# New Mexico Municipal Court Manual for Judges and Staff

A Guide for New Mexico Municipal Judges and Staff

New Mexico Judicial Education Center
Institute of Public Law
UNM School of Law

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# NEW MEXICO MUNICIPAL COURT MANUAL FOR JUDGES AND STAFF

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# NEW MEXICO MUNICIPAL COURT MANUAL FOR JUDGES AND STAFF

# PREFACE

## Purpose

The *New Mexico Municipal Court Manual for Judges and Staff* is intended to serve as a practical guide for municipal judges and court staff in handling the typical cases that come before the court. It is a current and convenient secondary source of laws, rules, procedures and best practices for municipal court cases.

Do not rely on this *Manual* for legal authority. Instead, consult the municipal ordinances, rules and forms, as well as case law, statutes and court policies and procedures for specific requirements.

## Acknowledgements and History

The *New Mexico Municipal Court Manual for Judges and Staff* is a revised and updated combination of the previously-published *New Mexico Municipal Benchbook* and the *New Mexico Municipal Court Clerks Handbook.* This combined *Manual* was prepared by Deborah Bogosian, Education Specialist (now retired) with the New Mexico Judicial Education Center, and Judith Olean, Chair of the Paralegal Studies Program at Central New Mexico Community College and former municipal judge.

The previous *New Mexico Municipal Benchbook* was primarily authored by Judith Olean and the staff at the New Mexico Judicial Education Center in 2003 and revised in 2004 and 2008. The *Benchbook* incorporated provisions of the prior *Municipal Benchbook: A Guide for New Mexico Municipal Judges,* published in 1994 by the New Mexico Municipal League and the New Mexico Municipal Judges Association.

The previous *New Mexico Municipal Court Clerks Handbook* was compiled by the Association of Municipal Court Clerks. The *Handbook* was first printed in 1988 and extensively revised in 1995, 2003 and 2006 in cooperation with the New Mexico Municipal League, the Municipal Court Automation Project and the Judicial Education Center.

## Style and Format

The *New Mexico Municipal Court Manual for Judges and Staff* is written in a descriptive style. Abbreviations are kept to a minimum and should be readily recognizable when encountered. Citations to ordinances, 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:

- Statutes: New Mexico statutes are cited as §__-__-__, such as §66-8-113, without "NMSA 1978." Federal laws are cited as __ U.S.C. §___, such as 25 U.S.C. §1901.

- Rules: New Mexico judicial rules are cited as Rule __-___, such as Rule 8-501, without the addition of "NMRA."

- Cases: New Mexico cases are cited using the New Mexico Reports citation, such as 116 N.M. 456 (1993), and, if available, the vendor-neutral citation adopted in 1998, such as 1998-NMCA-039.

## Effective Date

The information in this *Manual* is current through June 2009. The *Manual* will be updated periodically as funds and staffing allow. Please contact the Judicial Education Center at the address below for information about the status and availability of updates.

## Additional Copies

The *Manual* is available free of charge on the Judicial Education Center web site, http://jec.unm.edu/. For information on obtaining additional copies, please contact the Judicial Education Center.

## Permission to Reproduce

For information on the permission and acknowledgements necessary for reproducing portions of this *Manual*, please contact the Judicial Education Center.

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# CHAPTER 1

# General Matters

This chapter covers:

- New Mexico judicial system, including the types of courts.
- Municipal court jurisdiction, including ordinances, campus traffic regulations, search and arrest warrants, subpoenas, bench warrants, contempt, and performance of marriage ceremonies; also effective dates of ordinances and court rules.
- Municipal court procedures, including court rules, conduct of proceedings, time periods, presence of the defendant, attorney representation, proceedings conducted using audio-visual equipment, recording of proceedings, and use of interpreters.
- Municipal judge requirements, including qualifications, term of office, salary, training, responsibilities, vacancies, temporary judges and removal from office.
- Duties of the municipal court clerk.
- Ethics, including the Code of Judicial Conduct and court staff cannons.
- Oversight of the courts.

## 1.1 New Mexico Judicial System

### 1.1.1 Courts of Limited Jurisdiction

The judicial system in New Mexico has three levels, beginning with courts of limited jurisdiction. Courts of limited jurisdiction are trial courts whose jurisdiction has been established by either the New Mexico constitution or the legislature. These courts can only do the things that the law gives them the authority to do, which is why they are called limited jurisdiction courts. Municipal courts are courts of limited jurisdiction. Metropolitan, Magistrate, and Probate courts are also courts of limited jurisdiction

## 1.1.2 Courts of General Jurisdiction

The next level in the judicial system is the court of general jurisdiction. District courts are courts of general jurisdiction. This means that district courts have wide ranging authority to hear cases, including criminal, civil, probate, family law and juvenile cases.

## 1.1.3 Appellate Courts

The highest level in the state judicial system is the appellate courts. These courts do not preside over trials, but instead hear appeals of decisions from the courts below them. 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 hears arguments by the attorneys. Witnesses do not testify and no new information can be presented. However, see the next section for a discussion of appeals from the municipal courts to the district courts.

