indicating that it is an accessory case. There is nothing different in the sentencing of a defendant who is charged under the theory of accessory liability or parties to a crime. That defendant would be sentenced as if s/he were the principal who directly committed the crime. If an officer charges parties to a crime and does not indicate the underlying charge, the clerk should bring the citation to the judge's attention and follow his or her direction.

b. Amending Criminal Complaints or Citations (Rule 6-303): A criminal complaint or citation shall not be invalid because of any defect, error, or omission which does not prejudice the substantial rights of the defendant on the merits. The court may at any time before a verdict cause the complaint or citation to be amended as to any defect, error, or omission if no additional or different offense has been charged and if the substantial rights of the defendant are not prejudiced. It is generally an abuse of discretion to not grant a motion to amend unless the defendant's rights would be prejudiced by the amendment. See the case law in the annotation to the district court rule on amendments, Rule 5-204, for examples of amendments which may be allowed. In *State v. Nixon*, 1976-NMCA-031, the court found that defendant's rights were not prejudiced when the DWI complaint was amended to include the correct section number.

B. Criminal Summons

1. The judge may issue a criminal summons in non-felony criminal actions within the court's jurisdiction only upon a sworn statement of facts showing probable cause that an offense has been committed. Rule 6-204(A). If the case is within the magistrate court's trial jurisdiction, there is a preference for a summons, rather than a warrant, unless good cause is shown. Rule 6-204(B).

2. The criminal summons orders the defendant to appear before the judge at a stated time and place; no arrest of the defendant is made. Rule 6-204(C).

3. Service of a summons shall be by mail unless the court directs that personal service be made. The summons and complaint shall be served together. Rule 6-205(E). Citations on which the defendant has signed the promise to appear need not be sent with the summons.

4. The summons must be signed by the judge or the clerk and contain the name of the court and county in which it is filed, the docket number of the case, and the name of the defendant to whom it is directed. It must also contain a direction to appear at a certain date and time, and the name and address of the law enforcement entity or prosecuting attorney filing the complaint.

5. Service shall be made at least ten (10) working days before the defendant is required to appear. If service is made by mail, an additional three (3) days are added. Service by mail is complete upon mailing. Rule 6-205(D).

6. Following service by mail, the return is made by the defendant appearing as required. Rule 6-205(I).

7. Personal service is obtained by giving a copy of the complaint and summons to the defendant. If s/he refuses to accept the documents, they can be left at the location where the defendant has been found and that shall constitute valid service. If defendant cannot be found, the documents can be delivered to someone at the place of abode who is over fifteen (15) years old and if there is no such person, or no one is willing to accept service, the documents can be posted on a public place on the premises and a copy mailed to the defendant at the last known mailing address. The person making service completes the certificate of service and returns it to the court. Rule 6-205(H), (I).

C. Arrest without a Warrant

1. An officer must have a warrant to arrest a person for a misdemeanor, unless the misdemeanor was committed in the officer's presence. *City of Las Cruces v. Sanchez*, 2009-NMSC-026, ¶ 11. This is what is known as the misdemeanor arrest rule. Over time, through legislation and case law, exceptions have been created. The exceptions to the misdemeanor arrest rule are: 1) when the suspect was present at the scene of a motor vehicle accident; 2) when the person is on a highway when charged with theft of a motor vehicle; or 3) the suspect is charged with a crime in another jurisdiction. Section 66-8-125. Additionally, the misdemeanor arrest rule does not apply to DWI investigations. *City of Santa Fe v. Marcos Martinez*, 2010-NMSC-033.

2. New Mexico statutes allow an officer at the scene of a domestic disturbance to arrest the suspect without a warrant if the officer has probable cause to believe that a person has committed an assault or a battery upon a household member. Section 31-1-7(A). Household member is defined as a spouse, former spouse, family member (including a relative, parent, current or former step-parent, current or former in-law, grandparent, grandparent-in-law or co-parent of a child), or a person with whom the victim has had a continuous personal relationship. Section 30-3-11. In *State v. Almanzar*, 2014-NMSC-001, the Supreme Court ruled that a defendant's warrantless arrest in a domestic violence case is lawful when the arrest is made reasonably close to the location of the incident and close in time to the incident. This would fulfill the definition of "at the scene" as being reasonably close, both spatially and temporally.

3. In *State v. Lyon*, 1985-NMCA-082, the Court created another exception to the misdemeanor arrest rule when a "police team" exists. This occurs when a misdemeanor is committed in the presence of one officer and that information is communicated out by police radio or other means and a description of the suspect

is given and another officer arrests the suspect within a reasonable period of time of receipt of the information.

4. Section 30-16-23 allows an officer to arrest a suspect for shoplifting when the crime has not been committed in the officer's presence as long as the officer has probable cause to believe the crime has been committed.

D. Probable Cause Determination

1. Under the Fourth Amendment to the United States Constitution, an accused who is detained and unable to meet conditions of release has a right to a probable cause determination. *Gerstein v. Pugh*, 420 U.S. 103 (1975). The New Mexico Supreme Court has interpreted *Gerstein* to require a probable cause determination within 48 hours of arrest. Rule 6-203. This was endorsed by the United States Supreme Court more than 20 years ago as a constitutional mandate. *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

2. The 48-hour probable cause finding is mandatory, whether or not the court receives a criminal complaint. It is the magistrate's responsibility to determine probable cause "promptly" within 48 hours after defendant is taken into custody and no later than defendant's first appearance, whichever occurs earlier. Rule 6-203A. Forty-eight hours means 48 hours, regardless of weekends and holidays.

3. Without a showing of prejudice, delay in holding a probable cause determination is not grounds for voiding a conviction or dismissing the criminal proceedings. *State v. Sedillo*, 1968-NMSC-049; *see also*, *State v. Hicks*, 1986-NMCA-129.

4. In most cases, the magistrate is aware that a defendant has been arrested because a criminal complaint is filed. Most county detention centers will not accept and book into the detention center a person arrested without a warrant unless the police officer files a complaint and probable cause statement at the time the defendant is taken into custody at the detention center. Rule 6-203(B) assumes a complaint has been filed and that the determination by the magistrate on whether or not there is probable cause is made based on what is written in the statement of probable cause. Form 9-215 can be used by the officer to execute a written statement of probable cause. A separate statement of probable cause is not necessary if the criminal complaint includes enough factual information to enable the judge to make the probable cause determination.

5. If a detention center is holding defendants in custody after a warrantless arrest without any written statement of probable cause or enough factual information on the complaint, it will not be possible for the magistrate to determine that there is probable cause to continue to keep the defendant in custody. After 48 hours, the magistrate would have to order the defendant's release. Each magistrate court should establish with the detention center a process that ensures the magistrate will have a probable cause or factual statement to review before the 48-hour window passes. As noted above, the statement of probable cause can be found in Form 9-215. The court must communicate with the jail regarding the importance

or imperative nature of not booking defendant without charging documents. The AOC will gladly work with your county, the county attorney, the detention center administrator, and law enforcement agencies to make plain the critical need to file a complaint and probable cause statement at the time a defendant is booked into the detention center.

6. In many counties, a magistrate court clerk picks up new complaints from the detention center each morning. This is an acceptable procedure. A magistrate can also review a facsimile copy of the probable cause statement, may read it on a tablet or smart phone, or as an attachment to an e-mail. The AOC has long urged courts not to *open* a case from a fax copy of a complaint because later, when the complaint is mailed or delivered to the court, there is an opportunity to open the case again and confusion follows. However, the case does not have to be opened in order for the magistrate to review a written probable cause statement sent by fax or otherwise, make a finding and, if probable cause is found, impose any appropriate conditions of release. The clerk, upon opening the case at a later time, shall date the probable cause determination to reflect the actual date of the judge's decision.

7. It may be very obvious, but in addition to establishing a process that gets the written probable cause statement to the magistrate for review within 48 hours of a warrantless arrest, *the detention center should also establish a regular procedure for notifying the magistrate when there has been a warrantless arrest*. A magistrate could not make a probable cause determination if the magistrate never learned there had been a warrantless arrest, but the 48-hour probable cause review requirement still exists.

   If a magistrate experiences cases in which notice of a warrantless arrest is not communicated to the court in time to permit the magistrate to make the 48-hour probable cause determination, this failure must be addressed with the detention center and law enforcement agencies.

8. The process runs smoothly when the court receives the criminal complaint in a timely manner and the complaints are brought in the regular course of business to the magistrate for determination of probable cause. With the exception of weekends and holidays, this occurs if new complaints are picked up at the detention center each day.

   The most difficult circumstances occur when a defendant is arrested on Friday night or a holiday and there must be a probable cause determination before the court will next be open for business. Each magistrate court must establish a procedure with the local detention center that gives the magistrate an opportunity to review the probable cause statement on the weekend for those arrested before Saturday morning. Without such a process, a person arrested before Saturday morning will be in custody for more than 48 hours before the court opens for business on Monday morning. This requirement can be met by the magistrate going to the detention center on the weekend to review probable cause statements, or by having the written probable cause statement delivered to the magistrate at

home or at work on paper, or sent to the magistrate for review by fax, e-mail, or text. Similar arrangements are required for any holiday that is long enough to risk defendants remaining in custody after a warrantless arrest for more than 48 hours before the court's next business day.

It is possible that a law enforcement agency will not file a complaint and probable cause statement on in-custody defendants until the next business day of the court. If that is the practice in your county, there will not be a written probable cause statement to review within 48 hours of arrest for a person arrested on Friday night or on many holidays. The magistrate will have to order the defendant's release, regardless of the nature of the charges. As stated above, this is why it is critical for law enforcement officers to file a complaint and probable cause statement at the time the person is booked into the detention center following a warrantless arrest.

9. A finding of probable cause must be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. Witnesses are not necessary unless the court believes such witnesses might be useful for establishing probable cause.

10. The probable cause determination is non-adversarial and may be held in the absence of the defendant and of counsel. Although the defendant need not be present at a probable cause determination, a judge may hold a first appearance and probable cause hearing at the same time.

11. While the probable cause finding must be in writing, there is no requirement that it be typed. Handwriting on the forms is okay as long as the writing is readable. Because the finding must be in writing, a magistrate should keep copies of the forms at home or in a briefcase for orders of release as well as for finding probable cause and setting release conditions. When the magistrate uses one of the forms, the magistrate shall take the document or a copy of the document to the court for filing at the earliest opportunity.

12. When probable cause is established, Rule 6-203(C) requires the magistrate to review any existing conditions of release and set conditions of release in accordance with Rule 6-401. The finding of probable cause must be in writing. A magistrate can use Form 9-207A to find probable cause. On Form 9-207A, when probable cause is found, the magistrate needs to check one of the two boxes on the form. First, there is a box to check to order release on personal recognizance. A second box is checked if there are to be conditions on release, "on the conditions of release set forth in the release order." The several forms on which release conditions can be specified, including an appearance bond or bail bond, are Forms 9-302, 9-303, 9-303A, and 9-304. Use the forms. Additionally, if the law enforcement officer uses the criminal complaint form designated by the Supreme Court, Form 9-201, there is a section to make a probable cause determination at the bottom of that form. If the law enforcement officer does not use that form, it is also appropriate for the judge to write his/her probable cause

determination at the bottom of the complaint. The judge must make sure that a copy of the complaint with his/her written finding is filed in the court.

13. If probable cause is lacking, the magistrate uses Form 9-207A indicating that there is no probable cause and defendant is released on his/her own recognizance. The judge can also make the indication on the criminal complaint and release on his/her own recognizance. Rule 6-203(B) permits the officer to amend the complaint or statement of probable cause to establish probable cause within the 48-hour time for the magistrate to make a final determination.

14. An amended complaint or a statement of probable cause may be filed within 48 hours after custody begins and no later than the first appearance of the defendant whichever occurs earlier with sufficient facts to show probable cause for detaining the defendant. The court may notify the complainant that there is not enough of a factual basis filed to support probable cause and that an amended probable cause statement or criminal complaint can be filed. Rule 6-203(B).

15. If the court finds that the complaint fails to establish probable cause to believe defendant has committed an offense and no amendment is filed containing sufficient facts to show probable cause for detaining defendant, the court shall order the release of the defendant on his/her own recognizance. Rule 6-203(C).

16. A confusing situation can exist when a defendant is arrested and booked into a county detention center although the arrest occurs in another county. It is not clear whether the probable cause determination should be made by the magistrate in the county where the detention center is located or by the magistrate from the county where the defendant was arrested. There are different practices in the courts. It appears acceptable for the magistrate in which the detention center is located to make the finding, but it is certainly permitted for the magistrate in the county where the arrest occurred and the charges will be filed to make the determination.

E. Detention Hearing for Children

1. Magistrate judges can make a 48-hour probable cause determination if a child is arrested without a warrant. Section 32A-2-13. The analysis is the same as it is for adults. *See* Form 10-431.

2. Magistrate judges may hold a detention hearing for a child under the Children's Code. Rule 10-225(F). A detention hearing is triggered NOT from a child being placed in detention, but a child being in continued detention and a delinquency/detention petition being filed by the district attorney's office. Rule 10-225(A). Section 32A-2-13 requires that the district attorney file a petition within 24 hours of when the child is arrested. A detention hearing must be held within 1 day (excluding weekends and holidays) from the time a petition is filed if the child is in detention at that time, or from the time the child is placed in detention if that occurs after a petition is filed. Rule 10-225A(1).

3. Notice of the detention hearing shall be given orally or in writing by the court to the children's court attorney, the public defender and juvenile probation services. Probation services are to give oral or written notice to the child and the parents, guardian or custodian of the child. Rule 10-225(B). If the child is not released and a parent, guardian or custodian was not notified of the hearing and did not appear or waive appearance, the judge shall rehear the detention matter without unnecessary delay upon the filing of an affidavit stating the facts and a motion for rehearing. Section 32A-2-13(I).

4. Section 32A-2-13(A)(3) states that if a hearing is conducted by electronic communication it must be recorded and preserved as part of the record. Moreover, the hearing in the courtroom needs to be on the record.

5. At the beginning of the detention hearing the judge shall advise the parties of their basic rights as provided in Rule 10-224.

6. At the detention hearing, unless counsel has entered an appearance on behalf of the child, the court shall appoint the public defender to represent the child. Rule 10-223(A). *See* Form 10-408A.

7. Any order of appointment shall be served on the parents, guardian, or custodian by the court along with a written notice that if they can afford an attorney, they will be ordered to reimburse the state for public defender representation. The notice shall also have a copy of the eligibility determination for indigent defense services form attached and shall advise the parents, guardian, or custodian that if they do not fill the form out and return it to the public defender or contract attorney within the prescribed time, they may be charged for all legal representation of the child. It shall also advise that the public defender has the duty to assist them in any indigency determination proceeding. Rule 10-223(B). *See* Forms 10-407 and 10-408.

8. The court must review the need for detention and determine if the criteria for detention exist. Section 32A-2-11A. The criteria to be reviewed are:

    a. whether the child poses a substantial risk of harm to him/herself;

    b. whether the child poses a substantial risk of harm to others; or

    c. the child has demonstrated that s/he may leave the jurisdiction of the court.

9. If none of the criteria for detention exist, the court shall either release the child on the child's written promise to appear before the court at a stated time and place, or release the child after imposing the first of the following conditions of release (or combination of conditions) which will reasonably assure the appearance of the child at the adjudicatory hearing. Rule 10-225(C).

    a. Place the child in the custody of a designated person or organization agreeing to supervise the child; and/or

b. Place restrictions on the child's travel, association or place of abode during the period of release; and/or

c. Impose any other condition that is reasonably necessary to assure appearance, including a condition that the child must return to detention if required.

10. A denial of release may be reviewed at any time. Rule 10-225(D).

F. Arrest Warrant

1. Although a criminal summons is the preferred method of acquiring jurisdiction over a defendant in a non-felony criminal action, the judge may determine, if good cause is shown, that the interests of justice will be better served by issuing an arrest warrant. Rule 6-204(B).

2. The judge may issue an arrest warrant only upon a sworn statement/affidavit of the facts establishing probable cause that an offense has been committed by the named defendant. Rule 6-204(A).

3. The showing of probable cause shall be based upon substantial evidence, which may include hearsay in whole or in part, as long as there is a substantial basis for believing the source of the hearsay to be credible and for believing there is a factual basis for the information furnished. Rule 6-204(A). The court may require the officer affiant to appear personally and may examine the affiant under oath along with any witnesses provided by the affiant, provided that such additional evidence is reduced to writing and supported by oath or affirmation.

4. If the defendant is arrested pursuant to a warrant, an additional probable cause determination is not necessary after arrest.

5. The warrant shall be signed by the court and shall contain the name of the defendant or if the name is unknown, a name or description by which the defendant can be identified with reasonable certainty. Rule 6-204 allows for an arrest warrant to be requested using any of the following methods as listed in Rule 6-208(G):

a. by hand-delivery of an affidavit substantially in the form approved by the Supreme Court with a proposed arrest warrant attached;

b. by oral testimony in the presence of the judge provided that the testimony is reduced to writing, supported by oath or affirmation, and served with the warrant; or

c. by transmission of the affidavit and proposed arrest warrant required under Subparagraph (a) of this paragraph to the judge by telephone, facsimile, electronic mail, or other reliable electronic means.

Additionally, if the judge issues the warrant remotely, it shall be transmitted by reliable electronic means to the affiant and the judge shall file a duplicate original

with the court. Upon the affiant's acknowledgment of receipt by electronic transmission, the electronically transmitted warrant shall serve as a duplicate original and the affiant is authorized, but not required, to write the words "duplicate original" on the transmitted copy. If the judge approves and issues an arrest warrant at night or on the weekend, s/he needs to make sure that the court receives a copy of the arrest warrant, affidavit of arrest warrant and criminal complaint the next business day and that the court manager is alerted that s/he has approved an arrest warrant outside of business hours so that the file can be opened.

6. The warrant may limit the jurisdictions in which it can be executed to within the county, the state, or nationwide. The arrest warrant shall be docketed along with the criminal complaint and the affidavit in support of the arrest warrant. All of these documents are public record available for the public to view unless there has been a sealing order entered by the court. The officer shall have the warrant put into the NCIC system. Defendant, when arrested, shall receive a copy of the warrant. The return shall be filed by the officer at the court and it shall be docketed in the court file. After arrest, the officer executing the warrant shall have the warrant removed from the NCIC system. If the court withdraws the warrant, the court staff shall have the warrant removed from the NCIC system as soon as possible. Rule 6-206(D).

1.3 Arraignment

A. General

1. The arraignment is the proceeding at which the defendant is brought before the judge after arrest or in response to a criminal summons in order to be informed of the charges and constitutional rights and enter a plea to the charge(s). The term arraignment is used for cases within the trial court jurisdiction of the magistrate court. For a felony case, the proceeding is called a first appearance and the court does not have the authority to enter a plea to the charges. See Section 2 of this manual for more information.

    a. With prior approval of the court, an arraignment may be waived by the defendant filing a written waiver and plea of not guilty before the arraignment. Rule 6-501. **The judge's signature is required on the waiver.**

    b. Arraignment may be handled through use of a two-way audio-video communication. This is the "in jail" arraignment process.

        The arraignment by simultaneous audio-visual communication constitutes an appearance in open court. Rule 6-110A(B).

2. The defendant must be arraigned within thirty (30) days of the later of either the filing of the criminal complaint/citation or the date of arrest if the defendant is not in custody and within four days if the defendant is in custody. Rule 6-506(A). If the court does not have an arraignment within the required time frame, the court should have the arraignment as soon as possible. There is no dismissal unless the defendant can show some prejudice due to the delay.

3. At the arraignment, the judge:

   a. informs the defendant of the charges;

   b. informs the defendant of the penalty provided by law for the offense(s) charged;

   c. informs the defendant of his or her rights;

   d. receives a plea to the charges;

   e. sets bond and/or bail; and

   f. sets or reviews conditions of release.

   See below for the explanation of rights.

B. Initial Procedures for Juveniles in the Magistrate Courts.

1. If the defendant was a minor (under 18 years of age) at the time of the alleged offense and the defendant is charged with a delinquent act, that is, an offense that would be a crime if committed by an adult, the judge transfers the case to the children's court. Sections 32A-1-5(C) and 32A-2-6; *see also*, Section 32A-1-8(A)(1) (Children's Court has exclusive jurisdiction over children charged with delinquent acts.).

2. Most traffic offenses committed by a minor are within the jurisdiction of the magistrate courts and need not be transferred to Children's Court.

3. There are traffic offenses considered "Delinquent Acts," which must be transferred, including: DWI; Failure to stop for an Accident Causing Death, Personal Injury, or Property Damage; Reckless Driving; Driving on a Suspended or Revoked License; Injuring or Tampering with a Vehicle; and any other traffic offense which is a felony. Section 32A-2-3. Other offenses which must be transferred include: Minor in Possession of Alcohol; Illegal Use of Glue or other Chemical Substance; Violation of the Controlled Substances Act; Violation of an Order of Protection; and Unauthorized Graffiti. Section 32A-2-3(A).

4. Transfer Procedure:

   a. The judge orders that the minor be taken promptly to the children's court or a designated place of detention, or that the minor be released to a

parent, guardian, or other custodian pending appearance before the children's court. Section 32A-2-6(B).

b. The judge transfers a copy of the entire file to the Children's Court and takes steps to ensure that documents in the court record are treated as confidential in the same manner and to the same extent as if charges had first been filed in children's court. Section 32A-2-32. There is no specific form for transfer to Children's Court. The order should be somewhat like the order used to transfer a case to district court for competency, but amended to reflect that the transfer is because the defendant is a juvenile and the magistrate court lacks jurisdiction over the defendant.

5. If the defendant is 15 to 18 years old and charged with first-degree murder, then the defendant is considered to be a "serious youthful offender" under the criminal code. An alleged serious youthful offender may be detained prior to arraignment in metropolitan, magistrate, or district court in:

a. a licensed detention facility for delinquent children;

b. any other suitable place that meets standards for detention facilities as set by the Children's Code and federal law; or

c. a county jail if (a) and (b) are not appropriate.

6. At arraignment, if the court determines that the alleged serious youthful offender should remain in custody, the offender may be detained in an adult or juvenile detention facility. Sections 31-18-15.2 to -15.3.

C. Explanation of Rights (Rule 6-501(A)):

At all arraignments the judge must inform the defendant of each of the following:

1. The offense(s) charged which would include the reading of the statute. The judge should get affirmation from the defendant that s/he understands the charges. If the statute is unclear, the judge can refer to the Uniform Jury Instruction, if one exists, for that offense;

2. The maximum penalty and mandatory minimum penalty provided by law for the offense(s) charged; if a specific penalty is not provided for the alleged crime, the defendant is informed of the penalty for a misdemeanor or petty misdemeanor, whichever is applicable;

3. The right to bail;

4. The right to trial by jury, if applicable to the offense(s) charged;

5. The right to see, hear, question, and cross-examine the witnesses who testify against the defendant at the trial;

6. The right to call witnesses to testify for the defense and to have them subpoenaed and required to appear, at no cost to the defendant (N.M. Const. art II, § 14);

7. The right to the assistance of counsel at every stage of the proceedings;

8. The right to representation by an attorney at state expense, if the defendant is an indigent and a jail sentence may be imposed;

9. The right to remain silent; the fact that any statement made by the defendant may be used against him or her;

10. The right to testify at trial, but if the right is exercised, the defendant is subject to cross-examination (N.M. Const. art. II, § 14);

11. The right to a preliminary examination if the case for which the defendant is being arraigned is not within the court's trial jurisdiction;

12. That if the defendant pleads guilty or no contest, it might impact his or her immigration or naturalization status. If the defendant is represented by an attorney, the court shall determine if the defendant has been advised by legal counsel about the immigration consequences of a plea;

13. That if defendant is being charged with a crime of domestic violence or a felony, a guilty or no contest plea will affect his or her constitutional right to bear arms, including shipping, receiving, possessing, or owning any firearm or ammunition, and all of which are federal offenses for persons convicted of any domestic violence crime or a felony; and

14. That, if defendant pleads guilty or no contest to a crime for which registration as a sex offender is, or may be, statutorily required, such registration either will in fact or may be required. If defendant is represented by an attorney, the court shall make efforts to determine whether defendant has in fact been advised by legal counsel of the registration requirement under the Sex Offender Registration and Notification Act. Section 29-11A-1.

D. Representation by Counsel and Pro Se Representation

1. After the explanation of rights, the judge determines whether the defendant is represented by counsel.

2. If the defendant is not represented by counsel, the judge may allow the defendant reasonable time and opportunity to make phone calls and consult with counsel before the proceedings continue. Rule 6-501(A).

3. If it appears that the defendant may be indigent, then the judge decides if a jail sentence will be imposed upon a plea of guilty or upon conviction.

   a. If the judge decides that no imprisonment will be imposed:

      i. The defendant is not entitled to appointed counsel.

State v. Sanchez, 1980-NMCA-055, ¶ 5, and *Scott v. Illinois*, 440 U.S. 367 at 373 (1979): "actual imprisonment (is) the line defining the constitutional right to appointment of counsel."

ii. No determination of indigency is necessary.

iii. No waiver of counsel is necessary. *Compare Smith v. Maldonado*, 1985-NMSC-115 (no voluntary, knowing, and intelligent waiver of counsel where defendant who pled guilty was not advised or aware of the possibility of jail time).

b. If the judge decides to reserve the option of imposing a sentence of imprisonment, then a determination of indigency is necessary. The court should use the **conditional** order of appointment (Form 9-403A) when there is a Public Defender's Office in the magistrate district. In that case, the Public Defender's Office will be making a determination on indigency. In magistrate districts that do not have a Public Defender's Office, the court should use the order of appointment available in Odyssey to appoint a contract public defender. In such case, an indigent defendant is entitled to appointed counsel. Sections 31-16-3 and 31-15-12.

4. In any case in which the judge reserves the option to sentence the defendant to incarceration, the defendant must be represented by counsel or must knowingly and intelligently waive counsel. Form 9-401A (Waiver of Counsel). If counsel is waived, a written waiver should be obtained before the defendant is allowed to appear on his or her own behalf.

5. On the other hand, if the defendant is indigent and does not waive counsel, counsel should be appointed.

6. The waiver of counsel is important because the sentence for a second or subsequent conviction of an offense that provides an enhanced penalty for a subsequent conviction may not be enhanced unless the defendant was either represented by counsel throughout the proceedings for the prior conviction or waived counsel. *State v. Thornton*, 1997-NMCA-108. An example of this is in the proof of prior DWI convictions to enhance the sentence.

7. The judge should not accept a waiver of counsel without being satisfied that the waiver is knowingly, voluntarily, and intelligently made and that the defendant is informed of the possible disadvantages of self-representation. Section 31-16-6. In making this determination the judge must consider such factors as the person's age, education, familiarity with English, and the complexity of the crime involved. Section 31-16-6. The judge may not force a lawyer upon a criminal defendant when the defendant insists on conducting his or her own defense. U.S. Const. amend. VI; N.M. Const. art. II, § 14. In *State v. Garcia*, 2011-NMSC-003, ¶ 25, the Court stated that there are three requirements which must be met in order for a defendant to proceed pro se. First, the defendant must clearly and unequivocally make his or her intention known that s/he wishes to represent him

or herself. Second, the assertion must be made in a timely manner. And last, the defendant must knowingly and intelligently give up the benefit of counsel. In *State v. Castillo*, 1990-NMCA-043, ¶¶ 9-12, the Court set out warnings which must be given to the defendant before allowing pro se representation: 1) advise the defendant of the dangers of proceeding pro se; 2) inform the defendant of the charges, the statutory offenses, range of punishment, possible defenses; and 3) ensure that the defendant will follow the Rules of Evidence and courtroom procedures. If defendant is allowed to proceed pro se, the judge may, despite objections from the defendant, appoint "standby counsel" to assist the defendant if and when assistance is requested or if and when the judge finds it necessary to terminate self-representation. If defendant is not indigent, s/he would have to pay for "standby counsel." The judge may terminate self-representation and appoint counsel for a defendant who intentionally engages in serious and obstructionist misconduct. *State v. Rotibi*, 1994-NMCA-003, ¶ 13.

1.4 Pleas: Entry of Plea and Plea Agreements

A. After the explanation of rights, and an opportunity to consult with counsel (if counsel is present unless counsel is not required or is waived), the defendant is required to plead to the complaint.

B. If the defendant refuses to plead or stands mute, the judge enters a plea of not guilty for the defendant. Rule 6-302(B).

C. The plea must be one of the following (Rules 6-302(A) and 6-501(B)):

i. Guilty

ii. Not guilty.

iii. Nolo contendere (no contest), if permitted by the judge. This plea means that the defendant is not contesting the charges. This plea has the same legal effect as a plea of guilty for purposes of the action before the court. (However, the plea may not be used against the defendant as an admission of guilt in any collateral proceeding.) Rule 11-410; *but see*, *State v. Marquez*, 1986-NMCA-119, ¶ 11 (a prior conviction based on a no contest plea can be used to enhance a sentence under the habitual offender statute).

iv. Occasionally a party will present a plea to the court called guilty pursuant to *Alford*. This refers to the U.S. Supreme Court case *North Carolina v. Alford*, 400 U.S. 25 (1970). This is a plea where the defendant does not admit his guilt and maintains his innocence, but pleads guilty. The judge must be satisfied that there is a factual basis for the plea, independent of the defendant's statements. The defendant is pleading guilty for several reasons: because it is the best option under the evidence; to take advantage of a good plea deal; to avoid the publicity and expense of a trial; and to affect the judge's position at sentencing. This is

different from a no contest plea where a defendant is not admitting guilt or innocence and is not contesting the charges. A no contest plea protects a defendant from a civil lawsuit and there is no admission of the facts by the defendant. An *Alford* plea does not protect a defendant from a civil lawsuit and there must be an admission of the facts by the defendant.

D. If the defendant pleads not guilty, the case is set for trial as soon as possible.

i. The judge asks the defendant whether the defendant demands or waives the right to a jury trial.

ii. At any point in the proceedings, the defendant may request to enter a guilty plea or, if permitted, a no contest plea.

E. If the defendant pleads no contest, before accepting the plea, the judge must be sure that the plea is voluntarily made, that the defendant realizes that the plea of no contest will have the same effect as a guilty plea in this court, and that the defendant understands the consequences of the plea. Rule 6-502(C). The defendant should be personally questioned for these purposes, even when represented by counsel. Rule 6-502(C).

F. The court shall not accept a guilty or no contest plea or plea agreement without first addressing defendant personally in open court or by video, informing defendant of, and determining that defendant understands, all of the following, using the Guilty/No Contest Plea Proceeding Form 9-406A:

i. the nature of the charge(s) to which the plea is offered;

ii. the mandatory minimum penalty under the law, if any, and the maximum possible penalty for each offense involved in the plea or plea agreement, including any penalty enhancements;

iii. that the defendant has the right to plead not guilty or to continue with a not guilty plea if it has already been made;

iv. that if defendant pleads guilty or no contest, the defendant is waiving his or her right to a trial.

v. that if defendant pleads guilty or no contest, it may have an effect on his or her immigration or naturalization status. If defendant has an attorney, the court shall determine if legal counsel has in fact advised defendant of the immigration consequences of a plea;

vi. that a plea of guilty or no contest to a domestic violence charge or a felony will affect the defendant's constitutional right to bear arms, which includes shipping, receiving, possessing or owning any firearm or ammunition, all of which are offenses punishable by federal law for persons convicted of a domestic violence charge or a felony; and

vii. that a plea of guilty or no contest to an offense for which registration as a sex offender is required will in fact require such registration. If defendant has an

attorney, the court shall determine if legal counsel has in fact advised defendant of the registration requirement under the Sex Offender Registration and Notification Act. Section 29-11A-1.

G. Before accepting a guilty or no contest plea, the judge must make sure that the plea is voluntarily made and not the result of any force, threats or promises apart from the plea agreement; that the defendant realizes the consequences of the plea, as outlined previously; that the plea is a result of discussions between the government and the defendant or defendant's counsel; and that there is a factual basis for the guilty plea. Rule 6-502(C), (E). The defendant should be personally questioned for these purposes, even when represented by counsel. The factual basis that is required for the plea of guilty, but not for the plea of no contest, may be established by simply asking the defendant: "What did you do that makes you believe you are guilty of this offense?" The answer that the defendant gives should establish every element of the offense, including general criminal intent or specific intent. Another way the defendant may give a factual basis is by adopting the facts in the criminal complaint or have his/her attorney state that there is a factual basis. The factual basis is not required for a no contest plea. Rule 6-502(E).

H. The court shall not participate in any plea discussions. Rule 6-502(D)(1). The plea agreement should be in writing and presented to the judge for approval, and if it is approved, the judge signs the plea agreement. The plea agreement is filed in the court file. Rule 6-502(D)(2).

I. If the judge finds parts of the plea agreement unacceptable after reviewing it and any presentence report, the court will allow the defendant to withdraw his plea and the agreement will be void. This does not apply to a plea for which the court rejects a recommended or requested sentence, but otherwise accepts the plea. Rule 6 502(D)(4). The court must advise the defendant that an agreement with a recommended or requested sentence does not bind the court's sentencing authority. *State v. Pieri*, 2009-NMSC-019, ¶ 1. If the plea agreement sets out a specific sentence which binds the court, the court must either enforce the plea or allow the defendant to withdraw his plea. *Id.* The court should allow the defendant to withdraw his plea for any fair and just reason. The court should weigh the prejudice to the state caused by reliance on defendant's plea as a factor in the determination.

J. The judge has broad discretion to accept or reject a plea agreement and that discretion will not be disturbed unless abused. Rejection of a plea agreement based upon facts that support the judge's decision is not an abuse of discretion. *State v. Holtry*, 1981-NMCA-149. The plea agreement may include an amendment or dismissal of charges. No other paperwork is necessary to amend or dismiss the charges. Under no circumstances shall either party write on a filed criminal complaint or other filed pleading.

K. When the court approves a plea agreement that includes a limitation on the sentence, it cannot, at a later date, increase the sentence without permitting the defendant to withdraw his plea of guilty or no contest. For example, in *State v. Sisneros*, 1981-NMCA-085, *aff'd in part, rev'd on other grounds*, 1982-NMSC-068, *aff'd* 1984-NMSC-085, the defendant entered into a plea agreement with the understanding that he would be

sentenced to probation. At the sentencing hearing, the State requested that the defendant be incarcerated. The district court erred in not allowing the defendant to withdraw his plea.

L. After a plea of guilty or no contest has been accepted, the judge may order a pre-sentence investigation and report. Section 31-21-9.

M. If the judge does not accept a plea of guilty or no contest, a plea of not guilty is entered, and the case is set for trial as soon as possible.

N. If a defendant pleads guilty or no contest, s/he waives the right to a trial de novo upon appeal, unless constitutional invalidities are later alleged. *State v. Ball*, 1986-NMSC-030.

O. Conditional Pleas

i. A defendant who enters into a conditional plea agreement pleads guilty or no contest, but reserves the right to appeal "a significant pretrial issue … in a case in which conviction seems certain unless the defendant prevails on the pretrial issue." *State v. Celusniak*, 2004-NMCA-070.

ii. Conditional pleas are permissible in the magistrate court. *Celusniak* sets out the procedure to be followed by the magistrate courts when accepting a conditional plea.

iii. A defendant enters a conditional plea by:

a. preserving the error through a pretrial motion, i.e., a motion to suppress;

b. obtaining the consent of the prosecution; and

c. obtaining the court's approval.

iv. The magistrate court shall enter a judgment and sentence that reflects the plea agreement. The judgment shall also expressly set out the issues reserved for appeal. The defendant has 15 days to file a notice of appeal. The district court only hears the matters reserved on appeal which it hears de novo. The district court then enters an order resolving the matters it heard. If the defendant prevails on appeal to the district court and the State does not appeal to the Court of Appeals, the case is remanded to the magistrate court and the magistrate court must give the defendant an opportunity to withdraw the original plea. If the State prevails, and the defendant does not appeal to the Court of Appeals, the case is remanded back to the magistrate court and the original judgment and sentence is enforced. The case is not remanded back to the magistrate court until all appeals have been resolved.

1.5 Right to Jury Trial

A. In magistrate court, both the State and the defendant have a statutory right to trial by jury on all criminal charges except contempt of court, penalty assessment misdemeanors, and offenses that do not have incarceration as a possible penalty under the statutes. Section 35-8-1.

B. The New Mexico Constitution guarantees a right to trial by jury in those cases in which the right existed either by common law or by statute when the New Mexico Constitution was adopted. N.M. Const. art. II, § 12.

C. The statutory right under Section 35-8-1 for trial by jury in the magistrate courts is carried forward by Rule 6-602, which sets out the requirements for jury trials for both petty and full misdemeanor cases. For petty misdemeanor cases, either party may demand a trial by jury orally or in writing before the entering of a plea, or in writing within 10 days after the entering of a plea. If the demand is not made as described, the jury trial is deemed waived and should be set for a bench trial. For misdemeanor cases or where the potential or aggregate penalty includes more than six months imprisonment, the case will be tried by jury unless the defendant waives a jury trial with the approval of the court and the consent of the state. A defendant may only change his or her decision of waiving the right to jury trial with permission of the court. It is best practice to have a defendant sign a waiver of jury trial after s/he has consulted counsel unless s/he has signed a waiver of counsel.

1.6 Dismissals and Refiled Complaints:

A. Definitions

1. Dismissal with prejudice means that the dismissed offense may not be charged again in any court. The judges should be thoughtful when dismissing a case with prejudice. If a case is appealed, the appellate courts will review your decision and decide whether or not you abused your discretion.

2. Dismissal without prejudice does not prevent the prosecution from again charging the defendant with the same offense; the prosecution is free to bring another action.

3. The term dismissal and nolle prosequi mean the same thing.

B. Voluntary Dismissal by Prosecution (Rule 6-506A, Form 9-415 (Notice of Dismissal of Criminal Complaint)):

1. The prosecution may file with the court a notice of dismissal at any time before the commencement of trial or preliminary hearing. This would be before the jury is sworn in or before the first witness is called in a bench trial/preliminary hearing.

2. Dismissal is without prejudice unless otherwise stated in the notice of dismissal.

3. The prosecution is responsible for serving the notice of dismissal on the defendant.

4. A specific count or charge in the complaint may be dismissed without dismissing the entire complaint. The notice of dismissal form should be modified to indicate the count or charge that is being dismissed.

5. The dismissal signed by an assistant district attorney does not gain the release of the defendant. A court order from the judge is necessary to obtain the release of the defendant. Even if a jail would accept a dismissal as the pleading to release an inmate from jail, such a release is illegal.

   Section 33-3-12 (Commitments to be furnished; orders of release; penalty):

   a. Every public officer who has power to order the imprisonment of any person for violation of law shall, on making such order, transmit to the sheriff, jail administrator or independent contractor of his respective county a true copy of the order so that the person imprisoned may be considered under his custody until expiration of the commitment or until further steps, as provided by law, are taken to obtain the prisoner's liberty, of which he shall, in due time, notify the sheriff, jail administrator or independent contractor in writing.

   b. Any jailer who deliberately and knowingly releases a prisoner without an order of release as provided in this section, except upon expiration of the prisoner's term of commitment, is guilty of a misdemeanor and shall be removed from office.

6. Additionally, a voluntary dismissal does not automatically cause a bond to be exonerated. Rules 6-506A(B) and 6-406(A).

C. Dismissal for Violation of the Six-Month Rule (Rule 6-506; Form 9-414 (Order Dismissing Criminal Complaint)):

1. In the Magistrate Courts, if trial does not begin within the following time limits, the court must dismiss the criminal complaint or uniform traffic citation **with** prejudice. Rule 6-506(E).

   a. Criminal trials must begin within 182 days after the latest of the following events (Rule 6-506(B)):

      i. The date of arraignment or the filing of a waiver of arraignment by defendant.

      ii. If a competency evaluation has been ordered, the date an order or remand is filed finding the defendant competent to stand trial.

      iii. If a mistrial is declared, the date the mistrial order is filed.

iv. In the event of remand from an appeal, the date the mandate or order is filed in the magistrate court disposing of the appeal.

v. If the defendant is arrested or surrenders in this state for failure to appear, the date of arrest or surrender.

vi. If the defendant is arrested or surrenders in another state for failure to appear, the date the defendant is returned to New Mexico.

vii. If the defendant has been placed in a pre-prosecution program, but fails to comply with such program, the date a notice is filed that the pre-prosecution program has been terminated.

b. The time limits for beginning trial listed above may be extended (Rule 6-506(C)):

i. Upon the filing of a written waiver of the time limits of the rule by the defendant and approval of the court. This means that a trial can be set beyond the 182 days and the defendant has waived his/her right to argue it is in violation of this rule. Best practice dictates that the court should still set the case for trial as soon as possible. Additionally, a defendant requesting a continuance does not necessarily have to include a request for an extension of time or a waiver of time limits. If only a continuance is requested and granted, the court should set the case within the original six-month time frame. There is no time limit on how long the case can be extended under this subsection. However, the extension should be as limited as possible so as not to violate defendant's right to a speedy trial.

ii. Upon motion of the defendant, for good cause and with the **approval of the court**, the court may grant an extension up to 30 days, provided that the aggregate of all extensions granted by this subparagraph shall not exceed 60 days. Rule 6-506(C)(2).

iii. Upon stipulation of the parties and **approval of the court**, for a period up to 60 days, provided that the aggregate of all extensions granted by this subparagraph shall not exceed 60 days. Rule 6-506(C)(3).

iv. Upon withdrawal of a plea or rejection of a plea for a period up to 90 days. Rule 6-506(C)(4).

v. Upon a determination by the court that exceptional circumstances exist that were beyond the control of the state or the court that prevented the case from being heard within the required time period, provided that the aggregate of all extensions granted pursuant to this subparagraph may not exceed 60 days. "Exceptional circumstances," as used in this rule, would include

conditions which are unusual or extraordinary such as: death or illness of the judge, prosecutor, or a defense attorney immediately preceding the commencement of the trial; and circumstances which ordinary experience or prudence would not foresee, anticipate or provide for. Rule 6-506(C)(5).

vi. If defense counsel fails to appear for trial within a reasonable time, for a period up to 182 days, provided that the aggregate of all extensions granted under this subparagraph may not exceed 182 days. Rule 6-506(C)(6).

c. A motion to extend the time limits may be filed within the applicable time limits or upon exceptional circumstances shown within 10 days of the expiration of the time period. At the request of either party the court may hold a hearing prior to the beginning of trial to determine whether or not the granting of an extension is appropriate. Rule 6-506(D).

d. There must be an order entered for an extension of time which includes the party who requested the extension, the subsection under which it was requested, the time period granted for the extension, and the new rule date. A post-it note or a note in Odyssey is not a court order and has no legal effect.

2. There is a question as to whether or not the issuance of a revocation of conditions of release warrant stops the six month rule for the period from date of issuance to date of arrest and whether a new six month rule begins. There is no case law directly on this point. The closest case is *State v. Littlefield*, 2008-NMCA-109. In that case the defendant was allowed a furlough from jail for medical treatment and did not return as required by the court's order. A warrant was issued for his failure to abide by the conditions of release. It was not a failure to appear warrant. The Court of Appeals, in the majority opinion, found that this warrant was akin to the regularly issued failure to appear warrant and held that when defendant was arrested on it, a new six month rule began. The dissenting opinion disagreed and argued that it was a violation of conditions of release warrant from which an arrest does not start a new six-month rule. An argument could be made that the defendant should not benefit from the failure to abide by the court's order in allowing the six month rule to continue to run during the time outstanding on the warrant. There is no basis for a new six-month rule to begin unless the warrant is like the one in *Littlefield*. It is possible that the court could set a hearing after the warrant for violation of conditions of release is issued and if the defendant fails to appear, then a failure to appear warrant can be issued and there would be a new six months after the defendant is arrested on that warrant.

D. Refiled Complaints for Cases Within the Magistrate Court's Trial Jurisdiction

1. If a citation or complaint is dismissed without prejudice and later refiled, the refiled complaint shall be clearly captioned "Refiled Complaint" and shall include the following:

a. The court in which the original charges were filed;

b. The case file number of the dismissed charges;

c. The name of the assigned judge at the time the charges were dismissed; and

d. The reason the charges were dismissed. Rule 6-506A(C).

2. Procedure after refile. The refiled case shall be treated as a continuation of the earlier case and the trial on the refiled charges shall begin within the unexpired time for trial, unless the court, after notice and a hearing, finds that the refiled complaint should not be treated as a continuation of the original case. The time between dismissal and refiling shall not be counted as part of the unexpired time as required by Rule 6-506. Rule 6-506A(D).

1.7 Other Preliminary Matters

A. Subpoenas, Issuance; General Rules

1. For subpoenas to compel the attendance of a witness, not a party:

a. A person does not have to be subpoenaed in order to appear; a witness may appear voluntarily at the request of a party without a subpoena.

b. The same subpoena may not be used for more than one witness.

c. The party requesting the subpoena fills in the information on the subpoena form; the judge or clerk signs and dates the subpoena. Rule 6-606(A)(3); Forms 9-503 (Subpoena) and 9-504 (Subpoena Duces Tecum).

d. Any attorney authorized to practice in New Mexico who represents his/her client may issue a subpoena on behalf of the Court in which the case is pending, but not for compelling attendance at an interview. Rule 6-606(A)(3), (B). The court, if it has time, may, but is not required to fill in the information on the subpoena.

e. The judge must sign the subpoena compelling the attendance at an interview of a witness. The witness may be required to attend an interview anywhere within the jurisdiction of the court. Rule 6-606(B).

2. For subpoenas to compel the production of documentary evidence:

a. A person does not have to be subpoenaed in order to produce tangible evidence; the witness may voluntarily produce it at the request of a party without a subpoena.

b. The papers or other documents that need to be produced must be specified in the subpoena. Rule 6-606(A)(1)(c).

c. The person subpoenaed must produce the information or materials before or at the trial or preliminary examination, as specified in the subpoena.

B. Service of Subpoena

1. The subpoena (original and one copy) is normally given to the requesting party who is responsible for having the subpoena served.

2. The subpoena may be served personally by:

a. the sheriff or a deputy (the judge may give the subpoena directly to the sheriff for service), or

b. any person at least eighteen years of age and not a party to the action. Rule 6-606(C)(1).

3. Service of the subpoena may be made by delivering a copy of the subpoena to the person named within it, and:

a. If the witness is to be paid from state funds used for payment of state witnesses or witnesses in indigency cases, by processing for payment the fee and mileage prescribed by the AOC. Rule 6-606(C)(1)(a);

b. For all other witnesses, by tendering to the witness the fee for one day per diem expenses and mileage as provided in, Section 10-8-4(A) and (D). The fee for per diem expenses shall not be prorated. If witness is needed for more than one day, the full day's expenses will be paid prior to the beginning of each day attendance is required. If the subpoena is issued on behalf of the state or an officer or an agency thereof, fees and mileage need not be tendered. Rule 6-606(C)(1)(b).

4. Return of service is made on the original of the subpoena, which is then filed with the court. Rule 6-606(C)(2).

C. Motion to Quash Subpoena (Rule 6-606(D)(3)):

1. The person subpoenaed may file with the court a motion to quash the subpoena.

2. The judge shall quash or modify the subpoena if:

a. it subjects a person to an undue burden, for example, if all the records of a business are subpoenaed instead of only those records relevant to the case; or

b. it fails to allow reasonable time for compliance; or

c. it requires disclosure of privileged or other protected matter and no exception or waiver applies.

3. The judge, in order to protect a person subject to or affected by a subpoena, may quash or modify a subpoena if the subpoena requires:

a. disclosure of a trade secret or other confidential research, development or commercial information;

b. disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study not made at the request of a party; or

c. a person not a party (or officer of a party) to incur substantial expense or travel more than 100 miles to attend trial. Rule 6-606(D)(3)(b).

4. A hearing, with notice to the person subpoenaed and the party who requested the subpoena, is normally held on a motion to quash a subpoena.

5. A copy of any written motion to quash a subpoena must be served on the requesting party in the manner of service of pleadings and other papers. Rule 6-209.

6. Unless an order on a motion to quash a subpoena is issued in the presence of the requesting party and the subpoenaed person, the order must be issued and served as provided for service of pleadings and other papers. The order must be in writing.

7. When subpoenas are issued to produce and permit inspection of documents or tangible things, unless specifically ordered to appear, the person need not appear in court. Rule 6-606(D)(2).

8. A person commanded to produce and permit inspection and copying may serve upon all parties written objection to inspection or copying of any or all of the designated materials or of the premises. The objection must be filed within 14 days after service of the subpoena. If an objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

D. Failure to Appear

1. If a subpoenaed witness fails to appear as required in the subpoena, and with proper proof of service of the subpoena, the judge may:

a. grant a continuance of the proceeding; and/or

b. issue a bench warrant to arrest and bring the person before the court *if the subpoena was issued by the court*. Rule 6-207. This can be done without proceeding on a contempt charge; the bench warrant is issued within the same case.

2. The party who requested the witness may agree to have the proceeding take place without the subpoenaed witness.

3. Normally, the judge consults with the party who requested the subpoena before issuing a bench warrant.

4. Failure to appear without an adequate excuse may be deemed contempt of court punishable by fine or imprisonment. Rule 6-606(F). The court needs to follow the procedures concerning contempt if this is the route chosen for the witness who fails to appear.

E. Discovery (Rule 6-504):

1. Not less than ten (10) working days before trial, the prosecution shall disclose and make available for inspection and copying any records, papers, documents, recorded statements made by witnesses, or other tangible evidence in its possession, custody and control which are material to the preparation of the defense or are intended for use by the prosecution at trial or were obtained from or belong to the defendant.

2. Not less than ten (10) working days before trial, the defendant shall disclose and make available to the prosecution for inspection and copying any records, papers, documents or other tangible evidence in the defendant's possession, custody or control which the defendant intends to introduce in evidence at trial.

3. Not less than ten (10) working days before trial, the prosecution and defendant shall exchange witness lists including the names and addresses of witnesses each intends to call at trial. If requested by a party, a witness shall be made available for interview prior to trial.

4. Each party has a continuing duty to disclose information as required by this rule and shall promptly give notice to the other party of the existence of additional material or witnesses.

5. If a party fails to comply with this rule or an order issued pursuant to it, the court may:

a. order the party to disclose the information;

b. grant a continuance to allow completion of discovery;

c. order the party to complete the interview or inspect the materials at the trial setting;

d. prohibit the party from calling an undisclosed witness or introducing undisclosed evidence. This, like dismissal, should only be used in extreme cases. The exclusion of witnesses is improper absent an intentional non-compliance with a court order, prejudice to the opposing party and the consideration of lesser sanctions. *State v. Harper*, 2011-NMSC-044; or

e. enter any other appropriate order, including holding an attorney or party in contempt of court.

6. Under Rule 6-504(E), dismissal could be an option. However, in *State v. Jackson*, 2004-NMCA-057, ¶ 10, and in *State v. Bartlett*, 1990-NMCA-024, ¶ 5, the Court of Appeals stated that "dismissal is an extreme sanction to be used only in exceptional cases." Sanctions are discretionary with the court. "A defendant is not entitled to a dismissal or other sanctions upon a mere showing of violation of a discovery order." *Bartlett*, 1990-NMCA-024, ¶ 4. Defendant must also show prejudice resulting from the violation. Additionally, in *Jackson*, the Court cites the ABA Standards for Criminal Justice stating that "The sanction of dismissal is wasteful of judicial and investigative resources, and should be imposed only where no less severe sanction will remedy the violation." *Jackson*, 2004-NMCA-057, ¶ 15. Thus, dismissal as a sanction for failure to comply with discovery is an appropriate sanction only in the most exceptional cases and should be used sparingly by the court. The court should look at all other options, as discussed above, before granting a dismissal for a discovery violation. Frequent use of dismissal as a discovery sanction might well be viewed as abuse of discretion and subject a judge to discipline.

F. Pretrial Conference and Scheduling Order (Rule 6-505)**:**

1. The purpose of a pretrial conference is to enable the judge to clarify the pleadings, encourage negotiation, to utilize judicial resources more effectively and to expedite disposition of the case.

2. A pretrial conference may be ordered upon a motion by either party or upon the motion of the court.

3. Witnesses may not be called or subpoenaed unless ordered by the court. Pretrial conferences are not to be used to determine if witnesses are available for trial.

4. The court may enter a scheduling order that limits the time to file and hear motions and to complete discovery. The scheduling order may also include the dates of conferences and pretrial hearings, a trial date, and other matters deemed appropriate by the court.

G. Motions (Rule 6-304):

1. Any matter that is capable of determination without trial of the general issue, including defenses and objections, may be raised before trial by motion.

2. Suppression of evidence motions, for cases within the court's jurisdiction may be filed when a person is aggrieved by:

   a. a search and seizure of his or her property;

   b. a confession, admission or other evidence.

3. An application to the court for an order shall be made by written motion, unless made during a hearing or trial. The motion shall state with particularity the grounds on which it is based and set forth the relief or order sought. Written motions shall be served on each party in accordance with the rules on service and filings of pleadings. Rule 6-209. If it is an oral motion during a hearing or trial, the court should allow the opposing party to respond. If the party needs more time, that party needs to request it of the court.

4 *Unopposed motions*: The moving party shall determine whether a motion will or will not be opposed. If unopposed, a proposed order, initialed by opposing counsel, shall accompany the motion. Such a motion is not granted until the order is approved by the court.

5. *Opposed motions*: The moving party's motion shall state that concurrence by opposing counsel was requested or, if that was not done, shall specify why no such request was made. Opposed motions may include a brief or supporting points with citations or authorities. In addition, affidavits, statements, depositions or other documentary evidence in support of the motion may be filed with the motion. The movant shall request concurrence from opposing counsel unless the motion is one of the following:

   a. motion to dismiss;

   b. motion concerning bonds and conditions of release;

   c. motion for a new trial;

   d. motion to suppress evidence; or

   e. motion to modify a sentence pursuant to Rule 6-801.

6. Unless otherwise specified within the Rules of Criminal Procedure, written responses to motions shall be filed within fifteen (15) days after service of the motion. Rule 6-304(F). Responses may be accompanied by affidavits, statements, depositions or other supporting documentary evidence. The court must wait the 15 days before ruling on the motion. If there is no response filed, the court can rule on the written motion or set it for a motions hearing.

7. Motions and affidavits: Written motions (other than those that can be heard *ex parte*) and the notice of hearing on the motion must be served at least five days before the hearing, unless the rules provide otherwise or the court orders

otherwise. An example of an ex parte motion is an enlargement of time in which to hold a preliminary hearing when there is no opposing counsel. Any accompanying affidavit must be served with the motion. Any opposing affidavits must be served at least one day before the hearing, unless the court orders otherwise. Rule 6-104(C).

H. Recording of Trial

1. A party in a magistrate court criminal proceeding or any person with a claim arising out of the same transaction or occurrence giving rise to the proceeding may make a record of the testimony in the proceeding with prior approval of the court. Rule 6-601(D).

2. The recording is at the party's or person's expense.

3. The party or the person shall make a copy available to all parties in the proceeding.

4. A record of the testimony of a witness may only be used in magistrate court criminal proceedings if admissible under the Rules of Evidence. Rule 6-601(E).

5. If the record is audio or videotape, the proponent of the record is responsible for having the appropriate technology available for playback. Rule 6-601(F).

6. At the request of any party, the person making the recording shall make the recording available for review along with any exhibits and shall furnish a copy of the recording to the requesting party upon receipt of payment of reasonable cost of copying. Rule 6-601(G).

7. If only part of the record of the proceedings is offered in evidence, an adverse party may require the offeror to offer any other relevant part and any party may introduce any other parts as allowed in the Rules of Evidence. Rule 6-601(F)(3).

I. Service and Filing by Facsimile.

1. A party may file a copy of any pleading or other paper by faxing it directly to the court if:

   a. no fee is required for filing;

   b. only one copy is required;

   c. it does not exceed 10 pages in length; and

   d. it has a cover sheet with the names of the sender and recipient, any applicable instructions, the voice and fax number of the sender, an identification of the case, the docket number and the number of pages transmitted. Rule 6-210(D).

2. A party may file a copy of any pleading or other paper by faxing it to an intermediary agent who files it in person with the court. Filing in this manner is not subject to the restrictions in Rule 6-210(D). Rule 6-210(E). A facsimile copy has the same effect as any other filing for all procedural and statutory purposes. Rule 6-210(A).

3. Faxed filings must be sent to a number designated by the clerk. Judges may permit faxing to a number designated by the judge, who must note the filing date on the copy and promptly give it to the clerk's office. Rule 6-210(A).

4. The court may use facsimile transmission for issuance of notice, orders or writs, or for receipt of affidavits. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ. Rule 6-210(A). A notice, order, writ, pleading or paper may be faxed to a party or attorney who has listed a fax number on a pleading or paper filed in the action with the court, or has letterhead with a fax number, or has agreed to be served by fax. Rule 6-210(G).

5. Proof of facsimile service must include:

   a. a statement that the pleading or paper was transmitted by fax and reported as complete;

   b. the time, date, and sending and receiving fax numbers; and

   c. the name of the person who made the fax transmission. Rule 6-210(H).

6. A party has the right to inspect and copy the original of any pleading or paper that has been filed or served by fax if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury. Rule 6-210(I).

7. A document is "signed" if it includes an original signature, a copy of an original signature, a computer generated signature, or any other legally authorized signature. Rule 6-210(J).

J. Service and Filing by Electronic Transmission (Rule 6-211):

1. Pleadings and other papers ("documents") may be filed and served by electronic transmission, which is the transfer of data from one computer to another, other than by fax. These documents may be filed with the court if the court has adopted technical specifications for electronic transmission and if there is either no filing fee or payment is made at the time of filing.

2. The court may send documents to, and service may be made upon, an attorney registered with the Supreme Court as accepting documents by electronic transmission and to any other person who agrees to accept documents in this manner.

3. Proof of service by electronic transmission must be made by an attorney certificate or non-attorney affidavit and must include:

   a. the name of the person who sent the document;

   b. the time, date and electronic address of the sender;

   c. the electronic address of the recipient; and

   d. a statement that the document was successfully served by electronic transmission.

4. A party has the right to inspect and copy any document that has been filed or served by electronic transmission if the document has a statement signed under oath or affirmation or penalty of perjury.

K. Computation of Time (Rule 6-104):

1. Rule 6-104 determines how to calculate time periods included in the rules of criminal procedure, statutes, or orders of the court.

2. When calculating a time period:

   a. The day of the act, event, or default from which the time period begins is not counted. Rule 6-104(A).

   b. The last day of the time period is counted, except for weekends or legal holidays. (Legal holidays are New Year's Day; Martin Luther King, Jr.'s birthday; Presidents Day, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving, Christmas, and any other day designated as a state or judicial holiday.) Rule 6-104(A).

   c. However, the last day of the time period is not counted **if** the act to be done is the filing of a paper in court **and** the last day is a day on which the weather or other conditions have made the office of the clerk of the court inaccessible. Rule 6-104(A).

   d. Intermediate weekends and legal holidays are counted if the time period is more than 11 days. If the time period is less than 11 days, intermediate weekends and holidays are not counted. For example, if you are counting the days in which to hold a preliminary hearing for a defendant in custody (10 days), do not count the weekends or legal holidays to determine your time frame. Rule 6-104(A).

   e. Whenever notice or documents are served by mail on a party, three days are added to the prescribed time period. Rule 6-104(D).

3. Enlargement of Time (Rule 6-104(B)): The court, in its discretion, may enlarge time when cause is shown:

   a. with or without a motion or notice, order the period enlarged if the request is made before the expiration of the required time period; or

   b. upon motion made after expiration of the required time period, but it may not extend the time for probable cause determination, commencement of trial or for taking an appeal.

   c. This rule can be used to enlarge the time in which the State can hold a preliminary hearing. The court must enter an order giving an end date for the enlargement of time. The court can enter an order with or without a motion to enlarge time filed by the State.

Section 2 Felonies

2.1 General

A. Definition

1. A crime is designated as a felony:

    a. if it is so designated by law; or

    b. if, upon conviction, a sentence of imprisonment for a term of one year or more in the state penitentiary is authorized. Section 30-1-6.

2. Felonies are classified as follows:

    a. capital felony;

    b. first degree felony;

    c. second degree felony;

    d. third degree felony; and

    e. fourth degree felony. Section 30-1-7. A crime declared by statute to be a felony, but for which no degree is specified in the statute, is also a fourth degree felony.

B. Authority of Magistrate Court (Section 35-3-4 (criminal jurisdiction of Magistrate Courts)):

1. The Magistrate Courts do not have jurisdiction:

    a. To hear or decide a felony charge (that is, to conduct a trial). *State v. De La O*, 1985-NMCA-023.

    b. To hear or decide a motion to suppress a search warrant if it is in connection with a felony charge.

    c. To dismiss a felony charge for failure to dispose of the case within six months. Rule 6-506 does not apply to cases that are not within the magistrate court's trial jurisdiction.

    d. To hear or decide a misdemeanor charge if it is arising out of the same incident as a felony charge and the indictment or criminal information filed in the district court includes the same misdemeanor charges filed in magistrate court. Magistrate and district courts have concurrent jurisdiction over misdemeanor charges. However, after the filing of an indictment or information in district court, the identical charges in magistrate court should be deemed abandoned. In the interest of orderly procedure, there should not be piecemeal prosecutions arising from the same incident. *State v. Muise*, 1985-NMCA-090, ¶ 19. If the indictment

or information does not include charges within the trial court jurisdiction of the magistrate court which have been charged on the criminal complaint, the court should set the charges for an arraignment, unless the court has received a dismissal from the district attorney's office.

2. However, if the charge is a felony, the court may:

   a. Issue an arrest or search warrant upon a written showing of probable cause by a law enforcement officer or prosecutor. Rules 6-206 and 6-208.

   b. Make a probable cause determination if the defendant has been arrested without a warrant and has not been released. Rule 6-203(A).

   c. Set the conditions of release. Rule 6-203(C)(2).

   d. Conduct the first appearance proceeding unless the defendant has been indicted. Rule 6-501.

   e. Conduct a preliminary hearing. Rules 6-202(D) and 6-501(D).

3. The defendant should be taken before a judge in the district where the crime is alleged to have been committed upon an arrest upon a warrant. Section 35-3-5(A). If the defendant is brought before a judge in a county other than the one in which the arrest warrant was issued, the judge has no jurisdiction and the judge does not set bail or take any other judicial action. However, the judge advises the defendant that s/he has the right to consult with the public defender or other counsel.

2.2 Felony Complaint and Arrest Warrant

A. Filing Complaint and Docketing of Action (Rule 6-201):

1. The criminal complaint in felony cases is the basis for:

   a. issuing an arrest warrant; and/or

   b. beginning a criminal action against the defendant.

2. The criminal complaint is a sworn statement containing:

   a. the facts;

   b. the common name of the offense charged; and

   c. the specific statutory section number describing the offense.

3. If the complaint charges a capital, felonious or other infamous crime, the defendant may be tried only upon the filing of an indictment or an information, and only by the district court. N.M. Const. art. II, § 14.

4. If the defendant is arrested without a warrant, a copy of the criminal complaint is given to the defendant prior to the defendant being transferred to a detention facility. Rule 6-201(D). If the court is open when the defendant is taken into custody, the criminal complaint shall be filed at that time. If the court is not open when the defendant is taken into custody, it shall be filed the next business day of the court. If the defendant is not in custody on the next business day, the complaint shall be filed as soon as practicable.

5. The district attorney may proceed by indictment or information filed in the district court. Unless the defendant is indicted, a preliminary hearing must be held within ten (10) business days after the initial appearance of a defendant who is in custody or within sixty (60) days if the defendant is not in custody. Rule 6-202(D). Remember that in determining the 10 day time frame for an in-custody case, do not count the weekends or legal holidays. Rule 6-104.

6. If the defendant is indicted by the grand jury prior to the preliminary hearing, the district attorney should immediately advise the judge. Rule 6-202(E). The court should receive a copy of the grand jury indictment. The court file is then closed and the bond posted in the court is automatically transferred to district court. Rule 6-202(F).

7. After indictment, the magistrate court judge takes no further action in the case. The judge does not conduct a preliminary hearing and closes the file on the case. Conditions of release set by a magistrate judge remain in effect unless amended by the district court. Rule 6-202(E).

8. If the indictment only includes felony charges and the magistrate complaint includes petty/misdemeanor charges, those charges need to be dismissed by the district attorney or the magistrate court should set the misdemeanor charge(s) for arraignment and proceed accordingly.

9. Refiled Felony Complaints:

   There is currently no rule which gives guidance to the magistrate courts when the state dismisses a felony complaint and then refiles the exact same complaint. The best practice is that they should be filing a refiled complaint, as Rule 6-506A(C) describes for non-felony cases. This way the court will not open the same case twice. Once the complaint is refiled, assuming it is exactly the same as the original complaint, there is no need to conduct another first appearance. The case should be set as soon as possible for a preliminary hearing.

B. Issuance of an Arrest Warrant (Rule 6-204):

1. Upon a written showing of probable cause that the defendant has committed an offense, the judge may issue an arrest warrant. The arrest warrant is directed to a law enforcement officer and commands the arrest of a person on the grounds stated in the warrant. A criminal complaint and an affidavit for arrest warrant or another similar document including the facts which support probable cause must be included when an arrest warrant is requested.

a. The arrest warrant is usually issued upon the request of a law enforcement officer.

b. Normally, the arrest warrant is issued at the time the complaint is filed.

2. The arrest warrant may be issued if the judge is satisfied that:

a. an offense has been committed;

b. there are reasonable grounds to believe that the defendant committed it; and

c. the ends of justice would be better served by the issuance of a warrant in lieu of a summons.

3. The arrest warrant:

a. includes the judge's signature;

b. contains the name of the defendant or, if the name is not known, any name or description by which the defendant can be identified with reasonable certainty;

c. describes the offense charged; and

d. commands that the defendant be arrested and brought before the court. Rule 6-204.

4. The arrest warrant is directed to a full-time salaried:

a. state or county law enforcement officer;

b. municipal police officer;

c. campus security officer; or

d. Indian tribal or pueblo law enforcement officer. Rule 6-206(A).

5. The requesting officer or district attorney prepares the arrest warrant and submits it to the judge for signature and the date.

6. A separate arrest warrant must be issued for each person accused; one arrest warrant may be issued for more than one charge or complaint.

7. Usually, the judge issues the arrest warrant to the officer or district attorney requesting it.

8. It is the duty of the agency requesting the arrest warrant to cause it to be entered into the NCIC system.

9. A request for an arrest warrant may be made using a number of methods:

   a. by hand delivery of a hard copy of the affidavit with a copy of the arrest warrant and criminal complaint attached;

   b. by oral testimony in the presence of a judge, under oath, and reduced to writing and served with the warrant; or

   c. by transmission of the affidavit, proposed warrant and criminal complaint to the judge by telephone, fax, electronic mail or other reliable electronic means.

10. Before ruling on the affidavit for arrest warrant, the judge may require the affiant to appear before him/her by telephone, personally or by audio-visual transmission. If the judge issues the warrant remotely, it shall be transmitted by reliable electronic means to the affiant and the judge shall file a duplicate original with the court. Any signatures used can be original, a copy, or a computer generated signature. Rules 6-204 and 208(H).

C. Arrest and Return (Rule 6-206(B), (C)):

1. At the time of arrest, the arresting officer either serves a copy of the arrest warrant on the defendant or if the officer does not have a copy of the warrant:

   a. informs the defendant of the offense;

   b. informs the defendant of the fact that a warrant has been issued; and

   c. serves the warrant on the defendant as soon as practicable.

2. Return on the arrest warrant is made by the arresting officer who:

   a. completes the return portion on the original of the arrest warrant;

   b. returns the original to the issuing court; and

   c. immediately notifies NCIC to remove the warrant because the defendant has been arrested.

3. The magistrate court retains and files the original of the complaint, the affidavit of arrest warrant, and the return of the arrest warrant.

4. When the court is notified that a warrant has been served, the clerk shall mark the location of the warrant as "in transit" so the court can track whether the original warrant has been returned.

D. Arrest Followed by Complaint and Probable Cause Determination (Rule 6-201(D)):

Under the Fourth Amendment to the United States Constitution, an accused who is detained and unable to meet conditions of release has a right to a probable cause determination.

Gerstein v. Pugh, 420 U.S. 103 (1975). The probable cause determination must ordinarily be made as soon as possible, but at most within forty-eight (48) hours of arrest, unless there are extraordinary reasons for delay. Weekends and holidays are not extraordinary circumstances. The probable cause determination is done in the same manner it is done for misdemeanor cases.

E. Amendment of Complaints

1. The court may cause a complaint to be amended at any time before the verdict as long as:

   a. no additional or different offenses are charged; and

   b. the substantial rights of the defendant are not prejudiced. Rule 6-303(A).

2. The amendment may be to correct a defect, omission, error, imperfection, or repugnancy in the form of the complaint or a variance between the allegations of the complaint and the evidence offered in support of these allegations. Rule 6-303(C).

3. Any unnecessary allegation contained in a complaint may be disregarded as surplusage. Rule 6-305(B).

2.3 First Appearance

A. Definition; General

1. The first appearance is the proceeding at which the arrested person who is charged with at least one felony is brought before the judge for the first time after his or her arrest.

2. An officer must have probable cause to make a warrantless arrest. A probable cause determination shall be made at the time of the first appearance if one has not been done prior to that time. Rule 6-203(A).

3. The judge shall not require the defendant to plead to the complaint, nor shall the judge enter a plea for the defendant. Arraignments, including a plea to a felony charge, occur in district court.

4. A first appearance may be made before the court by use of a two-way audio-video communication pursuant to Rule 6-110A.

B. Explanation of Rights

1. At the first appearance, the judge informs the defendant of the offense charged and of his or her rights. Rule 6-501(A).

2. The judge must inform the defendant of all of the following:

   a. The offense charged;

b. The maximum penalty and mandatory minimum penalty for the offense charged;

c. The right to bail;

d. The right, if any, to trial by jury;

e. The right to the assistance of counsel at every stage of the proceedings;

f. The right to representation by an attorney at the state's expense if the defendant is indigent;

g. The right to remain silent and the fact that any statement made by the defendant may be used against him or her; and,

h. The right to a preliminary hearing unless indicted first.

C. Representation by Counsel and Pro Se Representation

1. After the explanation of rights, the judge determines whether the defendant is represented by counsel.

2. If the defendant is not represented by counsel, the judge allows the defendant reasonable time and opportunity to make telephone calls and consult with counsel before the proceedings continue. Rule 6-501(A).

3. The defendant is encouraged to obtain counsel and is advised of the right to representation by the public defender or appointed counsel if the defendant is unable to afford a private attorney.

4. The defendant may waive the right to counsel. Section 31-16-6. A waiver should be accepted only after the judge has informed the defendant of the right to counsel and is convinced that the defendant understands the consequences of the waiver. Section 31-15-12. In making this determination, the judge must consider such factors as the person's age, education, familiarity with English, and the complexity of the crime involved. Section 31-16-6. The judge may not force a lawyer upon a criminal defendant when the defendant insists on conducting his or her own defense. U.S. Const. amend. VI; N.M. Const. art. II, § 14. In *State v. Garcia*, 2011-NMSC-003, ¶ 25, the Court stated that there are three requirements which must be met in order for a defendant to proceed pro se. First, the defendant must clearly and unequivocally make his/her intention known that s/he wishes to represent himself. Second, the assertion must be made in a timely manner. And last, the defendant must knowingly and intelligently give up the benefit of counsel. In *State v. Castillo*, 1990-NMCA-043, ¶¶ 9-12, the Court set out warnings which must be given to the defendant before allowing pro se representation: the judge must 1) advise the defendant of the dangers of proceeding pro se; 2) inform the defendant of the charges, the statutory offenses, range of punishment, possible defenses and 3) ensure that the defendant will follow the Rules of Evidence and courtroom procedures. If defendant is allowed

to proceed pro se, the judge may, despite objections from the defendant, appoint "standby counsel" to assist the defendant if and when assistance is requested or if and when the judge finds it necessary to terminate self-representation. The judge may terminate self-representation and appoint counsel for a defendant who intentionally engages in serious and obstructionist misconduct. *State v. Rotibi*, 1994-NMCA-003, ¶ 13.

5. If the defendant insists on waiving the right to counsel, s/he must sign the waiver of counsel form. The form is also signed by the judge and the public defender or other counsel appearing with the defendant at the first appearance.

D. Determination of Indigency

Form 9-403 is to be used to determine whether a defendant is indigent and eligible for court-appointed defense counsel. The court should use the **conditional** order of appointment (Form 9-403A) when there is a Public Defender's Office in the magistrate district. In that case, the Public Defender's Office will be making a determination on indigency. In magistrate districts that do not have a Public Defender's Office, the court should use the order of appointment available in Odyssey to appoint a contract public defender. In such case, an indigent defendant is entitled to appointed counsel.

2.4 Preliminary Hearing

A. The preliminary examination will be held within ten days from the first appearance if the defendant is still in custody at that time or within sixty days if the defendant has been released. Rule 6-202(D). There is no waiver of time for a preliminary hearing. If a party wants to enlarge the time in which to hold a preliminary hearing, the procedure in Rule 6-104(B) should be followed. An order enlarging time should be issued by the court.

B. Dismissal is not an appropriate remedy for failure to conduct a preliminary hearing within the time limits when defendant is not in custody and has not demonstrated prejudice. *State v. Tollardo*, 1982-NMCA-156. If the court has not set a preliminary hearing within the time frame, the court needs to set it as soon as possible. The court can hold a hearing to review bond and conditions of release on its own motion or wait for such a motion to be filed by defense counsel.

C. The defendant has a constitutional right to counsel at a preliminary hearing because it is a critical stage of the proceedings. The defendant can waive the right to counsel if it is competently, intelligently and voluntarily waived. *Pearce v. Cox*, 354 F.2d 884 (10th Cir. 1965).

D. At the hearing, the prosecution examines witnesses, and the defendant may call witnesses and cross-examine any witness. The Sixth Amendment right to confrontation of witnesses is a trial right and does not apply to probable cause determinations in preliminary hearings. *State v. Lopez*, 2013-NMSC-047. For example, if a blood test results report can be admitted into evidence under an exception to the hearsay rule, the

analyst who did the testing does not have to be called as a witness which would be required at trial. An audio recording is made of the preliminary hearing and is kept by the court for a period of six months. Rule 6-202(A), (B). If the case is bound over, the recording shall be filed with the clerk of the district court along with the bind over order.

E. There is not full discovery for preliminary hearings. Parties shall provide to each other any prior statements or reports made by any witness who will testify at the preliminary hearing. *Mascarenas v. State*, 1969-NMSC-116, *overruled on other grounds by Lopez*, 2013-NMSC-047.

F. The defendant will be bound over to district court for trial if evidence is produced showing probable cause that the offense was committed and that the defendant committed the offense; if the state fails to show probable cause, the defendant will be discharged. Rule 6-202(C). It is often helpful for the magistrate court to review the uniform jury instructions for any specific charge to determine the elements of the charge. Upon this review the magistrate court can make a determination as to whether the state has presented evidence to support probable cause for each element of the offense.

The district attorney shall file with the magistrate court a copy of the information filed in district court and a copy of an order extending the time in which the district attorney can file the information if such is requested. The district attorney must file the information in district court within 30 days of a waiver of preliminary hearing or after the completion of the preliminary hearing, unless time has been extended by the district court upon motion of the State. Rule 5-201(C). If there is probable cause found for only offenses within the magistrate court's trial jurisdiction, the magistrate court should arraign the defendant on those charges and set a trial date. The magistrate court should also issue an order not finding probable cause on the felony offense(s).

G. If the defendant is bound over for trial, the magistrate court shall retain jurisdiction over the defendant and the bond until an information or an indictment is filed in district court or until 12 months have passed, whichever occurs first. If the defendant is indicted, the judge must transfer any bond to the district court and all further action on the bond shall be taken in district court, unless the case is remanded to magistrate court. Rule 6-202(F).

H. If the defendant waives a preliminary examination after having been advised of his or her rights, the magistrate judge binds the defendant over to district court for trial. The magistrate court should make sure that the defendant understands the consequences of waiving the right to a preliminary hearing. If defendant does not understand the consequences, defendant should consult counsel.

I. If the State files a criminal information in district court before a preliminary hearing is held in the magistrate court, a number of things could happen. If defendant waives the right to a preliminary hearing in district court, the magistrate court should receive a copy of this pleading and close its case. The State might dismiss the charges in magistrate court. The case should then be closed in magistrate court. The case could be remanded from district court to magistrate court to hold a preliminary hearing. The magistrate court will reopen its case if the charges are the same as a previous magistrate case, or open a

new case to conduct the preliminary hearing. The magistrate court should not close its case until the charges are resolved either by a preliminary hearing or a waiver thereof or a dismissal.

J. In 2010 the Court of Appeals decided *State v. White*, 2010-NMCA-043. In that case a criminal complaint was filed against the defendant charging him with two felonies. A preliminary hearing was held in magistrate court and no probable cause was found. The district attorney re-filed a criminal complaint in district court which was identical to the criminal complaint filed in magistrate court. The district court remanded the new case to the magistrate court and it was assigned to the judge who held the prior preliminary hearing and found no probable cause. The district attorney excused that judge; there was objection by the defendant. However, it was assigned to a new magistrate judge. The new judge set it for preliminary hearing after a motion was heard in district court on the excusal. When the preliminary hearing was scheduled, the defendant's witness was not available. The judge listened to the tapes of the first preliminary hearing. There was no new evidence presented. The second judge found probable cause based on the same evidence on which the first judge found no probable cause. One of the questions the court looked at was whether it was proper to have two preliminary hearings on the same charges.

First, the Court looked at whether the State could disqualify the first judge once the re-file was remanded to magistrate court. The Court found that because the charges filed in district court were identical to the charges previously dismissed by the first judge after finding no probable cause, the two complaints are the same case. Therefore, the State could not disqualify the first judge after it asked him to exercise his discretion in the first preliminary hearing. The Court reasoned that the result of this was that one magistrate was allowed to overrule another magistrate on the issue of probable cause based on the same evidence which is improper. It also stated that it was error for the district court to order a magistrate to conduct a second probable cause determination and to allow the state to excuse the first judge from conducting the preliminary hearing after remand.

If a magistrate court has the same situation arise, it should make sure that the facts do not fall under the *White* reasoning. The court should have a hearing to determine how the re-filed case is distinguishable from *White*. The inquiry by the court would be whether or not the evidence to be presented in the second preliminary hearing is the exact same evidence previously presented. If the court finds that the criminal charges are identical and the evidence to be presented is the same evidence as previously presented, the case should be dismissed pursuant to *White*. If the court finds that the criminal charges are identical and the evidence to be presented is different from the original evidence, a preliminary hearing should be set.

Section 3 Bail; Release

3.1 Definitions

A. Bail Bond: A bail bond is a type of bond to obtain the release of a person from imprisonment and secure the defendant's appearance before the court. The release on a bail bond serves important interests: it gives effect to the presumption of innocence by not subjecting the accused to imprisonment until guilt is proven beyond a reasonable doubt and advances administration of justice because the bond insures the defendant's appearance in court. When a bondsman posts bond for a defendant, the bondsman enters into a contract with the state where there is a guarantee that the defendant will appear as directed by the court. *State v. Valles*, 2004-NMCA-118.

B. When someone bonds out of jail, the bondsman or the jail puts an arraignment date on the paperwork, and the court can do a number of things: 1) calendar that date and if defendant fails to appear, send a summons; 2) upon receipt of the bond paperwork, immediately send a summons and if defendant appears on the date given on the paperwork, cancel summons and arraignment; or 3) provide to the jail the dates which work for the court. Since the jail bond schedule is provided by order of the court and the jail is acting as a designee of the court, if defendant fails to appear on the date given by the jail, the court can issue a bench warrant for failure to appear as well as a notice of forfeiture of bond and order to show cause.

C. Bail Bondsman (Section 59A-51-2 (Definitions)):

1. "bail bondsman" means a limited surety agent or a property bondsman;

2. "insurer" means any surety insurer which is authorized to transact surety business in this state;

3. "limited surety agent" means any individual appointed by an insurer by power of attorney to execute or countersign bail bonds in connection with judicial proceedings and [who] receives or is promised money or other things of value therefor;

4. "property bondsman" means any person who pledges currency, money orders or cashier's checks or other property as security or surety for a bail bond in connection with a judicial proceeding and receives or is promised money or other things of value;

5. "solicitor" means a person employed by a bail bondsman for the purpose of assisting the bail bondsman in presenting the defendant in court when required, or to assist in the apprehension and surrender of defendant to the court or keeping the defendant under necessary surveillance, and to solicit bail bond business, to sign property bonds and assist in other conduct of the business all as authorized by the employer bail bondsman. This does

not affect the right of a bail bondsman to hire counsel or to ask assistance of law enforcement officers.

Under this statute the term bail bondsman includes both a limited surety agent who represents an insurer and a property bondsman who posts money or property. In court when we talk about a bondsman we are using the term generally as anyone who posts money or property for a defendant and is compensated for providing that service.

A bondsman can be backed by an insurance company to provide the security for a bond or the bondsman has property which s/he posts as security for the bond.

3.2 Legal Basis for Bail

A. The right to bail is granted by the New Mexico Constitution to any arrested person except for a person charged with a capital offense where the proof of guilt is evident or the presumption of guilt is great. N.M. Const. art. II, § 13. The district court may deny bail for a period of sixty days after the incarceration of the defendant by an order entered within seven days after the incarceration, in the following instances:

1. the defendant is accused of a felony and has previously been convicted of two or more felonies, within the state, which felonies did not arise from the same transaction or a common transaction with the case at bar;

2. the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction, within the state.

B. Although an arrested person has a right to release, certain restrictions or requirements for release may be imposed. Rule 6-401.

C. All defendants are entitled to bond pre-adjudication. It is unconstitutional to issue a no bond warrant before adjudication. No bond warrants are within the court's discretion for probation violations since they are post-adjudication.

3.3 Bondsman License

A. Qualifications for license (Section 59A-51-4):

Applicants for a license as a bail bondsman or solicitor under the provisions of the Bail Bondsmen Licensing Law shall be qualified if s/he is over 18 years old, a US citizen, not a convicted felon, and not a law enforcement, jail, court or prosecution official, or an employee of any of those entities, or an attorney or government officer. For a bail bondsman license, the applicant must pass a written examination. For a property bondsman license, the applicant must be

financially responsible and provide a surety bond or deposit in lieu thereof. For a limited surety agent license, the applicant must be appointed by an authorized surety insurer. For a solicitor license, the applicant must be appointed by a licensed bail bondsman. A license is continued as long as the bondsman is qualified. Section 59A-51-10.

B. License suspension and termination (Section 59A-51-14):

The superintendent may deny, suspend, revoke or refuse to continue any license issued under the Bail Bondsmen Licensing Law for many reasons, including but not limited to: any violation of the laws of this state relating to bail or the bail bond business; misappropriation, conversion, or unlawful withholding of money belonging to insurers or others and received in the conduct of business under the license; fraudulent or dishonest practices in the conduct of business under the license; and knowingly having in the bail bondsman's employ a person whose bail bond business license has been revoked, suspended or denied in this or any other state.

Additionally, if any property bondsman discontinues writing bail bonds during the period for which s/he is licensed s/he shall notify the clerks of the courts with whom s/he is registered of such discontinuance. Within thirty (30) days after such discontinuance the licensee shall return his/her license to the superintendent for cancellation. Section 59A-51-11.

You can call the Agent Licensing Bureau at the Office of the Superintendent of Insurance at 505-827-4349 and you should be able to obtain information as to whether or not the bondsman is licensed and in good standing.

If a bondsman is not licensed or cannot show his license, s/he is considered an uncompensated surety.

3.4 Release

A. The Supreme Court in Rule 6-401(A) has mandated that a person shall be released on **personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court**, subject to other release conditions, unless the court determines that such release will not reasonably assure the appearance of the person as required. An unsecured appearance bond requires the defendant to pay the full amount of the bond if s/he fails to appear as required or fails to comply with any other conditions of release that may be imposed. A bail bond differs from an appearance bond in that a bail bond is executed by a surety or sureties on behalf of the defendant; a surety agrees to pay the amount of bond if the defendant fails to appear. If the court determines that the above measures are not sufficient to secure such appearance or will endanger the safety of any other person or the community, in addition to any release conditions imposed, the court shall make a **WRITTEN FINDING** and order release subject to the first of the following types of secured bonds that will reasonably assure the defendant's appearance and the safety of

another and/or the community. This includes a written factual basis to support the finding. This will include an analysis of the factors listed in Rule 6-401(B). The judge may review the defendant's criminal history in Odyssey as a source of information. The court cannot skip down the list, but must make an analysis in order to determine if that type of secured bond will assure the defendant's appearance and the safety of the community:

1. The execution of a bail bond in a specified amount executed by the person and secured by a deposit of cash of 10% of the amount set for bail or secured by a greater or lesser amount as is reasonably necessary to assure appearance of the required individual. The cash deposit may be made by a paid licensed surety provided such paid surety also executes a bail bond for the full amount of the bail set; or

2. The execution of a bail bond by the defendant or by unpaid sureties in the full amount of the bond and the pledging of real property (Rule 6-401(A)(2)); or

3. The execution of a bail bond with licensed sureties or execution by the person of an appearance bond and deposit with the clerk, in cash, of 100% of the amount of bail set. Rule 6-401(A)(3).

B. A person may be detained without bail upon motion by the State and a full hearing to determine if bail may be properly denied under the constitution. Rule 6-401(E). There is a question, however, under the state constitution as to whether a magistrate has the authority to hold a defendant without bond. *See* N.M. Const. art. II, § 13.

C. Release and conditions of release may be broadly categorized as follows:

1. release on own recognizance, that is, release based on the defendant's promise to appear;

2. release subject to bond requirements;

3. release subject to conditions in addition to recognizance or bond requirements. Rule 6-401(C).

D. Release on own recognizance without any other conditions is the least restrictive form of release. Cash only bonds are constitutional, but should be the last option for the court and should only be imposed after careful consideration. *State v. Gutierrez*, 2006-NMCA-090.

E. There are two reasons for imposing bond and conditions of release:

1. The primary purpose is to assure the appearance of the arrested person at court proceedings.

2. The secondary purpose is to restrict the activities of the defendant if there is a danger that the person will unlawfully interfere with the orderly administration of justice or endanger the safety of other persons or the community. Rule 6-401(A).

F. Only the bond or other conditions of release necessary to assure the appearance of the defendant, to prevent interference with the administration of justice, or to protect the safety of others or the community should be imposed.

G. The court has great discretion in setting the condition or combination of conditions that will assure the appearance of the defendant, the orderly administration of justice, and the safety of others. Each defendant must be considered individually.

3.5 Factors to Be Considered for Setting Conditions of Release

The Court must balance the defendant's interest in pretrial release with the state's interest in securing the defendant's appearance at trial and the interest in safeguarding the community from any potential threat.

The following factors must be considered prior to determining the type of bail and which conditions of release will reasonably assure the appearance of the defendant and the safety of any other person and the community (Rule 6-401(B)):

A. the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves a narcotic drug;

B. the weight of the evidence against the person;

C. the history and characteristics of the person, including:

1. the person's character and physical and mental condition;

2. the person's family ties;

3. the person's employment status, employment history and financial resources;

4. the person's past and present residences;

5. the length of residence in the community;

6. any facts tending to indicate that the person has strong ties to the community;

7. any facts indicating the possibility that the person will commit new crimes if released;

8. the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and

9. whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;

D. the nature and seriousness of the danger to any person or the community that would be posed by the person's release; and

E. any other facts tending to indicate the person is likely to appear.

3.6 Conditions of Release to Assure the Orderly Administration of Justice

The court may set any of the following conditions of release to assure the orderly administration of justice (Rule 6-401(C)):

A. the condition that the person not commit a federal, state or local crime during the period of release; and

B. the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:

1. a condition that the person remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the person will appear as required and will not pose a danger to the safety of any other person or the community;

2. a condition that the person maintain employment, or, if unemployed, actively seek employment;

3. a condition that the person maintain or commence an educational program;

4. a condition that the person comply with restrictions on personal associations, place of abode or travel specified by the court;

5. a condition that the person avoid all contact with an alleged victim of the crime and with any potential witnesses who may testify concerning the offense;

6. a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

7. a condition that the person comply with a specified curfew;

8. a condition that the person refrain from possessing a firearm, destructive device or other dangerous weapon;

9. a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

10. a condition that the person undergo available medical, psychological or psychiatric treatment, including treatment for drug or alcohol dependency and remain in a specified institution if required for that purpose;

11. a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;

12. a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

13. a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

14. The court should use Form 9-303A if defendant is to be released on a secured or unsecured appearance bond or bail bond. If a surety bond is used, the court should also use Form 9-304.

3.7 Posting Bond

A. **Bondsman**: Rule 6-401B sets out the requirements for bondsmen in posting different types of bonds.

1. Surety Bonds: If the bond is a surety bond, the bond must be signed by a licensed bail bondsman as surety and who has paid all outstanding default judgments or forfeited surety bonds. At this time there is no way of knowing if the bondsman has paid all outstanding default judgments or forfeited surety bonds. If the bondsman is licensed as a limited surety agent, he shall file proof of appointment by an insurer by power of attorney with the bond. Rule 6-401B(A).

2. Property Bonds: It is called a property bond, even if the property posted is money. If a property bond (money) is submitted by a compensated surety, the bail bondsman or solicitor must be licensed as a property bondsman and must file in each court in which s/he posts bond an irrevocable letter of credit in favor of the court, a sight draft payable to the court and a copy of his/her license. Rule 6-401B(B). Form 9-311 shows the court how much credit the bondsman has. A problem arises if a bondsman is posting the same letter in many courts and there is no way, as of yet, to determine

whether or not the bondsman has exceeded his/her credit limit. Hopefully, this will be set up in the Odyssey program so that each court can see what the bondsman has outstanding in all the other courts, so the court can determine whether s/he still has the ability to post bond.

3. Real or Personal Property Bonds: Real or personal property bonds may only be executed for a defendant's release in a magistrate district in which the district court has ordered it as appropriate in their district. If a property is submitted by a compensated surety (not a family member or friend), under this section, the bail bondsman or solicitor must be licensed as a property bondsman and must pledge or assign personal or real property owned by the property bondsman as security for the bail bond. In addition, a licensed property bondsman must file in each court in which s/he posts bonds proof of the ownership of the property and a copy of his/her license. Additionally, s/he must also attach to the bond a current list of outstanding bonds, encumbrances, and claims against the property every time s/he posts bond. This is Form 9-305. Rule 6-401B(C).

4. There are limits on the property bonds posted. No single property bond can exceed the value of the real or personal property pledged. The aggregate amount of all property bonds posted by the surety cannot exceed 10 times the amount pledged. When a bondsman takes collateral from someone, it is limited to a lien on that person's property which should be reasonable in relation to the amount of the bond and return when the bond is exonerated. If the collateral is cash or negotiable security, it shall not be more than 50% of the bond amount and there shall be no other collateral. If the collateral is a mortgage on real property, the mortgage may not exceed 100% of the bond amount. If the collateral is a lien on a vehicle or other personal property, it cannot exceed 100% of the bond amount. If the bond is forfeited, the bondsman must return any collateral in excess of the amount of indemnification and the premium is allowed by law. Rule 6-401B(D).

B. **Unpaid Surety**: If an unpaid surety (not a bail bondsman, but a family member, friend, etc.) is going to post a real property bond, the bond must be signed by the owner of the property. The affidavit must contain: 1) a description of the property by which the surety proposes to justify the bond and its encumbrances; 2) the number and amount of other bonds and undertakings for bail entered into by the surety remaining undischarged; and 3) a statement that the surety is a resident of New Mexico and owns real property in this state having an unpledged and unencumbered net value equal to the amount of the bond. Proof may be required of the matters set forth in the affidavit. The provisions of this rule shall not apply to a paid surety. Rule 6-401A.