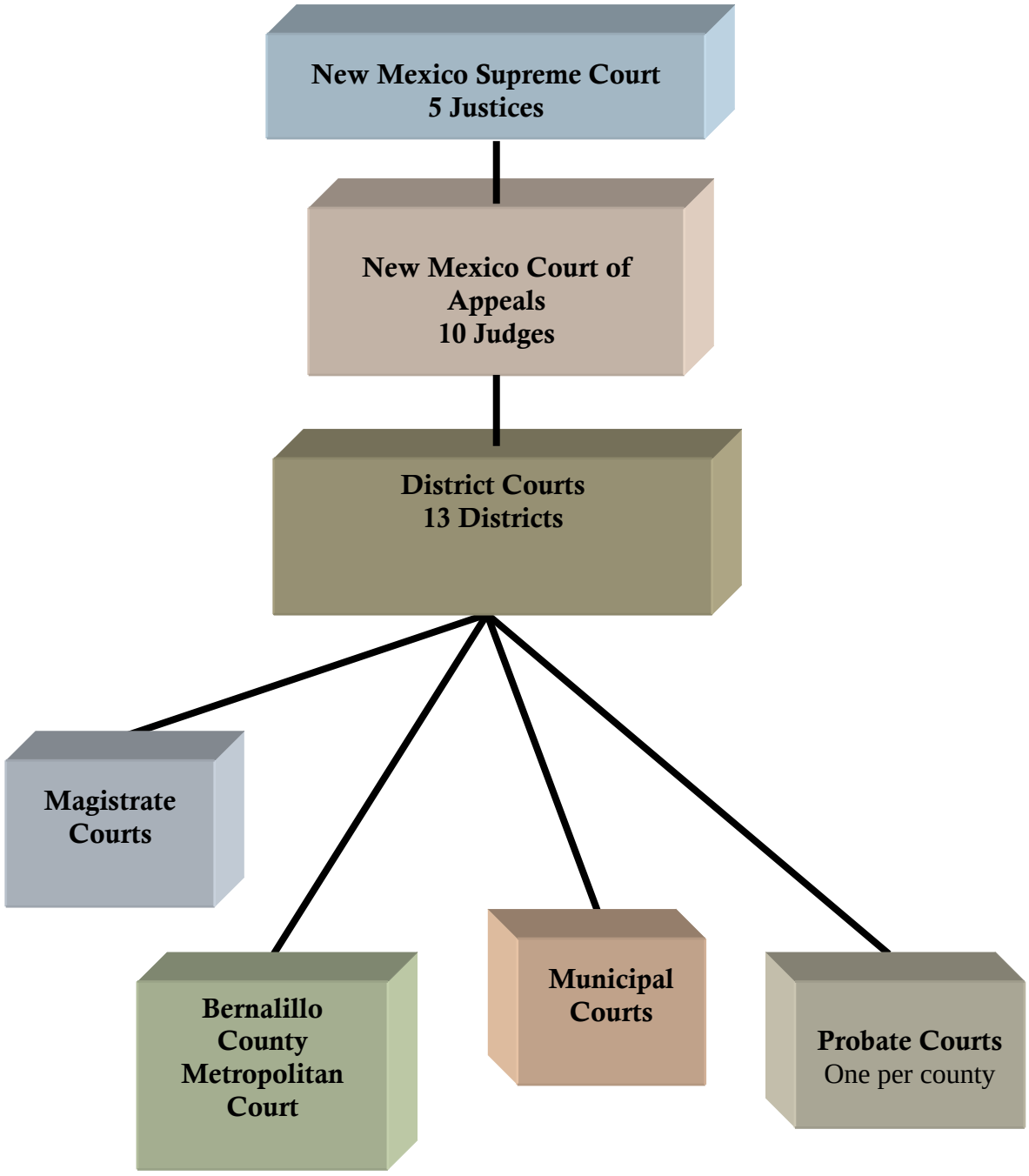
There are two appellate courts in New Mexico: the Court of Appeals and the Supreme Court. The Court of Appeals hears appeals of cases from the district court, and the Supreme Court hears appeals of cases from the Court of Appeals. There are a few exceptions to this rule. For example, if a defendant convicted in district court was sentenced to death or life imprisonment, the appeal would bypass the Court of Appeals and go directly to the New Mexico Supreme Court.

## 1.1.4 Appeals from Municipal to District Court

The district court is an appellate court for cases that are heard in the courts of limited jurisdiction. A defendant who is unhappy with a decision in municipal court can appeal to the district court, where the case would be heard *de novo*, meaning "anew." A whole new trial will be held in the district court. The reason these appeals are heard *de novo* is because there is no record or transcription made of trials in the municipal courts. This appeal to the district court is not the same kind of appeal discussed above, where the appellate court only reviews the record to ensure the law was followed. Instead, the district court holds a new trial in which witnesses can testify and exhibits can be introduced. In fact, new witnesses and new evidence can be introduced in this proceeding since it is treated as if the trial in municipal court had never taken place.

## 1.1.5 Court System Flow Chart

The following is a flow chart of the court system. The number of Supreme Court Justices and Court of Appeals Judges are indicated on the blocks. Because the number of other judges may fluctuate at times, the current number of judges for district, magistrate, and municipal court have not been included on the chart. There is one Probate Court per county.



# 1.2 Municipal Court Jurisdiction

The municipal court is a city/town/village court. It gets its authority from state law, but it is a part of the municipal government, not the county (as in magistrate court) or the state (as in district and appellate courts). As a part of municipal government, the jurisdiction of the municipal court is limited to offenses that violate municipal ordinances and that occur within municipal limits. §35-14-2.

## 1.2.1 Ordinances

The municipal court has authority to hear cases involving offenses for which the municipal government has adopted an ordinance. Specifically, the court has jurisdiction over criminal cases where the offense is a petty misdemeanor (up to 90 days imprisonment and/or a $500 fine, except for driving while intoxicated offenses which carry a more severe penalty). §3-17-1C. That is the limit of the court's jurisdiction.

- The municipal court has no jurisdiction to hear criminal cases involving misdemeanors (up to one year imprisonment and/or $1000 fine).
- The municipal court has no jurisdiction to hear criminal cases involving felonies (more than one year imprisonment and/or more than $1000 fine).
- The municipal court has no jurisdiction to hear civil cases, such as landlord-tenant disputes or contract disputes.
- The municipal court has no jurisdiction to hear cases involving violations of state law.