3.8 Jail Bond Schedule

A. A bail designee is a person who is appointed by the judge to act on behalf of the judge in bail matters when the judge is unavailable. Section 31-3-1. It is within the discretion of each magistrate court as to whether or not to issue a schedule. Rule 6-401(J). For the magistrate courts, the local jail has been made the designee through the bond schedule. The designation must be in writing by the presiding judge of the magistrate district in which the jail is located. A bond schedule at the jail allows for a simplified method for a defendant's release from jail.

B. A designee has limited powers in bail matters. A designee may not hold a hearing to determine if bail may be denied, review conditions of release previously imposed, or amend conditions of release previously imposed. Rule 6-401(J).

C. A person may not serve as a bail designee if that person or his or her spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds in this state or if employed by a jail or detention facility, unless designated in writing by the presiding judge of the magistrate district in which the jail or detention facility is located. Rule 6-401(J).

D. The jail bond schedule is set by the magistrate court for whatever offenses they feel are appropriate to allow a defendant to bond. Often there are certain offenses which are excluded, such as DWI or domestic violence cases. Constitutionally, there is no requirement that a bond be set upon a defendant's arrest; the Constitution does not give a particular time frame. However, in the rules, a review of conditions of release is required during the probable cause determination or the first appearance before the court, whichever occurs first. Therefore, a bond will be set in all cases at one of these two times, but no later than 48 hours from when a defendant is taken into custody.

3.9 Release Proceedings

A. Evidence

In all hearings relating to bail, the court may receive and act on credible hearsay. The Rules of Evidence do not apply to bail matters. Rule 11-1101(D).

B. Review Conditions of Release; Failure to Comply with Conditions of Release

1. At any time, upon motion of the prosecuting attorney or upon the court's own motion, the judge may have the defendant arrested and brought to court to review the conditions of release or amount of bail set. This warrant should be a no bond warrant since the defendant has violated the previous conditions as set by the court. Rule 6-403(A). The bench warrant should be supported by an affidavit as required by Rule 6-207, if the judge does

not have personal knowledge of the violation. The defendant should be seen no later than the next business day, once s/he has been arrested on the warrant. At that time the defendant may admit or deny the allegation of the violation. If defendant admits the violation, the court may set new conditions of release which can include a new bond amount. If the defendant denies the allegation of the violation, defendant has a right to an evidentiary due process hearing. *State v. Segura*, 2014-NMCA-037. This evidentiary hearing should be held within seven days from defendant's arrest. If, after the evidentiary hearing, the court finds that defendant violated his conditions of release, the court may set new conditions, including bond, pursuant to Rule 6-401.

2. A person may petition the district court for release if new or additional conditions of release are imposed and after twenty-four (24) hours from the time of imposition of the new conditions the person continues to be detained due to inability to meet the new conditions of release or the person is ordered released on a condition which requires him or her to return to custody after specified hours. Rule 6-403(C)(2).

3. If at any time the judge increases the amount of the bond previously imposed, the existing bond may be supplemented by a new bond or cash deposit to make up the new amount that is required by the court.

C. Revocation of Release

1. After the court has had the defendant arrested under Rule 6-403(A), the judge may revoke the bail or recognizance only after an evidentiary due process hearing, and if there is a showing that the defendant has been indicted or bound over for trial on a charge constituting a serious crime allegedly committed while on release. This is a very narrow category of cases on which the court can revoke bail.

2. However, under Rule 6-403(B), the Supreme Court has taken away the magistrate judge's ability to revoke the bail or recognizance and have the defendant remain in jail without bond. In magistrate court, if the judge revokes the bail or recognizance, the judge must set a new bond in accordance with Rule 6-401.

D. Petition to District Court; Felonies

1. A person who is charged with a felony and who has not been bound-over to the district court may file a petition for release with the district court. Rule 6-401(I).

2. A petition for release is a request that the district court review and change the conditions of release imposed by the magistrate court.

3. After a petition for release has been filed in district court, the magistrate court has no jurisdiction to release the accused.

4. Any conditions of release or bail amount previously imposed by the magistrate court continue in effect pending a determination by the district court.

5. If the district court does not act on the petition within 48 hours, any conditions imposed or amount of bail set by the magistrate court continue in effect.

6. If the district court modifies the conditions of release or amount of bail imposed by the magistrate court, the judge may no longer act on release matters relating to the defendant.

3.10 Failure to Appear and Forfeiture

A. If a person fails to appear as required in the conditions of release, the judge *may*:

1. Issue a warrant for the arrest of the defendant (Section 31-3-2(B)(1)) and

2. Declare forfeiture of the bail if there is a breach of a condition of the bond. Rule 6-406(C) and Section 31-3-2(B)(2).

3. If the court declares forfeiture it must be done at the time of defendant's non-appearance. This means declaration must occur at the hearing for which the defendant fails to appear. At that hearing the judge must say that s/he wants a warrant to issue for defendant's failure to appear and declare that the bond is forfeited. If the judge declares forfeiture, a warrant must issue. The court may issue a warrant for failure to appear without declaring forfeiture. This gives notice to the parties of the warrant and the bond forfeiture. Once the bond is declared forfeited at the hearing, the court has four business days from the hearing to give written notice of the forfeiture to the surety. If the court declares bond forfeiture, a warrant for defendant's arrest must issue. The court may issue a warrant for the defendant's arrest without declaring forfeiture of bond. If the court does not declare forfeiture at the time of non-appearance and give the four-day notice, the court cannot forfeit the bond at a later time. The bond would continue on the original case and the defendant would have to post another bond after arrested on the failure to appear warrant.

B. If a person willfully fails to appear as required, the person may be charged with and a new criminal case opened for:

1. a fourth degree felony if released on a felony charge, or

2. a petty misdemeanor if released on a misdemeanor or petty misdemeanor charge. Section 31-3-9.

   It is best practice to only charge the defendant with a new charge of failure to appear in only the most egregious cases. If the court does charge this case, there must be a prosecutor to go forward at trial; the court cannot act as a prosecutor.

C. A person arrested for failure to appear is entitled to bail on the new charge.

D. If a forfeiture is declared, a Notice of Forfeiture and Order to Show Cause is served on the surety or on the clerk of the court. Form 9-307 (Notice of Forfeiture and Order to Show Cause). If served on the clerk, the clerk shall mail copies of the notice to the sureties at their last known address. Rule 6-407 (sureties on bail bonds appoint the clerk of the court as their agent upon whom any papers affecting their liability may be served); *see also*, Section 31-3-2(D). A hearing is held 30 or more days after the service of the notice. Rule 6-406(C). Upon forfeiture, the defendant (in the case of an appearance bond) or the surety (in the case of a bail bond) is required to pay the amount of the bond.

E. Prior to entry of judgment, the judge after a hearing may set aside, in whole or in part, the declaration of forfeiture:

1. if upon a showing of good cause why the defendant did not appear as required; Form 9-308 (Order Setting Aside Bail Bond Forfeiture) (setting forth two types of "good cause:" incarceration and hospitalization. Other reasons for "good cause" may be shown); or,

2. if the defendant is surrendered into custody prior to entry of judgment of default on the bond. Rule 6-406(D).

F. If after a hearing, the forfeiture is not set aside, the court shall enter a default judgment on the bond. If the default judgment is not paid within 10 days after it has been filed and served on the sureties, it may be executed upon. This means for an unsecured appearance bond, where there is no money to forfeit, the court may proceed to execute upon the judgment to obtain the funds owed to the court. Rule 6-406(E) and Forms 9-309 and 9-310. This can be done either by contacting the AOC so that the Attorney General's Office can proceed with post-judgment proceedings or the default judgment can be referred to a third party collection agency for collections. Another option is to set the bond amount on the failure to appear warrant as the amount of the forfeiture, and not execute upon the default judgment.

G. If a bondsman does not have property to satisfy the judgment, the court entering the judgment shall send written notice to the Superintendent of Insurance (Mailing Address: P.O. Box 1689, Santa Fe, NM 87504-1689). The superintendent will then notify the bondsman that if the judgment is not satisfied or an appeal or writ not taken within 30 days, the bondsman will forfeit the right to do business in the state.

If the appeal or writ is not taken, the superintendent will do all that is necessary to revoke the right of the bondsman to do business in New Mexico. Section 31-3-2(H).

H. If there is an appeal of the judgment entered under Rule 6-406, it is a civil appeal to district court and it does not stay the underlying criminal proceedings. The criminal case in magistrate court should proceed forward. Rule 6-406(F). Additionally, execution on the forfeiture default judgment is not stayed until the posting of a supersedeas bond pursuant to Rule 2-705(G).

I. The only ground for forfeiture is failure to appear. Bonds cannot be forfeited for violation of other conditions of release. *State v. Romero*, 2007-NMSC-030.

3.11 Exoneration, Discharge, and Termination of Bond

A. Exoneration:

1. A **bail bond** may be automatically exonerated by the magistrate court, unless otherwise ordered for good cause (Rule 6-406(A)):

    a. after 12 months if the crime is a felony and no charges have been filed in the district court;

    b. after 6 months if the crime is a misdemeanor or petty misdemeanor and no charges have been filed;

    c. at any time prior to entry of judgment of default on the bond if the district attorney approves; or

    d. upon surrender of the defendant to the court by an unpaid surety.

2. If a case is dismissed without prejudice, the court must hold the bond for the time required (12 months or 6 months) unless the person posting the bond files a motion for exoneration and the court finds good cause that the bond should be exonerated. The motion should be filed and docketed and an order should be issued by the court.

B. Discharge

1. Uncompensated Surety (Section 31-3-3):

    a. An uncompensated surety desiring to be discharged from the obligations of a bail bond before a final disposition of the charges against the defendant may:

        i. arrest and take the defendant to the office of the sheriff in the county where the action is pending;

ii. deliver to the sheriff a certified copy of the release order and the bail bond; and

iii. apply in writing to the court for a written order discharging the surety from the obligations of the bail bond. Section 31-3-3(C).

b. Upon satisfactory proof that the surety has complied with the three requirements listed above, the judge shall enter a written order discharging the surety from liability under the bond.

2. Compensated Surety

a. The paid surety can follow the same procedure as set out for the unpaid surety. A paid surety may only be discharged by order of the court. Section 31-3-4(A), (B), (C), (D).

b. The judge shall order the discharge of a paid surety if one or more of the following conditions are present:

i. there has been a final disposition of all charges against the accused;

ii. the accused is dead;

iii. circumstances have arisen which the surety could not have foreseen at the time of becoming a paid surety for the accused; or

iv. The contractual agreement (the bond and its conditions) between the surety, the principal (arrested person), and the State has been terminated. Section 31-3-4(E).

c. A compensated surety desiring to be discharged from bond obligations applies in writing to the court for a written order discharging the surety from the obligations of the bail bond, setting forth the grounds for discharge.

C. Termination of Liability (Section 31-3-10):

1. All recognizances secured by the execution of a bail bond shall be null and void upon the finding that the accused person is guilty, and all bond liability shall thereupon terminate. *State v. Valles*, 2004-NMCA-118, states that a paid surety is released from its obligations under the bail bond when the defendant is found guilty or pleads guilty/no contest to the charges. This is also reflected in the bail bond (Form 9-304) which explicitly states the bond is in effect until the defendant is found guilty or not guilty.

2. Release pending sentencing: Once defendant has entered a plea of guilty or no contest or is found guilty at trial, the bond is terminated. At this time, if the court is going to have a sentencing hearing at a later date, the court must review the issue of conditions of release. Rule 6-402(B) states that the defendant will continue on release under the same conditions as previously imposed unless the surety has been released or the court determines that other conditions or terms of release are necessary for the defendant not to flee or to not obstruct the orderly administration of justice. In practical terms, the original bond is terminated and the judge must order new conditions of release or remand the defendant to jail pending sentencing without conditions of release (no bond) if the facts dictate such action.

Section 4 Excusal, Recusal, Inability to Proceed

A. Excusal (Rule 6-106):

1. Whenever a party to any criminal action or proceeding of any kind files a notice of excusal, the judge's jurisdiction over the matter terminates immediately. In criminal cases, "party" means the defendant, the state or an attorney representing the defendant or the state.

2. No party may excuse more than one judge.

3. A party may not excuse a judge after the party has requested the judge to perform a discretionary act other than conducting an arraignment or first appearance, setting initial conditions of release, or a determination of indigency.

4. No judge may be excused from conducting an arraignment or first appearance, or setting initial conditions of release.

5. A party exercising the statutory right to excuse a judge must file a notice of excusal with the court clerk as follows:

   a. A party must file within 10 days after arraignment or filing a waiver of arraignment, or service by the court of notice or assignment or reassignment of the case, whichever is later.

   b. A defendant in a criminal case that has been filed, dismissed without prejudice, and then refiled, must exercise his or her right of peremptory excusal of the judge within 10 days of arraignment on the **original** charges. The time for exercising a peremptory right to excuse a judge does not begin anew from the date of arraignment on the refiled charges. *Walker v. Walton*, 2003-NMSC-014.

   c. A party seeking to excuse a judge scheduled to hold a preliminary hearing must file the excusal at least four days prior to the hearing.

6. When a case is assigned to a judge, the court must give notice of the assignment to all parties. This must be followed when a new judge is elected or appointed or a judge pro tem or another magistrate judge is assigned to hear a particular caseload. The 10 days in which a party has to excuse a newly assigned judge does not begin until the service on the parties by the court of the notice of assignment or reassignment of the case to a judge so it is imperative that the court send notice to all parties as soon as possible after the reassignment of the case. Any party electing to excuse a judge must serve notice of the election on all parties. When there is a mass reassignment of cases due to a judicial appointment or a newly elected judge, the court should follow the procedure as set out by the AOC.

B. Recusal (Rule 6-106(F), (G)):

1. A judge may not sit in any action in which the judge's impartiality may be reasonably questioned under the state constitution or the Code of Judicial Conduct. N.M. Const. art. VI, § 18; Rule 21-211. A judge must file a recusal in this event. Recusal is not for convenience of the judge or only because a party asks for it. It goes on record that the judge does not believe her/himself impartial or that there is an appearance of not being impartial.

2. A judge shall recuse himself or herself in any proceeding where the judge knows that the judge, the judge's spouse or domestic partner, or person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person, or a member of the judge's staff:

   a. is a party to the proceeding, or an officer, director or trustee of a party;

   b. is acting as a lawyer in the proceeding;

   c. is known by the judge to have more than a de minimis interest that could be substantially affected by the outcome of the proceeding; or

   d. is likely to be a material witness in the proceeding.

3. A judge should recuse him or herself in a proceeding in which the impartiality of the judge might reasonably be questioned, including but not limited to instances where:

   a. s/he has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding;

   b. s/he has served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association or the judge has been a material witness concerning it;

   c. the judge knows that s/he individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in the subject matter in controversy or is a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding. Rule 21-211.

4. The judge is required to be informed about his or her own personal and fiduciary financial interest and make a reasonable effort to be informed about the personal financial interests of his or her spouse and minor children residing in the household. Rule 21-211(B).

5. A judge disqualified other than by bias and prejudice may, instead of withdrawing from the proceeding, disclose on the record the basis of his or her disqualification and may ask the parties and lawyers to consider waiving disqualification. If independent of the judge's participation, all agree that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

6. A judge shall recuse her or himself from sitting in the action by giving written notice to all parties.

7. *Failure to Recuse*: If a party believes that the judge's impartiality may be reasonably questioned under the state constitution or the Code of Judicial Conduct, the party may file a notice of facts requiring recusal. The notice must specifically state the constitutional grounds alleged. Upon receipt of the notice, the judge must file a certificate of recusal in the action or enter an order that there are no reasonable grounds for recusal. If within ten (10) days after the filing of notice of facts requiring recusal, the judge fails to file a certificate of recusal in the action, any party may certify that fact by letter to the district court of the county in which the action is pending with a copy of the notice of recusal. No filing fee shall be required for the filing of a letter certifying grounds for recusal. The party's certification to the district court shall be filed in the district court not less than five (5) days after the expiration of time for the magistrate court judge to file a certificate of recusal or not less than five (5) days after the filing of an order in the magistrate court finding the grounds alleged in the notice of recusal do not constitute reasonable grounds for recusal, whichever date is earlier. A copy of the letter shall also be filed with the magistrate court. The district court shall make such investigation as the court deems warranted and enter an order in the action, either prohibiting the magistrate court judge from proceeding further or finding that there are insufficient grounds to reasonably question the magistrate court judge's impartiality under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct

8. **Any judge who willfully attempts or presumes to act as judge in an action after his or her disqualification is guilty of a petty misdemeanor and shall be removed from office**. Section 35-3-7(C).

9. *Stay*: If a letter is filed with the district court and magistrate court certifying the issue of recusal to the district court, the magistrate court judge may enter a stay of the proceedings pending action by the district court. If the magistrate court judge fails to stay the proceedings, the party filing the letter in the district court may petition the district court for a stay of magistrate court proceedings. The district court may grant a stay of the proceedings for not more than fifteen (15) days after the filing of a letter certifying a recusal issue to the district court. Unless a stay is granted, the magistrate court judge shall proceed with the adjudication of the merits of the proceedings.

C. Inability of a Judge to Proceed (Rule 6-106(I)):

1. If a judge is unable to proceed after a trial or hearing has started, any other judge of the magistrate district may proceed with the action after certifying familiarity with the record and determining that there will be no prejudice to the parties by completing the proceedings. The successor judge may recall any witness.

2. If no other judge is available in the magistrate district, a party may certify that fact by letter to the district court of the county in which the action is pending. The district court may investigate as it deems warranted and, if it finds that the judge is in fact

disabled or unavailable, appoint a magistrate judge currently sitting in any other magistrate court in the state.

3. This authorizes district judges to designate out-of-magistrate-district judges for more than one case. By direction of the Supreme Court, the AOC obtains standing orders of designation for every magistrate court, so that substitute judges are available for every magistrate judge in the state.

D. Reassignment of Judges (Rule 6-105):

1. In magistrate districts with two or more judges, the procedures are:

   a. Upon receipt of a notice of excusal or recusal, the magistrate or court clerk must give written notice to the parties.

   b. Recusal: There will be a random assignment to another judge in the originating court. If all judges in that court are excused or have recused, another judge in the magistrate district will be randomly assigned the case. A presiding judge for good cause can make a specific assignment. A joint recusal can be entered for multiple judges.

   c. Excusal: Parties may agree to a judge. If the parties fail to agree, then within 10 days, a judge will be randomly assigned by Odyssey from the originating court. If all judges in that court have been excused or recused, another judge in the magistrate district will be randomly assigned by Odyssey. The court does not need to wait 10 days to reassign a judge; the assignment must be completed within 10 days. A presiding judge can make a specific assignment if there is a justifiable reason to do so and that reason is written in the notice of reassignment.

   d. If all the judges in the magistrate district have been excused or have recused themselves, within 10 days after service of the last notice of excusal or recusal, a judge will be randomly assigned from the district court standing order listing the judges available to that magistrate district. There is no need to contact the district court as long as the annual district court standing order is in place, unless all the judges on the standing order have been recused or been excused in a case. "Randomly assigned" may, in the future, be done by Odyssey. Until that time, court managers should select a name randomly from the standing order and not just select the next judge on the list or the one who may be available.

2. In magistrate courts with one judge, the procedures are:

   a. Recusal: another judge in the same magistrate district will be randomly assigned by Odyssey.

   b. Excusal: the parties may agree to another judge in the same district to be assigned the case.

c. If all judges in the magistrate district have been excused or recused, within 10 days of the filing of the last notice of excusal or recusal, another judge from the district court standing order will be randomly assigned by the court manager or by Odyssey to the case.

3. *Subsequent Proceedings*: All proceedings shall be conducted in the original magistrate court, except that with the consent of all parties and the assigned judge, proceedings may be held in another magistrate court in the same judicial district in which the original magistrate court is located. The clerk of the original magistrate court shall continue to be responsible for the court file and shall perform such further duties as may be required. Within five (5) business days after assignment or designation of a new judge, the clerk shall make a copy of the court file for the designated judge and forward it to the judge. Within ten (10) business days of adjudication of the case, the original documents of the adjudication shall be forwarded to the clerk of the original magistrate court for filing.

4. *Unavailability of Judge*: At any time during the proceedings, if the assigned judge is unavailable, the assigned judge may assign another judge to hear any matter that is not dispositive of the case or the parties may agree on another judge in the magistrate district to hear any matter, including the merits of the case. The agreement is subject to the approval of the assigned judge and the judge agreed upon by the parties. If another judge is agreed upon to hear the merits of the case, the case will be reassigned to that judge.

Section 5 Jury Selection and Trials

5.1 Calling of Prospective Jurors

A. General

1. Juries in the courts of limited jurisdiction consist of six persons. Section 35-8-3(A). A larger number are called as prospective jurors to allow for challenges and for excusing persons from jury service.

2. The qualifications are the same as those in district court. An individual must be at least 18 years old, a United States citizen, and a resident of New Mexico residing in the county for which the jury is being convened to be eligible, unless the person is incapable of service because of a physical or mental illness or infirmity or undue or extreme physical or financial hardship. Section 38-5-1. Additionally, persons convicted of a felony may be summoned for jury service if the person has successfully completed all conditions of the sentence including conditions for probation and parole.

    a. Undue or extreme physical or financial hardship means that the prospective juror would:

        i. be required to abandon another person under his or her care or supervision due to the extreme difficulty of obtaining an appropriate substitute caregiver during the period of jury service;

        ii. incur costs that would have a substantial adverse impact on the payment of necessary daily living expenses of the person or the person's dependent; or

        iii. suffer physical hardship that would result in illness or disease;

        AND

        iv. the above three circumstances do not exist solely because a prospective juror will be absent from employment. Section 38-5-2(G).

3. The jury list is selected randomly from lists of registered voters, personal income tax filers and driver's license holders. Section 38-5-3(A). No person may be required to remain as a member of a magistrate jury panel for longer than six months following qualification as a juror in any year unless the panel is engaged in a trial. Section 35-8-3(D).

B. Jury Management System:

Jurors should be selected as set out by the AOC procedure with use of the jury software on which court staff should be trained. Contact the AOC Jury Statewide Program

Manager for the most recent procedure at 505-476-6081. There is a best practices manual on the "inside nmcourts.gov" page under jury management.

1. A willful failure to appear as ordered in the jury summons is a petty misdemeanor. Accompanying each summons, the jurors shall be provided a form upon which they may state the facts supporting their eligibility to claim exemption from jury service and to express a claim for exemption. Section 38-5-10.

2. If the trial is canceled before the trial date, but after prospective jurors have been notified to appear, the court should attempt to notify the prospective jurors that the trial has been canceled.

C. Excusing Jurors and Exemptions (Section 38-5-2):

1. Any person may be excused from jury service at the discretion of the judge if the person shows good cause for being excused. The judge may disallow fees and mileage for any person excused from jury service.

2. Any person who has served as a member of a petit jury panel or a grand jury in either state or federal court within the preceding thirty-six (36) months shall, on request, be exempt from serving as a juror. Section 38-5-2(A).

3. A person who is seventy-five years of age or older who files an affidavit requesting an exemption from jury service with a local court shall be permanently exempt from jury service. Section 38-5-2(B).

4. Upon request by a juror, the judge must postpone an individual's jury service if the person has not previously been granted a postponement and s/he agrees to a future date, approved by the court, to appear for jury service not more than six months after the original s/he was called to serve. Section 38-5-10.1.

    a. The court may approve a subsequent request to postpone jury service only in the event of an emergency that could not have been anticipated at the time the initial postponement was granted. Before granting a subsequent postponement, the prospective juror must agree to a future date to appear for jury service within six months of the postponement.

    b. The court must postpone and reschedule the service of a summoned juror, without affecting the summoned juror's right to request a postponement described above, if the summoned juror is:

        i. one of two summoned jurors from the same small employer (5 or fewer employees); or

        ii. the only person performing essential services for the employer such that the employee's absence would require the employer to close or cease to function if the person is required to perform jury duty; or

        iii. required to attend to an emergency as determined by the judge.

5. The court may, in its discretion, excuse a prospective juror if (Section 38-5-2(C)):

   a. jury service would cause undue or extreme physical or financial hardship to the prospective juror or to a person under the prospective juror's care or supervision; or

   b. the person has an emergency that renders the person unable to perform jury service; or

   c. the person presents other satisfactory evidence to the judge or the judge's designee.

D. Jury Costs (Sections 10-8-4[Per Diem and Mileage], 38-5-15 [Mileage and Compensation], and 50-4-22 [Minimum Wage]):

1. Persons summoned for jury service and jurors shall be reimbursed for travel from their place of actual residence to the courthouse when their attendance is ordered, at the rate allowed public officers and employees per mile of necessary travel. Persons summoned for jury service and jurors shall be compensated for their time in travel, attendance and service at the highest prevailing state minimum wage rate. Jurors are paid in accordance with the Supreme Court approved Jury Payment Guidelines. Contact the AOC Jury Statewide Program Manager for a copy of these guidelines.

2. Jurors are paid by the State Treasurer in the same manner as other magistrate court expenses are paid. The AOC will not pay for the appearance of any person who is excused from jury duty at his/her own request.

5.2 Calling the Case

A. Start of Trial

1. The judge begins the trial by calling the case.

2. Calling the case normally consists of the following types of statements made by the judge or clerk:

   a. Court is now in session;

   b. The case of State of New Mexico versus (*name of defendant*) is now before this court for trial unless the defendant has waived appearance in writing, but counsel for the defendant appears.

3. The jury is sworn using UJI Criminal 14-123. Preliminary instructions are given to the jury panel before opening statements or presentation of any testimony. In a criminal action, UJI 14-101 is given. All parts of each instruction may not be appropriate to every case. The judge should read the directions for use following the instructions and use discretion regarding appropriate parts to be read. Use of

uniform jury instructions in all magistrate court cases is at the court's discretion. Rule 6-609.

4. Once the jury is sworn, double jeopardy attaches. This means that the defendant is protected from being retried on the same offenses unless a mistrial is declared for reasons of manifest necessity. *State v. Saavedra*, 1988-NMSC-100. "The concept of 'attachment of jeopardy' arises from the idea that there is a point in a criminal proceeding at which the constitutional purposes and policies behind the Double Jeopardy Clause are implicated and the defendant is put at risk of conviction and punishment." *State v. Angel*, 2002-NMSC-025, ¶ 8. "In a criminal trial, jeopardy attaches at the moment the trier of fact is empowered to make any determination regarding the defendant's innocence or guilt." *Id.* In a nonjury trial, this means jeopardy attaches when the court begins to hear at least some evidence on behalf of the state. In a jury trial, jeopardy attaches at the point when a jury is impaneled and sworn to try the case. "In the case of a guilty plea or a plea of nolo contendere, jeopardy attaches at the time the court accepts the defendant's plea." *State v. Nunez*, 2000-NMSC-013, ¶ 28.

B. Readiness to Proceed with Trial

1. The judge then inquires whether or not all parties are present and ready to proceed with trial.

2. If all parties are not present, the judge may:

   a. reset the date of trial upon good cause shown for nonappearance;

   b. if the defendant is not present, issue a bench warrant for the defendant;

   c. if the prosecution is not present, dismiss the case for failure to prosecute.

3. If the parties are present but are not ready to proceed with trial, the judge may:

   a. Upon good cause shown, grant a continuance (postponement) of the trial;

   b. Require the parties to proceed. If the State cannot proceed because they do not have a witness or other evidence, the court has no authority to dismiss the case for the failure of a witness to appear. The State may decide to dismiss upon review of the evidence; or

   c. If a subpoenaed witness has not appeared and is essential to the trial, the court may issue a bench warrant pursuant to Rule 6-207 for the non-appearing witness, if there is proof of service, and the subpoena is issued by the court. The court may then grant a continuance. If there is little or no time left under the six-month rule (Rule 6-506), the court should consider extending the time in which to hold the trial pursuant to Rule 6-506(C).

      If the subpoena was issued by a party, the court may pursue a contempt case and issue a warrant as part of that new criminal case. A warrant may only be issued in this context if the court wishes to go forward with a

contempt case because the subpoena is not signed by the court, which excludes it from the issuance of a bench warrant for failure to appear under Rule 6-207. If the subpoena is issued by the court, the court can proceed under Rule 6-207 and is not required to begin a contempt case.

C. Motion to Quash Jury Array (Section 38-5-16):

1. The defendant may move to quash (set aside) the entire jury array on the grounds it was not empaneled in accordance with law.

2. In order to be valid, a motion to quash the jury array must be made before jury selection begins at trial; otherwise, such challenge is waived.

3. If the judge grants the motion to quash the jury array, the trial is postponed and a new jury array is selected. If necessary, an extension of time in which to hold the trial should be ordered under the appropriate section of Rule 6-506(C).

5.3 Selection of Jury

A. Calling Jurors

1. The judge or clerk reads aloud the names of the prospective jurors who have been called to hear the case and who have not previously been excused; each prospective juror responds with "here" or "present" when his or her name is called.

2. If the judge determines that there are not enough prospective jurors present after the names have been called from which to select a six-member jury, the court should follow the AOC jury guidelines to obtain more jurors. Contact the AOC Jury Statewide Program Manager for current guidelines.

3. A court clerk will prepare a list of the names of all jurors present, a copy of which is given to each party or the party's attorney. Rule 6-605(D)(1).

B. Voir Dire: General

1. Voir dire consists of questions to prospective jurors to determine if they should be qualified or excused from hearing the case. The questioning also allows the parties an opportunity to gauge the prospective juror's attitude, bias, and reaction to the case.

2. Prior to oral questioning, the judge administers an oath, such as the following, to the prospective jurors:

> Do you swear or affirm to answer truthfully the questions asked by the judge or the attorneys concerning your qualifications to serve as a juror in this case, under penalty of law?

UJI Criminal 14-122.

3. Prospective jurors may be examined by the judge and the parties (or their attorneys) by questioning all of the jurors present individually or as a group. Rule 6-605(B), (D).

4. During the judge's questioning or at the conclusion of it, the judge may further question individual prospective jurors where appropriate as a result of the nature of a person's answer to a general question.

5. After the judge has finished asking questions, the parties (*prosecutor* first, then *defendant*) may further question the prospective jurors as a group or individually.

6. The extent of questioning of prospective jurors is at the discretion of the judge.

7. Voir dire may proceed along the lines of the sample format in the Uniform Jury Instructions-Criminal, with questions omitted or modified as appropriate, and additional or follow-up questions asked as necessary. UJI Criminal 14-120.

C. Challenges for Cause: Each court's process for challenges may vary. However, the basic procedure is described below.

1. After all questioning of prospective jurors has been completed, challenges for cause may be raised by the parties or the attorneys. Section 38-5-14; Rule 6-605(B).

2. Challenges for cause are made on the basis of answers by the prospective jurors or oral or written questions.

3. Generally, a prospective juror may be disqualified for bias, relationship to a party, or other grounds of actual or probable partiality.

4. Challenges for cause must be made outside the hearing of the prospective jurors. Section 38-5-14. The party making a challenge shall not be announced or disclosed to the jury panel, but each challenge shall be recorded by the clerk or judge and placed in the case file.

5. There is no limit to the number of challenges for cause. Any of the prospective jurors may be disqualified or excused on the basis of challenges for cause.

6. Although the parties or attorneys may raise challenges for cause, the final determination is made by the judge.

7. After all challenges for cause have been made and after the judge has determined which jurors may be disqualified or excused, the judge makes an announcement along the following lines:

> The following prospective jurors have been excused: (give names of persons excused). These persons may leave at this time. You will be notified when to appear again for jury service (or inform persons of date and time if known).

D. Drawing Names (Rule 6-605): Jurors shall be selected pursuant to the AOC's jury procedure. Contact the AOC Jury Statewide Program Manager for the current procedure.

E. Peremptory Challenges

1. Peremptory challenges are made at the discretion of each party, and the judge may not prevent a peremptory challenge from being made. Rule 6-605(C).

2. The peremptory challenges must be made out of the hearing of the prospective jurors. Section 38-5-14.

3. The party making a challenge shall be recorded by the clerk of judge and placed in the case file.

4. After all peremptory challenges have been made, the judge announces the names of the six-member jury and of the alternate juror. The judge informs the other members of the jury panel that they are excused and they may leave.

5. If an alternate juror is selected and if a party's peremptory challenges have not been exhausted in the selection of the other jurors, the party may exercise its peremptory challenge in the selection of the alternate juror.

6. Peremptory challenges are exercised as follows (Rule 6-605(C)):

   a. Each party shall exercise their peremptory challenge alternately.

   b. In petty misdemeanor cases, each party is allowed one peremptory challenge;

   c. In misdemeanor cases, each party is allowed two peremptory challenges.

7. Limitations on peremptory challenges:

   The state's power to use peremptory challenges is limited by the Equal Protection Clause of the federal constitution. *State v. Goode*, 1988-NMCA-044, ¶ 3. A defendant may challenge the constitutionality of the state's selection of members of the petit jury when s/he shows s/he is a member of a cognizable racial group and establishes a prima facie case that potential jurors were excluded from the jury for racial reasons. Additionally, a potential juror may not be excluded on the basis of gender. *State v. Gonzales*, 1991-NMCA-007. The Court of Appeals has stated that: To establish a prima facie case, [a] defendant must show that: (1) s/he is a member of a cognizable racial group; (2) the state has exercised its peremptory challenges to remove members of that group from the jury panel; [and] (3) these facts and any other relevant circumstances raise an inference that the state used its challenges to exclude members from the panel solely on account of their race. *Goode*, 1988-NMCA-044, ¶ 5. Once a defendant makes a prima facie showing that the state used its peremptory challenges improperly, the burden then shifts to the state to come forward with a racially-neutral explanation for its strikes. *Id.* ¶ 4. *See also, State v. Dominguez*, 1993-NMCA-042. These types of challenges may also be referenced as

Batson challenges pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986) which has been adopted in the New Mexico case law as described above.

F. Additional Jurors

Additional jurors must be selected in accordance with law in the same manner as other jurors are selected.

G. General

1. If more than one jury trial is held on the same day, the same jury array/panel may be used for all the trials; six jurors (plus alternates) are selected from the same array/panel for each of the trials.

2. Trials must be open to the public, though the defendant's Sixth Amendment right to a public trial is not absolute. Closure only occurs in the rare case. *State v. Turrietta*, 2013-NMSC-036. A total or partial closure of the court room is allowed when there is a showing of an overriding interest that it is likely to be prejudiced; the closure must be no broader than necessary to protect that interest; the court must consider reasonable alternatives to closing the court room; and the court must make findings to support the closure.

3. Last minute motions and continuances:

   It is within the judge's discretion as to whether or not a motion or continuance is heard or granted on the day of jury selection. If the court is using the scheduling order, any last minute motions, unless there is good cause, should be denied as in violation of the order. If the court is not using the scheduling order, the judge must make a determination as to whether it is appropriate to hear the motion at that time. Cases which are scheduled for trial should go to trial, unless there are exceptional circumstances. Rule 6-601(A) states that continuances shall be granted for good cause shown at any stage of the proceedings. Thus, if the court does find good cause, a continuance can be granted. Keep in mind the six-month rule. The judge can request from the parties a motion for extension of time before the granting of the continuance or the case should still be set within the remaining time of the six-month rule.

5.4 Witness Oath; Exclusion Rule; Opening Statements

A. Witness Oath

1. If the witnesses are to be administered the oath as a group, the oath is given after opening statements. Otherwise, each witness is administered the oath when called to testify.

2. The following oath, or one similar to it, is appropriate (Rule 6-601(C)):

> You do solemnly swear (or affirm) that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury.

3. Any party giving testimony must take the oath or a declaration as a witness; if, for reasons of conscience, the person refuses to swear to an oath, the judge requires the person to declare that he or she will testify truthfully. Rule 11-603.

4. Every interpreter appointed pursuant to the Court Interpreters Act shall take an oath that s/he will make a true and impartial translation in an understandable manner using his or her best skills and judgment in accordance with the standards and ethics of his or her profession. Section 38-10-8.

B. Exclusion Rule (Rule 11-615)

1. The judge asks if the parties wish to "invoke the rule" excluding witnesses or a party may ask the court to "invoke the rule." "The purpose of the rule is to maintain the effectiveness of cross-examination by preventing witnesses from using knowledge of prior testimony to recast their own testimony, perhaps even with honorable motives, to conform to what other witnesses have said or to otherwise anticipate possible cross-examination." *State v. Reynolds,* 1990-NMCA-122, ¶ 27.

2. If either party invokes the rule, the judge excludes the witnesses from the courtroom so that they cannot hear the testimony of the other witnesses. When the judge applies the rule to any witness, the witness should be instructed substantially as follows:

> The rule has been invoked. You must leave the courtroom and remain outside so you cannot hear the testimony of the other witnesses. You should not discuss your testimony with anyone, either before you testify or after you have testified, except that you may discuss your testimony with the lawyers in the case—but you must not do so in the presence of any other witness.

3. The judge may order exclusion of witnesses without a request from either party.

4. The exclusion rule does not authorize the exclusion of a party or other person whose presence is essential to the presentation of the party's case, such as an expert who is to assist a lawyer or the law enforcement case agent. Rule 11-615(C); *see also State v. Hernandez,* 1993-NMSC-007, ¶ 37 (holding that allowing investigating officer to remain in court during testimony of other witnesses, even after the rule had been invoked, was not an abuse of discretion). The judge must decide whether or not the expert must be allowed to hear the testimony of other witnesses.

C. Opening Statements

1. An opening statement is an oral outline of anticipated proof in the case. Its purpose is to give the jury introductory information about facts and issues so the jury will be able to understand the evidence. No exhibits may be introduced or witnesses examined in an opening statement.

2. The judge permits the State to make an opening statement. An opening statement may be waived.

3. After the State has made an opening statement or has waived the opportunity to do so, the judge permits the defendant or defendant's attorney to make an opening statement if s/he desires to do so. The defendant may choose to present an opening statement after the State's case has been presented. UJI Criminal 14-101.

4. If there are multiple defendants, opening statements may be made by each attorney representing each defendant.

5. In criminal trials, the prosecution may not comment on the defendant's exercise of the constitutional right to remain silent during its opening (or closing) statement. *State v. Gutierrez*, 2007-NMSC-033, ¶ 17 (prosecutor cannot comment on defendant's refusal to take a polygraph test during its opening statement).

5.5 Presentation of Evidence

A. Order of Presentation

1. The prosecution calls and examines each witness for the prosecution. After each witness testifies, the defendant has an opportunity to cross-examine. If the defendant cross-examines the witness, the prosecution may conduct redirect examination. After all of the prosecution's witnesses testify, the prosecution rests.

2. The judge hears appropriate oral motions, which may be made by either party at this point in the proceedings.

3. If the defendant did not present an opening statement at the beginning of the trial, the opening statement may be given before the defendant's first witness is called.

4 Although the defendant is not required to present any evidence or call any witnesses, the defendant has an opportunity to call and examine his or her own witnesses at this point. After each witness testifies, the prosecution has an opportunity to cross-examine. If the prosecution cross-examines witnesses, the defendant may conduct redirect examination. After presenting all of his or her witnesses, the defense rests.

5. The prosecution may call rebuttal witnesses and then rest its entire case.

   a. If the defendant did not call witnesses or present any evidence, the prosecution shall not call rebuttal witnesses.

b. Rebuttal witnesses are called only to rebut evidence that has previously been introduced by an opposing party.

6. After both parties have rested their entire cases, the judge hears oral motions.

B. Witnesses; Testimony

1. After each witness has been examined, the opposing party may cross-examine the witness. Rule 11-611(B). Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness.

2. Although the extent of the cross-examination is within the discretion of the trial judge, the judge may not restrict cross-examination if it assists the defendant or if it concerns subjects on which the defense is entitled to cross-examine. *State v. Urioste*, 1980-NMCA-103; *State v. Martin*, 1984-NMSC-077, ¶ 20 (Court can expand the scope of cross-examination).

3. After cross-examination, the party who called the witness may re-examine (redirect) the witness regarding evidence presented during cross-examination.

4. At the discretion of the judge, the party who cross-examined the witness may "recross-examine" the witness, but only if new subject matter was brought out during the redirect examination. *State v. Vigil*, 1977-NMCA-119.

5. A party or attorney may object to questions, but if s/he fails to do so, the judge may interrupt to prevent questions that are valueless or are likely to mislead the jury.

6. The judge may ask appropriate questions of a witness at any point during the presentation of evidence. Rule 11-614. However, the judge must not comment to the jury on the evidence or the credibility of any witness. Rule 11-107. Moreover, the judge must exercise great care in questioning witnesses in order to maintain the appearance of impartiality, to avoid the appearance of commenting on the evidence or guilt or innocence of the defendant, and to preserve the prosecution's burden of proving its case. *State v. Stallings*, 1986-NMCA-086. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present. Rule 11-614(C).

7. Each witness is examined individually in accordance with the Rules of Evidence.

   a. In general, a witness may not testify to a matter unless the witness has personal knowledge of the matter. Rule 11-602 (does not apply to expert witness testimony under Rule 11-703).

   b. Hearsay evidence is not admissible unless allowed by the Rules of Evidence. Rules 11-801 to 11-807 (regarding hearsay).

   c. Statements made by the defendant during plea negotiations are not admissible in evidence for any purpose including impeachment of the defendant. *State v. Trujillo*, 1980-NMSC-004; Rule 11-410.

8. A witness may refuse to testify to a matter if he or she has a privilege to refuse under the Rules of Evidence. Rules 11-501 to 11-514 (regarding privileges).

9. In addition to the privileges allowed under the Rules of Evidence, a witness has the privilege under the Fifth Amendment to refuse to answer any question in any civil or criminal proceeding where the answer might tend to incriminate him or her in future criminal proceedings. U.S. Const. amend. V.

10. Relevant evidence may be excluded if its probative value is substantially outweighed by unfair prejudice, confusion of the issues, confusion of the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. Rule 11-403.

C. Defendant as Witness

1. A defendant has the same privilege as any witness to invoke the Fifth Amendment and to refuse to answer any question in any criminal proceeding. U.S. Const. amend. V.

2. A defendant waives his or her Fifth Amendment privilege against self-incrimination:

   a. When testifying on his or her own behalf, except as limited by the Rules of Evidence. *State v. Allen*, 1978-NMCA-054, ¶ 16.

   b. During cross-examination on matters reasonably related to the subject matter of his or her direct examination, including impeachment by proof of prior convictions. Impeachment means to call into question the credibility of the witness.

3. A defendant may be questioned about prior convictions under certain circumstances.

   a. Rule 11-609(A)(1)(b) allows cross-examination of a criminal defendant regarding any prior felony conviction if the judge finds its probative value outweighs the prejudice to the defendant. *State v. Lucero*, 1982-NMCA-102.

   b. Rule 11-609(A)(2) allows cross-examination regarding conviction of any crime, felony or misdemeanor, if the offense involves dishonesty or a false statement.

   c. Evidence of a conviction is not admissible if more than ten years have elapsed since the date of the conviction or release of the defendant from confinement imposed as a consequence of the conviction unless (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect, and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use. Rule 11-609(B).

4. A defendant *may not* be questioned about a prior conviction if:

   a. The answer could expose defendant to an enhanced sentence or deprive him or her of liberty. *State v. Archunde*, 1978-NMCA-050 (as in admitting to a felony conviction which would affect a future habitual enhancement proceeding);

   b. The conviction is for a misdemeanor not involving the veracity of the defendant and is therefore irrelevant to the defendant's credibility. *Albertson v. State*, 1976-NMSC-056;

   c. The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Rule 11-609(C)(2); or

   d. The conviction has been the subject of a pardon, annulment, certificate of rehabilitation or other equivalent procedure based on a finding of rehabilitation and the person has not been convicted of a subsequent felony. Rule 11-609(C)(1).

5. Generally, the defendant, when testifying as a witness, may not be questioned about post-arrest silence relating to any issue in the case when the defendant's silence lacks probative value. *State v. Gutierrez*, 2003-NMCA-077. However, there are times when post-arrest silence has probative value, i.e., when defendant has testified to an exculpatory version of the events and claims to have told the police the same, *State v. Romero*, 1980-NMCA-052, or to impeach the credibility by showing prior inconsistent statements, *State v. Olguin*, 1975-NMCA-132. Both of these cases involve differences in the testimony at trial versus the version told law enforcement, not whether defendant made any statements to law enforcement at all.

D. Introduction of Documentary Evidence and Other Things

1. A party examining a witness may introduce written documents or other things as evidence during examination of the witness. *See* Rules 11-901 to 11-903 and 11-1001 to 11-1008. Introduction of exhibits proceeds as follows:

   a. A party asks to have the exhibits numbered in sequence and marked as exhibits.

   b. The witness being examined then identifies the exhibit that has been marked. Rule 11-901.

   c. The admissibility of an exhibit is established through examination of witnesses and may require the testimony of more than one witness before the exhibit becomes admissible.

   d. A party may offer an exhibit to be admitted as evidence at any time before resting; the judge then rules on whether the exhibit is admissible as evidence.

2. The judge may allow the exhibit to be passed among the jurors. When the jurors have completed their examination, the exhibit is returned to the judge or court clerk.

3. Once the exhibit has been admitted into evidence, it may be used in the examination of other witnesses.

4. Documentary evidence that is hearsay is not admissible unless allowed by the Rules of Evidence. Rules 11-801 to 11-806 (regarding hearsay).

E. Objections (Rules 11-103 and 11-104).

1. The opposing party may object:

   a. to a question asked a witness;

   b. to an answer given by a witness; or

   c. to the introduction of documents or other things as evidence.

2. The objection must be raised at the time of the question, answer, or introduction of evidence.

3. When an objection is raised to a question or exhibit, the party must state the reason for the objection. The judge may call the parties to the bench to discuss the objection out of the hearing of the jury. This is called a bench conference. The judge either sustains (agrees with) or overrules (disagrees with) the objection.

4. Once an answer has been given, the objection takes the form of a motion to strike the answer.

   a. If the judge grants the motion to strike, the jury is told to disregard any answer given.

   b. If the judge denies the motion, the answer stands as if the motion had not been made.

F. Confessions

1. Generally, a confession by a defendant may be admissible in evidence only if it was freely and voluntarily made without duress, fear, or compulsion in its inducement and with full knowledge of the nature and consequences of the confession. *State v. Aguirre*, 1978-NMCA-029.

2. A confession of the accused shown not to have been freely and voluntarily made is generally not admissible in evidence against the accused except to the extent that it may be used to impeach the testimony of the accused. *State v. Trujillo*, 1979-NMCA-055.

3. Warnings against self-incrimination under the Fifth Amendment of the United States Constitution pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), apply only when a person is in custody or deprived of his or her freedom of action in any

significant way and is being questioned. Consequently, one of the main issues in cases involving a criminal defendant who has given a statement or made a confession to the police is whether the defendant was "in custody" and being interrogated by the police when the statement or confession was made. *State v. Wilson*, 2007-NMCA-111.

4. A defendant who is stopped and questioned in a routine traffic stop is not entitled to *Miranda* warnings. The United States Supreme Court has said that "persons temporarily detained pursuant to [non-coercive, ordinary traffic stops] are not 'in custody' for the purposes of *Miranda*." *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984). The roadside questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation. *Miranda* warnings are required only if defendant can demonstrate that, at any time between the initial stop and the arrest, s/he was subjected to restraints comparable to those associated with a formal arrest. *Wilson*, 2007-NMCA-111, ¶ 25.

5. *Miranda* warnings are not required even if the defendant motorist believed s/he was temporarily detained or the arresting officer believed s/he would have restrained the defendant. The inquiry is whether a reasonable person would believe s/he was in custody or under restraint comparable to those associated with a formal arrest. *Armijo v. State ex rel. Transp. Dep't*, 1987-NMCA-052, ¶ 6 ("The roadside questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation. *Miranda* warnings are required after a traffic stop only if defendant can 'demonstrate that, at any time between the initial stop and the arrest, he was subjected to restraints comparable to those associated with a formal arrest.' The fact that the motorist may temporarily feel that he is not free to leave does not render him 'in custody' for purposes of *Miranda*.")(internal citations omitted).

6. A field sobriety test does not necessarily entitle a defendant to *Miranda* warnings. On-the-scene questioning does not require advisement of the *Miranda* rights. *Armijo*, 1987-NMCA-052, ¶ 11.

7. Asking a criminal defendant to "make a statement" is police behavior designed to elicit an incriminating response. Therefore, when the police asked the defendant to "make a statement" and s/he was in police custody, there was "custodial interrogation" and the *Miranda* decision applies. *State v. Dominguez*, 1982-NMCA-008.

8. Once an accused in custody has expressed the desire to deal with police through counsel, the accused is not to be subjected to further interrogation until counsel has been made available unless the accused voluntarily initiates further communication with the police. *State v. Boeglin*, 1983-NMCA-075. If counsel is not provided for the accused and the accused gives a statement or confession to the police, the State has a heavy burden proving defendant waived his or her right to counsel and that the statement was voluntary and a knowing and intelligent waiver was given.

5.6 Rules of Evidence

A. Overview

1. This chapter provides an introductory explanation of basic evidence principles as used by magistrate courts in New Mexico. Evidence is information used to prove or disprove a fact of consequence in litigation. A fact of consequence is a fact that must be proved to prevail or that is essential to establish a defense. The Rules of Evidence are aimed at ensuring a certain degree of usefulness and trustworthiness in the information offered in a trial or hearing.

2. The New Mexico Rules of Evidence are adopted by the New Mexico Supreme Court in Set 11 of the New Mexico Rules Annotated. These rules are followed by numerous case annotations illustrating their application. Some of these annotations are used as examples in this outline. Many treatises and casebooks are available for more comprehensive instruction in the rules and use of evidence.

3. Judges should consult the applicable New Mexico rules for the complete text of the evidentiary standard and not rely solely on this chapter for interpretation of the rules.

B. Application of the Rules of Evidence

1. Courts

   The Rules of Evidence apply to all courts in the state, including municipal, magistrate, metropolitan, probate, district and appellate courts, and to commissioners, masters, referees and child support hearing officers appointed by the court. Rule 11-1101(A).

2. Proceedings

   a. The rules apply to civil and criminal proceedings, and to non-summary contempt proceedings. Rule 11-1101(B).

   b. The evidence rules do *not* apply to:

      i. Preliminary questions of fact determined by the court prior to admission of evidence. Rule 11-1101(D)(1).

      ii. Some miscellaneous proceedings: extradition or rendition; sentencing by the court without a jury; granting or revoking probation; issuance of warrants for arrest, criminal summonses and search warrants; proceedings for release on bail. Rule 11-1101(D)(3).

   c. The rules on privilege apply at all stages of all actions, cases and proceedings. Rule 11-1101(C).

3. Types of Evidence

The Rules of Evidence apply to all types of evidence: testimony of witnesses, real evidence (an object which has a direct or indirect part in the incident), and demonstrative evidence (visual aids such as models, maps, charts and demonstrations).

C. Construction of the Rules of Evidence

Judges have a great deal of discretion in ruling on the admissibility of evidence. In doing so, judges are guided by the overall philosophy expressed in Rule 11-102: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."

D. General Principles of Evidence

1. Overall

The goal of the Rules of Evidence is the introduction of relevant, reliable, and material information for use in determining issues. The fact-finder must evaluate the evidence to determine its credibility. Evidence that is relevant, reliable, and material may be excluded if it will create unfair prejudice, confusion, or a waste of time, or if public policy (as expressed in the Rules of Evidence) mandates exclusion.

2. Judicial Notice

The court may take judicial notice (accept as established) of a fact that is commonly known to be true without the need for evidence. The fact must be either generally known within the community or capable of determination by reference to sources with known accuracy. Rule 11-201. The purpose of this rule is to save the time and expense of proving self-evident or well-established facts. For example, the court may take judicial notice if requested by a party of a statutory provision.

E. Relevancy

1. Admission in General

a. Relevant evidence means evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Rule 11-401.

b. Relevancy is the fundamental basis for admission of any evidence. Evidence that is not relevant is not admissible, for it would have no use in proving anything at issue. Evidence that is relevant is admissible unless otherwise provided by law.

c. Generally, whatever naturally and logically tends to establish a fact at issue is relevant. The logical relevance of the evidence need be only minimal to be

admissible. Since the evidence must have "any tendency" to establish the fact, the evidence in itself need not be sufficient to persuade the judge or jury that the fact is more probably true than not.

2. Exclusion in General

a. Relevant evidence is admissible unless excluded by constitution, statute, the New Mexico Rules of Evidence, or other rules adopted by the Supreme Court. Rule 11-402. The rules favor admission of relevant evidence except when certain public policies or practical considerations dictate. For example, Rule 11-404 excludes certain character evidence offered to prove conduct, for while the evidence may have some relevance the risk of unfair prejudice is too great.

b. The exclusion of evidence under Rule 11-402 is based on specific legal standards. A judge should refer to the applicable statute or rule to determine the admissibility of the offered evidence.

c. Evidence also can be ruled inadmissible based on trial concerns. Relevant evidence may be excluded if "its probative value is substantially outweighed by a danger of unfair prejudice … or by considerations of undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 11-403. Evidence is probative if it tends to prove or disprove an issue or fact. *Black's Law Dictionary* 600 (4th Pocket ed. 2011). This rule gives the judge a great deal of discretion in admitting or excluding evidence. The judge must balance the persuasive nature of the evidence against the factors enumerated in the rule. The rule applies to all types of evidence.

3. Authentication and Identification

a. Authentication and identification are aspects of relevancy. Evidence must be authenticated or identified in some way to be relevant and admissible. Generally, this requirement is met if there is evidence to support a finding that the matter in question is what its proponent claims. Rule 11-901. For example, a nonexpert witness can testify on the genuineness of a person's handwriting based upon familiarity with the handwriting. A witness can identify a voice on the phone based upon familiarity with the voice. Public records may be authenticated by testimony that they are from the public office where items of that nature are kept. In the case of a document, authenticity and identification usually are not an issue unless the document is challenged, which may then require identification by the author or custodian.

b. Certain documents can be self-authenticated, meaning no other evidence is required to support authenticity. Rule 11-902. Examples include public documents under seal, certified copies of public records, official publications, newspapers and magazines, and documents declared to be authentic by statute.

F. Evidence on Specific Topics

1. Character Evidence

a. Character is a person's nature, general disposition, or specific disposition on traits such as honesty or peacefulness. Evidence of a person's character is not admissible to prove that the person acted consistently with that character on a particular occasion. Rule 11-404. This is because character evidence often has little probative value and may distract the judge or jury from the main question of what actually occurred in the case in question. This can be a particularly difficult area of evidence for judges and trial lawyers.

b. Exceptions to the general rule:

i. Character evidence used for impeachment of the truthfulness of witnesses as provided in Rules 11-608 and 11-609 is admissible.

ii. In a criminal case, evidence of the defendant's character is admissible when offered by the defendant. The prosecution then may introduce evidence of the defendant's character to rebut the defendant's evidence. The prosecution may not use evidence of the defendant's character unless initially offered by the defendant.

iii. In a criminal case, the character of the victim is admissible when offered by the defendant. Once admitted, the prosecution may introduce evidence of the victim's character to rebut this evidence.

iv. Similarly, evidence of other crimes or wrong acts is not admissible to show that a person acted in conformity with this history. This evidence may be admissible for other purposes, however, such as to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The prosecution must provide reasonable notice of any such evidence it intends to offer at trial and do so before trial or during trial for good cause. Rule 11-404(B)(2). The trial court properly admitted evidence of the defendant's flight from police, where the evidence was used to prove the defendant's identity and consciousness of guilt, not his character. *State v. Kenny,* 1991-NMCA-094.

v. Specific instances of a persons' conduct may be admitted in cases where character is an essential element of a charge, claim, or defense. Rule 11-405(B).

vi. The Rules of Evidence are specific about what character evidence can be used. When character evidence is admissible, it may be proved by testimony on the person's reputation or by an opinion. Once this evidence is allowed, cross-examination of the witness may inquire into specific instances of conduct. Rule 11-405(A).

2. Guilty Pleas

Evidence of a defendant's offer to plead guilty or no contest to a crime, or any statement made during the plea negotiations, is not admissible against the defendant in any civil or criminal proceeding. Rule 11-410. This rule is intended to promote plea bargaining as part of the orderly administration of criminal justice. However, the court may admit a statement made in plea negotiations if one statement has been admitted and, if in fairness, both statements should be considered together.

3. Victim's Past Sexual Conduct

In prosecution of sex crimes, evidence of the victim's past sexual conduct is inadmissible unless the court finds that it is material and relevant to the case and that its prejudicial nature does not outweigh its probative value. Admissibility must be decided by a pretrial motion and in camera hearing followed, if granted, by a written order. Rule 11-412. This rule is intended to protect the privacy of victims and lessen the reluctance of victims to report a crime and participate in its prosecution.

G. Witness Testimony

1. Basic Requirements

a. Every person is competent to be a witness unless the rules provide otherwise. Rule 11-601. The two qualifications are:

i. The witness must have personal knowledge of the matter. Rule 11-602.

ii. The witness must declare by oath or affirmation that the testimony will be truthful. Rule 11-603.

b. The competency of a witness to testify means that the witness must have some capacity to observe, record, recollect and recount, as well as understand the duty to tell the truth. In determining witness competency, courts generally view the evidence in the light most favorable to the witness and permit the jury to assess the witness's credibility.

c. The judge may not testify in the case. Rule 11-605.

2. Questioning of Witnesses

If a witness cannot recall an event while testifying, the witness may use a writing, such as a police report, to refresh his or her memory. The writing is not introduced into evidence just because it has been used in this way. However, if a witness uses a writing to refresh memory for the purposes of testifying, the court may order that the adverse party be allowed to inspect the writing, introduce it, and cross-examine the witness on it. Rule 11-612. Using a writing to refresh a witness's memory is different from using a recorded recollection. Once a witness "jogs" his or her memory by reviewing some kind of writing, the witness then testifies in court from his or her refreshed memory - not by reading the writing aloud. By contrast, a

recorded recollection is used in lieu of live testimony when a witness is no longer able to recall past events, but was able to record those events at an earlier date. When a recorded recollection is used, the writing is read aloud into evidence.

3. Impeachment

Impeachment is the process of questioning or attacking the credibility ("believability") of a witness. The credibility of a witness may be attacked by any party, including the party calling the witness. Rule 11-607. A witness can be impeached, for example, by showing that the witness made prior inconsistent statements, is biased, has a disreputable character, has been convicted of a crime, or was unable to observe the events. Rules 11-608, 11-609, 11-613. The question of a witness's credibility is aimed at assessing the reliability of the testimony. Note that the rules prohibit the use of a witness's religious beliefs to support or impair the witness's credibility. Rule 11-610.

4. Opinions and Expert Testimony

Opinions that are helpful to the judge in determining the facts are admissible. As the line between fact and opinion is often difficult to draw, the rules allow witnesses to express opinions as long as they are based on a certain degree of reliability.

a. Lay Witnesses. When a witness is not testifying as an expert, any opinions the witness testifies to must be rationally based on the witness's perception, and must be helpful to a clear understanding of the testimony or a fact in issue. Rule 11-701. This means that prior to offering an opinion the witness must lay a foundation establishing personal knowledge of the facts that form the basis of the opinion. The foundation for a lay opinion must establish that the witness was able to observe an event, that the witness actually observed the event, and that the witness observed enough information to form a reliable opinion. For example, before a witness to a car accident may give his or her opinion on the cause of the accident, the testimony must establish that the witness was in sight of the accident scene at the time of the accident, that the witness actually saw the accident from his or her vantage point, and that the witness viewed enough of the accident to form a reliable opinion (e.g., that the witness saw the entire accident from beginning to end).

b. Expert Witnesses. Expert witness testimony is admissible if it is helpful to the judge and if the witness is properly qualified to give the testimony. The rule states that if scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. Rule 11-702.

i. The court has wide discretion in determining whether an expert witness is qualified. The trier of fact determines what weight to give the testimony if it is admitted.

ii. An expert may base his or her opinion on facts or data s/he observed, perceived, or became aware of either at or before a hearing. These facts need not be admissible into evidence if they are reasonably relied upon by experts in the field. Rule 11-703. This means that an expert can base an opinion on hearsay if that is reasonably done in the field. For example, a ballistics expert could form an opinion based on test results even if those test results were not admissible in evidence.

iii. An expert may give an opinion on an ultimate issue to be decided by the trier of fact. Rule 11-704. The opinion may be helpful to the judge or jury, and of course can be disregarded in whole or in part. Unless the court requires otherwise, an expert may testify as to an opinion and the reasons for it without first testifying on the underlying facts or data. The expert may be required to disclose these underlying facts on cross-examination. Rule 11-705.

iv. The court may appoint expert witnesses on its own motion or on motion of any party. Rule 11-706.

H. Hearsay

1. General Rule

a. Hearsay is defined as an oral or written statement, other than one made by a person testifying at a trial or hearing, that is offered in evidence to prove the truth of the matter asserted. Rule 11-801. The person who made the out-of-court statement is called the "declarant."

b. Hearsay is considered to be unreliable because it is a statement made out of the courtroom, where the declarant could not be observed by the judge or jury to assess demeanor and credibility. Because of its inherent unreliability, the general rule is that hearsay is not admissible unless it falls into one of the exceptions created by the New Mexico Rules of Evidence, other rules adopted by the Supreme Court, or statute. Rule 11-802.

c. Although the general rule is simple (hearsay is inadmissible), there are numerous exceptions to the hearsay rule that allow the introduction of hearsay under circumstances deemed to be minimally reliable. These exceptions will be discussed below.

2. Constitutional Limitations on Hearsay

a. Even when hearsay is admissible under a rule or statute, the rules and statutes remain subject to the requirements of the New Mexico and U.S. Constitutions. For example, the New Mexico Rules of Evidence allow the admission of an excited utterance even when the declarant is available to testify. Rule 11-803(2). However, the New Mexico Court of Appeals has held that the Confrontation Clause of the New Mexico Constitution (which guarantees defendants in criminal cases the right to confront the witnesses

against them) requires the declarant to be *un*available before an excited utterance may be admitted into evidence in a criminal case. *State v. Rick Lopez*, 1996-NMCA-101 (holding that the proponent of the excited utterance evidence must demonstrate the declarant's unavailability before the excited utterance may be admitted into evidence).

b. The U.S. Constitution also imposes limits on the use of hearsay evidence. In *Crawford v. Washington*, 541 U.S. 36 (2004), a witness made incriminating statements during a police interrogation while the witness was in police custody as a potential suspect. The witness was unavailable to testify at trial and the tape-recorded statements were admitted over the defendant's objection. The U.S. Supreme Court held that admission of this evidence violated the defendant's constitutional right to confront the witnesses against him. The Court ruled that when evidence offered against a defendant in a criminal case is testimonial and the witness is unavailable, the Confrontation Clause of the Sixth Amendment to the U.S. Constitution prohibits admission of the evidence unless the defendant had a prior opportunity to cross-examine the witness.

c. The Supreme Court stated that the "core class" of testimonial statements requiring the opportunity for cross-examination may include ex parte in-court testimony (or its functional equivalent) and extra-judicial statements contained in formalized testimonial materials. Examples may include:

   i. Affidavits;

   ii. Depositions;

   iii. Statements made while in police custody;

   iv. Statements made in response to police interrogation;

   v. Confessions;

   vi. Prior testimony at a preliminary hearing, before a grand jury or during a former trial that the defendant was unable to cross-examine;

   vii. Similar pretrial statements that declarants would reasonably expect to be used in a prosecution; or

   viii. Statements made under circumstances that would lead an objective witness to reasonably believe that the statements would be available for use at a later trial.

d. The Crawford analysis has been followed in a number of New Mexico appellate cases: *State v. Alvarez-Lopez*, 2004-NMSC-030; *State v. Johnson*, 2004-NMSC-029; *State v. Duarte*, 2004-NMCA-117; *State v. Lopez*, 2011-NMSC-035.

e. In *Crawford*, the Supreme Court also identified types of evidence that are ordinarily admissible under exceptions to the hearsay rule that are not testimonial, and therefore admissible against defendants in criminal cases, including:

i. Business records; and

ii. Statements made in furtherance of a criminal conspiracy.

f. To summarize, before admitting hearsay evidence, New Mexico courts must now consider whether the hearsay in question is a "testimonial statement." If the hearsay is testimonial and the proponent has demonstrated that the witness is unavailable to testify, the court cannot admit the hearsay evidence unless the defendant had an opportunity to cross-examine the declarant before trial, even if the hearsay falls into one of the established hearsay exceptions.

3. Statements that are Not Hearsay

a. As noted above, hearsay is an out-of-court statement that is offered *to prove the truth of the matter asserted.* Rule 11-801. By definition, out-of-court statements that are not offered to prove the truth of the matter asserted, but are offered for other purposes, are not hearsay and are not subject to the hearsay rules.

b. Additionally, the rule defining hearsay includes a list of statements that are not considered to be hearsay. Rule 11-801. Hence, the hearsay rules do not apply to these statements, although other Rules of Evidence may apply. Statements that are *not* hearsay include a prior statement by a witness and an admission of a party opponent.

4. Exceptions to the Hearsay Rule (When Hearsay can be Admitted)

a. There are so many exceptions to the hearsay rule that the study of hearsay is really the study of the exceptions. Rule 11-803 lists a variety of out-of-court statements that fulfill the definition of hearsay yet may be admitted, even if the person who made the statement is available to testify. This means a party can use just the statement as evidence and need not call the person as a witness. When made under the circumstances enumerated in Rule 11-803, the statement is admissible because it is considered to have a sufficient degree of reliability. Even then, however, the hearsay must also satisfy the requirements of the confrontation clause discussed above.

b. All hearsay statements are subject to the overall limitation of Rule 11-403, which permits exclusion of relevant evidence when its probative value is substantially outweighed by unfair prejudice, confusion or waste of time. Moreover, all hearsay statements are subject to the limitations of the state and federal constitutions, including the limitations created by the Confrontation Clause.

c. Evidence which may be admitted under exceptions to the hearsay rule include business records, vital statistics, public records and reports, family records, various documents, market reports, learned treatises, reputation, and court judgments. Each of these is further defined in the rules.

d. Other admissible hearsay relates to the person's perceptions at the time in question. The following hearsay statements may be admitted *regardless of the availability of the declarant* to testify if the statements are non-testimonial under *Crawford*:

i. Present Sense Impression. A statement describing or explaining an event made while the person was perceiving the event or immediately thereafter is admissible. Rule 11-803(1).

- In *State v. Romero*, 2006-NMCA-045, the Court of Appeals held that while on the scene statements to police officers in response to initial questioning will generally be non-testimonial, if there are indications that the officer or the declarant was trying to obtain or provide testimony, they can be considered testimonial. If the officer's main goal was to secure the scene and give aid to the victim and the declarant's goal was to get help, the statements will be considered to be non-testimonial. There is no blanket rule about whether present sense impressions are testimonial. Rather, the facts of each case will determine whether a present sense impression will be considered testimonial hearsay.

ii. Excited Utterance. A statement relating to a startling event made while under the stress and excitement of the event is admissible. Rule 11-803(2).

- Admission of an excited utterance will violate the confrontation clause of the state constitution unless the prosecution shows that the declarant is unavailable to testify. *State v. Lopez*, 1996-NMCA-101.

- Although the state constitution requires proof that the declarant is unavailable before an excited utterance may be admitted into evidence, excited utterances are unlikely to be considered testimonial statements under *Crawford*. Consequently, excited utterances are likely to be admissible under the federal constitution even though there has been no opportunity for prior cross-examination.

iii. Mental and Physical Condition. A statement of the person's state of mind, emotion, sensation or physical condition at the time is admissible (for example, statements of intent, plan, motive, design, mental feeling, pain, or bodily health). Rule 11-803(3).

iv. Medical Diagnosis and Treatment. Statements made for medical diagnosis or treatment are admissible if they describe: medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source of the symptoms, pain, or sensations, insofar as reasonably pertinent to diagnosis or treatment. Rule 11-803(4).

v. Recorded Recollection. A statement or record made when a witness had knowledge but no longer has sufficient recollection is admissible. Rule 11-803(5).

e. Rule 11-804 allows admission of hearsay statements *only when the declarant is unavailable* to testify. Some of these statements are former testimony, statement against interest, and a statement against a party who wrongfully caused the declarant's unavailability. *See State v. Romero*, 2006-NMCA-045, for a discussion on forfeiture by wrongdoing.

I. Privileges

1. General Rule

a. A "privilege" is an exemption from giving testimony. Privileges are intended to protect a relationship of social importance. Since privileges can result in the exclusion of relevant evidence and suppression of the truth, they are limited to relationships of special value that could be irrevocably harmed if breached.

b. The rules on privilege begin with a presumption of non-privilege. No person has a privilege to refuse to be a witness, refuse to disclose any matter, refuse to produce any object or writing, or prevent another person from being a witness or disclosing information, except as required by the constitution, the New Mexico Rules of Evidence, or other rules adopted by the Supreme Court. Rule 11-501. New Mexico does not recognize common law or statutory privileges.

2. Exceptions (Rules 11-502 through 11-514)

Some of the privileges recognized are:

a. Reports Privileged by Statute. A party may refuse to disclose reports required by law if the statute requiring the report so allows. Rule 11-502.

b. Lawyer-Client Privilege. A client has a privilege to refuse to disclose and to prevent other persons from disclosing confidential communications made in the course of professional legal services. Rule 11-503.

c. Physician-Patient and Psychotherapist-Patient Privilege. A patient has a privilege to refuse to disclose and to prevent other persons from disclosing confidential communications made for the purposes of diagnosis or treatment

of the patient's physical, mental or emotional condition, including drug addiction, between the patient and the patient's physician or psychotherapist. Rule 11-504.

d. Spousal Privilege. A person has a privilege to refuse to disclose and to prevent others from disclosing a confidential communication made by the person to his or her spouse while they were married. Rule 11-505. There is, however, no spousal privilege in proceedings charging one spouse with a crime against the person or property of the other, or against the child of either. Nor is there a privilege in a civil action brought by or on behalf of one spouse (or a child of either spouse) against the other spouse (or a child of either). Rule 11-505(D).

e. Communications to Clergy Privilege. A person has a privilege to refuse to disclose and prevent others from disclosing a confidential communication made by the person to a clergy member as spiritual advisor. Rule 11-506.

3. Voluntary Disclosure

A person who is granted a privilege may waive it by voluntarily disclosing or consenting to the disclosing of a significant part of the matter or communication. Rule 11-511. Disclosure of privileged matter is not admissible against the person if the disclosure was compelled erroneously or was made without opportunity to claim the privilege. Rule 11-512.

4. Commentary on Claim of Privilege

The court and counsel must not comment on a claim of privilege, and no inferences may be drawn from the claim. Rule 11-513.

5.7 Motions for Directed Verdict or Dismissal During Trial

A. Motion for Directed Verdict

1. A motion for directed verdict is a request for the judge to decide the case in the defendant's favor without sending the case to the jury; the defendant claims that the evidence is so clearly in his or her favor that there is nothing for the jury to consider.

2. The motion is made at one of the following points during the trial:

   a. after the opening statement of the prosecution;

   b. after presentation of the prosecution's case.

3. The judge may rule on the motion or may take the motion under advisement until a later stage in the proceedings.

4. If the motion is made before presentation of the defendant's case, the defendant does not waive the right to present evidence if the motion is denied.

5. The motion must state the specific grounds on which it is based.

6. "In ruling on a motion for a directed verdict, the trial court must view the evidence in the light most favorable to the state at that particular point in the trial proceedings," *State v. Johnson*, 1983-NMSC-043, ¶ 8, "with all conflicts resolved and all permissible inferences indulged in [the state's] favor." *State v. Garcia*, 1980-NMSC-141, ¶ 3. Moreover, a verdict of not guilty should be directed only when there are no reasonable inferences or sufficient surrounding circumstances from which the requisite intent may be inferred. *State v. Robinson*, 1980-NMSC-049, ¶ 11. Where there is substantial evidence to support a conviction, a directed verdict is not proper. *Johnson*, 1983-NMSC-043, ¶ 8. Substantial evidence is that evidence which is acceptable to a reasonable mind as adequate support for a conclusion. *Robinson*, 1980-NMSC-049, ¶ 11.

7. A motion for directed verdict, in effect, claims that the prosecution's case is so weak that no reasonable jury could conclude beyond a reasonable doubt that the defendant was guilty.

8. If the judge grants the motion, a final order is entered showing that the judge found the defendant not guilty and that a motion for directed verdict was granted.

B. Motions for Dismissal

1. The following motions for dismissal may be made by the defendant, normally at the beginning of the trial:

   a. Motion for dismissal due to lack of jurisdiction; or

   b. Motion to dismiss on the grounds that the time limit for bringing the action has expired.

2. The defendant must state the specific reasons for making the motion.

3. The judge may delay ruling on the dismissal motion until after the defendant's case has been presented.

4. The defendant does not waive the right to present evidence if the motion is denied.

5. If the judge grants the motion:

   a. The court enters an order of dismissal.

   b. The case is dismissed with prejudice unless the court specifically orders otherwise.

   c. The judge discharges the jury if it is a jury trial.

   d. No judgment is entered.

6. Dismissal by stipulation of the parties may occur at any point during the trial and must be granted by the judge.

5.8 Instructions to the Jury after the Presentation of Evidence

A. General

After presentation of all evidence, and before attorneys make final arguments to the jury, the court orally instructs the jury on the procedure to be followed to decide the case. UJI Criminal 14-103 and 14-104.

B. Instructions

1. The use of Uniform Jury Instructions in criminal cases is discretionary. Rule 6-609(B).

2. There are two jury instructions which are required to be used if the jury has one or more members who is a non-English speaker or is hearing impaired. UJI Criminal 14-6021 is the pre-deliberation oath to be provided to the interpreter for such a juror. UJI Criminal 14-6022 is the pre-deliberation instruction to the jury explaining the rules governing the conduct of the interpreter and the jury during deliberations.

C. Requested Instructions

1. The court may give any relevant uniform jury instruction requested by a party or deemed appropriate by the court on its own motion. Rule 6-609(B).

2. When the court determines that the jury should be instructed on a subject for which there is no Uniform Jury Instruction, the court shall give an instruction that is brief, impartial, and free from hypothesized facts. Rule 6-609(B).

3. Any discussion about requested instructions must be held out of the presence of the jury.

4. The judge decides which of the requested instructions, if any, will be given and may give Uniform Jury Instructions not requested by either party.

5. Instructions in addition to the required general instructions should be given only if the judge determines that they will assist the jury in its deliberation.

5.9 Closing Arguments (UJI Criminal 14-104)

A. Definition

The closing argument is the opportunity for each side to summarize its case for the jury. No evidence may be introduced or witnesses examined.

B. Order of Presentation

1. The prosecution's argument is given first. However, the prosecution may waive the opportunity to give an argument at this point.

2. The defendant's closing argument follows the prosecution.

   a. The defendant may give a closing argument even if the prosecution does not give one first.

   b. The defendant is not required to give a closing argument.

3. After the defendant's closing argument, the prosecution may give a rebuttal closing argument, but only for the purpose of rebutting the defendant's closing argument.

4. The prosecution is prohibited from making any statement either in opening or closing argument that can be construed by the jury as a comment on the defendant's failure to testify. *Gonzales v. State*, 1980-NMSC-070.

5. The attorneys in closing argument may comment concerning the failure of a party (the State or the defendant) to call a witness (other than the defendant) to testify in the case. *State v. Ennis*, 1982-NMCA-157.

5.10 Jury Deliberation; Verdict; Trial by Court

A. Deliberation and Verdict (Rules 6-609 and 6-610)

1. After the closing arguments, the judge or clerk may give verdict forms to one member of the jury.

2. The judge directs the jury to retire to the jury room and to:

   a. select one of its members to serve as foreperson; and

   b. deliberate the case and attempt to reach a verdict.

3. The alternate juror, if s/he is not needed to complete the six-person jury, is excused by the judge before jury deliberations. *State v. Coulter*, 1982-NMCA-106. The presence of the alternate juror during jury deliberations creates a rebuttable presumption of prejudice to the defendant that is grounds for a new trial. *State v. Pacheco*, 2007-NMSC-009, ¶ 14.

4. The courtroom may be used as a jury room if all persons, other than the members of the jury, are excluded from the room.

5. If, during the course of its deliberations, the jury has any questions or wishes to have additional instructions given, the jury may make the request orally or in writing to the judge; the judge may then give any further applicable instructions contained in the Uniform Jury Instructions. Any communication from the jury

and all instructions given by the court shall be in open court with the parties and their counsel present. *State v. McClure*, 1980-NMCA-067.

6. If the jury asks for further instructions regarding its duties after informing the judge that it is deadlocked, the judge may tell the jury that it may consider further deliberations, but not that it must consider further deliberations. *State v. McCarter*, 1980-NMSC-003.

7. If the jury requests that one exhibit be sent into the jury room and if the judge grants the request, all exhibits (except guns, drugs and other such evidence) must be sent into the jury room. This is the law under the district court rules, Rule 5-609(C). The magistrate rules do not have a comparable section. It is probably not bad practice to follow the same rule in a magistrate court trial. *See also, State v. Guerra*, 2012-NMSC-027.

8. If the jury fails to reach a verdict by the end of the day and if the jury indicates that it believes it will be able to reach a verdict, the judge may:

   a. recess the jury and have it resume deliberations the following day; or

   b. direct the jury to continue its deliberations.

9. The jury verdict must be unanimous. Rule 6-610(A).

B. Procedure When Jury Reaches Verdict

1. The judge asks the foreperson for the verdict of the jury.

   a. If verdict forms have been provided to the jury, the foreperson gives the signed form to the judge who reviews it for proper form and then orally reads the verdict.

   b. If no verdict forms have been provided, the foreperson states the verdict of the jury.

2. Upon demand of either party, the judge polls the jury.

   a. The judge may ask: "(Name of juror), is this your verdict?"

   b. If all six jurors do not answer "yes" to the question, the jury is sent out for further deliberations.

3. The judge thanks and discharges the jurors.

4. The court prepares the appropriate judgment of guilty or not guilty. Rule 6-701.

C. Failure of Jury to Reach Verdict

1. The judge may discharge the jury prior to return of a verdict if:

   a. The judge is satisfied that the jury cannot agree upon a verdict after a reasonable time. (The judge makes such determination by recalling the jury and questioning the foreperson on the likelihood of the jury reaching a verdict. For example, "If the court asks you to continue your deliberations, do you feel there is a reasonable probability that you would reach a verdict?"); or

   b. The judge in the exercise of his or her discretion, determines that a necessity exists for discharging the jury. Rule 6-610(G).

2. The judge thanks the jurors for their participation and tells them that they are discharged from the case and may leave.

3. Unless the parties agree that the judge may render judgment when the jury fails to reach a verdict, the judge declares a mistrial and notes in the file that there has been a mistrial.

4. If the parties agree to have the judge render judgment, the judge orally announces the decision as if it were a nonjury trial. The judgment form is amended to state: "The cause was decided by the judge, upon consent of the parties, after the jury failed to reach a verdict."

D. Mistrial

1. *Black's Law Dictionary* 491 (4th Pocket ed. 2011) defines mistrial as "A trial that the judge brings to an end, without a determination on the merits, because of a procedural error or serious misconduct occurring during the proceedings."

2. Jeopardy attaches once the trial jury is sworn. *State v. Gutierrez*, 2014-NMSC-031. Under constitutional double jeopardy law, a defendant cannot be tried for the same crime twice. This concept is overridden if there is a declaration of mistrial with a finding of manifest necessity or if defendant consents to the mistrial. *Id.* When manifest necessity exists, "it is clear and evident that terminating the trial is necessary because of something extraordinary which occurred in the trial." *State v. Yazzie*, 2010-NMCA-028, ¶ 11. A manifest necessity finding precludes the defendant from successfully raising a double jeopardy argument. It contemplates a sudden and overwhelming emergency, beyond the court's and parties' control, that makes conducting a trial or reaching a fair result impossible. *Black's Law Dictionary* 507 (4th Pocket ed. 2011). If the Court does not find manifest necessity for the mistrial, the state is precluded from retrying the defendant. *Yazzie*, 2010-NMCA-028. The State has a heavy burden to demonstrate manifest necessity when the defendant objects to a mistrial. *Id.* ¶ 13. There is a balance between the defendant's right to have his or her trial completed against the public's right to a fair trial.

3. There are a number of situations during which a mistrial can happen:

   a. Too prejudicial or improper question answered.

   b. A key witness is unavailable.

   c. A hung jury.

   d. Sickness of counsel/judge/juror.

   e. Jury bias/tainted jury.

4. When one of these events occurs, a party will ask for a mistrial. Once the issue of a mistrial has been raised the court must follow a specific process. A granting of a mistrial is not automatic. "Determination of the propriety of manifest necessity must be made under the particular facts of each individual case." *State v. Messier*, 1984-NMCA-085, ¶ 11.

5. First, the court must determine, if the State has asked for the mistrial, whether or not it acted in bad faith. A prosecutor acts in bad faith when an action is "designed to afford the prosecution a more favorable opportunity to convict." *State v. Mestas*, 1980-NMCA-001, ¶ 11. If the State acts in bad faith in asking for a mistrial to gain a trial advantage, the court may not make a finding of manifest necessity and the State would not be able to retry the defendant.

6. If the Court finds that the State did not act in bad faith, the court must examine other reasonable alternatives to mistrial; the court does not need to make specific findings regarding those options.

7. In *State v. Salazar*, 1997-NMCA-088, a defendant was on trial for multiple drug charges. A jury was chosen and sworn and no alternates were picked. The following day one of the jurors asked to be excused. After a lengthy meeting in chambers, the court found that though the juror was willing to serve, she was physically and emotionally disabled. This was based on the juror's demeanor and that she was emotionally distraught. The illness of a juror may be considered manifest necessity for the declaration of a mistrial. *Messier*, 1984-NMCA-085, ¶ 12. The court looked at several possible alternatives. First, the court could continue the trial with this juror. Second, the court could continue with eleven jurors, but this was not constitutionally permissible. The last alternative was for the defendant to agree to a mistrial for manifest necessity which he rejected. When the court asked for other alternatives, neither the State nor defendant offered any. The Court of Appeals determined that the trial court met its obligation. There was no evidence that there was bad faith on the part of the State. The Court found that the trial court did not abuse its discretion by declaring a mistrial due to manifest necessity.

8. In *State v. O'Kelley*, 1991-NMCA-049, there was a hung jury on one count in the indictment. "It is well established under New Mexico case law that a retrial after

a mistrial caused by a hung jury does not violate the constitutional prohibition on double jeopardy." *Id.* ¶ 11.

9. Scheduling issues can be a basis for mistrial. In *State v. Saavedra*, 1988-NMSC-100, there were many issues regarding scheduling which arose. A jury was sworn and testimony was begun. A week after the trial started defendant's attorney became ill and would not be able to continue with the trial. A letter was sent by his doctor stating that he would not be contagious in a week and defendant requested a one week continuance. The prosecutor was scheduled for surgery three days after the continuance date, though he said he could put it off if necessary. Neither side wanted a mistrial. The judge doubted that the trial could be finished by the time the prosecutor was scheduled for his surgery. Additionally, the judge had promised himself and his staff a vacation beginning the day which the trial would resume if a continuance was granted. The judge wanted the parties to continue the conversation about scheduling and determine if there was a solution. The court subsequently declared a mistrial for reasons of manifest necessity. The Supreme Court found that the trial judge did consider alternatives to mistrial. The Court stated that there are a substantial number of courts which have found the extended illness of one of the participants supports the declaration of a mistrial for manifest necessity and that the vacation plans of the judge and his staff do not provide a basis for a declaration of mistrial for reasons of manifest necessity.

10. In *Yazzie*, a metropolitan court judge declared a mistrial on her own motion based on an improper question by defense counsel. The Court of Appeals held that there was no manifest necessity to declare a mistrial. This was a domestic violence case in which the issue was who initiated the violence. Defense counsel asked the victim whether he pled guilty to a battery on a household member. The prosecutor objected and the question was then asked if victim pled guilty to battery on a household member in 2000 for battering the defendant. Again, there was an objection. The judge, after argument and a recess, ruled that the question was improper and declared a mistrial on her own motion. The analysis the Court of Appeals underwent was twofold. First, was merely asking the question sufficiently prejudicial to the State's right to a fair trial to support a mistrial over defendant's objection. The Court found that the mere asking was not "an error of such character and magnitude as to deprive the State of a fair trial." *Yazzie*, 2010-NMCA-028, ¶ 15. The second question the Court considered was whether the trial court looked at alternatives to the declaration of a mistrial. There was nothing in the record which showed that the trial court looked at any alternatives before declaring a mistrial. *Id.* ¶ 19. Thus, there was no manifest necessity.

11. Juror bias/prejudice can be the basis of a declaration of mistrial for manifest necessity. "[W]here the irregularity involves possible partiality within the jury, it has been more often held that the public interest in fair verdicts outweighs defendant's interest in obtaining a verdict by his first choice of jury." *State v. DeBaca*, 1975-NMCA-120, ¶ 8. Again, the trial court must review the specifics in the particular case and then make a determination whether there is any

alternative to the granting of a mistrial, i.e., dismiss the juror and use an alternate in her place.

12. The unavailability of a key witness is an issue often raised as a basis for a mistrial for manifest necessity. This was addressed in *State v. Gutierrez*. The victim in a criminal sexual contact of a minor case was interviewed by the prosecutor a few days before trial. After the interview, the victim fled the jurisdiction. When the trial started, the jury had been sworn, and the victim was not present, defense counsel argued that the prosecution improperly threatened the victim in the interview and that the charges be dismissed. The State moved for a mistrial based on the victim's unavailability and requested a bench warrant for the victim. The trial court granted the State's motion for mistrial and found manifest necessity based on the victim's unavailability. The Court of Appeals affirmed the district court holding that the State's conduct did not constitute prosecutorial misconduct and that double jeopardy was not violated because manifest necessity justified a mistrial. *Gutierrez*, 2012-NMCA-013, *rev'd*, 2014-NMSC-031. (New Mexico Supreme Court made no holding regarding prosecutorial misconduct.)

The United States Supreme Court in *Martinez v. Illinois*, 134 S.Ct. 2070 (2014) and *Downum v. United States*, 372 U.S. 734 (1963) has stated that an absence of a witness generally does not constitute the kind of extraordinary circumstance needed to grant a mistrial. The New Mexico Supreme Court in *Gutierrez*, 2014-NMSC-031, taking into account the strict scrutiny test and the case law from the US Supreme Court, reversed the Court of Appeals. In its guidance the New Mexico Supreme Court stated that the district court could have waited to swear the jury, knowing that there were issues regarding the appearance of the witness. The district court could have admonished the jurors and had them appear the next day. If the witness did not appear, the court could have released those jurors without a double jeopardy consequence and reconvened when the witness was located. Additionally, the State could have requested the district court not to swear the jury until the appearance of the witness. Instead, the State took the risk that they would find her after the jury was sworn. The declaration of a mistrial with no finding of manifest necessity which results in the dismissal of the case was the consequence of taking such a risk. The New Mexico Supreme Court said once the jury is sworn and jeopardy has attached, a declaration of mistral should be avoided, especially when there is a missing witness.

In conclusion, a magistrate judge should not automatically grant a mistrial when the issue is raised. The judge must analyze the request for mistrial under the specific facts and circumstances of the case before the court. If after considering alternatives to the declaration of a mistrial, the court finds that there is a basis for the mistrial for manifest necessity, the court should enter a written order explaining the ruling of the court.

E. Bench Trial: Nonjury Trials

1. In a nonjury bench trial, the judge orally announces his or her decision after the parties have rested their cases and have given closing arguments. Rule 6-604. The

standard of proof, as in a jury trial, is proof beyond a reasonable doubt. UJI 14-5060 is instructive as to what is meant by beyond a reasonable doubt. It states "It is not required that the state prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense - the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life."

2. No statute or court rule provides for taking a case under advisement; the decision is given at the conclusion of the trial.

3. The court prepares the judgment and sentence.

5.11 Preservation and Disposition of Exhibits (Rule 6-112)

A. Preservation

1. At the conclusion of the trial, all exhibits are kept by the court, unless the court otherwise orders. If the exhibits are returned to the parties, the court must advise the parties of their responsibility to preserve and retain the exhibits.

2. The party who offered the exhibits must deliver the exhibits and a receipt listing the exhibits to the clerk of the court. The clerk keeps the exhibits and signs the receipt. A copy of the receipt is filed in the court file.

B. Return to Court for Appeal

Any exhibits that were returned to the parties must be returned to the clerk of the court within 10 days after a notice of appeal is filed in the district court. Rule 6-112(C). The exhibits are submitted to the district court along with a copy of the file. Rule 5-826(F).

C. Final Disposition

All exhibits delivered to the clerk will be disposed of by the court, unless claimed by the attorney or party who offered the exhibit within 90 days after final disposition of the proceedings, including any appeal. The court may make other arrangements by order.

5.12 Recording of Judicial Proceedings

A. Record (Rule 6-601):

1. Magistrate Court is not a court of record with respect to criminal or civil actions. However, with the judge's prior approval, a party to a magistrate court proceeding, or any person with a claim arising out of the same transaction or occurrence giving rise to that proceeding, may, at the party's or person's expense, make a record of the testimony in the magistrate court proceeding. Any person

recording testimony, pursuant to Rule 6-601, shall make a copy of the transcription available to all parties in the proceeding.

2. A record of the testimony of a witness may only be used in magistrate court in: (1) civil proceedings when permitted by the Rules of Civil Procedure for the Magistrate Courts; and (2) criminal proceedings if it is admissible under the Rules of Evidence.

3. The form of record is to be as follows: (1) if the record is a stenographic or voice-to-print real time transcript, the court reporter shall transcribe the record prior to use in magistrate court; (2) if the record is an audiotape or videotape made pursuant to Rule 6-601, the person seeking to use the record in magistrate court pursuant to that rule shall be responsible for having available appropriate playback equipment and an operator; (3) if only part of the record of the proceedings is offered in evidence, any adverse party may require the offeror to offer any other part relevant to the part offered, and any party may introduce any other parts, subject to the Rules of Evidence.

4. At the request of any party to the proceeding or the deponent, a person who makes an audio or video record of testimony in magistrate court shall: (1) permit any other party or the deponent to review a copy of the audiotape or videotape and the original exhibits, if any; and (2) furnish a copy of the audiotape or videotape in the format in which it was recorded to the requesting party on receipt of payment of the reasonable cost of making the copy.

B. Broadcasting and Photographs

1. In magistrate court, taking photographs or recording or transmitting judicial proceedings for broadcasting by radio or television is prohibited except as described above in Rule 6-601. Rules 6-102 and 23-107.

2. Non-judicial proceedings in magistrate court carried out as ceremonies may be photographed or broadcast with permission and supervision by the court. Weddings may be photographed or videotaped.

5.13 Witness Fees

A. Statutory witness fees

Section 38-6-4 states that witnesses shall be allowed no fees for services, but shall receive per diem expense and mileage at the rate specified for nonsalaried public officers as provided in the Per Diem and Mileage Act [Section 10-8-1] for that time in which attendance is required, with certification of the clerk of the court.

B. AOC Guidelines (published by AOC Fiscal Division; contact the director at 505-827-4832 or the assistant director at 505-827-4840 for current guidelines.)

1. AOC will only pay for state witnesses and for defense witnesses when indigency has been determined for the defendant.

2. Witness payments are all allowable expenses charged by a witness who has been subpoenaed by the court, prosecution or defense for the purpose of giving testimony during trial to what s/he has seen, heard or observed.