The governing body of the municipality (e.g., city council, city commission) has the authority to adopt ordinances that are not inconsistent with the laws of the state. A municipal ordinance may be stricter than state law, but may not be more lenient. An ordinance may be exactly the same as the state law on the same subject. For example, a municipality may adopt a law prohibiting possession of a small amount of marijuana exactly like the state law does.

The governing body also can adopt certain state laws by reference, for example the state motor vehicle code. In that case, the state laws are incorporated into, and become part of, the municipal ordinances and may be prosecuted in municipal court as long as they involve only petty misdemeanor offenses.

## 1.2.2 Effective Dates of Ordinances and Court Rules

No new or revised ordinance enacted by a municipality, law enacted by the legislature, or rule of procedure enacted for the courts, can affect the right or remedy of any party in a pending case. New and amended ordinances and court rules apply only to cases filed after the ordinance or

rule is effective. A case that is pending at the time an ordinance or rule becomes effective is governed by the ordinance or rule in effect at the time the case was filed.
Municipalities and the state legislature are prohibited from enacting *ex post facto* laws (after the fact) or bills of attainder (laws that applies to specifically named or identified individuals). An ordinance that makes it a criminal offense to perform an act which previously was not a criminal offense or that increases the punishment for an act applies only to offenses committed after the effective date of the ordinance.

The effective date of an ordinance should be specified in the ordinance itself or in another municipal ordinance that addresses effective dates generally. The effective date of a court rule is listed in the Supreme Court Order adopting the rule and at the end of the rule when it is published. In addition, new and amended court rules are published in the New Mexico State Bar Bulletin.

## 1.2.3 Campus Traffic Regulations

If there is a written agreement between the board of regents of a state educational institution located within the municipality and the governing body of the municipality, then the municipal court has jurisdiction over campus traffic regulations. All monies collected in fines for violations of these regulations must be turned over to the educational institution.

## 1.2.4 Search Warrants

A municipal judge may issue a search warrant where the evidence to be seized will be used to prosecute a violation of a municipal ordinance. Only the judge's handwritten signature may be on the search warrant.

## 1.2.5 Arrest and Bench Warrants

A municipal judge may issue arrest warrants for the appearance of defendants and bench warrants for violations of municipal court orders. Only the judge's handwritten signature may be on an arrest or bench warrant.

## 1.2.6 Subpoenas

A court clerk or municipal judge may issue subpoenas for the appearance of witnesses and the production of documents relevant to a case in municipal court.

## 1.2.7 Contempt

A municipal judge has the authority to punish for contempt of court.

### 1.2.8 Marriage Ceremonies

Municipal judges are authorized by state law to perform marriage ceremonies, as are all judges. §40-1-2. Because a municipal judge has jurisdiction only within the city limits, any marriage ceremony performed by the judge must be held within those boundaries. The judge may not ask for any money or other gratuity for performing a marriage ceremony, but may receive an unsolicited gratuity for performing a ceremony outside of normal business hours. Code of Judicial Conduct, Commentary to Canon 21-600(B).

Samples of marriage ceremonies are readily available, either in the court or from other judges. The judge is required to sign the marriage certificate upon completion of the ceremony. Two witnesses are required to be present for the ceremony and to sign the marriage certificate. The certificate must be returned to the county clerk after the ceremony has been performed. Either the court can mail it or the newlyweds can see that the certificate is returned.

## 1.3 Municipal Court Procedures

### 1.3.1 Court Rules

The Rules of Procedure for the Municipal Courts, adopted by the New Mexico Supreme Court, govern the procedures for enforcement of municipal ordinances in municipal courts. The rules are to be "liberally construed to secure the just, speedy and inexpensive determination of every municipal court action." Rule 8-101(B).

The municipal rules are found in Chapter 8 of the rules for the New Mexico courts, known as the "New Mexico Rules Annotated" or "NMRA." The municipal rules consist of eight major subdivisions, called "articles," and numerous subdivisions, which identify a specific rule. The eight articles are:

1. General Provisions.
2. Initiation of Proceedings.
3. Pleadings and Motions.
4. Release Provisions.
5. Arraignment and Preparation for Trial.
6. Trials.
7. Judgment and Appeal.
8. Special Proceedings.

Officially, the rules are cited by a reference to the article and specific rule number, then NMRA (New Mexico Rules Annotated) and the year, e.g. Rule 8-101 NMRA 2000. In this benchbook, an informal citation style is used, without reference to "NMRA."

Rule 8-103(A) authorizes municipal courts to make and amend their own rules of practice, as long as they are consistent with law and the NMRA. The local rules can relate to office hours and procedures, the performance of clerical duties by clerical assistants, and other procedures for just, speedy and inexpensive resolution of cases. To be effective, local rules

and amendments to those rules must be signed by the judge, filed with the clerk of the court and made readily available to the public.

Forms used in municipal court must be substantially in the form approved by the New Mexico Supreme Court. Rule 8-103(B). A number of these forms are located in Chapter 9 of the NMRA, called "Criminal Forms."

## 1.3.2 Court Conduct

Judicial proceedings in municipal court "should be conducted with fitting dignity and decorum, in a manner conducive to undisturbed deliberation, indicative of their importance to the people and to the litigants and in an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice." Rule 8-102(A). In other words, the court and the persons in the court should act respectful towards each other and should not engage in disruptive conduct.