3. Witnesses shall be paid no fees for service. A witness will be reimbursed per diem and mileage expenses pursuant to the current Per Diem and Mileage Act.

4. The AOC will mail payment directly to the witness.

5. The person or agency that calls the witness shall be responsible for notifying the witness of trial cancellations, continuances, resettings or settlements. If the witness is not notified, the person or agency that called the witness shall be responsible for the per diem and mileage expenses of the witness. Under those circumstances, the AOC will not pay the witness fee. In determining payment responsibility, the person who called the witness must show that s/he was unable to contact the witness despite good faith efforts to do so. A sworn statement must accompany the request for payment.

6. A Certification of Witness form (published by AOC Fiscal Division) must be filled out and signed by the witness and the public defender, district attorney or attorney. The party who called the witness will assist in the preparation of the form. A copy of the subpoena must be attached to the certification and sent to the AOC. If reimbursing a traveler for airfare, bus ticket, etc., one of the ticket slips must be attached. The AOC will not accept travel agency invoices or credit card slips without the ticket slip attached. Reimbursement for hotels and travel agencies must include a copy of the relevant subpoena or the Certification of Witness form.

7. No per diem or mileage will be paid in advance unless the court has determined an extraordinary situation exists warranting an advance. The amount of the advance shall not exceed 80% of the estimated allowance and the AOC needs at least two weeks of notice to process advanced payments.

8. If the witness is a police officer who is on duty at the time of trial, s/he shall not receive per diem or mileage. If the officer is off duty, s/he will receive per diem and mileage.

9. Payment of mileage is only required when the witness must travel more than 15 miles from town or residence. The AOC will not pay in-town mileage. Mileage will only be paid for one person per vehicle. Rental car expenses shall not be reimbursed without prior approval of the judge.

C. Expert Witness Fees

1. Expert witness fees are all allowable expenses charged by a witness who is called for court testimony as a direct result of that person's expertise or specialized skill. In most cases the prosecution or the defense will call an expert, but occasionally a judge will call an expert for testimony.

2. The use of volunteer or state agency experts is encouraged as well as in-state experts. Out-of-state experts are discouraged and should only be used if in-state resources are unavailable, inadequate, or cannot be used.

3. No agency may pay an expert for services not rendered.

4. For preliminary hearings or bond arraignments in magistrate courts: the agency that calls an expert shall pay the fees of that witness. Since the purpose of a preliminary hearing is to determine probable cause and not to determine guilt or innocence, the need for an expert witness in magistrate court is minimal.

5.14 Interpreters (Rule 6-115)

A. Need for Interpreter:

1. The need for a court interpreter exists whenever a case participant is unable to hear, speak, or otherwise communicate in the English language to the extent reasonably necessary to fully participate in the proceeding. The need for a court interpreter may be identified by the court or by a case participant. A court interpreter shall be appointed if one is requested. The court is responsible for the arrangement for an interpreter for a juror.

2. If a defendant needs an interpreter, defense counsel shall notify the court at arraignment or within 10 working days of waiver of arraignment.

3. If a party's witness needs an interpreter, the party shall notify the court in writing upon service of a notice of hearing and shall indicate whether the hearing will last longer than two hours.

4. If a party fails to timely notify the court for the need for an interpreter, the court may assess costs against that party for any delay caused by the need to obtain a court interpreter unless that party establishes good cause for the delay.

5. The court shall appoint an interpreter if based on the court's own observations or disclosure from any other person that a case participant is in need of an interpreter to fully participate in the hearing.

B. Appointment of an Interpreter

1. When a need for a court interpreter is identified, the court shall appoint a certified court interpreter except as otherwise provided in the rules. A certified court interpreter is a court interpreter who is certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the AOC or who is acknowledged in writing by the AOC as a court interpreter certified by another jurisdiction that is a member of the Consortium for Language Access in the Courts. Rule 6-115(A)(6).

2. For cases involving only charges in the Motor Vehicle Code, except DWI, reckless driving and driving while suspended or revoked, the court may appoint a language access specialist without any other procedure necessary. A language access specialist is a bilingual employee of the New Mexico Judiciary who is recognized in writing by the AOC as having successfully completed the New Mexico Center for Language Access Language Access Specialist Certification program and is in compliance with the related continuing education requirements. Language access specialists may not assist in court, however.

3. The parties may stipulate to a non-certified court interpreter with approval of the court for non-plea, non-evidentiary hearings without complying with the waiver requirements. A non-certified court interpreter is a justice system interpreter, language access specialist, or other court interpreter who is not certified by and listed on the New Mexico Directory of Certified Court Interpreters maintained by the AOC.

4. To avoid the appearance of collusion, favoritism, or exclusion of English speakers from the process, **the judge shall not act as a court interpreter for the proceeding or regularly speak in a language other than English during the proceeding.** A party's attorney shall not act as a court interpreter for the proceeding, except that a party and the party's attorney may engage in confidential attorney-client communications in a language other than English.

5. If the court has made diligent, good faith efforts to obtain a certified court interpreter and one is not reasonably available, after consulting with the AOC, the court may appoint a justice system interpreter subject to the restrictions in Sub-subparagraphs (d) and (e) of this Rule 6-115(C)(5). A justice system interpreter is a court interpreter who is listed on the Registry of Justice System Interpreters maintained by the AOC. If the court has made diligent, good faith efforts to obtain a justice system interpreter and one is not reasonably available, after consulting with the AOC, the court may appoint a language access specialist or less qualified, non-certified court interpreter only after the requirements are met.

C. Waiver of Right to Court Interpreter:

Any case participant who needs an interpreter can at any time waive the right to services of an interpreter with the approval of the court only if the court explains in open court through a court interpreter the nature and effect of the waiver and makes a written finding

that the waiver is knowingly, voluntarily, and intelligently made. If the person waiving the right is the defendant, s/he must do so in writing and the court shall further determine that the defendant has consulted with counsel regarding the decision to waive the right to a court interpreter. The waiver may be limited to particular proceedings in the case or for the entire case. With the approval of the court, the case participant may retract the waiver and request a court interpreter at any point in the proceedings.

D. Procedures for Using Court Interpreters

1. Qualifying the interpreter: Before appointing an interpreter, the court must qualify the interpreter pursuant to Rule 11-604 (An interpreter must be qualified and must give an oath or affirmation to make a true translation.). The court may ask questions such as those listed in Form 9-109.

   A certified court interpreter is presumed competent, but that presumption is rebuttable. Before qualifying an interpreter less than a certified court interpreter, the court must inquire into whether the proposed court interpreter has assessed the language skills and needs of the case participant in need of interpretation services and whether the proposed court interpreter has any potential conflicts of interest. If a party has any objections to the qualifications of the interpreter, they shall be raised at this time or as soon as possible when the party becomes aware of a question of the interpreter's qualifications. An issue regarding an interpreter error must be raised at the time of the error or as soon as possible once a party becomes aware of an error.

2. Instructions regarding the interpreter's role: Before the court interpreter begins interpreting for a party during trial, the court shall instruct the parties and others present in the courtroom regarding the role of the court interpreter. If the court interpreter will provide interpretation services for a juror, the court also shall instruct the jury prior to deliberations in accordance with UJI 14-6022.

3. Oath of the court interpreter: Before a court interpreter begins interpreting, the court shall administer an oath to the court interpreter as required by Section 38-10-8 (that s/he will make a true and impartial interpretation or translation in an understandable manner using his or her best skills and judgment in accordance with the standards and ethics of the interpreter profession.) If a court interpreter will provide interpretation services for a juror, the court also shall administer an oath to the court interpreter prior to deliberations in accordance with UJI 14-6021. All oaths required under this subparagraph shall be given in open court.

4. Record of interpretation: Upon the request of a party, the court may make and maintain an audio recording of all spoken language court interpretations or a video recording of all signed language interpretations. Unless the parties agree otherwise, the party requesting the recording shall pay for it. Any recordings permitted by Rule 6-115(E)(5) shall be made and maintained in the same manner as other audio or video recordings of court proceedings. Rule 6-115(E)(5) shall not apply to court interpretations during jury discussions and deliberations.

5. Multiple case participants: When more than one case participant needs a court interpreter for the same spoken language, the court may appoint the same court interpreter to provide interpretation services for those case participants unless it is for a signed language interpreter in which the court shall appoint one for each participant. If a party needs a separate court interpreter for attorney-client communications during a court proceeding, prior to the commencement of the court proceeding, the party shall obtain a court interpreter of the party's own choosing and at the party's own expense. If the party is a criminal defendant represented by court-appointed counsel, a court interpreter for attorney-client communications may be paid as allowed under the Indigent Defense Act and Public Defender Act. Rule 6-115(E)(6).

6. Remote interpretation: Court interpreters may be appointed to serve remotely by audio or audio-video means approved by the AOC for any proceeding when a court interpreter is otherwise not reasonably available for in-person attendance in the courtroom.

7. Cancellation of interpreter: A party shall advise the court in writing as soon as it becomes apparent that a court interpreter is no longer needed for the party or a witness to be called by the party. The failure to timely notify the court that a court interpreter is no longer needed for a proceeding is grounds for the court to require the party to pay the costs incurred for securing the court interpreter.

E. Payment of costs of court interpreter: Unless otherwise provided, all costs for providing court interpretation services by a court interpreter shall be paid from the Jury and Witness Fee Fund in amounts consistent with guidelines issued by the AOC. This does not include judicial employees in the normal course of their duties.

Section 6 Misdemeanors: Judgment; Sentence; Appeal

6.1 General

A. Judgment and Sentence (J & S); Written Orders

1. The judgment and sentence are announced orally in open court by the judge after the finding of guilt or innocence by the jury or the judge, or after the defendant pleads guilty or no contest. Rule 6-701.

2. In non-traffic misdemeanors and arrestable traffic offenses to which the defendant pleads guilty or no contest, the judge may schedule a sentencing hearing so that the judge is fully informed of the facts before the judge exercises discretion in sentencing. Notice shall be sent to all parties.

3. The judge may schedule a sentencing hearing after trial and conviction on a not guilty plea if the judge needs further information before sentencing.

4. If the court holds a sentencing hearing in cases involving convictions of certain enumerated crimes (aggravated battery, aggravated battery on a household member, battery on a household member, negligent use of a deadly weapon, and stalking) (Section 31-26-3), the court must:

    a. inquire in open court whether a victim is present for the purpose of making an oral statement or written submission to the court respecting the victim's rights;

    b. if the victim is present, the court must allow the crime victim to make a statement or submit a written statement;

    c. if the victim is not present, the court must inquire in open court whether an attempt has been made to notify the victim of the proceeding. If the district attorney cannot verify that an attempt has been made, the court shall either:

        i. reschedule the hearing, though this is not required if it violates a jurisdictional rule; or

        ii. continue with the hearing, but reserve ruling until the victim has been notified and given an opportunity to make a statement; and

        iii. in either case, order the district attorney to notify the victim of the rescheduled hearing. Section 31-26-10.1.

5. If the defendant is adjudged not guilty on all charges, s/he is immediately discharged from custody or released from any bail obligations or other conditions of release. If the defendant is adjudicated guilty, but sentencing is postponed, the appearance bond must be released, though there are procedures for setting a new bond pending sentencing within the bond rules.

6. The oral judgment and sentence must be followed by the entry of a written order by the judge. Typically, a court clerk generates this form for the judge's signature. It is best practice to provide the clerk with clear instructions for the J & S. A sentencing worksheet may be used, but Odyssey case notes provides the most reliable guidance for clerks.

7. If an attorney is convicted of a misdemeanor involving moral turpitude, the judge or clerk of the court must forward a certified copy of the record of conviction to the New Mexico Supreme Court within 30 days of the conviction. Section 36-2-19.

B. Right to Appeal (Rule 6-702):

1. Unless the defendant pled guilty or no contest, at the time of entering a judgment and sentence, the judge must advise the defendant of his or her right to a new trial in district court. The judge must also inform the defendant that the notice of appeal must be filed in the district court within 15 days after entry of the judgment and sentence. Section 35-13-1; Rule 6-702.

2. The defendant must file a copy of the notice of appeal in the district court. Rules 6-702 and 5-826(A). If the notice of appeal is filed after the announcement of the decision or the return of verdict, but before the filing of the judgment and sentence, it shall be treated as if it has been timely filed and becomes effective once the judgment and sentence is filed in magistrate court. Rule 5-826(A). The notice of appeal, once filed in district court, must be filed in magistrate court along with the receipt of the payment of the docketing fee, if applicable. Rule 5-826(B)(2).

3. The prosecution (state, county or city) also has a right to appeal. N.M. Const. art. VI, § 27 ("Appeals shall be allowed in all cases from the final judgments and decisions of the probate courts and other inferior courts to the district courts, and in all such appeals, trial shall be had de novo unless otherwise provided by law."); *State v. Barber*, 1989-NMCA-058, ¶ 4 (holding that "the state is permitted to appeal to the district court from a final judgment or decision rendered by the magistrate court" and that "Section 35-13-1 does not preclude the state's appeal."). In *Barber*, the state appealed the denial of its motion requesting impoundment of a vehicle upon conviction in a DWI case. The motion was filed after defendant had plead guilty because the court was not following the law in sentencing the defendant. Before the issue could be heard, the district court dismissed the appeal stating that the state did not have a right to appeal. The Court of Appeals held that the state has a constitutional right to appeal from final judgments or decisions made by the magistrate court.

6.2 Sentencing

A. Pre-Sentencing Report

The judge may order a pre-sentence report prior to imposing any sentence. The report shall include such information that the court requests. Section 31-21-9. There are no statutory limitations on the contents of the report. The report may contain detailed information concerning the defendant's life, characteristics, and patterns of conduct. Inclusion of accurate information regarding prior arrests that did not result in convictions does not violate the due process rights of the defendant. *State v. Montoya*, 1978-NMCA-009.

B. Sentencing Options

1. The determination of the sentence is at the discretion of the judge, but must be within prescribed minimum and maximum sentences provided by law. The statutory limits for punishment are contained in:

    a. the statute designating the offense and the penalty; or

    b. the general punishment provisions applicable to a specific class of misdemeanors, if no other penalty is specifically provided. Section 31-19-1 (misdemeanors: up to 364 days incarceration and/or up to $1000 fine; petty misdemeanors: up to 6 months incarceration and/or up to $500 fine.

2. In addition to exercising discretion in imposing sentences within statutory limits, the judge may suspend a sentence in whole or in part or may defer a sentence. Section 31-20-3. The court may also grant a conditional discharge pursuant to Section 31-20-13 and for drug cases 30-31-28.

3. If a defendant is convicted on one count, the court cannot both defer sentence and impose a sentence of either a fine or a jail term. *State v. Aragon*, 1979-NMCA-074. The court may impose a sentence and suspend a part thereof. If the defendant is convicted on more than one count, the court may impose a fine and/or jail sentence on one count and defer the sentence on the other.

4. Suspending or deferring a sentence is an act of clemency, not a right of the defendant. *State v. Baca*, 1977-NMCA-030, ¶ 10.

5. According to Section 31-19-1(C), probation is mandatory when a misdemeanor penalty is suspended or deferred. "In other words, a deferred or suspended sentence always entails mandatory probation with conditions attached." *State v. Leslie*, 2004-NMCA-106, ¶ 7.

6. In a suspended sentence:

    a. The sentence is imposed, but the execution of the sentence is suspended in whole or part. Sections 31-19-1(C) and 31-20-3(B).

b. If the probationary period is satisfactorily completed, without revocation, the defendant is discharged from further obligations, but the conviction on the charge remains. The defendant can receive a satisfactory discharge from probation. Section 31-20-8.

7. In a deferred sentence:

a. There is no sentence, no fine or jail time imposed, but the judge reserves the power to sentence at a later time. There is an adjudication of guilt. Section 31-20-3.

b. The defendant must be placed on supervised or unsupervised probation for all or some portion of the deferral period. When the probationary period is satisfactorily completed, the charges are dismissed. Section 31-20-9.

c. A charge with a deferred sentence is still considered a conviction for many purposes. *See, e.g.*, Section 66-8-102(E) (DWI first).

d. Costs and fees are adjudged against the defendant because they must be collected upon conviction. Sections 35-6-1 & 35-6-4(B).

8. In a conditional discharge (Form 9-616):

a. Pursuant to, Section 31-20-13, a defendant cannot be previously convicted of a felony offense.

b. No adjudication of guilt is entered. Upon successful completion of a period of up to one year of probation, defendant is discharged from probation and the charges are dismissed. Form 9-617.

c. A conditional discharge can only be made available once for any person.

d. A conditional discharge is not an available sentence for a DWI case.

e. Drug conditional discharge: If there is a misdemeanor conviction under Section 30-31-23 for possession of a controlled substance and the defendant has not been previously convicted of any type of drug charge, the court may grant the defendant a drug conditional discharge pursuant to Section 30-31-28. If the defendant completes the probation of up to one year, the defendant shall be discharged from probation and the charges dismissed. It will not be considered a conviction for habitual offender purposes or other disabilities/disqualifications. Discharge and dismissal under this section may only occur once with respect to any person. A defendant may receive one drug conditional discharge and one general conditional discharge.

f. Court costs are not collected on a conditional discharge because there is no "conviction" as per Sections 35-6-1 and 35-6-4(B) (no adjudication of guilt).

9. Summary of Differences between Suspended and Deferred Sentences. A suspended sentence involves a sentence that has been imposed, but the execution of which has been suspended. By contrast, when a judge defers a sentence, the judge does not impose a sentence, but reserves the right to do so if an offender violates a condition or conditions of the deferral. *See State v. Kenneman*, 1982-NMCA-145. The difference between a suspended and a deferred sentence is notable when the probationer violates the conditions of probation. When a probationer under a suspended sentence violates conditions, the judge, having already imposed a sentence, may not alter that sentence upward, but may enforce the existing sentence. When a sentence is deferred and the probationer violates, the judge may impose any lawful sentence that could have been imposed at the time of conviction. *Id.* ¶ 7.

10. Probation, generally, should relate to the education and rehabilitation of the defendant with regard to the best interests of both the public and the offender. *State v. Baca*, 1977-NMCA-030, ¶ 10.

11. If the sentence is not deferred or a conditional discharge is not granted, the sentencing options available for each count charged are as follows:

    a. imposition of jail sentence;

    b. imposition of both jail sentence and fine;

    c. suspension of jail sentence and imposition of fine;

    d. imposition of jail sentence and suspension of fine;

    e. suspension of both jail sentence and fine;

    f. imposition of a fine.

12. The judge can suspend all or a portion of a jail sentence or fine; for example, the defendant may be sentenced to 60 days in jail with all but 10 days suspended.

13. If the defendant is convicted of more than one count or offense and is sentenced to a jail term for each, the judge may specify that the terms run concurrently (at the same time) or consecutively (one term following the other). If the judge does not specify whether the sentences are to run consecutively or concurrently, the sentences are to be served concurrently. *State v. Crespin*, 1977-NMCA-046. If multiple sentences will be served consecutively, the individual probation periods for each sentence may be "stacked," that is, imposed one after the other for a combined total period longer than the maximum sentence for one offense. If the stacked period of incarceration is greater than 364 days, the defendant may be ordered to serve his/her time at the Department of Corrections. If multiple sentences will be served concurrently, the probation period may only be imposed for the duration of the longest of the maximum allowable sentences. Once the counts have been sentenced, whether concurrently or consecutively, it is considered one sentence for the case.

14. "Good Time." With the approval of the committing judge or the presiding judge, the county sheriff or jail administrator may grant any person imprisoned in the county jail a deduction of time from the term of a sentence for good behavior and industry. Deductions cannot exceed one-half of the original term of the sentence. If the person is serving two or more cumulative sentences, the sentences are treated as one for the purpose of deducting time for good behavior. Section 33-3-9(A). The sheriff or jail administrator must establish rules and procedures for the accrual and forfeiture of "good time." Section 33-3-9(C). However, a prisoner may not accrue good time for the mandatory portion of a sentence for DWI or Driving While License Revoked or Suspended, whether prosecuted under a state or municipal code. Section 33-3-9(B). The granting of good time is within the discretion of the court, not the jail. It must be explicitly granted in the defendant's judgment and sentence in order for the jail to apply good time credit. *State v. Wyman*, 2008-NMCA-113.

15. Pre-sentence Confinement Credit: New Mexico has held that courts have an inherent discretion to award jail time credit in misdemeanor cases. *State v. Martinez*, 1998-NMSC-023. It is discretionary with the court as to whether or not to grant the credit. The only charge which is mandated statutorily for which the court must give pre-sentence confinement credit is for DWI first offense, Section 66-8-102(E); it is discretionary with the other levels of DWI charges. *State v. Calvert*, 2003-NMCA-028. If there is a minimum consecutive sentence that is given in hours, the defendant gets pre-sentence confinement credit in hours, *Calvert*, 2003-NMCA-028, ¶ 41. If the sentence is in days, the defendant will receive credit based on the one day rule as set out in *State v. Miranda*, 1989-NMCA-068, ¶ 8 (One-day credit should be granted for every 24 hours or fraction thereof. If a defendant has been in jail for less than 24 hours, s/he should get credit for one day in jail.)

16. Defendant cannot be given presentence confinement credit towards fines, fees and costs. Pursuant to Section 31-12-3, the court can commit a defendant to jail for nonpayment of any fines, fees or costs. This jail time is different from any jail sentence the defendant might receive for the crime for which s/he has been convicted. This commitment is based on the defendant's refusal to pay or nonpayment of fines, costs and fees. Thus, s/he should not benefit from any pre-sentence confinement s/he has served connected to the substantive crime.

C. Sentencing for Hate Crimes (Sections 31-18B-1 through -5)

1. When a petty misdemeanor or misdemeanor is motivated by hate, the basic sentence of imprisonment prescribed in Section 31-19-1 may include an alternative sentence that requires community service, treatment, education or any combination of these. The court may suspend or defer the entire sentence or a portion thereof, or grant a conditional discharge, except as provided by law. Section 31-18B-3(D). A separate finding must be made by the court or a jury that beyond a reasonable doubt the offender's crime was motivated by hate. This finding must be recorded in the case management system.

2. "Motivated by hate" means the defendant intended to commit the crime because of the actual or perceived race, religion, color, national origin, ancestry, age, handicapped status, gender, sexual orientation or gender identity of the victim, regardless of whether the defendant's belief or perception was correct. Section 31-18B-2.

D. Sentencing Minor in Possession of Alcohol (Section 60-7B-1):

1. It is a misdemeanor for a minor to buy, attempt to buy, receive, possess or permit him or herself to be served alcoholic beverages.

2. The sentence for the first violation is up to a $1000 fine and 30 hours of community service. For the second violation it is up to a $1000 fine, 40 hours of community service and the offender's driver's license is suspended for 90 days. If the offender is too young to have a license, 90 days will be added to the date on which the offender becomes eligible to obtain a license. For a third and subsequent offense, the sentence is up to $1000 fine, 60 hours of community service and a driver's license suspension of two years or until the offender turns 21, whichever period of time is greater. There is no statutory procedure for how a defendant's license is suspended upon conviction of this charge. A court may send a letter to the Department of Motor Vehicles indicating that defendant has been convicted of the second or more violation of MIP and include a copy of the J & S.

3. There is no jail sentence attached to this charge. However, if a judge suspends or defers the amount of the fine, under Section 31-20-5, the defendant MUST be placed on probation for some period of time. Since there is no maximum allowable incarceration time for the offense, since the charge is a misdemeanor, the maximum period of probation would be 364 days. It is within the judge's discretion how long a period of probation is ordered up to the 364 days.

4. If defendant violates probation by not completing community service or any other condition ordered by the court, the procedure for probation violation should be followed. There is no legal prohibition to issuing a bench warrant for the probation violation. Defendant should receive credit against probation for that time incarcerated. The court would have available to it whatever amount of the fine was suspended or deferred as a possible sentence plus any remaining time on probation and time served on probation.

E. Sentencing for Possession of Marijuana Less than One Ounce (Section 30-31-23(B)(1)):

Section 30-31-23(B)(1) requires that upon conviction of possession of marijuana less than one ounce first offense, a defendant is guilty of a petty misdemeanor and will be punished by a fine of $50 to $100 and a period of imprisonment of not more than 15 days for a first offense. Section 30-31-29 allows for a one year period of probation for an offense punishable by a period of incarceration of one year or less as long as the judge does not impose a prison sentence or suspends all of the prison sentence imposed. This is

in conflict with Section 30-20-5 which limits the period of probation to the maximum length of incarceration. This would indicate that if defendant is sentenced to 15 days and all but one day is suspended, defendant can only be placed on probation for 15 days. Under 30-31-29, if all of the 15 days are suspended, it would be possible to give the defendant up to one year probation. This is also in conflict with the status of this charge as a petty misdemeanor which only has a period of six months of probation. It is up to the individual judge to decide what the probationary period should be.

For a second or subsequent offense, defendant is guilty of a misdemeanor punishable by a fine of $100 to $1000 and/or a period of imprisonment not to exceed one year.

F. Terms and Conditions of a Deferred or Suspended Sentence: Probation

1. By imposing terms and conditions on a deferred or suspended sentence, the judge places the defendant on probation. Sections 31-19-1(C) and 31-20-5. The court must attach to its order deferring or suspending a sentence those conditions necessary to ensure that the defendant will comply with the law during the period of suspension or deferral. Section 31-20-6; *State v. Donaldson*, 1983-NMCA-064, ¶ 34 (explaining that a trial court has broad discretion in imposing probation upon a convicted defendant and that the terms of probation will not be set aside unless they: (a) have no reasonable relationship to the offense for which the defendant was convicted; (b) relate to activity that is not itself criminal in nature; and (c) require or forbid conduct that is not reasonably related to deterring future criminality).

2. A judge must place a defendant on probation when the sentence is deferred or suspended. It is within the judge's discretion whether the probation will be for some or all of the period of deferment or suspension and whether the probation is to be supervised or unsupervised.

3. A county is authorized to set up a misdemeanor compliance program which supervises defendants convicted of a misdemeanor criminal offense, DWI, or driving on a suspended or revoked license. As a condition of probation, the court can order the defendant to pay probation fees which can be set between $15 and $50 per month to the county for the term of his or her probation. This money can be only used to operate the misdemeanor compliance program. Section 31-20-5.1.

4. A magistrate judge may refer a defendant for supervision with the Probation and Parole Department pursuant to a Memorandum of Understanding (MOU) which was entered June 14, 2013. The PPD has agreed to supervise the following categories of defendants: 1) defendants convicted of their third DWI offense; 2) defendants currently supervised by PPD and those who have been supervised by PPD within the last five years; 3) defendants charged with a felony or felonies who plead to misdemeanor convictions when the felony charge was objectively reasonable and legitimate at its inception (this is not a case of overcharging); 4) defendants with violent criminal histories as defined in the MOU. When any of these types of defendants are referred to PPD they agree to accept them if they

meet the above referral standards/criteria. If they do not believe that the defendant meets the criteria, the judge will be notified promptly.

Additionally, if a judge refers a defendant to PPD, s/he must give PPD a self-executing order for arrest and hold. If a defendant is placed on an arrest and hold by PPD, the magistrate court shall issue a probation violation bench warrant to replace the arrest and hold as soon as possible. A copy of the MOU and Order are available in Appendix 2.

5. Additionally, the terms and conditions of probation are at the discretion of the judge as long as they are reasonably related to the rehabilitation of the defendant. If defendant is ordered to pay restitution, s/he must prepare a plan of restitution to the victim(s), if any, which is subject to approval by the court. Section 31-17-1. Restitution requires a direct, causal relationship between the criminal activities of a defendant and the damages which the victim suffers. Restitution must be limited by and directly related to those criminal activities. *State v. Madril*, 1987-NMCA-010, ¶ 6.

6. The following conditions may be imposed on the defendant at the discretion of the judge as part of probation (Section 31-20-6):

   a. family financial support;

   b. medical or psychiatric treatment;

   c. probation supervision;

   d. community service that benefits any public, charitable or educational entity or institution. It is recommended that probationers do not get community service credit by working in the jail washing dishes, cooking, etc., because it does not fall under the definition of community service in, Section 31-20-6(D);

   e. any other conditions reasonably related to the defendant's rehabilitation, such as prohibiting the offender from associating with the victim(s); and

   f. donation of not less than ten dollars ($10.00) and not more than one hundred dollars ($100), to be paid in monthly installments of not less than five dollars ($5.00), to a local crime stopper program, a local domestic violence prevention or treatment program or a local drug abuse resistance education program that operates in the territorial jurisdiction of the court.

7. As a condition of probation, a judge may require that a defendant attend and complete an educational program available to first offenders or persons in need of remedial driving education, such as DWI school or Driver Improvement School. Section 66-8-102(E).

8. The judge should make certain that the terms and conditions of probation are made clear in the judgment and sentence. If there are no terms and conditions of

probation specified, the defendant cannot violate the conditions. There must be due dates as to when the particular condition must be completed. Additionally, if a compliance office is supervising the defendant, the judge can provide a due date by which *all* conditions must be completed and the compliance office can set the specific schedule for each probation condition. Without that time frame, it would be impossible to violate a defendant's probation.

9. A fine and a jail term are penalties authorized by law and may not be imposed as a condition of probation unless the statute under which the defendant was charged and sentenced grants authority to the court to impose a fine or jail term as a condition of probation. *State v. Holland*, 1978-NMCA-008.

10. When the court has deferred or suspended the sentence, the order deferring or suspending the sentence may be limited to one or more counts, but in the absence of express limitation, the order extends to the entire judgment. Section 31-20-4.

11. The length of the probation period should be specifically entered on the judgment and sentence. If a fixed probation period is not specified, however, the probation period is assumed to be the same as the maximum allowable sentence. Section 31-20-5(A).

G. Modification of Sentence

1. The judge may modify but not increase a sentence or fine at any time during the maximum period for which incarceration could have been imposed, unless an appeal is pending. Rule 6-801.

2. No sentence can be modified without prior notification to all parties and a hearing on the matter. Rule 6-801.

3. No judgment of conviction shall be changed nor shall a fine which has been ordered be returned. The court cannot reverse a conviction and require the return of the paid fine to the defendant. Rule 6-801.

H. Removal of Deferred Sentence

It is a violation of the U.S. and New Mexico constitutions, as well as the Rules of Criminal Procedure for the Magistrate Courts, for any judge or clerk to remove a deferred sentence and impose a suspended sentence without meeting the requirements of constitutional due process: notice and opportunity to be heard. This includes traffic citations. There is statutory and rule authority for the court to order a deferred sentence. Section 31-20-3 and Rule 6-802(A). A clerk cannot order a deferred sentence. If a deferred sentence is ordered the court must place the defendant on probation with conditions. Sections 31-20-4, 31-20-6 and Rule 6-802(A). The only way that a deferred sentence can be removed is by the court setting a probation violation hearing upon receipt of an allegation of a violation of a condition of probation and the court then finding that probation was violated. This includes traffic cases. If the court makes this finding, the court may impose any sentence that could have originally been imposed. That is because when a deferred sentence is ordered, the court has not imposed sentence. After the

finding of a probation violation, the court may impose sentence which means the defendant can lose the deferred sentence and receive a suspended sentence.

The removal of a deferred sentence and imposition and/or suspending of a sentence CANNOT be done at the counter, by mail or any other method other than a hearing in front of the court after notice to the parties. This is a probation violation for which a hearing is required. Rule 6-802(C).

6.3 Payment of Court Costs, Fees and Fines

A. Court costs and fees shall be assessed against the defendant if convicted, including conviction after a plea of guilty or no contest. Court costs in a criminal case consist of the docket fee and other fees and costs. Sections 35-6-1 & 35-6-4(B). The docket fee is only collected if the criminal case has been contested, that is, the defendant has plead not guilty and then either comes to court and pleads guilty or no contest or is convicted at trial. It is only collected on one charge.

B. The court may not assess costs and fees if the defendant is not convicted. If a person is convicted of driving while under the influence of drugs or liquor (Section 66-8-102), s/he shall be assessed, in addition to any other fee or fine, a fee of $85.00 to defray the costs of chemical or other tests used to determine the influence of liquor or to analyze controlled substances, and a fee of $75.00 to fund comprehensive community programs to prevent driving while under the influence. Section 31-12-7.

C. Those convicted of violating the Controlled Substances Act or of distributing or possessing a controlled substance shall be assessed a fee of $75.00 to defray costs of chemical tests or analysis of such substances. Section 31-12-8.

D. If a fine and/or court costs are assessed against a defendant, a defendant may be allowed to pay the money owed in installments of such amounts and at such time as set by the court. Section 31-12-3:

1. Payment must be made by the date specified by the judge who must adhere to Policy Directive 7. See Appendix 1 for the Supreme Court Policy Directives;

2. Payment may be made by credit cards as allowed by the AOC, check, cash, or money order, unless the judge requires a specific method of payment;

3. A receipt must be completed after each payment;

4. If the defendant is unable to pay the fees or costs, the court may order the defendant to serve a period of time in community service (volunteer work), which benefits a public, charitable or educational entity or institution in lieu of the fees or costs. Section 31-12-3 and Policy Directive 7 (Appendix 1). Community service will be credited at the rate of the prevailing minimum wage. A magistrate judge must require community service to be performed at a rate of at least 40 hours per month. If the defendant will not do community service, the magistrate

judge may sentence the defendant to jail, with each day served credited toward the fines, fees, and costs owed at the rate set by state law. If the defendant serves some community service or jail time and then wishes to pay off the remaining balance, the court shall allow the defendant to do so.

E. Criminal defendants who prevail on appeal and obtain a reversal of their convictions cannot recover costs against the state for any of the criminal proceedings. *State v. Hudson*, 2003-NMCA-139.

F. Pursuant to Section 31-12-3 and Policy Directive 7 (Appendix 1), the Court can commit a defendant to jail for nonpayment of any fines, fees or costs. This jail time is different from any jail sentence the defendant might receive for the crime for which s/he has been convicted. This commitment is based on the defendant's refusal to pay or nonpayment of fines, costs and fees. Thus, the defendant should not benefit from any pre-sentence confinement s/he has served connected to the substantive crime. The court can only order confinement in lieu of payment of fines, fees or costs after defendant has been given the opportunity to do community service in lieu of payment. If defendant fails or refuses to pay or to do community service, the defendant can be ordered to a period of confinement to cover the money owed to the court.

G. Supreme Court Policy Directive Number 7 (Appendix 1) controls the issuance of agreements to pay and the acceptance of partial payments of fines and costs. Agreements to pay are limited to 30 days if defendant owes $100 or less. A defendant owing more than $100 may pay a minimum of $50 per month. In cases of severe hardship the magistrate judge has the discretion to accept partial payment based on written findings by the court documented in the physical file, including an adjustment of fines order. A magistrate judge may grant a defendant up to three extensions of time on an Agreement to Pay or may modify the Agreement to Pay up to three times in cases of severe hardship based on written findings by the court documented in the physical file.

6.4 Appeal

A. Right, Notice and Docketing of Appeal (Rule 6-703(A)):

1. A defendant convicted in a criminal case must be informed of the right to appeal at the time of entry of judgment and sentence or final order on the criminal complaint. The defendant may appeal to district court. Section 35-13-1; Rule 6-703(A).

2. A defendant who has entered a plea of guilty or no contest is not an aggrieved party. *State v. Ball*, 1986-NMSC-043. If defendant enters into a plea, s/he does not have a right to appeal.

3. The prosecution may also file an appeal to the district court. *Smith v. Love*, 101 N.M. 355 (1984) (explaining the state's constitutional right to appeal adverse decisions). However, there is no constitutional or statutory basis for an appeal by

the State from a suppression order of a magistrate court. *State v. Heinsen*, 2005-NMSC-035. An order of dismissal is an appealable final order and the state may file an appeal. *State v. Montoya*, 144 N.M. 458 (2008).

4. The appeal must be filed in the district court within 15 days after entry of the judgment or final order by any aggrieved party.

B. Record on Appeal (Rule 5-826(F)):

1. Within 15 days of the appellant filing the notice of appeal in magistrate court, the magistrate clerk shall file with the clerk of the district court the record of the appeal taken in the action in the magistrate court.

2. The record includes:

   a. a title page containing the caption of the case in the magistrate court and the names and mailing addresses of each party, or if represented by counsel, the name and address of the attorney;

   b. copies of all papers and pleadings filed in the magistrate court;

   c. a copy of the judgment or final order sought to be reviewed, with the date of filing; and

   d. any exhibits.

3. The magistrate court shall give prompt notice to all parties of the filing of the record on appeal with the district court. Any party who wants a copy of the record on appeal is responsible for paying for the cost of copying.

4. If anything material to either party is omitted from the record in error or by accident, the parties by stipulation, or the magistrate court or the district court, by suggestion or on its own, may direct that the omission be corrected and a supplemental record be transmitted to the district court. Rule 5-826(G).

C. Conditions of Release (Rule 6-703(B), (C) and Rule 5-826(H), (I)):

1. The appearance bond set to assure the defendant's appearance at trial shall be released. The court *may* set an appeal bond to assure the defendant's appearance in district court on appeal and *may* set conditions of release using the criteria in Rule 6-401 and considering defendant's conviction and length of sentence imposed. The amount of the appeal bond and the conditions of release shall be included on the judgment and sentence.

2. The court may release a person after judgment or sentence who was not released prior to or during trial.

3. If an appeal bond has been set by the magistrate court, upon the filing of the notice of appeal, the bond shall be transferred to district court pending disposition

of the appeal. The district court shall dispose of all matters pertaining to the appeal bond until remand to the magistrate court.

4. If the magistrate judge has refused release pending appeal or has imposed conditions of release that the defendant cannot meet, the defendant may file a petition for release with the clerk of the district court at any time after the filing of the notice of appeal. A copy of the petition endorsed by the district court clerk shall be filed in the magistrate court. If the district court releases defendant pending appeal, a copy of the order of release shall be filed in the magistrate court.

D. Disposition; Time Limitations (Rule 5-826(K), (L), (M) and (N)):

1. The district court shall dispose of all appeals by judgment and sentence or final order. The court in its discretion may also include a memorandum opinion. A mandate shall be issued by the court upon whichever of these events occurs latest:

   a. 15 days after the entry of the order disposing of the case;

   b. 15 days after disposition of a motion for rehearing;

   c. if a notice of appeal is filed, upon final disposition of the appeal.

2. All appeals to district court are trials de novo. In addition, in *City of Farmington v. Pinon-Garcia*, 2013-NMSC-046, the Supreme Court found that for pre-trial motions which are dispositive, such as speedy trial violations, violations of the six-month rule, double jeopardy and discovery violations, the appellate review in district court is de novo. When this type of motion is raised in magistrate court and the ruling appealed to district court, the court reviews de novo.

3. Upon expiration of time for appeal from the judgment or final order of the district court, if the relief granted is within the jurisdiction of the magistrate court, the district court shall remand the case to the magistrate court for enforcement of the district court's judgment.

4. Any aggrieved person may appeal from the district court's judgment to the Court of Appeals or the Supreme Court, or as authorized by law. Any bond and conditions of release in effect during the pendency of the appeal in district court, shall continue in effect pending appeal to the Court of Appeals unless modified.

5. After final determination of the appeal, the clerk of the district court shall transmit a copy of the judgment and sentence or final order to the magistrate court clerk.

E. Stay of Execution of Magistrate Court Sentence (Rule 6-703(D)):

Execution of any sentence, fine, fee, or probation shall be stayed pending the results of the appeal to district court. An abstract of record of the defendant's conviction shall not be prepared and sent in accordance with Section 66-8-135 until the later of the following dates:

1. expiration of the deadline for filing a notice of appeal under this rule if the defendant does not file a notice of appeal; or

2. ten (10) days after remand from the district court or issuance of mandate by the Court of Appeals or Supreme Court if the defendant does file a notice of appeal under this rule.

F. Writs (Article VI, Section 13, NM Constitution):

1. District courts have authority under the State Constitution to issue writs of prohibition to inferior courts. Art. VI, Section 13. The Supreme Court has stated that a writ of prohibition is "an extraordinary writ, issued by a superior court to an inferior court to prevent the latter from exceeding its jurisdiction, either by prohibiting it from assuming jurisdiction in a matter over which it has no control, or from going beyond its legitimate powers in a matter of which it has jurisdiction." *In re Extradition of Martinez*, 2001-NMSC-009, ¶ 7, as cited in *State v. Valerio*, 2012-NMCA-022, ¶ 19.

2. The district courts also have the authority to issue writs of superintending control which should only be issued when a ruling order or decision of the magistrate court is erroneous, is arbitrary or tyrannical, does gross injustice, may result in irreparable injury, and there is no other plain, speedy, or adequate remedy. *In Re Extradition of Martinez*, 2001-NMSC-009, ¶ 12.

3. Magistrate judges need not respond to the writs until ordered by the district court. It is recommended that court staff inform the AOC of any writ which is filed against the court or any of its judges.

Section 7 Probation Violation

7.1 Authority and Jurisdiction

A. Pursuant to Rule 6-802, once it "appears that a probationer may have violated conditions of probation," the court may issue a warrant for the probationer's arrest or may issue a notice to appear at a probation violation hearing. The court need not wait for a motion to revoke probation from a district attorney's office. The probation or compliance officer is not a prosecutor in these cases. This is the court's probation to do with as it wishes. The officer or monitor is a witness in the case. If the officer submits a violation report on which a warrant is to be based, it needs to have something like the "affidavit for bench warrant." *See* Form 9-211.

B. The court's jurisdiction ends when the probation period expires. The probation violation hearing must be held before the expiration of the court's jurisdiction. The court must determine whether or not it still has jurisdiction to address the probation violation. This is true even for violations occurring and motions filed before the expiration of probation. *State v. Ordunez,* 2012-NMSC-024; Sections 31-20-8 and 9.

C. Law enforcement officers can only arrest for a probation violation if the court has issued a probation violation warrant pursuant to Rule 6-802. A law enforcement officer cannot arrest for a probation violation without a warrant because s/he becomes aware that a probationer has violated a condition of probation, i.e., was seen in a bar, or because the probationer has committed a new offense. It is solely the court's discretion as to whether a defendant is arrested for a probation violation; law enforcement cannot take away the court's discretion. Law enforcement should be notifying the county compliance officer, if county compliance is involved in the case, who should then submit a probation violation report to the court from which the court can issue a warrant or a notice to appear; or law enforcement can notify the court directly that an individual was arrested on a new offense from which the court could issue a warrant or a notice to appear.

County compliance officers do not have the authority to direct someone to be arrested for a probation violation without a warrant.

7.2 Notice and Hearing

A. Once a defendant is picked up on the probation violation warrant or on the date scheduled on the notice for probation violation, there is a first appearance on the probation violation. The notice, pursuant to Rule 6-802, is not required to be personally served. The notice may be mailed or hand delivered to the defendant.

B. At the first appearance the defendant states whether there is an admission or a denial of the violation. If there is an admission, there is no evidence presented and the court may proceed to sentencing. If there is a denial, the court will usually set another hearing where evidence and testimony is presented.

C. "A hearing on revocation of probation or parole is not a trial on a criminal charge, but is a hearing to determine whether, during the probationary or parole period, the defendant has conformed to or breached the course of conduct outlined in the probation or parole order." *State v. Sanchez*, 1980-NMCA-055, ¶ 11.

D. In some courts there will be subpoenas issued for witnesses and in others, they are not necessary. At that hearing the court will hear testimony concerning the violation(s) and the witnesses may be cross-examined by the defendant or the defendant's attorney. The defendant has a right to have counsel at the probation violation hearing. The requirement for live testimony and the right to confront witnesses under the due process clause has been discussed by the Supreme Court in *State v. Guthrie*, 2011-NMSC-014. The 6th Amendment right to confrontation is not the issue here; it is the right to due process given under the 14th Amendment. This case states that if there is a significant need for confrontation to protect the truth-finding process and the substantial reliability of the evidence and the court specifies the reasons why, then the witness must appear and be subject to confrontation regardless of the reasons for the absence. If the need for confrontation is not significant and the court specifies why, then it does not matter whether the witness is available. Thus, the court will look to, among other things, whether the evidence is uncontested, corroborated, and documented by a reliable source. If it is, then live testimony and cross examination would have no use. For example, if defendant is not contesting that he left treatment, but just wants to explain why, then perhaps there is little necessity of testimony from the treatment center. However, if defendant claims he never left, the testimony might be necessary.

E. A violation of conditions of probation must be proven by reasonable certainty and satisfy the conscience of the court as to the truth of the violation. It does not require proof beyond a reasonable doubt. *Guthrie*, 2011-NMSC-014, ¶ 14. Additionally, the Rules of Evidence do not apply in a probation violation hearing. Rule 11-1101(D)(3)(d).

F. The court can find a probation violation even if the defendant had never reported to the probation office and no file was ever opened. Defendant is essentially "on probation" from the date of his sentencing. *State v. Jimenez*, 2004-NMSC-012.

G. In the situation where there are two cases with consecutive sentences, if the defendant violates probation during the first sentence, he is still liable for a probation violation on the second sentence since the sentence is taken as a whole. *State v. Lopez*, 2007-NMSC-011. A probation violation has been upheld when a defendant has been sentenced to jail to be followed by probation and defendant was released from jail for work release and did not return. *State v. Padilla*, 1987-NMCA-116.

7.3 **Probation Violation Sentencing** (Rule 6-802(C)):

A. If the court finds a probation violation there are a number of sentencing options.

1. The court may continue the defendant on probation which means the probation is not revoked and defendant continues on the sentence s/he has.

2. The court can revoke the probation and either order a new probationary period or require the probationer to serve the balance of the sentence imposed or any lesser sentence. In this situation defendant is ordered to jail for a period of time up to the amount of incarceration time left on the defendant's sentence.

3. If the sentence was a deferred sentence or a conditional discharge, the judge can impose a sentence, either suspend all or part of the sentence, or incarcerate the defendant for the time available on his/her sentence. If the charge is not a DWI or a domestic violence case, the court must give the defendant credit for any time served on probation. *State v. Leslie*, 2004-NMCA-106.

B. **Credit for time served on probation**. Defendant is entitled to credit for time successfully served on probation, except in cases of DWI or domestic violence. This means if the defendant was placed on 364 days of probation and successfully completed six months of probation before a probation violation warrant was issued, defendant will receive credit for that six months. Additionally, once the warrant is served on the defendant, defendant will get credit for the time in jail up to the date of the imposition of his sentence for probation violation.

C. **Fugitive from Justice**. The fugitive from justice analysis in Section 31-21-15(C) is one which is done to determine if defendant will receive credit for the time during which the probation violation warrant is outstanding. The policy behind the procedure is that if the state has requested a probation violation warrant and the court has issued such warrant, there is some obligation on the part of the state to have that warrant served on the defendant unless it would be futile to do so. Thus, to support a finding of fugitive status, the state must prove that it issued a warrant for the probationer's arrest and entered it into the national crime information center database and that the state unsuccessfully attempted to serve the warrant on the defendant, or that any attempt to serve the defendant would have been futile. *State v. Neal*, 2007-NMCA-086. If the state cannot meet this burden at a hearing, the defendant may receive credit for that time from the violation of probation to the time s/he was arrested against his or her probation time. This could make a difference as to whether there is time left on the defendant's sentence for the probation violation to be sentenced. This issue has been raised in a district court appeal in the 11th Judicial District which affects the San Juan and McKinley County Magistrate Courts. District Court Judge John Dean ruled in *State v. Trevor Begay*, Case No. D-1116-LR-201300040, that the magistrate court must do a fugitive justice analysis. Procedurally, this should be done at the same time as the probation violation hearing. It should be the first part of the hearing because it determines whether or not the magistrate court still has any jurisdiction over the defendant for a probation violation. This ruling only applies to the courts in the 11th Judicial District, and the case is pending at the Court of Appeals.

The Court of Appeals signed for the general calendar on July 9, 2014, so one can call the Court of Appeals and inquire about the status of Court of Appeals case number 33588 to find out more current information. As of November 6, 2014, no briefs had been filed.

For all the other magistrate courts, the judge should review and analyze the statutes, rules and case law to make his or her own determination as to the law. There is controversy concerning the applicability of Section 31-21-15(C) to the magistrate courts. It appears that neither this statutory section nor the Probation and Parole Act as a whole, apply to the magistrate courts. The Probation and Parole Act, Sections 31-21-3 through -19, was enacted to create a uniform system of rehabilitation for probationers and parolees. In Section 31-21-5, probation is defined as "the procedure under which an adult defendant, found guilty of a crime upon verdict or plea, is released by the court without imprisonment under a suspended or deferred sentence and subject to conditions." Then, "adult" is defined as "any person convicted of a crime by a **district** court." [Emphasis added.] These definitions were last revised in the legislature in 1991; the magistrate courts were created by the legislature in 1968. Thus, without a district court connection, the Act, including Section 31-21-15(C), does not control the procedure in the magistrate courts.

The Supreme Court enacted Rule 6-802 in 1989 and amended it in 2002. This is the magistrate court procedure for the Return of the Probation Violator which does not include the fugitive from justice analysis. However, for policy reasons it makes sense to not count the time from when the warrant is issued to when the defendant is arrested on the warrant against defendant's probation time. To allow a defendant's probation time to continue to run while s/he has absconded or not abided by the conditions of probation would be against the purpose of probation. A defendant would be able to essentially do nothing as required whenever s/he is placed on probation and just wait out the time and receive a satisfactory discharge. The court's order would have no meaning. There is no case law or statute that covers this analysis and it should be left to the judge's discretion as to whether to allow the probation violation warrant to stop the running of the probationary time.

D. **Unsatisfactory Discharge from Probation**. A defendant cannot receive an unsatisfactory discharge from probation without a revocation of probation. Once the court revokes defendant's probation, it may issue an unsatisfactory discharge of probation. If defendant's probation has not been revoked, even though s/he may not have completed the probation requirements, the defendant must still receive a satisfactory discharge. *State v. Lara*, 2000-NMCA-073 and Section 31-20-8.

7.4 Appeal from Probation Revocation

Rule 6-802(D) provides that the decision of the court to revoke probation may be appealed to the district court as otherwise provided in these rules. The only issue the district court will address on appeal will be whether there was a basis for the revocation of probation. The district court

shall not modify the sentence of the magistrate court. The hearing in district court is de novo. At the end of the hearing the district court can either reverse the order revoking probation and remand the case to magistrate court for enforcement of that judgment, or if the court finds that the probation revocation was proper, remand the case for enforcement of the sentence imposed by the magistrate court. *State v. Begay*, 2010-NMCA-089.

Section 8 Bench Warrant

A. General

1. A bench warrant is initiated when a person has been ordered by the judge to appear at a particular time and place or to do a particular thing and the person fails to appear in person or by counsel, when so allowed, or fails to do the thing so ordered. Rule 6-207.

2. At the time the bench warrant is issued, the judge indicates on the bench warrant the reason or reasons it is being issued. If the judge has personal knowledge of the failure, the judge orders the bench warrant. If the judge does not have personal knowledge of the failure, the judge may not issue the bench warrant until the person with knowledge submits an affidavit (sworn written statement) of probable cause for bench warrant. The bench warrant must also include a bond, unless it is a post-adjudication warrant.

3. Before issuing a bench warrant for failure to appear as required in a summons or a subpoena, the judge should first verify that service of the summons or subpoena has been made. If the subpoena was not issued by the court, a bench warrant for failure to appear cannot issue under Rule 6-207.

4. A person arrested pursuant to a bench warrant is entitled to the same rights as any other arrested person.

5. For traffic citations, the signing of the citation is a promise to appear. When a defendant fails to appear on his/her citation, a bench warrant cannot be issued because the citation itself is not considered a summons (a court order). A summons should be issued by the court after the defendant fails to appear on the citation. If there is a failure to appear after a summons has been served on the defendant, the court may issue a warrant for defendant's failure to appear.

B. Issuance

1. The court clerk prepares the bench warrant, the judge signs it, and the court gives the original to the sheriff or other law enforcement officer.

   a. The original is used by the sheriff for return of service and is then filed with the court.

   b. A copy of the bench warrant is served on the person arrested.

2. If the bench warrant is issued on a felony, misdemeanor, or DWI case, the court shall cause the warrant to be entered into a warrant information system (NCIC) maintained by a law enforcement agency. Other warrants may be given to the law enforcement agency which maintains NCIC for them to be entered into the system. If the defendant is arrested on a warrant before it is entered into NCIC, the warrant and the return should be entered into the system so that it can be documented. If the warrant cannot be entered into the system because there are not enough identifiers

pursuant to the NCIC policy, the warrant is not invalid. It can still be served on the defendant if s/he appears in the court at a later date.

3. The court may track served warrants to insure that in every case the original warrant is returned to the court.

C. Execution; Return

1. At the time of arrest, the law enforcement officer gives a copy of the bench warrant to the person arrested.

2. The law enforcement officer completes the return portion on the original of the bench warrant and returns it to the court.

3. Whenever possible, the officer brings the person before the judge.

4. When the bench warrant is issued, the judge should include the conditions of release and the amount of bail to be imposed if the judge is unavailable at the time that the person is arrested.

5. If the warrant has been entered into a law enforcement information system, upon the arrest of the defendant, the person executing the warrant shall cause it to be removed from the system. If the court withdraws the warrant, the court shall cause the warrant to be removed from the warrant information system.

D. The Most Common Grounds for Issuing Bench Warrants

1. Failure to appear at the time and place ordered by the court:

   This usually involves the nonappearance of a party or prospective juror who has not previously been excused. Under Rule 6-207 a warrant may only issue if the subpoena or notice to appear is issued by the court; this would not be true of subpoenas issued by an attorney. A warrant may be issued if the court chooses to charge the person with contempt of court.

2. Failure to appear as required by a summons issued by the court: If a defendant fails to appear as required by a criminal summons, the court issues a bench warrant for failure to appear pursuant to Rule 6-207.

3. Failure to Pay Fine, fees or costs. A bench warrant for failure to pay a fine or court costs may be issued pursuant to Supreme Court Policy Directive 7 (Appendix 1). If a defendant fails to make a payment pursuant to the Agreement to Pay (Form 9-605), the Court shall issue a bench warrant for failure to pay pursuant to Rule 6-207(A) within thirty days of the missed payment. The court may send a courtesy letter to the defendant warning that a bench warrant is about to issue and requesting payment before the warrant issues. A hearing before the issuance of the bench warrant is not legally necessary nor is it specifically authorized by the Supreme Court in Policy Directive 7.

If a defendant appears before the court after a bench warrant has been issued, but prior to an arrest on that warrant, defendant has the option to pay the full amount of any outstanding fines, fees or costs, see the assigned judge, or be arrested on the warrant. If a defendant appears in person, the court shall not accept partial payment from the defendant once a warrant has been issued. If a partial payment is received in the mail or online or if someone other than defendant comes in to make a payment on a case where there is an active warrant, the payment should be accepted and receipted. The receipt will indicate the balance still owed and it should be clearly indicated on the receipt that there is an active warrant which shall remain active until the balance has been paid in full. The payment amount on the warrant shall be the amount owed to the court for the full amount of any outstanding fines, fees or costs. A warrant for failure to pay shall not give defendant the alternative of posting a bond.

When a warrant for failure to pay is executed, and the defendant appears in court after arrest, the defendant shall not be granted an extended or renewed Agreement to Pay (Form 9-605), nor shall the warrant be quashed, except upon a written finding by the court of exceptional circumstances.

4. Failure to Comply with Probation. A bench warrant is one method of returning a person to the court who has allegedly violated conditions of a suspended or deferred sentence in order to determine if probation has been violated.

5. Failure to comply with conditions of release: Rule 6-403(A) authorizes the court to arrest a defendant to review conditions of release. This warrant does not stop the lapsing of the six-month rule. If that is a concern of the court, the court may summon the defendant to a review of conditions of release hearing, and if s/he does not appear, the court could issue a warrant for failure to appear. There may be times when the defendant has absconded or may be a danger to a victim or witness and the court will decide to issue a warrant immediately for the review of conditions of release.

6. Bench warrant fees: There is a $100 bench warrant fee assessed when the warrant is issued on any case where the charge date is on or after July 1, 1993. The bench warrant form, effective May 5, 2013, states that the fee is to be paid upon service or surrender on the warrant. Form 9-212C. Courts shall not cause a defendant to remain in jail for non-payment of a bench warrant fee, unless the defendant has appeared before the judge and had a hearing to determine the basis of the failure to pay. The bench warrant fee may be waived by the court.

E. No Bond Warrants

Article II, Section 13, of the New Mexico Constitution states that: "All persons shall, before conviction be bailable by sufficient sureties, except for capital offenses when the proof is evident or the presumption great and in situations in which bail is specifically prohibited by this section." Thus, it is unconstitutional to issue a warrant, other than a post adjudication warrant, without a bond. If an individual fails to appear for a hearing pre-adjudication, there must be a bond set on the warrant. Each case must be reviewed

individually and an appropriate bond amount should be set pursuant to Rule 6-401. For example, a first time failure to appear on a traffic citation warrant may have a different level or type of bond than one for someone who has failed to appear three times on a DWI case. This is within the discretion of the court. This is also true for warrants for a violation of conditions of release warrant which must have a bond amount set. If a warrant is issued for a probation violation, which is post-adjudication, the warrant can be issued without a bond. Again, this is within the discretion of the court.

Bond schedules for detention centers are different from the issuance of warrants without bond. When a magistrate court sets a bond schedule for the detention center in its district, it is appropriate, constitutional, and lawful in the discretion of the court to not have a bond listed for a specific crime, i.e., battery on a household member. Upon an arrest for that specific charge, a defendant would remain in jail until s/he sees a judge for an arraignment and a bond would be set. In-jail arraignments should be held as soon as possible after an arrest, and not more than four business days from when the defendant was taken into custody.

Section 9 Traffic Cases

9.1 Jurisdiction

A. The authority for limited jurisdiction courts to hear traffic offenses comes from Section 66-8-7, which provides that, unless specified as a felony, all violations of the Motor Vehicle Code are misdemeanors.

B. The Motor Vehicle Code is contained in Articles 1 through 8 of Chapter 66 of the New Mexico Statutes Annotated. Chapter 66 contains all laws relating to the licensing and operation of motor vehicles. A motor vehicle is defined as "every vehicle that is self--propelled and every vehicle that is propelled by electric power obtained from batteries or from overhead trolley wires, but not operated upon rails." Section 66-1-4.11(H). This includes, but is not limited to, automobiles, buses, farm tractors, mopeds, motorcycles, motor homes, certain off-road vehicles, and trucks. A bicycle is not a motor vehicle because it is human-powered, nor is a snowmobile. *State v. Eden*, 1989-NMCA-038. For more on off highway motor vehicles, including ATVs and snowmobiles, *see* the Off-Highway Motor Vehicle Act, Sections 66-3-1001 through 66-3-1020.

C. There are also misdemeanors in Sections 65-5-1, 65-5-2 and 66-3-1.1 with punishment being a fine of not less than $100 nor more than $500 and/or imprisonment up to 90 days. Violations of the Motor Transportation Act (Chapter 65, Articles 1, 3, and 5) except Sections 65-1-26, 65-1-36.1, 66-5-1, 65-5-2 or 66-3-1.1 or of the Motor Carrier Safety Act (Section 65-3-1 through 14) are misdemeanors with punishment being a fine of not more than $100 and/or imprisonment of not more than 30 days, or are penalty assessments. Section 65-1-36.

9.2 Penalty Assessments

A. Definitions

A penalty assessment program is a means of designating certain traffic offenses as those which do not require a court appearance. The state has adopted pre-set fines, i.e., penalty assessments, which an offender can elect to pay without appearing before a judge. Penalty assessment misdemeanors are listed in the State Motor Vehicle Code at Section 66-8-116 (those dealing with all drivers), Section 66-8-116.1 (those dealing with oversize loads), Section 66-8-116.2 (those dealing with the Motor Carrier Act), and Section 66-8-116.3 sets out the additional fees penalty assessment misdemeanors carry. Additionally, courts by written order can add other offenses which will be handled like penalty assessment misdemeanors where there will be no period of incarceration and the fine is set in the court order. Rule 6-503A. There are also penalty assessments in Section 66-3-1020 for off-road vehicles, Section 66-12-23 (the Boat Act), and Section 16-2-33 (Park Regulations).

B. Initial Procedure

If an offense has been designated as a penalty assessment misdemeanor, the citing officer is required to "offer the alleged violator the option of accepting a penalty assessment." Section 66-8-117(A). By signing the citation and accepting the penalty assessment the offender is pleading guilty to the offense. The offender then has thirty days to mail the payment to the Motor Vehicle Division if the offense is cited under state statute. A payment postmarked within that thirty day period will be accepted as timely by the Division. Section 66-8-117(B).

Failure to pay a penalty assessment within the specified time will result in the suspension of the person's driver's license. Section 66-5-30(A)(10) authorizes the Motor Vehicle Division to suspend the driver's license "without preliminary hearing upon a showing by its records or other sufficient evidence … that the licensee…has failed to pay a penalty assessment within thirty days of the date of issuance." The suspension remains in effect until the penalty assessment and any late fees or reinstatement fees are paid. Sections 66-5-32(C) and 66-5-33.1(A).

If defendant chooses to appear in court instead of accepting the penalty, but changes his/her mind and sends a payment to the Motor Vehicle Department instead of the court, it is the defendant's responsibility to take care of his/her court obligation and deal with the Motor Vehicle Department separately. This decision on the part of the defendant can result in severe consequences. If a defendant fails to appear on or by the date designated on the citation, because the person believes the ticket is resolved through payment to MVD, the court shall send a summons to the defendant to appear at an arraignment on the citation. If the person believes that having paid the penalty to MVD, s/he has resolved the ticket, the person will often not respond to the summons. At that point a failure to appear warrant issues for the defendant. Once the defendant is arrested on that warrant, the defendant may alert the court that s/he had changed his or her mind and had paid MVD. The defendant must plead guilty or not guilty to the citation and the case needs to be processed accordingly. At the conclusion of the case the defendant can request a refund from MVD.

9.3 Paperwork Offenses

Paperwork offenses are so labeled because, upon presentation to the court of appropriate paperwork, the citation can be disposed of either with a set fine or a dismissal. Some of these offenses are designated by statute and others can be included in a written order pursuant to Rule 6-503. This does not apply to tickets for repair. Citations cannot be dismissed just because a repair has been completed, i.e., headlight, windshield. If there is a written agreement with the officer, the defendant must still enter a plea and then the court can decide whether or not it will accept the agreement with the officer. There must be documentation of the repair if the court accepts the agreement; a court employee should not be expected to go outside the court to examine the repair.

A. No Driver's License

Section 66-5-2 is charged when a defendant does not have a driver's license. This could mean that the person never had a license, had a license that is expired, had a license that was revoked but the period of revocation is completed and the person has not yet obtained a new license, or had a license that was cancelled by MVD. This charge is different from Section 66-5-16 which is when a driver has a valid license, but s/he fails to have it in his/her possession. Both statutes state that "No person charged with violating this section shall be convicted if he produces in court a driver's license theretofore issued to him and valid at the time of his arrest." Clearly, the legislature wanted a duly licensed person not to be penalized if all they did was leave the house without his or her driver's license. The interest of the state is that people be validly licensed. The defendant can appear at the window with proof of a valid driver's license at the time of the offense, and with written permission of the court, the clerk can make a determination as to whether the defendant had a valid license at the time of the citation. If so, the case can be dismissed with proof shown. In the rare case when the defendant wants to see the judge, the judge should also review the paperwork and make a determination based on the evidence.

B. No Insurance

Like the no driver's license statutes, there are two no insurance statutes, one for those who do not have insurance at all and the other for the driver who has insurance but is not carrying proof of insurance. Section 66-5-205 requires that no person shall drive an uninsured vehicle in New Mexico. Section 66-5-229(C) states that every driver shall carry evidence of vehicle insurance while driving in New Mexico. Both statutes also state that no person shall be convicted if s/he has proof of valid insurance at the time of the issuance of the citation. These charges can be handled as the no driver's license. Once proof is shown, the charge can be dismissed.

C. No Registration

Section 66-3-13 requires that a vehicle owner sign the evidence of registration and exhibit it upon demand. The statute also contains the language of dismissal by proof if there is evidence of a signed registration valid at the time of issuance of the citation.

D. Procedure

1. Defendant comes to court with proof of documentation: license, registration, or insurance.

2. Clerk can look at the documentation and the charges and make a determination whether or not defendant was in compliance at the time of the citation.

3. If it looks clear to the clerk that defendant was in compliance, the clerk should prepare a dismissal and have the judge sign it.

4. The clerk gives or mails a copy of the dismissal to the defendant, dockets it, and closes the case.

5. The abstract should be sent to MVD with the indication of dismissal upon proof shown. Section 66-8-135 requires that within 10 days of the adjudication, the court must fill out the citation abstract and send it to MVD. The abstract may be signed by the judge or by the clerk.

9.4 Adjudication of Traffic Offenses

This section will highlight the procedures for traffic offenses which are different from or in addition to the standard procedures as described in the section on misdemeanor cases.

A. Appearance, Plea and Waiver (APW); Telephonic Pleas

1. A large portion of the traffic citations written in New Mexico are to non-residents. It is a burden on many of these defendants to return to the state to handle a traffic citation. The rules allow for defendants to appear by audio or audio-visual means. Rule 6-110A. If a defendant calls the court and wants to appear telephonically, the court should send the defendant the request for audio appearance, Form 9-104A. This rule allows the judge to conduct a hearing by telephone and may include entering a plea and sentencing the defendant. However, the rule does NOT allow a court clerk to take a plea by telephone. The clerk has no judicial authority to do so.

2. If a defendant calls the court and wants to enter a plea on a traffic citation which is a penalty assessment or another charge which may be disposed of without a hearing pursuant to a court order (Rule 6-503), the court clerk can take the defendant's information and send him or her an APW form. This allows the defendant to waive his/her appearance in court and enter a plea without coming to the court. Parts of the APW must be filled out by the court, to include the charges with the maximum fines as well as the dollar amount of court fees. The APW should be sent to the defendant with a date certain for return.

3. If defendant pleads guilty, s/he should return the APW with payment of fines and fees. If defendant pleads not guilty, the case should be set for trial. If defendant fails to return the APW by the date required by the court, the court can issue a warrant pursuant to Rule 6-207 for failure to appear if a summons has been previously sent to the defendant. Best practice may be that the court set the date for receipt for the APW as the date the arraignment is set. Then by this date either defendant waives his/her appearance for arraignment or should be in court on that date.

4. This procedure can also be used if a defendant appears at the court and wants to enter a plea on a penalty assessment/other charge with no sentence of incarceration. The clerk can give the defendant the APW and it can be filled out and signed by the defendant and returned to the clerk. If the defendant has pled guilty or no contest, two options exist. The first is that the defendant can request to see the judge for sentencing which could occur immediately or at a later date. The second is that the defendant is sentenced pursuant to the offense statute or

magistrate court order issued under Rule 6-503. In these instances, the clerk enters a J & S and the judge signs it. If authorized, the clerk may use the judge's signature stamp on the J & S. Once the J & S is signed, the defendant shall pay fines and fees or enter into an agreement to pay. If the J & S is not signed until a later date, a copy of the J & S shall be mailed to the defendant. If the defendant pleads not guilty, the case is set for trial and defendant is given a trial date..

5. If defendant wants to enter a plea on a misdemeanor, traffic misdemeanor, or petty misdemeanor, defendant should be mailed a request for audio appearance and a waiver of appearance Form 9-104. They should NOT be sent an appearance, plea and waiver form. The court may also send a guilty plea proceeding form. The defendant should be sent instructions concerning these forms with a date certain for their return. On all cases where there is a possible jail sentence, the defendant must appear either telephonically, audio-visually or in person, and the court must go through the guilty plea proceeding form with the defendant.

B. Citation Abstract

1. The information from the abstract is entered onto the offender's permanent driver's record, so that it may be accessed by law enforcement or the courts to determine a person's past driving history for sentencing or other purposes. Accuracy in filling out abstracts is critical. Incorrect information could lead to a person being penalized more or less severely and could lead to the incarceration of a person in error. The Motor Vehicle Division also will use this information to determine whether suspension or revocation of a person's driving privileges is warranted so the consequences to an individual can be quite serious.

2. Section 66-8-135(C) requires the court to send to the Motor Vehicle Department the citation abstract within 10 days of the later of entry of a final disposition on a conviction for violation of the Motor Vehicle Code or other law or ordinance relating to motor vehicles or the final decision of any higher court that reviews the matter and from which no appeal or review is successfully taken. It shall contain:

   a. the name and address of the defendant;

   b. the specific section number and common name of the provision of the state or local law, ordinance or regulation under which the defendant was tried;

   c. the plea, finding of the court and disposition of the charge, including fine or jail sentence or both;

   d. total costs assessed to the defendant;

   e. the date of the hearing;

   f. the court's name and address;

g. whether the defendant was a first or subsequent offender; and

h. whether the defendant was represented by counsel or waived the right to counsel and, if represented, the name and address of counsel.

It shall be signed by the judge or clerk who certifies that the information is correct. Section 66-8-135(G) states that the willful failure or refusal of any judicial officer to comply with this section is misconduct in office and grounds for removal. Section 66-8-135(B) requires the court to notify MVD if a defendant fails to appear on a motor vehicle violation.

3. For non-DWI traffic offenses, if defendant has received a deferred sentence, a tickler system must be used at the end of the period of deferment to determine if the probation has been successfully completed. In cases with a deferral, the abstract is not mailed to the Motor Vehicle Department until the period of deferment is complete. If the defendant meets the conditions of probation, the citation is dismissed by the judge and sent to the MVD. If prior to the expiration of probation, the defendant has not completed the conditions of probation and the court, following a hearing, finds that s/he has violated probation, the defendant may be sentenced on the original plea. At that time, the citation abstract can be completed and sent to MVD. The court should not be sending in abstracts on felony cases because the magistrate court does not have trial jurisdiction over those cases; district court must send in the completed abstract at the conclusion of the felony case. If defendant receives a deferred sentence on a DWI charge, the court should send the abstract within 10 days of the conviction and not wait until the end of the deferral period.

C. Failure to Appear on Traffic Citations

1. Every traffic citation, if signed by a defendant, shall contain a date by which the defendant needs to appear in court. In some jurisdictions this is a definite date for appearance as designated by "on _____ date." In other jurisdictions it is an indefinite date as designated by "on or before _____ date." In either case, defendant is required to appear before the court to be arraigned on the traffic citation. If defendant fails to appear on or by the date as indicated, the court CANNOT issue a warrant for failure to appear. The legislature, as of yet, has not made the traffic citation a summons for magistrate court.

2. When defendant fails to appear for the appearance date, the court shall issue a summons for the defendant's arraignment on the traffic citation. At that point the defendant is on notice by the court of his/her date to appear. If defendant fails to appear after a summons, the court may issue a bench warrant pursuant to Rule 6-207.

3. In either case, Section 66-5-30(A)(9) allows the MVD to suspend a defendant's driver's license if s/he fails to appear in court as promised on the citation or from notice by the court. The court, upon defendant's failure to appear, can fill out the notice of failure to appear form and forward it to the MVD. Once defendant

appears in court as required, the court should send a notice of clearance to defendant and MVD that the license may be reinstated because defendant appeared.

D. Jury Trials

1. The defendant must make an oral or written demand for a jury trial within 10 business days after s/he has entered a plea. If the demand is not made, it is deemed waived. Rule 6-602(A). However, if defendant is charged with more than two traffic misdemeanors where the potential period of incarceration exceeds six months, the defendant has a constitutional right to a jury trial. There is a jury trial unless there is a written waiver with approval of the judge and consent of the state.

2. Penalty assessment misdemeanors and offenses that do not prescribe incarceration as a penalty are not entitled to a jury trial. Section 35-8-1.

E. Plea and Sentencing

1. If defendant pleads guilty or no contest to a traffic misdemeanor, the court must fill out a guilty plea proceeding form. If the officer or the State wants to amend the traffic citation, it must be done on a copy of the citation or a new citation/complaint must be filed. Under no circumstances should any person write on a filed traffic citation or complaint.

2. For traffic citations other than penalty assessment misdemeanors, defendant shall be sentenced on a traffic misdemeanor to a period of jail of up to 90 days and or a fine not to exceed $300, unless there is another sentence indicated in the statutes. Section 66-8-7. Just as in any other misdemeanor case, if the judge suspends or defers any part of the sentence, the defendant shall be placed on probation for up to 90 days. It is recommended that any conditions of this probation should be completed within 60 days so that the court has time to have a probation violation hearing before the expiration of the probationary period. If the court fails to hold a probation violation hearing before the expiration of probation, defendant will have successfully completed his/her probation and if sentence was deferred, defendant shall obtain a dismissal.

3. If the citation is for a petty or full misdemeanor, the judge should sentence accordingly.

4. Reckless driving, Section 66-8-113, carries a sentence of five to 90 days incarceration and/or a fine of $25 to $100 for the first conviction, and 10 days to six months incarceration and/or a fine of $50 to $1000 for a second or subsequent conviction. The statute does not say that the sentence cannot be suspended. This means that the court must sentence, for a first offense to at least 5 days incarceration, but can suspend that time. This is also true for the second/ subsequent conviction.

5. Driving while license is revoked. The sentence for this charge if revocation is due to DWI is a minimum sentence of seven consecutive days incarceration and a fine of at least $300 up to $1000 which cannot be suspended, deferred, or taken under advisement. Section 66-5-39.1(B).

6. Driving while license is suspended. The sentence for this charge is a minimum of four days incarceration and/or up to a $1000 fine, both of which can be suspended, deferred or taken under advisement. Section 66-5-39.

7. If a defendant pleads guilty or no contest and a deferred sentence is not imposed, the back of the traffic citation can be the final order. Rule 6-701.

F. Unsigned Traffic Citations

If a law enforcement officer gives an individual a citation, but the person is not at the scene to sign the citation, there can be a problem of getting notice to the defendant. This occurs in hit and run accidents or if a defendant is injured and is no longer at the scene. The officer should write on the citation that defendant should be summoned to court. One problem is that the address that the officer uses for the defendant is often the vehicle registration address. This may not be the correct address of the defendant. The court may rely on this address to send a summons to the defendant. However, if the summons is returned, the court cannot, at that time, issue a warrant for failure to appear because defendant may not even have notice that there is a citation against him or her. If the summons is not returned and the defendant fails to appear, then a bench warrant can be issued. The best practice is for the court to either require the officer to locate another address for the defendant or the court can use the tools available to it to find another address for the defendant. The method used and where the address was found should be documented in the court file. If there is no address found, the court may issue an arrest warrant for the defendant based on an affidavit submitted by the officer.

G. Dismissal for Failure to Prosecute

It is not infrequent that an officer fails to appear at a trial setting on a traffic citation. When that occurs, it has been the practice in the magistrate courts for the court to dismiss the citation without prejudice to allow the officer to re-file the citation. The question arises as to whether or not a judge can dismiss the citation with prejudice which would not allow the officer to re-file the case. There is nothing in the law which prevents the judge from dismissing with prejudice. However, the appellate courts look to see if the magistrate judge has abused his or her discretion in doing so. It would make sense that an officer who regularly fails to appear to prosecute traffic citations may warrant a dismissal with prejudice. It is possible if the judge adopts the procedure of always dismissing with prejudice regardless of the circumstances, an appellate court may view that as an abuse of discretion or it could lead to a judicial standards review. The court must prepare an order of dismissal and not use the back of the citation as the final order.

H. Commercial Driver's License Issues (CDL)

1. Pleas (Section 66-5-69.1):

   This statute states that a person shall not take an action which prevents a conviction of a traffic control law violation from appearing on the driving record of a commercial driver's license (CDL) holder. This includes masking or deferring imposition of the judgment or diversion. This applies to moving violations only. Plea agreements are allowed under this statute with some limitations. An officer or prosecutor cannot have a plea approved which allows for a deferred sentence or diversion. A plea agreement can be reached which includes a guilty plea to a lesser charge. If the plea is going to be a moving citation changed to a nonmoving citation, it would be in violation of the statute. The officer may amend or dismiss and re-file but there must be a factual basis for the charge.

   Commercial drivers basically have a choice to plead guilty or no contest and be penalized or to go to trial. The court should ask anyone who wants a deferment on a traffic ticket if s/he is a CDL holder. If the defendant holds a CDL, the court cannot grant the deferment, even if the defendant was driving a passenger vehicle at the time of the incident or even if the officer agrees to the deferment.

   A pre-conviction dismissal filed by the officer is out of the court's hands. However, the statute says "a person shall take no action to prevent a conviction," so judges should stay away from any type of hearing that would allow a ticket to be taken under advisement with the officer stating s/he intends to file a later dismissal. We also do not recommend entering a conditional discharge under, Section 31-20-13. In that case there would be no conviction, and such a disposition would arguably conflict with the provision that "a person shall take no action to prevent a conviction …" An officer may dismiss the original charge and file another. It is part of the officer's prosecutorial discretion. What the court should not do is to grant the officer's request for a continuance or take the matter under advisement when the officer's stated intention is to dismiss the charge if the CDL defendant complies with the officer's conditions for a period of time. This arguably might constitute "masking or deferring imposition of a judgment of a traffic control law violation" in violation of Section 66-5-69.1(A)(1).

9.5 Non-Resident Violators

Non-Resident Violator Compact

If a non-resident receives a traffic citation in New Mexico for a moving violation, this person is covered by the Non-resident Violator Compact (Sections 66-8-137.1 through 137.4). This Compact provides for the non-resident to sign a citation promising to appear. If the non-resident fails to appear, the court sends notice to the MVD that the nonresident failed to appear. MVD

then will send notification to the defendant's home state and the defendant's driver's license may be suspended. Once the citation has been resolved in New Mexico, MVD will provide proof to the home state and the home state will begin reinstatement. The procedure under the NRVC does not stop the six-month rule. The court may also issue a warrant for failure to appear which does stop the lapsing of the six-month rule.

Section 10 Fugitive Actions

A. **Fugitive Complaint** (Rule 6-810): Extradition is the surrender, by one state to another, of a person accused or convicted of an offense outside its own territory and within the territorial jurisdiction of the other.

When an officer learns that there is an out of state warrant against a person who is located in his/her jurisdiction, the officer may immediately take the person into custody upon his/her reasonable belief that the person is charged with a crime in another state, if the offense is a felony.

1. A fugitive action may be commenced by filing a sworn fugitive complaint that:

   a. identifies the defendant and the state that seeks the defendant;

   b. contains the grounds for extradition; and

   c. indicates whether an arrest warrant is sought or the date and time of arrest.

2. The action must be filed in the county in which the defendant has been arrested or where the defendant is expected to be found.

3. If the fugitive is arrested without a warrant, a fugitive complaint must be prepared and given to the defendant and filed with the court prior to transferring the defendant to the detention facility. If the court is not open at the time the complaint is given to the defendant, it shall be filed on the next business day. The demanding state's warrant is not being served on the defendant, so defendant cannot bond out of jail on the bond amount on the warrant.

B. **Arraignment and Commitment Hearing** (Rule 6-811):

1. The defendant must be brought before the court for an arraignment and commitment hearing within two business days after his/her arrest.

2. At the arraignment, the court must:

   a. inform the defendant of the right to retain counsel;

   b. provide the defendant with copies of any documents the prosecution will rely on at the commitment hearing, including the fugitive complaint, copy of the warrant, etc.;

   c. inform the defendant of the right to the issuance and service of a warrant of extradition before being extradited, and of the right to obtain a writ of habeas corpus according to law; and

   d. ask the defendant to admit or deny that s/he is the person described in the fugitive complaint.

3. The defendant may waive extradition proceedings by signing a written waiver of extradition. If the court finds the waiver is voluntary, the court must issue an order to hold the defendant without bail for delivery to an authorized agent of the state demanding the defendant. The time frame should be a reasonable time frame for which the demanding state has to pick up the defendant. The policy behind extradition is to get the defendant to the demanding state as quickly as possible when no local charges are pending. Once the waiver is executed, the defendant is in the same position as if the governor's warrant had been served. The court should not permit the defendant to voluntarily return to the demanding state unless the demanding state officials have consented. If the demanding state does not pick up the defendant by the time stated in the court's order, and no one has requested the court to extend the time, the fugitive complaint shall be dismissed without prejudice and the defendant is released from custody.

4. If the defendant denies being the person described in the fugitive complaint, the court must examine the information that was the basis for the arrest and determine whether it appears that the defendant is the person sought. The state's burden is to establish probable cause on the issues of identity and whether the person is charged or convicted. Witnesses from the demanding state should not be required and the Rules of Evidence do not apply pursuant to Rule 11-1101(D)(3)(a).

5. If the defendant does not waive extradition or denies being the person described, the court may either set conditions of release pending the governor's warrant or hold the defendant in custody for not more than 30 days pending the governor's warrant. On motion by the State, the court may extend the commitment or conditions of release pending the issuance of the governor's rendition warrant for not more than 60 additional days. This motion hearing should include a determination by the court that the asylum state is proceeding with diligence and the continuance is necessary to complete the process. If the governor's warrant is not filed within the required time frames, the fugitive complaint **mus**t be dismissed without prejudice and the defendant released.

6. If local charges are pending, defendant cannot waive his/her extradition. This would allow the defendant to not have to take responsibility for local charges by agreeing to be delivered to the demanding state. Under these circumstances, defendant should be told at arraignment that the only person to determine whether or not s/he is delivered immediately to the demanding state or whether s/he remains in New Mexico pending the completion of the local charges is the Governor's office. Thus, the State, either through law enforcement or the District Attorney's Office, must be notified to go forward in obtaining a Governor's warrant. Additionally, the local charges should be handled by the court pursuant to court procedure. Section 31-4-19.

C. Transfer of Actions (Rule 6-812):

If the fugitive action is pending when the Governor issues a warrant for the arrest and extradition of the defendant, the judge must transfer the case to the district court for further action. All further action in the case is handled in the district court. The

magistrate court retains the case until the Governor's warrant is obtained or a habeas petition is filed in district court. The magistrate court case may be closed upon the delivery of the defendant to the demanding state if a waiver of extradition has been filed or if the time has passed and defendant has not been picked up. The court should dismiss the case without prejudice, release the defendant, and close the case.

Section 11 Determination of Competency (Section 31-9-1 and Rule 6-507):

A. In Magistrate Court, the issue of a defendant's competency to stand trial may be raised by the defendant, by motion, or upon the judge's own motion at any stage of the criminal proceedings. Based on defendant's actions and statements in court and/or by statements of counsel, a judge may determine that there is an issue as to defendant's competency to stand trial. At that time, the judge should transfer the case to the district court for determination of competency. Any further proceedings are suspended and the cause is transferred to the district court, where a competency determination proceeds pursuant to the Rules of Criminal Procedure for District Courts. The magistrate court retains jurisdiction over the defendant and conditions of release until the action is filed in district court. Rule 6-507.

B. Competency: A person is competent to stand trial if s/he:

1. understands the nature and significance of the criminal proceedings against him/her;

2. has a factual understanding of the criminal charges; and

3. is able to assist his/her attorney in his/her defense. *See State v. Najar*, 1986-NMCA-068, ¶ 8.

C. It is a violation of due process to prosecute a defendant who is incompetent to stand trial. A defendant must be able to assist in his or her own defense and understand the reasons for the punishment s/he is facing. A defendant can be diagnosed with a mental illness and be competent to stand trial. *State v. Flores*, 2005-NMCA-135.

D. After the district court has made a determination on competency, it may: 1) dismiss the case in district court and send the magistrate a copy of the dismissal order (a bond posted in magistrate court should be released and the case closed); 2) enter an order finding defendant incompetent to stand trial and remand the case to the magistrate court for further action (this means the court or the prosecution should dismiss the case based on defendant's incompetency, release the bond, if any, and close the case); or 3) upon a finding of competency by the district court, the case should be remanded to the magistrate court for continuation of the case. The case's six-month rule is reset from the date of when the order or remand is filed in magistrate court. Rule 6-506(B)(2).

Section 12 Contempt

A. General; Definitions

1. Contempt of court is an act calculated to lessen the authority or dignity of the court by embarrassing, hindering, or obstructing the court in the administration of justice.

2. Magistrate judges have jurisdiction to punish contempt that consists of:

   a. Disorderly behavior in the presence of the court or so near the courtroom as to obstruct the administration of justice;

   b. Disobedience or resistance to any lawful order, process, or rule of the court; and

   c. Misconduct of court officers in official transactions. Rule 6-111.

3. Contempt, except direct contempt, may be punished only after notice and hearing. No person shall be punished for contempt until given an opportunity to be heard. Rule 6-111.

4. What can a judge do when someone is disrespectful to the court?

   a. Ignore the behavior.

   b. If the person is the defendant, instruct the officer or defense counsel to control the defendant.

   c. Instruct the person that the conduct is improper.

   d. Warn the person, and perhaps, warn them again.

   e. After a warning, eject the person from the courtroom or clear the courtroom if the spectators are out of control.

   f. Speak to the offender's superior if the offender is an attorney or an officer.

   g. If the offender is an attorney, report the conduct to the disciplinary board.

   h. Hold the person in contempt of court.

5. When the primary purpose is to preserve the court's authority and to punish the disobedience of the court's orders, the contempt is criminal. If the primary purpose is to provide a remedy for an injured party and to coerce compliance with an order, the contempt is civil. Civil contempt is remedial and for the benefit of the litigants. An example of civil indirect contempt would be if a defendant in a civil case is jailed until she produces information about her assets to the plaintiff in that case. There is a question as to whether or not the magistrate courts have the authority to find civil contempt. Criminal contempt is a crime in the general sense; it is a violation of the law. *State v. Pothier*, 1986-NMSC-039, ¶ 11. It is not considered a misdemeanor charge, though that is the status it is given when it

is opened in ODYSSEY. Criminal contempt can be punished up to the court's maximum jurisdiction of 364 days incarceration and/or $1000 fine, all within the court's discretion. In determining the punishment for criminal contempt the court should consider the seriousness of the consequences of the contumacious behavior, the public interest in terminating the defendant's behavior, and the importance of deterring future defiance. *Case v. State*, 1985-NMSC-103, ¶ 4. The punishment should be reasonably related to the nature and gravity of the actions. *Id.*

B. Criminal Direct Contempt

1. Direct contempt must be:

   a. committed in the presence of the judge;

   b. known to the judge; and

   c. necessary for the judge to take immediate corrective steps to restore order and maintain the dignity and authority of the court.

2. Under most circumstances, direct contempt may be tried and punished summarily at the time of the contempt if the judge certifies that he or she saw or heard the conduct and such conduct was committed in the presence of the court. *In the Matter of Klecan*, 1979-NMSC-094. Before a summary order for contempt may be imposed and enforced, the record should be clear that:

   a. a specific warning was given by the judge;

   b. an opportunity to explain was afforded; and

   c. a hearing was held.

   These conditions are not required in the case of flagrant contemptuous conduct.

3. Any person present in the courtroom may be charged with contempt for disorderly behavior, including:

   a. a party to the case;

   b. an attorney;

   c. a witness; or

   d. an observer.

4. If the expressions or tone of voice of an attorney (or a party not represented by an attorney) are offensive, the judge should warn the party first and state that the person will be held in contempt if he or she persists. The person should be charged with contempt only if he or she persists in the offensive conduct. A judge should always distinguish between vigorous, but respectful advocacy for a position, which is not

contempt, and behavior that is disruptive or shows disrespect for the court's authority, which is contempt.

5. Generally, the judge who witnessed the contempt is the one who adjudicates the case. Rule 6-105(D). "Not only is a judge often personally involved to some degree in the conflict that must be adjudicated, the same judge exercises several responsibilities normally assigned to separate persons or institutions: 'That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers.'" *Concha v. Sanchez*, 2011-NMSC-031, ¶ 29, citing *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 at 840 (1994) (Scalia, J., concurring).

   When a judge has become so embroiled in the contempt case that he or she cannot objectively hear the case, or a member of the judge's staff will necessarily be a witness in the proceeding, another judge must conduct the hearing on the matter. *State v. Stout*, 1983-NMSC-094.

6. Failure of an attorney to appear in court at the time designated by the judge may be considered a direct contempt or an indirect contempt. *State v. Diamond*, 1980-NMCA-026. However, if the judge lacks personal knowledge of what caused the attorney's absence, the court may not try and punish without first giving notice and the opportunity to present a defense, and thus, the best practice is to treat it as an indirect contempt. Because the absence of a valid excuse is an indispensable element of the contempt, the judge cannot determine the validity of the excuse without a hearing on the matter.

7. If the judge finds a person in contempt of court, an order of direct contempt, Form 9-612, should be signed and entered which recites the facts as well as the judgment and sentence. This order opens the new misdemeanor (MR) case pursuant to Rule 6-201. No court costs should be charged because this is not a true criminal conviction as required by Section 35-6-1.

8. Tips for direct contempt:

   a. Warn the person.

   b. Warn them a second time unless the conduct is egregious.

   c. Act immediately if the behavior continues after the warnings.

   d. Give the person a chance to speak in their own defense: "What do you have to say about this?"

   e. Enter the order finding them in direct contempt. Sentence summarily. If you sentence them to jail, call law enforcement to take the person into custody.

   f. Make sure a new criminal case is opened for the criminal contempt.

g. You can bring the person back to court the next day and ask if s/he has reconsidered the behavior and suspend or vacate the remaining sentence if you are satisfied with the answer.

h. You can hold a sentencing hearing after you hold the person in direct contempt, but it is best practice to sentence immediately.

i. If you did not hold the person in contempt, but later decide you should have, you can probably issue an order for the person to show cause why s/he should not be held in contempt of court. Defendant must be arraigned and has the right to counsel. This is not the best way to handle direct contempt. It basically turns what should have been a summary direct contempt into an indirect contempt case.

C. Indirect Criminal Contempt

1. Indirect contempt normally involves behavior that occurs beyond the personal perception of the trial judge and generally, but not always, outside the courtroom. Examples include:

   a. preventing service of process;

   b. withholding evidence;

   c. bribing a witness;

   d. disobeying a court order, such as a discovery order;

   e. failure of a subpoenaed witness to show up for trial.

2. When a person does something that the judge believes constitutes indirect contempt, the judge must issue an order to show cause for specified allegedly contemptuous conduct. There must be personal service of the order to show cause. The order to show cause opens a new MR case pursuant to Rule 6-201.

3. A person may be guilty of a series of successive contempts of court during one trial or one proceeding. Separate, successive contempts are punishable as separate offenses. *State v. Driscoll*, 1976-NMSC-059, ¶¶ 16-17.

D. Notice

1. Notice and hearing are required before any contempt may be punished, except as described above for direct contempt. Rule 6-111(B).

2. The notice must state the essential facts of the contempt charged. Notice may be given:

   a. orally by the judge in open court in the presence of the person charged;

   b. by a summons;

c. by a bench warrant; or

d. by an order to show cause.

3. The person is entitled to bail as for other criminal actions.

4. The person must be given sufficient notice of the hearing to prepare a defense.

E. Hearing

1. At the contempt hearing, the court must advise the person of all rights afforded a defendant in a criminal action, except the right to demand a trial by jury. Section 35-8-1.

2. Counsel must be provided to an indigent accused of contempt since there is the possibility of a jail sentence.

3. The New Mexico Rules of Evidence and the Rules of Criminal Procedure apply to contempt hearings. There is no requirement in New Mexico law that the district attorney's office must prosecute contempt cases in magistrate court, although the district attorney may agree to do so. The judge may proceed on the contempt hearing without a prosecutor and must apply the criminal standards of the presumption of innocence and proof beyond a reasonable doubt in determining whether the person willfully committed contempt of court.

4. If the offender is found not guilty of contempt, the judge enters a final order indicating that the person was found not guilty.