## 1.3.3 Time Periods

Rule 8-104 describes the time periods for complying with the rules (for example, filing motions). Some of the provisions are:

- Calculation: The day of the act or event from which a time period starts to run is not counted. The last day of the time period is counted (except for weekends and holidays or a day on which weather or other conditions have made the office of the court clerk inaccessible).

- Extension before the period ends: The court can extend the time period if a request based on cause is made before the period ends. The request can be made with or without motion or notice.

- Extension after the period ends: The court can extend the time period if a request based on cause is made by motion after the time period ends. The court cannot extend the expired time period for commencing a trial (Rule 8-506) or for appealing a case (Rule 8-703).

- Motions and affidavits: Written motions (other than those which can be heard *ex parte*) and notice of the hearing on the motion must be served on the opposing party at least five days before the hearing, unless the rules provide otherwise or the court orders otherwise. Any accompanying affidavit must be served with the motion, and any opposing affidavits must be served at least one day before the hearing, unless the court orders otherwise.

- Service by mail: When notice or documents are served by mail, three additional days are added to the time period by which the person served must respond or act.

For example, a defendant wishing to appeal the court's judgment must file a notice of appeal within fifteen days after entry of the judgment and sentence. Rule 8-702. If the judgment is entered on Friday, May 21, 2004, the court begins counting the fifteen-day period on Saturday, May 22d. The fifteenth day then falls on Saturday, June 5. Because the fifteenth day is a Saturday, the defendant has until the end of business on Monday, June 7 to file a notice of appeal.

## 1.3.4 Attorney Representation

An attorney who represents a defendant must file a written entry of appearance in the case, unless the court appointed the attorney by written order. The filing of any pleading signed by an attorney represents an entry of appearance. With the court's permission, an attorney may enter an appearance orally with the court, provided a written entry of appearance is filed within three days. Rule 8-107(A), (B).

An attorney who has entered an appearance or been appointed by the court must continue to represent the defendant until relieved by the court. Rule 8-107(C).

## 1.3.5 Defendant's Presence

The defendant must be present at the arraignment and every stage of the trial, including sentencing, except as otherwise specified in the rules. Rule 8-108(A).

Exceptions. The defendant does not need to be present in the following situations:

- With the defendant's written consent, the court may permit the arraignment, plea, trial and sentencing in the defendant's absence.
- A proceeding (including trial) can continue without the defendant, if:
    - The defendant was initially present at the proceeding; and
    - The defendant then either (1) is voluntarily absent from the proceeding, or (2) engages in conduct that justifies excluding the defendant from the proceeding.
- If the defendant is a corporation, it can appear by its attorney for all purposes.

Rule 8-108(B), (C).

## 1.3.6 Audio-Visual Proceedings

Audio, and audio-visual, communications are governed by Rule 8-109A. The court may permit a defendant or attorneys to appear through the use of simultaneous audio or audio-visual communication when it will legitimately serve justice. One of the considerations in making this determination is the economic needs of the parties. Rule 8-109A(A).

When an appearance is conducted through audio or audio-visual communication:

- Beforehand, the defendant must file a written request to appear in this manner. Form 9-104A
- The court must conduct the proceeding in a place open to the public.
- The court may require the requesting party to pay the expense of the audio or audio-visual communication.

Under Rule 8-109A(B), the court can require the defendant to appear through the use of a simultaneous audio-visual communication for:

- Arraignment, initial appearance or bail hearing.
- Sentencing, unless the court needs to take testimony or a statement from someone other than the defendant.

When an audio-visual proceeding is required under Rule 8-109A(B), all of the following conditions must be met in accordance with Rule 8-109A(C):

- The defendant and his or her attorney, if any, must be able to communicate privately without being recorded.
- The judge, defendant and his or her attorney, if any, must be able to communicate and see each other through a two-way audio-visual communication between the court and the place of custody or confinement.
- The proceedings must be conducted in a place open to the public using audio-visual equipment that will allow the public to simultaneously see and hear the proceedings at the same time as the judge.

Rule 8-109A does not establish a right for anyone held in custody to appear by two-way audio-visual communication, nor does it prohibit other audio or audio-visual appearances as long as the person held in custody or confinement waives any right to be physically present for a proceeding. Rule 8-109A(D).

## 1.3.7 Recording of Proceedings

Municipal court is not a court of record. No official recording or transcript is made of any proceeding in municipal court. A party or any person with a claim arising out of the same transaction or occurrence giving rise to the municipal court proceeding and who wants to record or in any way transcribe the proceedings may do so only with prior approval of the judge. The party or person bears the expense of the recording or transcription and must make a copy of it available to all other parties in the proceeding. Rule 8-601(D). A record of the

testimony in municipal court may only be used in municipal court if it is admissible under the Rules of Evidence. Rule 8-601(E).

In municipal court, taking photographs in the courtroom during judicial proceedings or recess, or recording or transmitting the proceedings for broadcasting by radio or television, is not permitted, except under the limited provisions of Rule 8-601. Rule 8-102(A).

Nonjudicial proceedings, such as weddings and other ceremonies, may be photographed or broadcast from the courtroom with the judge's permission and supervision. Rule 8-102(B).

### 1.3.8 Use of Interpreters

Occasionally, individuals in municipal court will not speak or understand English. Or, they may not be comfortable enough with English to be able to understand the proceedings. In these cases, an interpreter will be necessary. Since municipal courts are not courts of record, it is not required that the interpreter be certified by the state. Oftentimes, a court employee or other city employee will be called upon to provide interpretation and translation.

The judge should not act as his or her own interpreter even if fluent in the language. Because court proceedings are open to the public it is imperative that there be simultaneous interpretation so that all in attendance can hear. If the judge is conversing with the individual in a language other than English this requirement of full disclosure to the public may be compromised.

## 1.4 Municipal Judge

### 1.4.1 Qualifications

Municipal judges are elected officials. To be elected a municipal judge, the candidate must be a qualified elector of the municipality within which he or she is running. A qualified elector is a United States citizen eighteen years of age or older who has resided in the municipality for at least thirty days prior to the election and who is registered to vote in the municipality. N.M. Const. Art. VII, Sec. 1; §3-1-2(K). A municipal judge does not need to be an attorney.

### 1.4.2 Term of Office

The municipal judge is elected for a term of four years at the regular municipal election. Even if the election is to fill a vacancy in the office, regardless of the expiration date of the original judge's term of office, the newly elected judge serves for a four year term. For information regarding the election process, see the city clerk.

### 1.4.3 Oath of Office

A municipal judge elected at the regular municipal election takes the oath of office along with any other officials elected at that time. The oath must be taken on the sixth day following the election, unless the judge is unable to be sworn in at that time. In that case, the judge can file an affidavit and take the oath at a later date. If the oath of office is not taken within the required time and no affidavit has been filed, the governing body must declare the office vacant and appoint someone to fill the vacancy according to law. Once the oath of office is taken, the judge has officially taken office. §3-8-33. Any questions regarding the oath of office should be directed to the city clerk.

### 1.4.4 Bond

The governing body may require that the municipal judge post bond for the faithful performance of duties, but the bond must be paid by the municipality. If the judge fails to qualify for the bond, the governing body may declare the office vacant and appoint someone to fill the vacancy according to law. The amount of the bond is set by ordinance of the municipality. §3-10-2.

### 1.4.5 Salary

The salary, if any, of the municipal judge is provided by ordinance. There is no requirement that the judge receive a salary. The ordinance may set the compensation on any basis deemed appropriate by the governing body, except that it may not be based on the number of convictions occurring in the court. Once a salary is set, it may not be increased or decreased during the judge's current term of office unless additional non-judicial duties are imposed on the office of the judge. An increase in hours due to a larger caseload is not considered an increase in duties. However, a governing body may provide a salary for the judge during the current term of office if the judge had previously not received a salary. §35-14-3.

### 1.4.6 Training

All municipal judges must successfully complete an annual training as a condition of remaining in office. This training is conducted by the New Mexico Judicial Education Center. Failure to complete the training may result in removal from office. A judge can seek an exemption from the training by submitting a written request to the New Mexico Supreme Court. §35-14-10.

Newly elected judges must attend a week-long New Judge's Orientation conducted by the Judicial Education Center. This training is held the week following the municipal election, after the judge has been sworn in but prior to taking the bench. Newly elected judges will be contacted by the Judicial Education Center with details.

Judges who are appointed to fill vacancies should contact the Judicial Education Center and request videotapes of the New Judge's Orientation as soon as possible after appointment.

These tapes must be viewed in their entirety for the new judge to fulfill the training requirement and be eligible to receive a salary.

Although annual training is not required for temporary or alternate judges, it is recommended that any person regularly serving as a temporary or alternate judge attend the training or view the videotapes.

## 1.4.7 Frequency of Court Sessions

There is no law requiring a judge to hold court for a certain amount of time each day or week or even month. Judges must, however, hold court frequently enough that arraignments are held in a timely manner and cases are heard within the time specified by Municipal Court Rules. It is recommended that a judge examine the caseload of the court, look at past court practices and develop a schedule for when court will be open. Court hours should include time for people to schedule hearings and take care of payments with the court clerks, in addition to actual trial time. A judge may set specific court hours for trials with attorneys and those without. Additional sessions may need to be scheduled if people are waiting too long for their cases to be heard.

## 1.4.8 Vacancy in Office

A vacancy in office is created when the municipal judge is removed from office by the New Mexico Supreme Court, resigns, is unable to continue to serve due to incapacity, or dies. When one of these occurs, it is up to the governing body to fill the vacancy. The process of filling the vacancy should be contained in a city ordinance. The person selected to fill the vacancy serves until the next regular municipal election regardless of how much time was left on the original judge's term of office.

## 1.4.9 Temporary or Alternate Judge

There are times when a municipal judge is temporarily unable to serve. This can be due to illness or vacation, or because the judge has a conflict and must disqualify him or herself from hearing a case. Any registered voter of the municipality may be appointed to fill the temporary vacancy. A temporary judge is authorized to hear and determine all cases that the municipal judge would hear. A temporary judge has all other powers of the municipal judge during the time the regular judge is absent.

The governing body may establish a procedure by ordinance for appointment of a temporary judge. §35-14-5. If there is no ordinance or other set procedure, the municipal judge or some other person may certify by letter to the district court that a temporary judge needs to be appointed. The district court will then make the appointment. Rule 8-105.

Some municipalities have a "permanent" alternate judge. This judge serves a specified term and acts at any time during the regular judge's absence. Appointing an alternate judge saves the governing body from having to appoint a temporary judge each time the judge is absent.

Having an alternate judge available keeps the court running smoothly in the event of an unexpected absence by the regular judge.

The temporary or alternate judge must be a qualified elector of the municipality, the same as the elected municipal judge. The governing body may, by ordinance, impose additional requirements. It is probably good practice to require that the temporary or alternate judge have at least the same qualifications as the elected judge and either attend training or review videos supplied by the Judicial Education Center.

### 1.4.10 Removal from Office

Although the state statutes provide for the removal of any elected official either by recall (if allowed by the municipal government) or by the district court, the New Mexico Supreme Court has determined that only it can remove a municipal judge from office. The Supreme Court may remove a judge for unlawful conduct, failure to perform the duties of office, or any other violation of the Code of Judicial Conduct. No other method of removal of judges is authorized. The other elected officials of the municipality (e.g., mayor, councilors, trustees, commissioners) have no authority to remove a municipal judge.