F. Punishment; Appeal

1. Upon a finding of guilt, the court enters judgment and sentence within the limits of the jurisdiction of the court which would be a maximum of 364 days incarceration and/or a $1000 fine. No court costs should be charged because this is not a true criminal conviction as required by Section 35-6-1.

2. A person found guilty of contempt may appeal to the district court as for other criminal actions. Section 35-3-9 and Rule 6-111(D). The district attorney does not have the authority to dismiss the appeal of a magistrate court criminal contempt case.

G. Example of Indirect Criminal Contempt for an Attorney Failing to Appear

1. Defense counsel fails to appear with his client for a probation violation hearing. This attorney has failed to appear several times previously. This time the judge wants to communicate to the attorney that this is serious so he decides to issue an order to show cause and proceeds with an indirect contempt case. By making this decision, the judge is taking a serious action by exposing the attorney to a criminal trial, conviction, and sentence. If the court does not want to do this, it should simply set a status hearing and notice the attorney as well as the state into the hearing to discuss defense counsel's failure to appear. Issuing an order to

show cause is not just a piece of paper, it initiates the contempt case. There is no other purpose for an order to show cause other than to begin a contempt case.

2. In issuing an order to show cause, the judge is beginning a new indirect contempt case on the attorney. The order to show cause should be issued by the court with enough facts so that the attorney knows for the basis of the contempt and so that he may prepare a sufficient defense: Attorney failed to appear at probation violation hearing on April 22, 2014.

3. The order to show cause requires personal service. The court should have the sheriff or other person personally serve the attorney.

4. The order to show cause should be docketed, a new criminal case opened, and the matter set for the order to show cause/contempt hearing.

5. Defendant has a right to counsel and the other rights a defendant would have on a misdemeanor case except the right to a jury trial.

6. If the court decides, after the hearing on the order to show cause, to dismiss the order to show cause, an order should be entered and the case closed.

7. If the defendant excuses the judge, it should be assigned to another judge and the original judge becomes a witness to the case.

Section 13 Game and Fish Violations

A. Jurisdiction; Penalties

1. Magistrates have jurisdiction in cases involving violations of game and fish laws and regulations. The game and fish laws can be found in Sections 17-1-1 through 17-8-6. The regulations may be found in the New Mexico Administrative Code Title 19, Chapters 31 through 35.

2. The magistrate court has jurisdiction over game and fish cases arising in its own district and in any adjoining magistrate district, provided that the defendant consents to the magistrate's jurisdiction; otherwise, the case must be handled by a magistrate in the district where the violation occurred. Section 17-2-9.

3. If the defendant is a minor, the magistrate court does not have jurisdiction and the case must be transferred to the children's court. Section 32A-2-3.

4. Violations of game and fish laws and regulations are misdemeanors subject to imprisonment in the county jail for up to six months and a mandatory fine, depending on the illegal activity and type of animal involved, as specified by statute. Section 17-2-10. Second convictions are misdemeanors subject to imprisonment up to 364 days and increased fines, as specified by Section 17-2-10(B). A third or subsequent conviction is a misdemeanor subject to imprisonment of a minimum mandatory sentence of not less than 90 days which shall not be suspended or deferred and not more than 364 days with fines, as specified in Section 17-2-10(C). If the crime is not listed in this section, the punishment is a fine of $50 to $500 and/or imprisonment of not more than six months. Section 17-2-10(D).

5. There is one penalty assessment misdemeanor: fishing without a license and hunting small game without a license. Section 17-2-10.1.

B. Arrest; Search Warrants; Citations

1. The following entities are authorized to arrest persons for violations of game and fish laws and regulations (Section 17-2-19):

   a. Director of the State Department of Game and Fish;

   b. Game and Fish conservation officers;

   c. Sheriffs (in their own counties); and

   d. New Mexico state police officers.

2. A person may be arrested with or without an arrest warrant; the requirements for issuance of an arrest warrant and the filing of a complaint are the same as for other criminal actions.

3. Search warrants may be issued to authorized officers if there is probable cause to believe that game or fish has been taken or held in violation of Chapter 17 of the New Mexico Statutes Annotated. Search warrants issued for this reason are subject to the same requirements as any other search warrant.

4. In addition to arresting persons for violating game and fish laws and regulations, a conservation officer on official duty may also enforce some provisions of the New Mexico Criminal Code. Section 17-2-19(C). Under emergency circumstances a conservation officer may enforce violations of the Criminal or Motor Vehicle Codes.

5. Instead of arresting a person for violating game and fish laws or regulations, the officer may issue a citation. Section 31-1-6.

    a. The form of the citation must meet the requirements of law set forth in Section 31-1-6.

    b. The officer may enter on the citation the date and time the defendant is to appear in magistrate court or may take the defendant for immediate appearance before the magistrate.

    c. When a citation is issued, the procedures involving magistrate court are generally the same as for traffic offenses.

    d. The citation serves as a valid complaint when filed in court.

    e. If the defendant is arrested without a warrant, the officer may offer the defendant a citation to appear in lieu of jail and a criminal complaint. Section 31-1-6(A). The arresting officer files the citation in court as soon as practicable.

Section 14 Animals

There are a number of statutes that control the treatment of animals, including dangerous dogs and livestock. The procedure is generally an application for a warrant to seize an animal followed by a determination on the previous treatment of the animal.

14.1 Seizure of Animals, Not Including Livestock (Section 30-18-1.1):

A. An officer may apply to the magistrate court for a warrant seizing an animal the officer believes to be endangered due to cruel treatment. The warrant should be issued in the county in which the animal to be seized is located. Cruelty to animals is defined as: (1) negligently mistreating, injuring, killing without lawful justification or tormenting an animal; or (2) abandoning or failing to provide necessary sustenance to an animal under that person's custody or control. Section 30-18-1.

B. If the court finds that there is probable cause that the animal is being cruelly treated, the court shall issue a warrant for the seizure of the animal. If there is a pending criminal case, the warrant should be issued under that case number. The court shall schedule a hearing on this matter as quickly as possible within 30 days unless there is good cause shown why the hearing should be later.

C. Written notice regarding the time and place of the hearing shall be sent to the owner of the seized animal. The court may order a notice to be published in the newspaper closest to the location of the seizure.

D. If the owner of the seized animal cannot be determined, a notice concerning the circumstances of the seizure shall be posted where the animal is seized at the time of the seizure.

E. The owner has the option to have the animal examined by a veterinarian of his choice at his/her own expense.

F. This section does not apply to livestock (animals used or raised on a farm or ranch). Section 30-18-1.2(H).

14.2 Disposition of Seized Animals (Section 30-18-1.2):

A. If the court finds that the animal is not being cruelly treated and the owner is able to adequately provide for the animal, the animal will be returned to the owner.

B. If the court finds that the animal is being cruelly treated or that the owner cannot adequately provide for it, the court shall hold a hearing to determine the disposition of the animal.

C. The agency, in whose custody the animal cruelly treated has been placed, can petition the court to request the animal's owner post security with the court to cover costs incurred for the care and custody of the seized animal pending the disposition of cruelty to animal

charges. The court shall determine the amount of security, taking into consideration the owner's ability to pay, and may have periodic reviews. If security is posted, the agency caring for the animal may, with permission from the court, use the security to cover the costs of providing care for the animal in its custody.

D. If the owner does not post security within 15 days of the issuance of the order, or if after reasonable and diligent attempts, the owner cannot be located, the animal can be deemed abandoned and relinquished to the agency in whose custody it has been entrusted for adoption or humane destruction. An owner can voluntarily relinquish the animal to the agency in lieu of posting security. The relinquishment will not preclude further prosecution for felony cruelty to animals.

E. Upon conviction for cruelty or extreme cruelty to animals, the court shall place the animal with an animal shelter or welfare organization for placement or humane destruction.

14.3 **Costs for Seized Animals** (Section 30-18-1.3):

A. Upon conviction for cruelty or extreme cruelty to animals, the defendant is liable for the reasonable costs of the boarding of the animal, vet exams and care of the animal during the pendency of the case. The amount of these costs will be offset by any security posted pursuant to Section 30-18-1.2. Unspent security will be returned to the defendant.

B. In the absence of a conviction, the seizing agency shall pay the costs of the boarding of the animal, vet exams and care of the animal during the pendency of the case. The agency shall return the animal, if not relinquished, and the security posted to the defendant.

14.4 **Dangerous Dogs; Definitions** (Sections 77-1A-2 and 77-1A-3):

A. Dangerous dog: a dog that caused a serious injury to a person or domestic animal.

B. Potentially dangerous dog: a dog that may reasonably be assumed to pose a threat to public safety as demonstrated by the following behaviors:

i. causing an injury to a person or domestic animal that is less severe than a serious injury;

ii. chasing or menacing a person or domestic animal in an aggressive manner and without provocation; or

iii. acting in a highly aggressive manner within a fenced yard or enclosure and appearing able to jump out of the yard or enclosure.

C. Serious injury: a physical injury that results in broken bones, multiple bites or disfiguring lacerations requiring sutures or reconstructive surgery.

D. There are exceptions to the dangerous dog definition.

14.5 **Seizure of Dog** (Section 77-1A-4):

A. If an animal control agency has probable cause to believe that a dog is a dangerous dog and poses an imminent threat to public safety, or is a potentially dangerous dog and poses a threat to public safety, it may apply to a court of competent jurisdiction in the county where the dog is located for a warrant to seize the dog.

B. After seizure, the animal control agency will impound the dog pending disposition of the case or until the owner has fulfilled the certificate of registration requirements of the Dangerous Dog Act in Section 77-1A-5 and 77-1A-6.

C. After seizure:

1. the owner may admit that the dog is dangerous or potentially dangerous and comply with the requirements for a certificate of registration pursuant to the Dangerous Dog Act; or

2. the animal control authority may, within 14 days after seizure of the dog, bring a petition in court seeking a determination of whether the dog is dangerous or potentially dangerous. If the court finds, by clear and convincing evidence, that the dog is dangerous and poses an imminent threat to public safety or potentially dangerous and poses a threat to public safety, the court shall order the owner to comply with the registration and handling requirements for the dog and obtain a certificate of registration within 30 days or have the dog humanely destroyed. If the court does not make the required findings pursuant to this paragraph, the court shall immediately order the release of the dog to its owner. If the owner does not admit that the dog is dangerous or potentially dangerous and no petition has been brought within 14 days, the court shall immediately order the release of the dog to its owner. If the owner admits that the dog is dangerous and transfers ownership to the animal control authority, the dog may be humanely destroyed.

D. A finding that the dog is not dangerous or potentially dangerous will not prevent the animal control authority from making another application for seizure based on the dog's subsequent behavior.

14.6 **Seizure of Livestock** (Section 77-18-2):

A. Livestock includes all domestic or domesticated animals used or raised on a farm or ranch and exotic animals in captivity; it does not include dogs or cats. Section 77-2-1.1. If a livestock inspector or other peace officer has reason to believe that livestock is being

cruelly treated, s/he may apply to the court in the county in which the livestock is located for a warrant to seize the livestock.

B. If the court finds probable cause that the livestock is being cruelly treated, it shall issue the warrant seizing the livestock. The court shall set a hearing as soon as possible within 30 days unless good cause is shown.

C. If criminal charges are filed against the owner, the court shall, upon proper petition, determine if security is required to be posted. Otherwise, the magistrate judge executing the warrant shall notify the livestock board, have the livestock impounded, and give notice to the owner of the time and place of the hearing.

D. All interested parties, including the district attorney, are able to present evidence at the hearing and if the court finds that the owner cruelly treated the livestock, the court shall order the sale of the livestock at fair market value or order humane destruction. If the livestock is ordered sold, the sale shall occur within 10 business days of the order. The owner or his/her representative cannot bid on the livestock during the sale. If the court finds that the owner has not cruelly treated the livestock, the court shall order it returned to the owner.

E. Proceeds from the livestock sale shall be forwarded to the court. From these proceeds, the court shall pay all expenses incurred in caring for the livestock while it was impounded and any expenses involved in its sale. Any excess proceeds of the sale shall be forwarded to the former owner. If the expenses incurred in caring for and selling the livestock exceed the amount received from the sale, the court shall order the former owner to pay the additional cost.

Section 15 Juvenile Issues

15.1 Jurisdiction

A. Definitions

The magistrate court has jurisdiction over juveniles (those people under the age of 18) for only particular crimes. Section 32A-2-3 defines a delinquent act, over which only the children's court would have jurisdiction. The most common type of cases for juveniles in magistrate court are traffic offenses/penalty assessment misdemeanors. Delinquent acts, which are handled in children's court, constitute anything that could be considered a crime when committed by an adult, including some game and fish violations.

B. Incarceration of Juveniles

Only the children's court has the authority to incarcerate a juvenile who has been found guilty of a violation of the Motor Vehicle Code. Section 32A-2-29(F). If a magistrate judge wants to incarcerate a juvenile, s/he must contact the children's court judge and obtain an order from that judge to remand the juvenile into custody.

C. Preliminary hearings

The magistrate court may hear cases involving serious youthful offenders. These defendants are defined under the Children's Code as an individual 15 to 18 years of age who is charged with and indicted or bound over for trial for first degree murder. A "serious youthful offender" is not a delinquent child as defined pursuant to the provisions of the Children's Code. Section 32A-2-3(H). This means that it is possible for the magistrate court to hold a preliminary hearing on a juvenile aged 15 to 18 who is charged with first degree murder. The case should be handled as any other felony case in the magistrate court. The defendant is not considered a delinquent child under the Children's Code.

Additionally, when the court arraigns a serious youthful offender, s/he may remain in custody on the magistrate court's order and can be detained in either an adult or juvenile facility depending on accreditation and provisions of federal law. Section 31-18-15.3.

D. Transfer of Jurisdiction

In a criminal case if it appears to the magistrate court that the defendant was under the age of 18 at the time the offense charged was alleged to have been committed and the offense charged is a delinquent act pursuant to the provisions of the Children's Code, the magistrate shall promptly transfer jurisdiction of the matter and the defendant to the children's court together with a copy of the accusatory pleading and other papers, documents and transcripts of testimony relating to the case. The magistrate court shall not transfer a serious youthful offender. Section 32A-2-6. There is no specific form for the transfer to Children's Court. The court should use Form 9-404 and edit it to reflect that it is a transfer to the Children's Court for lack of jurisdiction.

15.2 Juvenile Witnesses and Subpoenas

A. Competency to Testify

Pursuant to Rule 11-601, every person is competent to be a witness. This includes a child. However, a judge must be satisfied that a child witness understands the difference between telling the truth and lying, and that lying is wrong and may have consequences. The judge may determine the child's ability to differentiate between a truth and a lie through questioning the child. Age alone is not a basis to find that a child is not a competent witness. *State.v. Hueglin*, 2000-NMCA-106.

B. Subpoenas

There is nothing in the magistrate court rules or statutes that requires the court to treat juveniles differently when issuing and serving subpoenas. However, the Children's Code may be informative as to whether or not a parent should be served along with a child or on the child's behalf. Children's Court Rule 10-103(G) states in regards to summons:

> A child who is a respondent, in either delinquency or abuse and neglect proceedings, shall be served by delivering a copy of the summons and petition to the respondent child and to a custodial parent, custodian, guardian or conservator of the minor in the manner and priority provided in Paragraph F or H of this rule as may be appropriate. If no conservator or guardian has been appointed for the minor, service shall be made on the minor by serving a copy of the process on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court. If the respondent child has a known guardian ad litem or attorney, notice of the proceedings shall be served on the guardian ad litem or attorney as provided in Rule 10-105 NMRA of these rules.

Additionally, the magistrate court rules do not allow a summons to be served on a minor. Rule 6-205(H). Following this line of reasoning, if a child has been subpoenaed by a party, it might be in the best interest of justice for the court to inquire as to whether the parent of the child was notified of the subpoena, whether the parent was served on behalf of the child, and if the child is not present, what procedure the party followed in procuring the presence of the child.

C. Uniform Child Witness Protective Measures Act (Section 38-6A-1 through 38-6A-9):

This Act is used to determine whether a child witness under 16 years old can testify by the alternative method of a videotaped deposition. Certain criteria must be met. The judge may order a hearing for the determination upon good cause shown upon motion of a party, child witness or a person who has sufficient standing to act on behalf of the child. Reasonable notice shall be given to all parties and the hearing must be on the record. The standard is whether if a child testifies in an open forum or face to face with the defendant, it would cause unreasonable and unnecessary mental or emotional harm. The Act sets

out factors used to determine whether to allow a child to testify by an alternative method. An order must be entered at the conclusion of the hearing which states the findings of fact and conclusions of law that support the judge's determination.

15.3 Juvenile Warrants

Only the Children's Court or district court judge can issue a warrant which incarcerates a juvenile. Rule 10-215. However, the magistrate can issue a traffic warrant for a juvenile which does not include incarceration, Form 9-212B, which lists whether or not the juvenile may be incarcerated pursuant to Section 32A-2-29(F).

Once a juvenile has reached the age of 18, the magistrate court can recall the juvenile traffic warrant and reissue it as a warrant for an adult. This would include incarceration.

Section 16 Immigration Issues

16.1 Immigration Holds

What many of the courts know as an immigration hold is technically a detainer placed by Immigration and Customs Enforcement (ICE). There is a federal regulation, 8 C.F.R § 287.7(a), which authorizes ICE to place a detainer on an alien who is in another law enforcement agency's custody. The detainer puts the other agency on notice that ICE seeks custody of the person for the purpose of arresting and removing him/her. The detainer is a request that the agency provide notice to ICE prior to the release of the person so that ICE can arrange assumption of custody. Subsection (d) of the regulation sets out the time frame in which ICE has to assume custody of the person on whom they have placed a detainer. It orders the agency which has custody of the person to maintain custody for a period not to exceed 48 hours, excluding weekends and holidays, from the time the person is no longer detained on the state or local charges. This means that once a bond is posted, an order of release is issued, or a jail sentence is completed, ICE has 48 hours to assume custody of the person, or s/he should be released from jail. A defendant who has an immigration hold should not be treated any differently than any other defendant. S/he still has a right to bail and conditions of release.

16.2 Bonds and Immigration Holds

A. Right to Bond.

Immigrants who are incarcerated for an offense are entitled to bond and conditions of release just as any other criminal defendant. They are covered by the New Mexico and United States Constitutions. Thus, a defendant's immigration status is specifically not relevant to the determination of bond. There are other factors that may be connected to immigration status when determining the defendant's flight risk. The court should not ask the defendant if s/he is in the United States legally. This question may call for the defendant to incriminate him or herself and should be avoided. The court could certainly ask the defendant how long s/he has resided in your county, about work and family/community connections and related types of questions. Thus, if a defendant has not lived in the area long and has no family here and no job, regardless of immigration status, s/he may be seen as more of a flight risk, depending on other factors, than someone who has family and lived and worked in the area his or her entire life. The court may also factor in that defendant is wanted by another law enforcement agency as reflected in the detainer.

B. Forfeiture of Bond.

The court may forfeit a bond if a defendant fails to appear in court. This is discretionary with the court. When a person with an immigration hold fails to appear in court because ICE has taken him/her into custody, the court needs to make a decision as to whether the bond will be forfeited. In *State v. Amador,* 1982-NMSC-083, the Court did not uphold a total forfeiture of a bond when the defendant was incarcerated in Texas at the time of his

court appearance. In that case, the bondsman located the defendant in Texas, a detainer was placed on the defendant, and the bondsman was willing to pay for the costs of extradition. The Court found that the bondsman did all he could do to secure the defendant's presence in court. It was the fault of the other sovereign jurisdiction that led to defendant's failure to appear in New Mexico. The Court found that it was an abuse of discretion to forfeit the bondsman's entire bond. When a defendant is taken into ICE custody a number of things could happen: s/he could be removed from the United States; s/he could undergo formal deportation proceedings; or s/he could be released. When a magistrate court is determining whether or not a bond should be forfeited, the court may want to hear from the bondsman or the person(s) who have posted the bond. Based on the facts and circumstances presented to the court, documentation of defendant's current location and other evidence, the court must use its discretion to determine if it is appropriate to forfeit the bond.

C. Failure to Appear Warrant.

Rule 6-207 uses the word "may" when delineating when a bench warrant is to be issued for someone who fails to appear in court as ordered. The issuance of the warrant is discretionary with the court. However, even if a defendant is taken into ICE custody during the pendency of a case, there may be good reason to issue a failure to appear warrant. Essentially, in order to preserve the six-month rule, a warrant should be issued. There could be a situation where defense counsel files a waiver of the six-month rule which may or may not affect a judge's decision to issue a failure to appear warrant.

16.3 Immigrants and Pleas

In 2010 the U.S. Supreme Court decided *Padilla v. Kentucky*, 559 U.S. 356 (2010), which requires that defense counsel must inform his or her client whether the client's plea carries a risk of deportation. The New Mexico Supreme Court ruled on this issue in *State v. Paredez*, 2004-NMSC-036, which requires appointed counsel to instruct their clients about the specific immigration consequences associated with a conviction for the charged crime prior to pleading guilty. Defense counsel is required to determine his or her client's immigration status and, if the client is a non-citizen, must give the specific immigration consequences of pleading guilty and must tell his or her client whether deportation is likely to occur. If defense counsel fails to do this, it is ineffective assistance of counsel. In 2012 the New Mexico Court of Appeals determined that the rules of *Paredez* and *Padilla* should be applied retroactively. *State v. Ramirez*, 2012-NMCA-057, *aff'd Ramirez v. State*, 2014-NMSC-023. However, once the defendant's sentence is completed, the magistrate court loses its jurisdiction to reopen the case for the purpose of allowing the defendant to withdraw his or her plea based on the failure of being given the immigration consequences of the plea. Defendant must file an action in district court to have this occur.

Based on these decisions the plea forms were amended to include an inquiry by the court as to whether the defendant understands that his or her plea could affect his or her immigration status. "I understand that entry of this plea agreement may have an effect upon my immigration or naturalization status, as well as my legal rights and personal opportunities, and I acknowledge

that, if I am represented by an attorney, my attorney has advised me of the immigration consequences of this plea agreement." Form 9-408A. This should be included in every plea, not just those that the court may know or assume are those by non-citizens or with a different immigration status. The court should not inquire about the defendant's immigration status because it may require the defendant to incriminate him or herself.

Section 17 DWI and Domestic Violence Issues

17.1 DWI

A. Arraignment

The DWI statute, Section 66-8-102, includes many levels of the offense based on the number of prior DWI convictions a defendant has. The elements are the same, though the punishment can differ greatly. The magistrate court has trial jurisdiction over first, second and third DWI offenses and can hold preliminary hearings on offense level fourth and up. Often a DWI is charged at one level and is found later to be another level, sometimes lower and sometimes higher. If a defendant has not been arraigned on every level, there can be legal issues concerning what information defendant was actually given prior to a plea. It is best practice for the magistrate judge, at arraignment, to give information to the defendant about the possible penalties of DWI first, second, third and the felonies. At a minimum, the judge should give the range of sentences for the misdemeanor DWIs and the range for the felony DWIs. This way the defendant at the outset of the case will know what all the possibilities are.

B. Sentencing

For DWI cases there are statutory requirements at sentencing. Section 66-8-102(E), (F). The court must make sure that all of the mandatory requirements are ordered and are reflected in the judgment and sentence (community service, incarceration, treatment, fine, etc.). Section 66-8-110(H) requires the court to inquire into the defendant's past driving record before sentencing for a DWI.

For all DWIs, defendant must obtain an ignition interlock license and have an ignition interlock device installed and operating on all motor vehicles *driven* by the defendant. The defendant shall pay all costs unless indigent. The ignition interlock device must be in place: a) for a first offender, for one year; b) for a second conviction, for two years; c) for a third conviction, for three years. If defendant has the ignition interlock in place at time of sentencing, he will receive credit at sentencing for the time period pre-sentence. Some courts have a defendant sign an affidavit stating that s/he does not have a vehicle and thus, will not be installing an ignition interlock device. That is not required by the statute. The statute specifically states "driven by the defendant", not "owned by the defendant." This means that the ignition interlock must be in any vehicle that the defendant drives. It doesn't matter whether s/he owns a vehicle if s/he is not driving. This becomes difficult to enforce unless someone sees the defendant driving a vehicle without an ignition interlock installed. Moreover, if defendant wants a valid ignition interlock license, s/he must have the device installed.

C. Probation Violations

There are specific mandatory punishments under Section 66-8-102 when a defendant violates DWI probation.

1. For DWI 1st: if defendant fails to complete, within a time specified by the court, any community service, screening program, treatment program or DWI school ordered by the court or **fails to comply with any other condition of probation**, the defendant shall be sentenced to a mandatory minimum of an additional 48 consecutive hours in jail. This sentence cannot be suspended, deferred or taken under advisement. Section 66-8-102(E).

2. For DWI 2nd: if a defendant fails to complete, within a time specified by the court, any community service, screening program or treatment program ordered by the court, the defendant shall be sentenced to a minimum of an additional seven consecutive days in jail. This sentence cannot be suspended, deferred or taken under advisement. Section 66-8-102(F)(1).

3. For DWI 3rd: if a defendant fails to complete, within a time specified by the court, any community service, screening program or treatment program ordered by the court, the defendant shall be sentenced to a minimum of an additional 60 consecutive days in jail. This sentence cannot be suspended, deferred or taken under advisement. Section 66-8-102(F)(2).

The mandatory time is only to be ordered if a defendant has violated his/her probation in the manner listed in the statute. The additional jail time for a probation violation is added to any jail sentence the judge imposes up to the court's jurisdiction of 364 days. Additionally, DWI defendants do not receive credit for time served on probation when the court finds that there is a probation violation and the probation is revoked. Section 66-8-102(T).

D. Administrative License Revocation Hearings; Collateral Estoppel

When there is a DWI criminal case and an administrative revocation hearing, and the administrative hearing occurred first, the defendant can argue that collateral estoppel should apply. Collateral estoppel prevents the "relitigation of ultimate facts or issues actually and necessarily decided in a prior suit." *Silva v. State*, 1987-NMSC-107, ¶ 6. For instance, the defendant could argue that since the hearing officer in the administrative hearing found that there was no reasonable suspicion for the stop, the issue has already been decided. Thus, collateral estoppel should apply, and the magistrate court must rule the same way. Under proper circumstances, collateral estoppel could apply in criminal cases. *State v. Bishop*, 1992-NMCA-034. There are four elements that must be met in order to establish a prima facie application of collateral estoppel:

1. the party against whom collateral estoppel is asserted must be the same party or in privity (a close, direct, or successive relationship; having a mutual interest or right) to the party in the original action;

2. the subject matter or the cause of action in the two proceedings must be different;

3. the ultimate issues must have been actually litigated; and

4. the issue must have necessarily been determined. *Id.* ¶ 8.

However, even if the court finds that a prima facie application of collateral estoppel has been made, the court may find that it is fundamentally unfair to apply collateral estoppel against a party if there was not a full and fair opportunity to litigate the issue in the prior hearing. The party opposing the application has the burden of proof that there was not a full and fair opportunity to litigate once the prima facie showing is made.

When analyzing the first element the court looks to the parties, whether they are the same or in privity. In both proceedings there are state actors: in the revocation proceeding the actor is the Motor Vehicle Division; in the criminal case, it is the district attorney's office. These proceedings are different. The purpose of a license revocation proceeding is to protect the public by the quick removal of drivers who drive under the influence. It is a summary proceeding. *Maso v. State Taxation and Revenue Department*, 2004-NMSC-028. The purpose of a criminal case is to determine the defendant's guilt or innocence. *State v. Alvarez-Lopez*, 2004-NMSC-030. These are not the same parties nor are they in privity. *Bishop*, 1992-NMCA-034 (collateral estoppel does not apply to a determination of the admissibility of breath alcohol tests made in a license revocation hearing in a subsequent criminal prosecution). The *Bishop* case includes a complete analysis of this issue.

E. Expert Testimony after *Bullcoming*

In 2011 the United States Supreme Court issued its opinion in *Bullcoming v. New Mexico*, 131 S.Ct. 2705 (2011). Under the 6th Amendment of the United States Constitution, every defendant has a right to confront the witnesses against him/her. The Confrontation Clause applies to all witnesses against the defendant who give testimony to establish or prove a fact. It applies particularly to testimonial out of court statements. In the New Mexico court, the certified lab report of a non-testifying lab analyst that showed defendant's blood alcohol results was admitted into evidence in violation of the defendant's confrontation right. The United States Supreme Court found the report was testimonial and the testimony of another analyst who did not participate in or observe the testing of defendant's blood sample and who had no independent opinion of the blood test results, could not meet the confrontation requirement.

In practical terms what this case means is that the State must present at trial the lab analyst who tested the blood for alcohol or drugs or another analyst who has completed an independent analysis of the blood and can render his or her own opinion. Additionally, there is the possibility that an expert could give his/her opinion about the blood test results. This puts a strain on the Scientific Lab Division who does the testing. At this time, there is no case law or court rule that allows video testimony by a lab analyst; that too, could be argued violates the defendant's right to confrontation. Until such time as our courts or the United States Supreme Court rules on this issue, video testimony is prohibited unless the parties agree to it. The New Mexico Court of Appeals held that it was error for the district court to permit two-way video conference testimony from an analyst as to the conduct and results of a blood test. *State v. Smith*, 2013-NMCA-081, *cert. denied*, 2013-NMCERT-6 (No. 34,112, Jun. 25, 2013).

If the parties agree to video testimony, make sure that JID knows well in advance when that is going to occur so that the video transmission goes as smoothly as possible.

In *State v. Almanza*, 2007-NMCA-073, the issue was whether the appearance by telephone of an SLD chemist met the requirements of the Confrontation Clause. The Court of Appeals held it does not. What is important in this case is that the reasons for wanting the telephonic testimony, the chemist's busy schedule and the inconvenience of live testimony, are just the types of reasons the State offers when they are requesting video testimony. It is clear in this opinion that those are not the kinds of exceptions which meet the Confrontation Clause. Inconvenience of a witness is not enough to not have face-to-face confrontation. Further, in *State v. Smith*, 2013-NMCA-081, *cert. denied*, 2013-NMCERT-6 (No. 34,112, Jun. 25, 2013), the district court permitted two-way video testimony by an analyst concerning the conduct and results of a blood test. The Court of Appeals found this to be error without an adequate showing of necessity. Necessity does not include convenience to the analyst.

F. DWI Court

There are a number of courts which have set up a problem-solving DWI court to address issues of drug and alcohol addiction in ways that the normal criminal justice solution does not. Problem-solving courts are set up for defendants who are the highest risk for reoffending and have the highest need for treatment. In DWI cases those who are referred must be a second or third DWI offender. This program mandates more intensive contact with the court than a standard probationary sentence. The goal is to help the defendant maintain sobriety and thus, not reoffend, as the addiction is directly linked to defendant's criminal activity. The defendants have the support of the judge and the program coordinator as well as the entire DWI court team which includes representatives from the district attorney's office, public defender's office, county compliance, and law enforcement. A defendant will be in the DWI court program for a minimum of one year and often, s/he will remain longer to complete all the requirements. This program is in lieu of a standard probation through a county compliance program. Defendant must plead guilty or no contest before being eligible for the DWI court program as it is a post-conviction model.

17.2 Domestic Violence

A. Definitions (Section 30-3-11):

1. *Household member*: spouse, former spouse, parent, present or former stepparent, present or former parent in-law, grandparent, grandparent-in-law, a co-parent of a child or a person with whom a person has had a continuing personal relationship. Cohabitation is not necessary to be deemed a household member for the purposes of the Crimes against Household Members Act (Sections 30-3-10 through 30-3-18). A minor child is not considered a household member for the purposes of these statutes. *State v. Stein*, 1999-NMCA-065. An adult child is included in the definition of a household member. *State v. Montoya*, 2005-NMCA-005.

2. *Continuing personal relationship*: a dating or intimate relationship.

3. Crimes included in the Crimes against Household Members Act: Assault against a Household Member, Section 30-3-12; Aggravated Assault against a Household Member, Section 30-3-13; Assault against a Household Member with Intent to Commit a Violent Felony, Section 30-3-14; Battery against a Household Member, Section 30-3-15; Aggravated Battery against a Household Member, Section 30-3-16; Criminal Damage to or Deprivation of Property of a Household Member, Section 30-3-18.

4. Other crimes that can be considered domestic violence acts: Harassment, Section 30-3A-2; Stalking, Section 30-3A-3; Aggravated Stalking, Section 30-3A-3.1; Interference with Communications, Section 30-12-1; Use of Telephone to Terrify, Intimidate, Harass, Annoy or Offend, Section 30-20-12; Violation of Order of Protection, Section 40-13-6.

B. Victim's Rights

1. The Magistrate Rules of Criminal Procedure have codified the Victims of Crimes Act (Sections 31-26-1 through 31-26-14) in Rule 6-113.

   a. At any scheduled court proceeding, the court shall inquire whether any victim entitled to notice of the proceeding, under Article II, Section 24, is present. If the victim is present, the court shall ascertain that the victim has been informed of the his/her rights, including but not limited to, right to notice of proceedings, right to be present at all public court proceedings, the right to make a statement at sentencing and post-sentencing proceedings and the right to restitution. The victims under the NM Constitution, Article II, Section 24, are for the following misdemeanor crimes: aggravated battery, abandonment of a child, negligent use of a deadly weapon. Victims of the following felonies fall under the Act: arson resulting in bodily injury, aggravated arson, aggravated assault, aggravated battery, dangerous use of explosives, murder, voluntary manslaughter, involuntary manslaughter, kidnapping, criminal sexual penetration, criminal sexual contact of a minor, homicide by vehicle, great bodily injury by vehicle or abandonment or abuse of a child.

   b. If the victim is not present, the court shall inquire of the district attorney whether an attempt has been made to notify the victim of the proceeding. If the district attorney cannot verify that an attempt has been made, unless doing so would result in a violation of a jurisdictional rule, the court shall:

      (1) reschedule the hearing; or

      (2) continue with the hearing, but reserve ruling until the victim has been notified and given an opportunity to make a statement; and

      (3) order the district attorney to notify the victim of the rescheduled hearing.

This procedure also applies to those crimes enumerated in the Victims of Crime Act.

2. Victims of Crime Act (Sections 31-26-1 through 31-26-14):

   a. In addition to the crimes listed in the Constitution, the Act also includes: stalking or aggravated stalking, aggravated assault against a household member; assault against a household member with intent to commit a violent felony; battery against a household member, and aggravated battery against a household member.

   b. Under the Act, the rights take effect in the magistrate courts when the defendant has been set for a preliminary hearing. Section 31-26-6 and 31-26-3(E).

   c. The victim can only exercise the rights if s/he: reports the crime within five days of occurrence or discovery unless there is a reasonable excuse; provides the district attorney with up-to-date information; and cooperates with law enforcement and the district attorney. Section 31-26-5.

   d. The district attorney is responsible for giving the victim notice of the court hearings. Section 31-26-9.

   e. The only requirement of the magistrate courts is as described above in the court rule. Section 31-26-10.1.

C. Sentencing Considerations

1. For a conviction for battery on a household member (Section 30-3-15) or misdemeanor aggravated battery on a household member (Section 30-3-16(B)), defendant must be sentenced to participate in and complete a domestic violence offender treatment or intervention program approved by the children, youth and families department pursuant to rules promulgated by the department that define the criteria for such programs. A current list of approved programs is available at www.cyfd.org under the subheading of domestic violence.

2. If a sentence for either battery or aggravated battery (misdemeanor) on a household member has been suspended or deferred, in whole or in part, the period of probation may extend beyond 364 days but may not exceed two years. If an offender violates a condition of probation, the court may impose any sentence that the court could originally have imposed and credit shall not be given for time served by the offender on probation; provided that the total period of incarceration shall not exceed three hundred sixty-four days and the combined period of incarceration and probation shall not exceed two years.

3. The court must follow the victim's rights requirements as described above, at sentencing.

4. If a defendant is convicted of stalking, Section 30-3A-3, defendant must be sentenced to participate in and complete a program of professional counseling at the person's own expense or a domestic violence offender treatment or intervention program.

5. The domestic violence offender treatment fee of $5 must be assessed on every conviction in magistrate court. Section 31-12-11.

6. If defendant is convicted of his/her third offense of battery or aggravated battery (misdemeanor) on a household member, when the household member is a spouse, former spouse, co-parent of a child or a person with whom the offender has had a continuing personal relationship, it is a fourth degree felony. If it is a fourth or subsequent offense, it is a third degree felony. To determine the number of offenses, each offense must have been committed after the conviction of the preceding offense. Section 30-3-17.

D. Orders of Protection

1. The magistrate courts do not have jurisdiction to issue orders of protection to victims of domestic violence. The victim must obtain an order from the district court. Section 40-13-2(C) (Family Violence Protection Act).

2. However, the violation of an order of protection is a misdemeanor that can be prosecuted in the magistrate court. Section 40-13-6(E), (F). If defendant is convicted of violation of an order of protection, in addition to any other punishment, the court shall order a person convicted to make full restitution to the party injured by the violation of an order of protection and shall order the person convicted to participate in and complete a program of professional counseling, at the person's own expense, if possible. If a defendant is convicted a second or subsequent time, the defendant shall be sentenced to a jail term of not less than 72 consecutive hours that shall not be suspended, deferred or taken under advisement.

3. A peace officer may arrest without a warrant and take into custody a party restrained under the order of protection whom the peace officer has probable cause to believe has violated an order of protection that is issued pursuant to the Family Violence Protection Act or entitled to full faith and credit (the obligation under Article IV of the U.S. Constitution for each state to recognize the public acts, records, and judicial proceedings of every other state). Section 40-13-6(D).

Section 18 Tribal Issues

18.1 Jurisdiction

The State does not have jurisdiction over crimes committed by Indians in Indian country. *State v. Quintana*, 2008-NMSC-012, ¶ 4. However, the magistrate court does have jurisdiction over Indians who commit crimes on non-Indian land. Additionally, Indian country includes the exterior boundaries of pueblos. *State v. Romero*, 2006-NMSC-039.

The magistrate court has no jurisdiction to transfer a case from magistrate court to tribal court. The court must dismiss the case for lack of jurisdiction and the officer must re-file in tribal court.

18.2 Extradition and the Tribes

Some states have a statute which authorizes the attorney general to negotiate an extradition agreement with a tribe which would allow the extradition of witnesses, fugitives and evidence found within the respective jurisdictions. New Mexico does not have such a statute. However, individual tribes have adopted the Uniform Criminal Extradition Act (Sections 31-4-1 through 31-4-30) as the state has. *See, e.g.*, San Ildefonso Pueblo Code, Title V, *available at* http://narf.org/nill/Codes/sicode/sanildcodetoc. html). If the tribe has adopted the act, it is then possible for a tribal member to waive extradition back to tribal court or in tribal court back to the state court. If this issue arises, obtain a copy of the tribal code and make a determination whether the issue in the particular magistrate court is covered. There is at least one district court which requires, as a condition of release, a defendant to waive extradition if s/he resides on tribal land. There have not been any problems because the tribe has agreed to this. Contact the AOC if the court is interested in pursuing this as a local procedure.

Section 19 Search and Seizure

19.1 Search Warrants

A. General

1. The New Mexico Constitution states "The people shall be secure in their persons, papers, homes and effects, from unreasonable searches and seizures, and no warrant to search any place, or seize any person or thing, shall issue without describing the place to be searched, or the persons or things to be seized, nor without a written showing of probable cause, supported by oath or affirmation." Article II, Section 10.

2. The law governing search and seizure is constantly evolving. This section is provided to give general guidelines for judges and is not intended to be a complete discussion of this subject.

3. Prior to the issuance of a search warrant the judge must independently determine whether the affidavit establishes probable cause for the search. *State v. Cordova*, 1989-NMSC-083, ¶ 5; Rule 6-208(F).

B. Sufficiency of Affidavit; Probable Cause

1. The judge determines the sufficiency of the facts set forth in an affidavit for a search warrant prior to issuance of the search warrant.

2. "'Probable cause' which will authorize the issuance of a search warrant requires a showing of a state of facts which leads a judge or magistrate, acting in a neutral capacity and as a prudent [person], to reasonably believe that an accused, at the time of the application for warrant, is in possession of illegal property or the fruits of a crime or that evidence relating to the commission of a crime exists on the premises sought to be searched." *State v. Donaldson*, 1983-NMCA-064, ¶ 9.

3. An affidavit for a search warrant needs to establish only a probability of criminal conduct (not absolute certainty or proof beyond a reasonable doubt). In reviewing the affidavit, the court should use common sense. *State v. Wisdom*, 1990-NMCA-099, *overruled on other grounds by State v. Barker*, 1992-NMCA-117.

4. In reviewing an affidavit for a search warrant, the court is not required to look beyond the affidavit unless there is a challenge to the truthfulness of statements made in the affidavit. *Donaldson*, 1983-NMCA-064, ¶ 16. According to *Donaldson*, "[w]hen deliberate misrepresentations or statements resulting from a reckless disregard for the truth are shown to be contained in an affidavit, the challenged material must be set aside and the balance of the affidavit scrutinized to determine whether there remain sufficient other facts to support a finding of probable cause." *Id.*

5. Rule 6-208(G) allows for a search warrant to be requested by the following methods:

a. by hand-delivery of an affidavit substantially in the form approved by the Supreme Court with a proposed search warrant attached;

b. by oral testimony in the presence of the judge provided that the testimony is reduced to writing, supported by oath or affirmation, and served with the warrant; or

c. by transmission of the affidavit and proposed search warrant required under Rule 6-208(G)(1) to the judge by telephone, facsimile, electronic mail, or other reliable electronic means.

6. If the judge issues the warrant remotely, it shall be transmitted by reliable electronic means to the affiant and the judge shall file a duplicate original with the court. Upon the affiant's acknowledgment of receipt by electronic transmission, the electronically transmitted warrant shall serve as a duplicate original and the affiant is authorized, but not required, to write the words "duplicate original" on the transmitted copy. Rule 6-208(H). *State v. Boyse*, 2013-NMSC-024, allows for the approval of a search warrant by telephone.

7. When the affidavit supporting the search warrant is based on information from a confidential informant, the court must apply the basis of knowledge and veracity tests as set out in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), and interpreted by the New Mexico Supreme Court in *Cordova*, 1989-NMSC-083, ¶ 6, quoting *Aguilar*, 378 U.S. at 114 ("the magistrate must be informed of some of the underlying circumstances from which the informant concluded that [the facts were as] he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant …was 'credible' or his information 'reliable'." The *Aguilar-Spinelli* test is designed to ensure that the court, rather than the police, make the determination that probable cause, based on reliable information, is present. Thus, the first prong of the test requires that the affidavit include the factual basis for any conclusions drawn by the informant to enable the court to perform an independent analysis of the facts and conclusions. For example, the confidential informant was in the motel room when a delivery of cocaine was received. The second prong requires that facts be presented to the court to show either that the informant is inherently credible or that the information from the informant is reliable on this particular occasion. For example, the confidential informant has given information on ten previous occasions which have led to arrests and confiscation of controlled substances. These requirements are often referred to as the basis of knowledge and veracity (or credibility) tests. *Barker*, 1992-NMCA-117, ¶ 4.

C. Sealing of Search Warrants

Search warrants are public record unless there is an order to seal requested and entered by the court. Rule 6-114(D) allows for anyone to file a motion to seal the court record. The court must find in its order that (1) the existence of an overriding interest that overcomes the right of public access to the court record; (2) the overriding interest supports sealing

the court record; (3) a substantial probability exists that the overriding interest will be prejudiced if the court record is not sealed; (4) the proposed sealing is narrowly tailored; and (5) no less restrictive means exist to achieve the overriding interest. Rule 6-114(F). The order may include a date when the sealing order expires. The court may want to seal the search warrant until it has been executed and the return has been filed with the court.

D. Nighttime Search Warrants

Rule 6-208(B) states "a search warrant shall direct that it be served between the hours of 6:00 a.m. and 10:00 p.m., according to local time, unless the issuing judge, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at any time." The Court must find reasonable cause to issue a nighttime search warrant. Reasonable cause is based on the facts of each case. The types of situations which may call for the issuance of nighttime search warrant could be if the evidence within the place to be search would be removed, destroyed or hidden before 6:00 a.m. or if the search can only be safely executed at night. Since the intrusion at nighttime is greater than in the day, there must be a greater showing of need for the search at that time for the warrant to issue. *State v. Garcia*, 2002-NMCA-050, ¶ 16, and *State v. Santiago*, 2010-NMSC-018, ¶ 11.

19.2 Searches Without Warrants

A. General

Searches without warrants generally come to the attention of a judge in the form of motions to suppress evidence made by defendants. Search warrants are required unless there is an exception for a warrantless search.

B. Searches of Persons and Places

The legality of a warrantless search by a state actor depends on whether an exception to the warrant requirement applies. The following are recognized exceptions to the search warrant requirement.

1. **Search Incident to a Lawful, Custodial Arrest**. An arresting officer may make a valid warrantless search of the person being arrested and that portion of the premises within the arrestee's control when there is either the need to remove a weapon the arrestee might use to resist arrest or to escape, or the need to prevent the concealment or destruction of evidence. *State v. Pittman*, 2006-NMCA-006, ¶ 7.

    a. The search and seizure will be invalid if the arrest is invalid.

    b. The arrest must be made before the search.

    c. The search should be made immediately after the arrest.

    d. An arrest is not valid if it is merely used as an excuse to search a person or place.

2. **Plain View**. If an officer sees contraband or other incriminating evidence in plain view while s/he is conducting a lawful investigation, the officer may seize such property without benefit of a warrant. Under the plain view exception to the warrant requirement, items may be seized without a warrant if the officer was **lawfully** positioned when the evidence was observed, and the incriminating nature of the evidence was **immediately apparent**, such that the officer had probable cause to believe that the article seized was evidence of a crime. With respect to whether the item in plain view is incriminating in nature, objects commonly associated with particular criminal activities can reasonably give rise to inferences that are distinct from objects ordinarily used for benign, non-criminal purposes, and an officer's experience and training, considered within the context of the incident, may permit the officer to identify drug paraphernalia or drug packaging with a reasonable level of probability, sufficient for probable cause. *State v. Ochoa*, 2004-NMSC-023, ¶ 13. If the seized property establishes probable cause, the officer may make a warrantless arrest. Seeing contraband in plain view does not constitute a search. However, as to automobiles, absent exigent circumstances or some other exception to the warrant requirement, an officer may not search an automobile without a warrant. If, however, following a lawful stop on a roadway, an item in an automobile is in plain view and the officer has probable cause to believe the item is evidence of a crime, the officer may seize the item. *State v. Bomboy*, 2008-NMSC-029, ¶ 17.