## 1.5 Municipal Court Clerks

### 1.5.1. Qualifications

Municipal court clerk qualifications are determined by the municipal court's personnel rules or, in some cases, by the municipality's personnel rules. In all cases the court clerk should be honest, reliable, and motivated.

### 1.5.2 Court Clerk Responsibility

The clerk of the municipal court is charged with the administrative and clerical functions of the municipal court. The court clerk is responsible for the supervision of the processing of all paperwork in the court and the establishment of office procedures.

### 1.5.3 Role of the Court Clerk

- The court clerk is often the first contact a person has with the court, prior to an individual seeing the judge. The court clerk frequently deals with police officers, attorneys, and municipal officials who are in municipal court to handle cases.

- The court clerk maintains the case files, files papers for the judges, and performs a number of other functions related to the work of the court.

- The court clerk is not a judge, and must not cross over into areas which are the sole responsibility of the judge.

## 1.5.4 General Duties of a Court Clerk

- Processing and retention administrator of all municipal court documents.

  The court clerk records, initiates, and files documents in accordance with New Mexico Statutes, municipal ordinances, and Supreme Court Rules for the court. Documents must always be processed in an accurate and timely manner.

- Court clerk to record orders.

  The court clerk is responsible for maintaining a record of judgments, rules, orders, and other proceedings of the court.

- Safeguarding court property.

  The court clerk shall preserve all property belonging to the office.

- Power to perform notarial acts.

  A judge, court clerk, or deputy clerk may perform notarial acts as defined in §4-14-3A(2). Rule 8-601C.

  > A "notarial act" means any act that a notary public of this state is authorized to perform and includes taking an acknowledgment, administering an oath or affirmation, taking a verification upon oath or affirmation, witnessing or attesting a signature, certifying or attesting a copy, and noting a protest of a negotiable instrument. §14-14-1A

- Administration of oaths.

  When a person is required to take an oath, the individual administering the oath shall use the form of oath appropriate for the occasion (for example, an Oath of Office).

  The person swearing shall, with right hand uplifted, follow the words as administered.

  The clerk of the municipality may have sample scripts appropriate for the occasion.

- Receipting of money.

  The court clerk of the municipal court is responsible for the receiving and receipting of all filing fees, fines, bonds, corrections fees, lab fees, court automation fee, judicial education fee, and other fees and costs authorized. All

receipts shall be submitted to the proper entities within time frames as provided by law.

- Public records.

  The court clerk is responsible for providing information on court matters to the public in accordance with law §14-2-1 through 12.

- Self-represented litigants.

  Self-represented litigants will have many questions for the court staff and judge. Rule 23-113 defines self-represented litigants and explains what information may be provided to them. Court staff may provide procedural advice but may not give legal advice.

  Use the following guidelines taken from Rule 23-113 to help determine what information a court clerk may or may not provide to court customers:

  **Court staff can provide:**

  - A list of attorneys within the area without specifically recommending one.
  - Information about available legal services that may be free or at a reduced cost without specifically recommending one.
  - Information on available statutory or court-approved forms, pleadings, pleadings and instructions without recommending a specific course of action.
  - Answer questions about the information requested on forms without providing specific words for the form.
  - Definitions of legal terminology without identifying specific definitions are applicable.
  - Provide references to statutes and rules without identifying applicable references.
  - Provide public docket information that has not been sequestered.
  - Provide general information concerning court policies, case processes, procedures, and court schedules.
  - Information on local court rules and administrative orders.

- Information on proper conduct in the court and appropriate apparel
- Information on community resources without specifying one in particular.

**Court staff cannot:**

- Interpret the meaning or application of legal definitions, statutes, or rules.
- Provide information that is confidential.
- Create documents or fill in the blanks on forms for the litigant.
- Perform legal research for litigants.
- Explain court orders or decisions.
- Tell the litigant what to say in court.
- Provide ex parte communications to the judge in behalf of the litigant.
- Advise the litigant whether or not to pursue a case in court.
- Predict the outcome of a case.
- Advise the litigant what to do.

- Records retention and disposition.

  The Records Retention and Disposition Schedule (RRDS) has been developed as a guideline for municipalities in their records and information management programs per §14-3-8 which permits the state records administrator to advise and assist municipal officials in the formulation of programs for the disposition of public records maintained in municipal offices. This RRDS does not have the effect of law until it is incorporated by each municipality into its records and information management program through municipal resolution. Before incorporation of the RRDS, it may be modified to meet the particular needs of the municipality.

- Authorized records shall be destroyed in one of four ways:
  - Witnessed incineration;
  - Witnessed dump site burial;
  - Witnessed shredding; or
  - Recycling through bonded recycler.

- The court is responsible for verification of destruction of the documents. Destruction can be accomplished through the following methods:

    - If the destruction of the documents is delegated to a state, county, or municipal employee, the employee should provide a Statement of Destruction that contains their name, title and signature.

    - If destruction of the documents is delegated to a private company, the court should obtain documentation of the following: a) the company is a bonded destruction unit; and b) Statement of Destruction is obtained containing the company's name and the signature of the person destroying the documents.

### 1.5.5 Training

While there are not any training requirements for court staff, each staff member should be willing and available to attend any training offered throughout the year. The Judicial Education Center provides a yearly program for court staff, many local community colleges provide skills important to work in the court, and many national court organizations provide appropriate court training.

## 1.6 Ethics

### 1.6.1 Code of Judicial Conduct

The Code of Judicial Conduct governs the conduct of all judges, including municipal judges. The Code has many rules that a judge must follow when running for office and once elected. It provides standards for maintaining the integrity of the court system. It explains when judges must disqualify themselves from hearing cases and how judges must avoid conflicts between their private business activities and their official judicial duties.

The Code of Judicial Conduct is found in Chapter 21 of the rules for the New Mexico courts. It consists of nine rules, sometimes called "canons," which contain specific details about the subject matter. The website address is available in the Appendices section of this manual Tab 13. The rules are followed by commentary that helps explain how they apply.

The preamble to the Code states: "An independent and honorable judiciary is indispensable to justice in our society. The provisions of this Code should be construed and applied to further that objective." After the definitions in Rule 21-001, the specific rules are:

21-100. A judge shall uphold the integrity and independence of the judiciary.
21-200. A judge shall avoid impropriety and the appearance of impropriety in all the judge's activities.
21-300. A judge shall perform the duties of office impartially and diligently.
21-400. Disqualification.

21-500. A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.
21-600. Reporting quasi-judicial and extra-judicial activities and compensation.
21-700. Elections and political activity.
21-800. A judge shall refrain from campaign fund-raising activity which has the appearance of impropriety.
21-900. Violations.
21-901. Applicability.

According to Rule 21-901, the Code applies to all judges and candidates for judges in New Mexico, unless a specific exception applies. There are several exceptions for full-time municipal judges:

- A full-time municipal judge is not required to comply with Paragraph B (7)(b) of Rule 21-300, which requires that a judge give notice to the parties when the judge obtains advice from a disinterested expert on the law.

- A full-time municipal judge is not required to comply with Paragraph E of Rule 21-500, which addresses a judge's fiduciary activities.

There are also several exceptions for part-time municipal judges. See Rule 21-901(C) for the details.

It is important to note that while a municipal judge may not be required to comply with a certain part of the Code of Judicial Conduct, there is nothing prohibiting the judge from complying. A municipal judge may decide, as a matter of personal or professional ethics, to comply with all of the requirements of the Code, not just the parts that are mandatory.

## 1.6.2 Court Staff Code of Conduct

While New Mexico has not established a court staff code of conduct there are several available from state or national organizations. A Court Staff Code of Conduct governs the conduct of all court staff. It provides standards for maintaining the integrity of the court system. It identifies areas in which court staff should be careful. The National Association of Court Managers has developed an excellent resource entitled the *Model Code of Conduct for Court Professionals.*

The preamble to the code states: Service to the judicial branch is a public trust. The foundation of our society rests, in part, on the ability of the citizens to wisely judge the value of our courts and to acknowledge the integrity of the judiciary as a co-equal branch of our government. Court professionals, who work for the judicial branch and are faithful to these values, must be accountable to that trust. This code is therefore a personal and professional pledge to that trust and to those values. The specific cannons are:

Canon 1: Avoiding Impropriety and the Appearance of Impropriety in All Activities

Canon 2: Performing the Duties of Position Impartially and Diligently

Canon 3: Conducting Outside Activities to Minimize the Risk of Conflict with Official Position

Canon 4: Refraining from Inappropriate Political Activity

## 1.6.3 Oversight of the Courts

The New Mexico Supreme Court has superintending control over all the courts in New Mexico. This means that the Supreme Court has oversight and management power over municipal courts. The Supreme Court has the authority to issue directives to municipal courts and oversee their details of operation.

- Oversight of the judge.

  The Judicial Standards Commission reviews complaints against judges and recommends sanctions to the Supreme Court, which makes the final determination. Only the Supreme Court can remove a judge from office for misconduct.

- Oversight of court staff.

  The judge in the municipal court is ultimately held responsible for the actions of court staff. The judge may employ a court administrator who handles the day-to-day human resource responsibilities. Depending on the size of court and whether or not the court has its own personnel rules it may be the court administrator, judge, or both who has responsibility for disciplining court staff.

# CHAPTER 2

# Procedures Before Trial

This chapter covers:

- Criminal actions.
- Petty misdemeanor procedural requirements, including jurisdiction, venue, time limits and competency to stand trial.
- Initiation of a case, including criminal complaint, citation, summons, arrest, preliminary rights and probable cause determination.
- Arraignment, including explanation of rights, legal representation and entry of plea.
- Dismissal, including voluntary dismissal and dismissal for failure to prosecute.
- Other preliminary matters, including discovery, pretrial conferences, motions, and filing and service by fax or electronic transmission.
- Excusal and recusal of judges, including grounds and procedures for disqualification.

## 2.1 Criminal Actions

A "criminal action" is a court proceeding involving a person charged with committing a crime. A crime is an act or omission forbidden by law or ordinance for which, upon conviction, a sentence of imprisonment and/or a fine is authorized. §30-1-4.

- The criminal actions that are under the jurisdiction of municipal court are petty misdemeanors. These violations include traffic offenses, DWI offenses, code enforcement violations, animal-related violations, or violation of municipal ordinances that provide for criminal punishment. A judge and court clerk should understand the types of criminal actions and the procedures for each.
- The municipality brings a criminal action against the person charged with committing a crime.

- Depending on the nature of the crime, the person against whom the criminal action is brought may be an individual or a business. Most criminal actions involve individuals.

## 2.2 Petty Misdemeanor Procedural Requirements

### 2.2.1 Petty Misdemeanor under Municipal Ordinance

According to §3-17-1 a petty misdemeanor may be prosecuted in municipal court if it is punishable by:

- Imprisonment in the city or county jail for 90 days or less, and/or
- Payment of a fine up to $500.

- Note that penalties for driving while intoxicated offenses exceed those listed above. For a full discussion, see The New Mexico DWI Benchbook, published by the Judicial Education Center.