3. **Exigent Circumstances**. Premises may be searched without a warrant if exceptional circumstances exist (also known as "exigent" circumstances).

   a. An exigent circumstance is a situation requiring swift action to prevent imminent danger to life or serious damage to property or to stop the imminent escape of a suspect or the destruction of evidence. *State v. Gallegos*, 2003-NMCA-079, ¶ 11.

   b. Imminent escape: This situation is not limited to a chase but also includes those situations where swift action is needed to forestall an escape. *State v. Chavez*, 1982-NMCA-072, ¶ 16. The "imminent escape" emergency justifies a warrantless entry into the residence of a suspect for the purpose of an arrest. There must be probable cause and exigent circumstances to enter a person's home without a warrant to make an arrest.

   c. Contraband: An officer may search without a warrant when he or she has good reason to believe that contraband may be immediately removed or destroyed when the occupants discover the police are present or that the occupants of the residence know that the police are present. *State v. Ortega*, 1994-NMSC-013.

4. **Hot Pursuit**. Although "hot pursuit" is often referred to as an exception to the warrant requirement, the fact that officers are in hot pursuit of a defendant does not necessarily justify a warrantless entry and search absent exigent circumstances and a valid purpose for entering. *State v. Moore*, 1979-NMCA-037.

5. **Consent**. A person may voluntarily consent to a search. With voluntary consent, the person waives the right to be free from a search without a warrant. *State v. Cohen*, 1985-NMSC-111. Any evidence seized during a consensual search is lawfully seized.

   a. Knowledge of the right to refuse consent is one factor to be taken into account when considering whether a person's consent was voluntary which is determined by the totality of the circumstances. *Id.* ¶ 55.

   b. The consent must be given voluntarily; that is, the person must not be under duress or be coerced by the officer requesting the search. *State v. Davis*, 2013-NMSC-028, ¶ 14.

   c. The consent must be clearly and explicitly given. Permission to enter is not permission to search.

   d. The scope of the search is limited to the consent given. *State v. Garcia*, 1999-NMCA-097, ¶ 9.

   e. Mere status as the property owner cannot resolve the question of the validity of the consent regarding a search of a renter's area. Rather, the validity of consent to search a renter's rooms turns on whether landlords had common authority over the apartment. *State v. Monteleone*, 2005-NMCA-129, ¶ 12.

6. Where two or more people have common use of or joint access to the premises and where only the consent of one of these people has been given, the search is a valid consensual search, provided that there is no showing that police took the non-consenting defendant's personal property from an area reserved for his or her exclusive use. Third party consent can occur when there is common authority over the property. *State v. Hensel*, 1987-NMCA-059, ¶ 11, *overruled on other grounds by State v. Rivera*, 2008-NMSC-056.

7. **Community caretaker/emergency assistance**: The claim of an extraordinary situation is measured by the facts known to the officers at the time they are called upon to act. In narrowly limited circumstances police may enter a home without a warrant or consent during a criminal investigation under the emergency assistance doctrine. *State v. Ryon*, 2005-NMSC-005, ¶ 27. The emergency assistance doctrine applies specifically to warrantless intrusions into the home. The emergency assistance doctrine requires an emergency (a strong perception that action is required to protect against imminent danger to life or limb) that is sufficiently compelling to make a warrantless entry into the home objectively reasonable under the Fourth Amendment. *Id.* ¶ 31. The community caretaker exception involves a stop or entry into an automobile when an officer believes that someone needs his or her assistance and is not in the midst of a criminal investigation, but entry is in the interest in public safety. *State v. Reynolds*, 1993-NMCA-162, *rev'd on other grounds*, *State v. Reynolds*, 1995-NMSC-008.

8. **School Searches**: Public school officials may conduct a warrantless search of a student's person if the official has reasonable suspicion that the student has

committed a crime or a violation of school rules or the official has reasonable cause to believe that the search will reveal evidence of the student's violation of law or school rules. *State v. Michael G.*, 1987-NMCA-142, ¶ 5.

When police officers conduct a warrantless search of a student without the involvement of school officials, the higher standard of suspicion (probable cause) is required, even if the search occurs on school grounds. *State v. Tywayne H.*, 1997-NMCA-015.

9. **Probation Searches**. Warrantless searches of probationers (or probationers' property) by probation officers are permissible when they are supported by reasonable suspicion. Neither probable cause nor exigent circumstances is necessary to justify a warrantless probation search. An officer has reasonable suspicion when s/he is aware of specific articulable facts that, when judged objectively, would lead a reasonable person to believe criminal activity occurred or was occurring. *State v. Baca*, 2004-NMCA-049, ¶ 43.

C. Searches of Motor Vehicles

1. The Fourth Amendment allows a warrantless search of an automobile and of the closed containers within the automobile if there is probable cause to believe that there is contraband within. *State v. Bomboy*, 2008-NMSC-029, ¶ 5. However, the State of New Mexico requires also a showing of exigent circumstances for a warrantless search of an automobile. *State v. Gomez*, 1997-NMSC-006.

2. Before a vehicle can be stopped, the officer must have an articulable and reasonable suspicion that a motorist is in violation of the law and it must be justified at its inception. *State v. Ochoa*, 2009-NMCA-002.

3. For a warrantless search of a vehicle to be valid, there must first be a justifiable reason for stopping it.

   a. An officer may stop a vehicle to lawfully arrest the driver for a violation of the Motor Vehicle Code. The existence of a Motor Vehicle Code violation must not be used as an excuse for searching the vehicle for evidence of another crime. The real reason for the stop must be supported by objective evidence of reasonable suspicion. *Id.*

   b. Roadblocks. An officer has authority to set up general roadblocks for purposes of checking sobriety, licenses and vehicle registrations. The roadblock may not be used as an excuse for searching the vehicle for evidence of crimes other than DWI and license, registration and insurance violations. *City of Las Cruces v. Betancourt*, 1987-NMCA-039. In *Betancourt*, the New Mexico Court of Appeals set forth eight standards for determining the validity of roadblocks and guidelines useful in testing that standard. *Id.* ¶¶ 14-21. These guidelines must be used in determining the reasonableness of a roadblock. All of the following guidelines must be considered by the court, but none are absolutely dispositive except for the role of supervisory personnel and the restrictions on the discretion of the

field officers. *State v. Bates*, 1995-NMCA-080. Those guidelines include (1) the role of supervisory personnel, (2) restrictions on discretion of field officers, (3) safety, (4) reasonableness of the location, (5) time and duration, (6) indicia of the official nature of the roadblock, (7) length and nature of the detention, and (8) advance publicity.

4. Generally, if it is practical to obtain a warrant to search a vehicle, a search warrant must be obtained. The following situations illustrate when a warrant should be obtained.

   a. The vehicle is regularly parked in a specific location, like a person's driveway.

   b. The vehicle travels a regular route, for example, a delivery truck.

   c. The vehicle is in a garage for repairs.

   d. Probable cause to search has developed after a vehicle has been impounded. *State v. Luna*, 1980-NMSC-009, *abrogated on other grounds by Horton v. California*, 496 U.S. 128 (1990).

5. **Inventory search**. Taking an inventory of the contents of a vehicle before towing and impoundment is an exception to the warrant requirement. *State v. Lopez*, 2009-NMCA-127. A warrantless inventory search of a vehicle is lawful if the following requirements are met:

   a. the vehicle is in police control and custody;

   b. police custody of the vehicle must be based on some legal ground and there must be some connection between the arrest and the reason for impounding the vehicle;

   c. the inventory is made pursuant to established police regulations; and

   d. the search is reasonable, that is, it is intended to protect the owner's property or to protect the law enforcement officer from false claims or potential danger. *State v. Williams*, 1982-NMSC-041, ¶¶ 4-5.

6. If during a lawful inventory search, evidence of a crime is discovered, the officer should obtain a warrant before seizing the evidence, unless the evidence is contraband. If the evidence discovered is property, the possession of which is prohibited by law, such as drugs or drug paraphernalia, no search warrant is required before seizing the property. *Lopez*, 2009-NMCA-127, ¶ 12.

7. An inventory search of defendant's automobile, lawfully parked at the scene of the crime, made after defendant has been arrested and booked, is lawful. *Williams*, 1982-NMSC-041.

8. **Border Searches**. Warrantless searches of automobiles crossing an international border (or its functional equivalent) are permissible if the vehicle searched is in the

same condition as when the border was actually crossed and the officer has reasonable suspicion that the person or thing searched is involved in some illegal activity. *State v. Gonzales*, 1981-NMCA-131, ¶ 20.

9. **Passengers or non-owner/renter**. A warrantless search of the automobile belonging to a driver who is providing the defendant with transportation is permissible because the defendant does not have a legitimate expectation of privacy while being transported in an automobile belonging to another and does not have standing to challenge the search of the automobile. *State v. Waggoner*, 1981-NMCA-125, ¶¶ 15-16. In a case involving a rental vehicle where the driver is neither the renter nor the person listed on the rental contract as an authorized driver, the driver bears the burden to present evidence of consent or permission from the lawful owner or renter to be in possession of the vehicle in order to establish standing to challenge a search of the vehicle. *State v. Van Dang*, 2005-NMSC-033.

10. **Consent**. A search and seizure of property may be valid if the defendant consented to the search. It is also important to determine whether the consenting party had authority to give consent for the items actually searched. In *State v. Celusniak*, 2004-NMCA-070, the Court of Appeals held that an officer who obtained valid consent to search a vehicle from the driver exceeded the scope of this consent when he searched a purse left in that vehicle by a passenger.

19.3 Motion to Suppress

A. General

1. In a case involving a misdemeanor or petty misdemeanor charge, a person aggrieved by a search and seizure may move for the return of the property and to suppress the use of the property as evidence. Rule 6-304(B). This motion must be filed and determined before trial, unless good cause shown. Rule 6-304(B)(2). If the motion is untimely filed, the court may grant a continuance to determine if there was good cause for the untimely filing. If no good cause is found, the judge can deny the motion for failure to comply with the rule.

2. At a hearing on a motion to suppress, the judge may receive evidence on any fact related to the motion. Hearsay is admissible. Rules 11-1101(D)(1) and 11-104(A).

3. In cases where the search and seizure were without a warrant and a motion to suppress is made, the prosecution has the burden of proving that circumstances existed that justified the officers' action.

4. If, after a hearing, the judge grants a motion to suppress, the property is returned unless otherwise subject to lawful detention.

B. Who May File Motion

1. Filing a motion to suppress the use of seized property as evidence is to challenge the legality of the search and seizure. Not everyone who claims an illegal search and seizure has a right to challenge it. The person making the challenge must have standing, that is, must have a reasonable expectation of privacy to the place searched or the property seized. U.S. Const. amend. IV; N.M. Const. art. II, § 10; *State v. Villanueva*, 1990-NMCA-051, ¶ 26.

2. Property ownership or possession is a factor to be considered, but it is not a substitute for a factual finding that the owner or possessor had a legitimate expectation of privacy in the area searched and therefore, the person's Fourth Amendment rights were violated. For example, passengers in a borrowed automobile who can show no legitimate expectation of privacy in the glove compartment or the area under the seat cannot challenge the seizure of property belonging to another found in these areas.

3. The judge should deny the motion to suppress if s/he determines that the person making the motion had no reasonable expectation of privacy in the area searched. Rule 6-304(C). If the person making the motion to suppress had no legitimate expectation of privacy, then the person's right to privacy under the Fourth Amendment has not been violated.

C. The Exclusionary Rule

1. The exclusionary rule prevents the use of illegally obtained evidence in a criminal trial. This is the law under both the federal and state constitutions. *State v. Wagoner*, 2001-NMCA-014. If the State conducts a search without a warrant and without sufficient grounds for an exception to the warrant requirement, the evidence will be suppressed to "effectuate in the pending case the constitutional right of the accused to be free from unreasonable search and seizure." *State v. Gutierrez*, 1993-NMSC-062, ¶ 53. This recognition of the constitutional nature of the exclusionary rule is based in large part on our Supreme Court's strong preference for the protections afforded by the warrant process.

2. There is a "good faith" exception to the exclusionary rule adopted by the United States Supreme Court. This exception allows the introduction of evidence seized by police officers who are acting in reasonable reliance upon a search warrant that was issued by a detached and neutral magistrate, but that is ultimately found to be invalid. *United States v. Leon*, 468 U.S. 897, 919-20, 926 (1984). However, New Mexico has not adopted the "good faith" exception. If the warrant is found to be invalid, the evidence seized pursuant to it must be suppressed. *Gutierrez*, 1993-NMSC-062.

D. Suppression of Evidence and Dismissal

If the State's evidence is suppressed, the court cannot dismiss the case. The court can and should enter an order suppressing the evidence. It is up to the State to determine whether or not it can go forward without that evidence. If they determine they cannot go

forward, they should dismiss the case. In *State v. Montoya*, 2008-NMSC-043, ¶ 18, Justice Maes stated "[T]he magistrate court heard evidence and anticipated that the State could not prove its case and intended to enter an order dismissing the State's case. This, of course, would be an improper act because once some evidence is suppressed, the State is entitled to determine, for example, whether to pursue its case with its remaining evidence, dismiss its case with prejudice or dismiss its case and refile it in district court."

Appendices

Appendix 1:

Supreme Court Policy Directives

Adopted in New Mexico Supreme Court Order No. 09-8200, In the Matter of Superintending Control Over Magistrate Courts, filed September 16, 2009.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. 09-8200

IN THE MATTER OF SUPERINTENDING CONTROL OVER MAGISTRATE COURTS

ORDER

WHEREAS, effective July 1, 1997, the New Mexico Legislature repealed NMSA 1978, Sections 35-7-1 and 35-7-2 and enacted a new NMSA 1978, Section 35-7-1, to provide that magistrate courts shall operate under the direction and control of the New Mexico Supreme Court;

WHEREAS, pursuant to said authority this Court hereby adopts certain existing policies to apply to all magistrate courts; and

WHEREAS, the Administrative Office of the Courts hereby is authorized to assist this Court in its superintending control over magistrate courts by providing administrative and support services.

NOW, THEREFORE, IT IS ORDERED that the order issued July 30, 1999, hereby is VACATED;

IT IS FURTHER ORDERED that the following policies hereby are adopted to apply to all magistrate courts:

POLICY DIRECTIVES

No. 1: Policy Relating to Acceptance of Personal Checks, Receipting of Monies Not Readily Identifiable, and the Receipting of Bail

No. 2: Policy Relating to Audit Exceptions

No. 3: Policy Relating to Overages/Shortages in Monies Collected

No. 4: Policy Relating to Reporting of Leave Taken by Magistrates

No. 5: Policy Establishing Presiding Judge Responsibilities

No. 6: Policy Establishing Mandatory Training Requirements for Magistrate Court Clerks and Judges

No. 7: Policy Relating to Acceptance of Partial Payments of Fines and Costs

No. 8: Policy Relating to Leases for Office Space for Magistrate Courts

No. 9: Policy Relating to Records Inspection Requests

No. 10: Policy Relating to the Use of Volunteers or Community Service Participants in the Magistrate Court

POLICY DIRECTIVE NO. 1 (Issued September 2009)

POLICY RELATING TO ACCEPTANCE OF PERSONAL CHECKS, RECEIPTING OF MONIES NOT READILY IDENTIFIABLE, AND THE RECEIPTING OF BAIL

This policy is issued in accordance with NMSA 1978, Section 35-7-1 to provide guidelines and directions regarding acceptance of personal checks for the payment of court costs and fines and the posting of bail.

Personal Checks.

Magistrates may exercise their discretion when accepting personal checks for the payment of costs and fines, giving careful consideration to their knowledge of the payer. If an individual has presented a bad check to the court, the court shall not accept another check from that individual for twelve months. Courts shall send the AOC a quarterly report on bad checks.

Monies Not Readily Identifiable.

Any money received in the mail, which is not readily identifiable (as to defendant or docket number), must be receipted and deposited in the regular course of business. The "other" category must be checked on the receipt form and a short explanatory note must be sent with the deposit ticket to the accounting staff of the Administrative Office of the Courts (AOC). The accounting staff will need all available information pertaining to the money that cannot be identified (social security number, address,

telephone number, etc.). If possible, provide the accounting staff with a photocopy of the check or money order. When the payment is identified, the accounting staff must be notified and the proper accounts credited. If the payment is identified during the same month as receipted, the clerk will make an accounting entry to distribute properly the monies received. At the end of the month, magistrate courts must issue a check to the suspense fund for money that cannot be identified. If at a later date money deposited in the suspense fund is identified, the court will have to write a letter to the AOC accounting staff requesting that a state warrant be generated and sent to the court. The warrant will be sent to the court for deposit into the Trust Account. If the money does not belong to the court, the magistrate will issue a check to the proper individual or agency.

Money received in the mail, which is owed to the court but is payable to an agency other than the magistrate court, may either be sent back to the defendant (accompanied by a letter requesting the defendant to issue a new check to the magistrate court), or be sent to the payee agency with a request to make the check payable to the court.

If the defendant pays monies owed the magistrate court to another agency, the court may contact the agency and request that the agency transfer to the court those monies owed. The defendant continues to be responsible for the payment that is due the court. The court may give an appropriate extension to allow the defendant time to retrieve the money, but the responsibility of doing that should fall on the defendant. The court should also process all paperwork necessary to finalize the pending case.

Bail.

All bail accepted by the magistrate court shall be payable in American currency, or by cashier's check, certified check, money order, or surety bond only. No personal or company checks, or foreign checks or currency are to be accepted.

All magistrate courts shall review the Cash Bond Record distributed by the AOC accounting staff on a monthly basis to ensure that appropriate action has been taken on each bond posted and that bonds are removed from the Cash Bond Record when six months have elapsed unless the court has entered a written order documenting good cause for extending

the time.

All unclaimed cash bonds shall be remitted to the AOC for deposit in the Magistrate Suspense Fund in accordance with Section 8.11-7 of the Magistrate Court Administrative Procedures Manual. (See Administrative Procedures Manual for processing instructions.)

This policy applies to all magistrate courts.

POLICY DIRECTIVE NO. 2 (Reissued September 2009)

POLICY RELATING TO AUDIT EXCEPTIONS

This policy is issued in accordance with NMSA 1978, Section 35-7-1, to provide guidelines and directions regarding audit exceptions as stated by either internal or independent auditors.

All audit exceptions shall be submitted in writing to the director of the Administrative Office of the Courts. All courts affected thereby shall be provided a copy of the exceptions and be given an opportunity to respond. All courts shall take the necessary corrective action within a time frame specified by the Director.

POLICY DIRECTIVE NO. 3 (Issued September 2009)

POLICY RELATING TO OVERAGES/SHORTAGES IN MONIES COLLECTED

This policy is issued in accordance with NMSA 1978, Section 35-7-1 to provide guidelines and directions regarding any overages/shortages that may occur during the collection of monies by the magistrate courts.

Overages.

Whenever overages occur and monies attributable to the overages cannot be identified, the overages amount collected must be deposited with regular daily receipts. Any excess money received, which cannot be identified, is to be receipted and deposited in the state general fund in the regular course of business. An explanatory letter from the magistrate must accompany the next regular report to the AOC.

Shortages.

A letter from the magistrate describing the circumstances surrounding any shortage must be filed with the AOC. Shortages over $10.00 must be reported with the standardized monthly revenue report. A shortage over ten dollars ($10.00) must be reported to the AOC immediately upon discovery.

If the aggregate total of all shortages for any magistrate court exceeds One Hundred Dollars ($100.00) during any one fiscal year, or if the number of recorded shortages during a fiscal year exceeds five (5) shortages even though the hundred dollar ($100.00) limit is not breached, the director of the AOC may request that the AOC internal auditors perform an audit of the financial records of the court. A formal response to all audit findings by the magistrate will be required.

If the ceiling of One Hundred Dollars ($100.00) per fiscal year is exceeded by any magistrate court, or if the aggregate number of shortages during a fiscal year exceeds five (5), depending on the circumstances, the internal auditors may conduct a formal audit or a review of court documents. The internal auditor will hold an exit audit conference with the magistrate and appraise him/her of the findings. A response by the magistrate to the audit findings must be filed with the AOC within ten (10) working days. The audit findings and the recommendations for corrective action will be presented to the AOC director.

The magistrate may be required to reimburse the State for the amount in controversy if, after an investigation and formal audit,

negligence or impropriety is shown on the part of the judge. If the director determines adequate measures are being taken to prevent future shortages, the director may waive the required payment. If the director waives the required payment, the matter is concluded. If the director finds negligence or impropriety and does not waive the required payment, the Supreme Court shall determine whether the magistrate should reimburse the State. (See Administrative Procedures Manual for processing instructions.)

This policy applies to all magistrate courts; however, no newly-elected or appointed magistrate shall be responsible for a shortage existing at the time he or she takes office.

POLICY DIRECTIVE NO. 4 (Issued September 2009)

POLICY RELATING TO LEAVE TAKEN BY MAGISTRATES

This policy is issued in accordance with NMSA 1978, Section 35-7-1, to provide guidelines and directions regarding the leave taken by magistrates.

A Magistrate judge is one "who holds office hours a minimum of

(40) hours per week." NMSA 1978, § 35-1-36.1. This Court regards that number as a minimum. As elected public servants, magistrate judges must be prepared to put in more than forty (40) hours per week if required. Magistrates shall spend at least thirty-five (35) hours per week physically present at a court, traveling to a court, or on court-related activities such as serving on committees or attending training. Because magistrates are often contacted by law enforcement during hours when the court is not open, this Court regards the remaining five hours that magistrates are required by statute to serve every week to be satisfied by such availability.

All magistrates shall notify the presiding judge of their magistrate district, or, if there is no presiding judge, the AOC director (or designee), of any absences longer than two days from the office that cannot or will not be covered by another magistrate during the absence.

POLICY DIRECTIVE NO. 5 (Issued September 2009)

POLICY ESTABLISHING PRESIDING JUDGE RESPONSIBILITIES

This policy is issued in accordance with NMSA 1978, Section 35-7-1,

to provide guidelines and directions regarding the daily duties and responsibilities of the presiding judge in each magistrate court.

A presiding judge or the judge in a single-judge court shall comply with the following responsibilities and shall ensure compliance with the Magistrate Court Administrative Procedures Manual published July 1985, as amended and approved by the Director of the Administrative Office of the Courts on an ongoing basis.

1. Provide leadership for the court, supervise and coordinate its administration, and be the intermediary between the court over which he presides and the Administrative Office of the Courts;

2. Set an example in the performance of judicial and administrative functions;

3. Implement and monitor compliance with all policies, rules, and regulations established by the Supreme Court;

4. Counsel and assist associate judges in the performance of their responsibilities in the administration of the court;

5. Assist associate judges in their initial orientation to the bench and encourage participation in all continuing education and training programs provided for members of the court;

6. Call and preside over meetings of the court; designate an associate judge to act as presiding judge during his/her absence or inability to act;

7. With the assistance of associate judges, propose local rules for the conduct of the court's business and supervise the enforcement

of these rules; ensure that all judges follow the same procedures in conducting court business, hearings and trials;

8. Appoint committees of the court and administer regulations concerning attendance at meetings and conferences;

9. Act in conformity with policies adopted by the court as a whole and freely solicit the advice and suggestions of fellow judges;

10. Provide feedback to the AOC regarding recruiting, hiring, training, supervising, evaluating, and monitoring personnel of the court according to the New Mexico Judicial Branch Personnel Rules with input as required by the Judicial Manager;

11. Monitor the chief clerk's evaluation of subordinate staff. Monitor the Judicial Manager's performance and provide information to the AOC regarding that performance as appropriate or when requested by the AOC. (The AOC shall evaluate the Judicial Manager.)

12. Supervise court finances, including financial planning, and prepare a monthly report concerning the court's financial and administrative activities in compliance with the regulations in the Magistrate Court Administrative Procedures Manual; approve, sign and submit all vouchers to the Administrative Office of the Courts;

13. Disseminate information concerning the court; supervise the collection of statistical data and the management of information systems pursuant to procedures established by the Judicial Information Division of the AOC;

14. Along with the Judicial Manager of the Court: supervise the record keeping functions of the court; periodically review the case flow, time standards, and calendaring; supervise and insure the

timely disposition of matters before the court; oversee an equitable method for the distribution and centralized setting of cases and resolve conflicts in settings between judges; require that a judge to whom a case is assigned accept that case unless he/she is disqualified or the interests of justice require a reassignment; require associate judges to notify the presiding judge or his designee when daily matters before the associate judges are finished or continued;

15. Establish hours of court, office hours for associate judges, and the hours during which associate judges must be on-call to conduct court business after regularly scheduled hours of court; submit for approval by the AOC all proposed hours which shall not become effective until approved by the AOC;

16. Approve annual leave requests from the Judicial Manager and leave requests for judges. (The Judicial Manager shall approve leave requests from staff.) Submit written notification to the Administrative Office of the Courts for clerical staff; provide written notification to the Administrative Office of the Courts of leave taken immediately upon clerical staff's return to work; report as soon as possible any prolonged absence of court employees due to illness; prepare an orderly plan for judicial vacations, attendance at educational programs, and similar matters;

17. Represent the court in its relations with other agencies of the government, the bar, the general public, the news media, and in ceremonial functions in compliance with Supreme Court Rules and the regulations found in the Magistrate Court Administrative Procedures Manual;

18. Oversee with the Judicial Manager juror management;

19. Coordinate with the AOC and the Judicial Manager the use of space, equipment, and facilities of the court;

20. Procure supplies and services for the court in compliance with the regulations found in the Magistrate Court Administrative Procedures Manual with the assistance of the Judicial Manager;

21. Delegate authority to associate judges and to court staff to facilitate effective administration of the court; delegate to the chief clerk and court administrator the responsibility for administrative functions and require administrative decisions to be in concurrence with the decisions of the presiding judge; the administrative authority of an associate judge shall be only that delegated by the presiding judge; the administrative responsibility of an associate judge shall include, but not be limited to, providing input to the presiding judge in the development of policies, rules, and regulations for the court and in the performance of judicial and administrative functions of the court; periodic mandatory meetings shall be held by the presiding and associate judges to allow an exchange of ideas and suggestions pertaining to the operation of the court;

22. Submit to the AOC Director for his/her review and resolution all reports regarding unresolved instances of noncompliance with court rules, procedures, and regulations by associate judges. This does not relieve a judge of the judge's responsibilities, if any, under NMRA Rule 21-300(D)(1);

23. Certify to the AOC Director for immediate resolution any scheduling, procedural, or administrative difficulties arising among the judges. Imposition of sanctions for noncompliance shall be at the discretion of the Supreme Court; and

24. Any grievances pertaining to or arising from these regulations should be submitted to the Chief Justice of the Supreme Court.

POLICY DIRECTIVE NO. 6 (Reissued September 2009)

POLICY ESTABLISHING MANDATORY TRAINING REQUIREMENTS FOR MAGISTRATES AND MAGISTRATE COURT CLERKS

This policy is issued in accordance with NMSA 1978, Section 35-7-1, to provide guidelines and directions regarding training and continuing education for magistrates and magistrate court clerks.

As a qualification for continued employment, and in furtherance of uniting the magistrate and courts and maintaining consistent procedure, each magistrate and magistrate court clerk shall attend the Conference sponsored by the Judicial Education Center, unless excused in writing.

Each clerk shall receive advance notice of the Conference. If the magistrate or clerk is unable to attend, a letter stating the reasons for excusal must be submitted to the AOC Director or designee. If the request is denied, the magistrate or clerk will be expected to attend and participate. If the request is granted, the person excused will make alternate arrangements with the AOC Director or designee to view the video tapes of the conference within four months of the conference.

This policy applies to all magistrate clerks.

POLICY DIRECTIVE NO. 7 (Issued September 2009)

POLICY RELATING TO ACCEPTANCE OF PARTIAL PAYMENTS OF FINES AND COSTS

This policy is issued in accordance with NMSA 1978, Section 35-7-1. It provides guidelines and directions for courts to allow criminal defendants to pay outstanding fines, fees, or costs through Agreements to Pay. This policy does not apply to civil actions or posting bond.

Imposing and collecting fines, fees, and costs has both a rehabilitative value and a deterrent effect on a defendant. A court that requires a defendant to pay at the time of sentencing emphasizes the importance of complying with the court's orders and promotes the integrity and credibility of all courts.

State law prohibits a magistrate's suspension or waiver of any fee or cost, other than the warrant enforcement fee. State law also imposes a number of mandatory fines, which may not be suspended or waived. All fees, costs, and mandatory fines must be collected or converted to community service or jail time.

Although there is statutory authority that allows a convicted criminal defendant to pay in partial payments all fines, fees, or costs

assessed, an Agreement to Pay imposes significant additional administrative and accounting burdens on the court system. Consequently, the circumstances under which Agreements to Pay may be allowed are limited as follows:

> A defendant owing $100 or less may be given an Agreement to Pay; the magistrate may not extend the time for full payment beyond thirty (30) days from the date of sentence or from the date defendant is released from jail, if jail time is part of the sentence without written findings of severe hardship by the court documented in the physical file.
>
> A defendant owing more than $100 may be allowed to pay through an Agreement to Pay; however, the magistrate may not allow for payment at a rate less than $50 per month. In cases of severe hardship the magistrate has the discretion to accept partial payment based on written findings by the court documented in the physical file, including an adjustment of fines order.

A magistrate may grant a defendant up to three extensions of time on an Agreement to Pay or may modify the Agreement to Pay up to three times in cases of severe hardship based on written findings by the court documented in the physical file.

If a defendant fails to make a payment pursuant to the Agreement

to Pay, the Court shall issue a bench warrant for failure to pay pursuant to NMRA 6-207A within thirty days of the missed payment. The court may send a courtesy letter to the defendant warning that a bench warrant is about to issue and requesting payment before the warrant issues. Once a defendant is arrested or surrenders him/herself on the warrant, a hearing will be held to determine the basis for the failure to comply with the Court's order. If the Court finds that the defendant is financially unable to pay the assessed fines, fees, or costs, the defendant shall be ordered to perform community service in lieu of the amounts owed that he or she is unable to pay. Community service will be credited at the rate of the prevailing minimum wage. A magistrate must require community service to be performed at a rate of at least 40 hours per month. If the defendant will not do community service, the magistrate may sentence the defendant to jail, with each day served credited toward the fines, fee, and costs owed at the rate set by state law. If the defendant serves some community service or jail time and then wishes to pay off the remaining balance, the court shall allow the defendant to do so. The Court may also modify the Agreement to Pay if there have been less than three prior

modifications or extensions.

If a defendant appears before the court after a bench warrant has been issued, but prior to an arrest on that warrant, defendant has the option to pay the full amount of any outstanding fines, fees or costs, see the assigned judge or be arrested on the warrant. If a defendant appears in person, the court shall not accept partial payment from the defendant once a warrant has been issued. If a partial payment is received in the mail or if someone other than defendant comes in to make a payment on a case where there is an active warrant, the payment should be accepted and receipted. The receipt will indicate the balance still owed and it should be clearly indicated on the receipt that there is an active warrant which shall remain active until the balance has been paid in full. The payment amount on the warrant shall be the amount owed to the court for the full amount of any outstanding fines, fees or costs. A warrant for failure to pay shall not give defendant the alternative of posting a bond. This policy may be supplemented by the Magistrate Court Administrative Procedures Manual.

When a warrant for failure to pay is executed, and the defendant

appears in court after arrest, the defendant shall not be granted an extended or renewed Agreement To Pay, nor shall the warrant be quashed, except upon a written finding by the court of exceptional circumstances.

POLICY DIRECTIVE NO. 8 (Issued September 2009)

POLICY RELATING TO LEASES FOR OFFICE SPACE FOR MAGISTRATE COURTS

This policy is issued in accordance with NMSA 1978, Section 35-7-1, to provide guidelines and directions regarding the awarding and renewal of leases for office space.

The Administrative Office of the Courts shall be responsible for the leases for magistrate court space. The AOC shall award a lease based on proposals received in accordance with published Requests for Proposals; when leasing from a public entity, the requirement for proposals may be waived in accordance with NMSA 1978, Section 13-1-98. When a lease is awarded, its expiration date shall be calendared. At least four months prior to the expiration of a lease, the AOC and the affected magistrate(s) shall review the lease provisions and conditions of tenancy, and shall make a determination whether to renew the lease, hold

over on a month-to-month basis, or seek new space.

The AOC shall consult with magistrates and staff in considering court locations.

If the lease is to be renewed pursuant to an option to renew contained in the lease agreement, adequate notice shall be given to the landlord in accordance with the terms of the agreement.

Upon expiration of the lease and any renewal period, the lease may revert to a month-to-month tenancy. The AOC shall notify the magistrate and the landlord before a new lease is awarded.

This policy applies to all magistrate courts.

POLICY DIRECTIVE NO. 9 (Issued September 2009)

POLICY RELATING TO RECORDS INSPECTION REQUESTS

This policy is issued in accordance with NMSA 1978, Section 35-7-1, to provide guidelines for implementing the Inspection of Public Records Act. This policy serves the purpose of the Act, which is to make available to the public, as part of the routine duties of the courts, the

greatest possible information about the affairs of the magistrate courts and the official acts of the judges and clerks.

The time requirements set forth in this directive are mandated by statute NMSA 1978, Section 14-2-1 et seq. Because penalties of $100 per day of noncompliance can be imposed, it is essential that the courts give priority to responding to written requests, including e-mailed requests, for records inspection. All written requests are deemed denied if the records are not provided for inspection within 15 calendar days of receipt of the request; the only exception is a request that is extremely burdensome or broad. A denial of a written request requires a written explanation. If a court receives a request that is extremely burdensome or requests confidential information, the court shall contact the Administrative Office of the Courts. Also refer to the Magistrate Court Administrative Procedures Manual for procedures upon request.

Administrative Form-Written Requests.

The Administrative Office of the Courts will supply the courts with an administrative form that will expedite responses to written requests. This form provides for a 3-day notice that the records are

available at another location, a 3-day notice that costs must be paid in advance of mailing requested copies, a 3-day notice of the date set for records inspection, a 15-day notice that more time is needed for an extremely burdensome or broad request, and a 15-day notice of denial. A copy of the form follows.

This policy applies to all magistrate courts.

FORM

RESPONSE TO WRITTEN REQUEST FOR INSPECTION OF PUBLIC RECORDS

Name:_____ Telephone No:_____

Address:_____ Date of Receipt
_____ of Request:_____
_____

You have requested to inspect court records pursuant to the Inspection of Public Records Act. The following applies to your request:

_____The requested records have been determined to be confidential in whole or in part. Only portions not found to be confidential are available to you.

_____The requested records are not available immediately. By law, these records must be provided for inspection no later than 15 calendar days after receipt of your request. These records will be available for your review on_____ [This notice to be given to requester

within 3 business days of receipt of request.]

_____The request is considered extremely burdensome or broad. Additional time will be required to provide these records. The records will be available for your review on_____. [This notice to be given within 15 calendar days of receipt of request.]

_____The requested records are not available at this court. You may inspect these records at_____. [This notice to be given within 3 business days of receipt of request.]

_____Request is denied. Attached is written explanation. [This notice to be given within 15 calendar days of receipt of request.]

_____The copies of records you have requested to be mailed are now available. The charge is as follows:

____copies at $.50/page $_____+ postage $_____=$_____(TOTAL DUE)

This charge must be paid in advance by cashier's check or money order payable to the magistrate court. A receipt will be provided with the records. [This notice to be given within 3 business days of receipt of request.]

_____ _____

Records Custodian Date

POLICY DIRECTIVE NO. 10 (Reissued September 2009)

POLICY RELATING TO THE USE OF VOLUNTEERS OR COMMUNITY SERVICE PARTICIPANTS IN THE MAGISTRATE COURT

This policy is issued in accordance with NMSA 1978, Section 35-7-1,

to provide guidelines regarding the use of volunteers and community service participants in the magistrate courts.

A. Volunteers.

The magistrate courts may allow volunteers to assist the court provided that the courts adhere to the following directives. A "volunteer" is any person who performs any type of clerical or other work for the court who is not a judicial branch employee or who is not paid for the work by funds appropriated to the Administrative Office of the Courts. A person assigned to the court under a DWI local program grant is a court volunteer.

1. Volunteers must comply with all laws, rules, directives, and regulations governing court procedure.

2. The judge must have each volunteer sign a waiver before the volunteer begins work at the court (Waiver form follows). All signed waivers must be filed with the director of the Administrative Office of the Courts. Compliance with the waiver requirement will be subject to audit.

3. Should a volunteer be a party to a case in the magistrate court, either during service to the court or within a reasonable time thereafter, the judge must recuse from the case to avoid the appearance of impropriety.

4. Volunteers shall not perform tasks that involve access to confidential information, such as screening results in DWI cases or

affidavits in support of search and arrest warrants, or that are required to be performed by a bonded state employee, such as receiving and receipting funds or issuing notices under seal. Examples of the type of work that volunteers may perform include filing of public records and documents and routine typing of forms or notices that the judge or clerk will sign and serve. If you have any questions about whether a particular task is appropriate for a volunteer, please call the Administrative Office of the Courts.

B. Community Service Participants.

Paragraphs 1 and 4 above also apply to community service participants. Those persons performing community service for the court are not required to sign the waiver because statutory immunity from liability is provided by NMSA 1978, Section 31-12-3. This statute also states that persons performing community service shall not be entitled to any of the benefits of state employment.

FORM

WAIVER FOR VOLUNTEERS IN THE MAGISTRATE COURT

I offer to assist the _____ County Magistrate Court at my own risk and with full knowledge and understanding that I will receive no remuneration from the court or from the judicial branch of New Mexico state government in any form, that I cannot receive any of the benefits of state employment such as workers' compensation should

I be injured, and that I hold the State of New Mexico harmless from any claim for damages, injuries or other losses that may arise during the course of my assistance at the court or as a consequence of my assistance at the court.

I further understand that I will work at the pleasure of the magistrate. I agree to comply with instructions from him or her or from the chief clerk and to refrain from performing any task that I have not been specifically permitted or directed to perform.

I will comply to the best of my ability with all rules, regulations, directives and instructions regarding court procedure. I will keep information confidential to the same extent as court employees are required to do. I am aware that I have no authority to act as agent for the court or for the State of New Mexico and will not represent myself to be or purport to be an agent of the court or the State.

I willingly sign this waiver to provide assistance to the court for so long as I am willing to volunteer or for so long as my services are needed by the court.

_____ _____

PRINT VOLUNTEER'S NAME SIGNATURE

_____
DATE

APPROVED BY:

_____ _____
MAGISTRATE DATE

Complete the following only if the volunteer is assigned to the court through a DWI local program grant:

PAID BY:_____

ADDRESS:_____

SUPERVISOR: _____

IT IS SO ORDERED.

DONE at Santa Fe, New Mexico, this 16th day of September, 2009.

Edward L. Chávez, Chief Justice

Patricio M. Serna, Justice

Petra Jimenez Maes, Justice

Richard C. Bosson, Justice

Charles W. Daniels, Justice

Appendix 2:

Memorandum of Understanding

between New Mexico Corrections Department and the Magistrate Courts of New Mexico, dated June 14, 2013.

MEMORANDUM OF UNDERSTANDING

The New Mexico Corrections Department ("NMCD"), through its Secretary Gregg Marcantel, and the Magistrate Courts of New Mexico ("Magistrate Courts"), through the Director of the Administrative Office of the Courts, Arthur Pepin, hereby enter into the following Memorandum of Understanding ("MOU"):

I. Recitals and Purpose

WHEREAS, representatives of NMCD and the Magistrate Courts have been involved in ongoing substantive discussions regarding when is it appropriate to place magistrate court misdemeanor offenders on probation supervision with NMCD;

WHEREAS, the parties acknowledge that NMCD's Probation and Parole Division (PPD) already provides probation supervision of varying levels to over 17,000 felony offenders, and that NMCD has limited manpower and other resources needed to also provide effective probation supervision to misdemeanor offenders;

WHEREAS, the parties encourage and fully support the continued use of county (supported) misdemeanor compliance programs to provide probation supervision to misdemeanor offenders when those programs are available and can provide effective supervision to these offenders;

WHEREAS, the parties acknowledge that in the best interests of public safety NMCD PPD will be needed to utilize its unique expertise and experience to provide probation supervision to certain magistrate court misdemeanor offenders who have problematic or extensive criminal histories, especially in those circumstances where county misdemeanor compliance programs are not available or are unable to provide appropriate probation supervision to this category of misdemeanor offenders; and

WHEREAS, based on the above described circumstances and in the best interests of public safety, the parties have agreed to enter into a MOU to address this matter.

The purpose of this MOU is to describe and formalize the parties' agreement regarding when and how NMCD PPD will provide probation supervision to these magistrate court misdemeanor offenders and other related factors.

II. Terms of MOU

A. NMCD (PPD) agrees to the following:

1. When referred by the Magistrate Courts, NMCD PPD agrees to accept for probation supervision only the following categories or groups of misdemeanor defendants or offenders:

   a. Defendants who have been convicted of their third DWI offense;

b. Defendants currently supervised by PPD, and individuals who have been supervised by PPD within the last five (5) years;

c. Defendants charged with a felony or felonies who plead to misdemeanor convictions when the felony charge was objectively reasonable and legitimate at its inception; and

d. Defendants with violent criminal histories. Defendants with violent criminal histories are defined as those Defendants with prior convictions for: those felonies designated as "per se" serious violent offenses under Section 33-2-34 (L) (4); those felonies determined by the sentencing judge to constitute serious violent offenses pursuant to Section 33-2-34 (L) (4); first degree murder; misdemeanor aggravated battery; misdemeanor aggravated battery on a household member; misdemeanor stalking; and (felony) sexual exploitation of a child by prostitution.

2. PPD shall promptly notify the sentencing magistrate judge if it appears the defendant does not meet the referral standards or criteria set forth in paragraph II.A.1. of this MOU.

3. PPD agrees that in those cases where it issues a warrantless arrest and hold on a misdemeanor defendant for alleged violations of probation conditions, PPD will then promptly request the appropriate magistrate judge to issue an bench warrant for the defendant with the alleged probation violation.

B. The Magistrate Courts agree to the following:

1. The Magistrate Courts agree to give PPD a self executing order issued by the assigned magistrate judge by which PPD will have the clear authority to arrest the magistrate court defendant without a warrant (based on PPD's arrest and hold order) if the defendant has allegedly violated his or her conditions of probation. A copy of the form of the self executing order to be used by the Magistrate Courts is attached hereto as Exhibit "A."

2. The Magistrate Courts agree to refer misdemeanor defendants to PPD for probation supervision only if the defendant meets the referral standards or criteria set forth in paragraph II.A.1. of this MOU, and to immediately remove from PPD supervision (when given prompt notification by PPD) any misdemeanor defendant who does not meet these standards or criteria.

3. The Magistrate Courts agree to promptly issue bench warrants upon PPD's request for those misdemeanor defendants arrested by PPD on a warrantless arrest and hold order pertaining to the defendant's alleged probation violations.

4. The Magistrate Courts agree to fully utilize county misdemeanor compliance programs to provide probation supervision to its misdemeanor defendants where those programs are available and can provide appropriate supervision; to encourage counties to continue to fund and support such programs; and to keep misdemeanor defendants already assigned to those compliance programs in those programs except when the public safety-related referral standards or criteria

set forth in paragraph II.A.1. of this MOU require that the defendant be transferred to supervision with PPD.

5. The Magistrate Courts agree and understand that they retain the authority and discretion not to send or refer misdemeanor offenders to PPD for probation supervision even if those offenders meet the referral standards or criteria set forth in paragraph II.A.1. of this MOU.

C. The parties agree to the following:

1. Misdemeanor defendants' probation supervision costs shall be controlled and determined by Section 31-20-6 NMSA 1978 as amended, which requires defendants to pay the actual costs of the supervised probation not exceeding $1,800 annually to be paid in monthly installments of not less than $25 and not more than $150 as set by the appropriate district supervisor of the PPD based on the financial circumstances of the defendant.

2. PPD has the authority and discretion to supervise misdemeanor offenders referred by the Magistrate Courts at the level and scope of supervision PPD deems appropriate, and to recommend early discharge for misdemeanor offenders as it deems appropriate.

3. The parties shall meet on or about fourteen (14) months after the effective date of this MOU to discuss the MOU's impact on the parties and whether any MOU amendments are needed.

III. Termination of MOU

This MOU may be terminated by either of the parties hereto upon written notice delivered to the other party at least 180 days prior to the intended date of termination. The parties agree to first meet and negotiate in good faith to attempt to resolve any issues or disagreements before giving any written notice of termination.

IV. Period of MOU

This MOU becomes effective upon signing by all parties, and shall remain in effect unless terminated by either party pursuant to Section III. above.

IV. Amendment of MOU

This MOU shall not be altered, changed, or amended except by a written instrument signed by the parties.

IN WITNESS THEREOF, the parties hereto have executed this MOU on the date or dates indicated below.

for Gregg Marcantel
NMCD Secretary

Date: 6/12/13

Arthur W. Pepin, Director
Administrative Office of the Courts

Date: 6/14/13

STATE OF NEW MEXICO COUNTY OF _____

MAGISTRATE COURT

STATE OF NEW MEXICO,

Plaintiff, Case # _____

Vs.

_____,

Defendant.

ORDER

IT IS HEREBY ORDERED THAT _____, defendant, has been placed on supervised probation with the Adult Probation Office for _____ days, beginning_____.

This is a self executing order and if said defendant violates his or her probation, the defendant is subject to immediate arrest by the probation officer.

_____

_____

Date

_____

Magistrate Judge

EXHIBIT "A"