### 2.2.2 Jurisdiction

The municipal courts have jurisdiction in all petty misdemeanor offenses under ordinances legally adopted by the governing body of the municipality. §35-14-2.

### 2.2.3 Venue

Venue is the place where the charges are brought and the trial is held. A case will be heard in municipal court if the offense was committed within the municipal boundaries and is a violation of a municipal ordinance.

### 2.2.4 Time Limits

The time limit for bringing a criminal action (filing a criminal complaint) in municipal court is within one year from the time the crime was committed. §35-15-5. This is called a statute of limitations, which sets the time limit for filing charges. The time limit for bringing someone to trial once charges have been filed is addressed later in this chapter.

### 2.2.5 Determination of Competency

A person is competent to stand trial if he satisfies all of the following requirements:

- Understands the nature and significance of the criminal proceedings against him.

- Has a factual understanding of the criminal charges.

- Is able to assist his attorney in his defense.

In municipal court, the issue of a defendant's competency to stand trial may be raised by motion or upon the judge's own motion at any stage of the criminal proceedings. If that happens, the case must be transferred to the district court for further proceedings pursuant to the Rules of Criminal Procedure for District Courts. Rule 8-507.

## 2.3 Initiation of a Case

### 2.3.1 Complaints and Citation

Under Rule 8-201, a case in municipal court begins by filing one of the following documents:

- Criminal complaint: This is a signed statement charging a person with violating a municipal ordinance. It contains the facts of the violation, the common name of the offense that is charged, and the specific section number of the ordinance that was violated. See Criminal Form 9-202, Criminal Complaint.
    - Complaints can be filed by municipal police officers or the city attorney.
    - Complaints can only contain charges that are within the jurisdiction of the municipal court.
    - If there is more than one defendant, a separate complaint must be filed for each.
- Criminal citation: This is a signed statement citing a person for violating a municipal ordinance and is sometimes called a non-traffic citation. It contains the name and address of the person, the specific offense charged, the specific section number of the ordinance that was violated, and the time and place for the person to appear in court. Rule 8-201(A)(3).
    - The citation is issued by an official authorized by law to do so, for example zoning violations are typically cited on criminal citations.
    - A copy of the citation is given to the person cited. The original must be filed in municipal court as soon as practical.
    - Unless the person requests an earlier date, the time specified in the citation for the person to appear in court must be at least three days after the citation is issued.
- Traffic citation: (For a full discussion, see the New Mexico Traffic Citations Manual, published by the Judicial Education Center.) This is a standardized form

known as the "uniform traffic citation" that is used statewide for enforcement of motor vehicle offenses. The content of this form is set by the Highway and Transportation Department in accordance with state law. §66-8-128. The form contains spaces for details about the person cited, the vehicle involved, the conditions at the time of the violation, the specific offense charged, and the police officer's signature. The form also contains two options: (1) a notice for the person to appear in court; or (2) a choice to admit guilt, sign the form and pay a fine known as a "penalty assessment" without having to appear in court. §66-8-128, §66-8-117. Rule 8-201(A)(2).

- The uniform traffic citation is issued by either a state or local traffic enforcement officer pursuant to section 66-8-130.

- A copy of the uniform traffic citation is given to the person cited. The citation copy thus serves as a summons. The original must be filed in municipal court as soon as practical.

The procedures for filing the criminal complaint or citation or uniform traffic citation and docketing (scheduling) the action are the same in all criminal actions.

If a person is arrested without a warrant, a copy of the complaint is given to him or her prior to transfer to a detention facility. If necessary, the complaint may be placed with the individual's personal belongings. There is no requirement that the complaint be sworn before a notary or judicial officer prior to being given to the person.

## 2.3.2 Case Files

- Receiving a criminal complaint or citation. A police officer will submit the criminal complaint or citation to the court. The clerk will then create a case file for the document. It is common practice for courts to file stamp (stamp the date and possibly time) on the complaint and other documents filed with the court in reference to the case.

- Docket number. Each complaint or citation submitted to the court should have a docket number. Each docket number should be distinct. This number may be obtained in one of two ways:
  - Automatic numbering through the computer case management system. (This is the most common process)
  - Manual assignment by the clerk using a docketing system developed by the court. (This is an older system which has been replaced with the computerized assignment in most courts.)

- Maintaining files. Each court should adopt an organized system for maintaining files (for example: numeric, alphabetic, or color-coded.) The system should provide easy access for all users. The court should also decide whether the

contents will be kept loose or fastened to the folder. There should also be a determination of how the contents will be filed in the folder (newest on top or on bottom) and should be consistent in each file.

- Search warrant procedures. Because not all search warrants result in a criminal complaint, a separate case file is not necessary for each search warrant. The clerk may create a special case file specifically for search warrants and keep multiple years in that file or the clerk may create a special file each fiscal year. They should be filed in a reasonable order such as by last name or date of issuance. If a criminal complaint is filed based on the search, the search warrant and accompanying documents should be moved to the defendant's case file.

  If a search warrant does not result in a criminal complaint being filed the court should retain the file until the time limits identified in the retention schedule are met.

## 2.3.3 Criminal Summons

The judge may have the court clerk prepare a criminal summons for criminal actions within court jurisdiction. Rule 8-203. The criminal summons orders the defendant to appear before the judge at a stated time and place; no arrest of the defendant is made. Form 9-208

Service of a summons must be by mail unless the court directs by local rule that personal service be made. Rule 8-204. The summons and complaint are served together. An original and multiple copies of the summons are prepared (one copy each for the court and the prosecution).

- The original summons is personally served on or mailed to the defendant along with the original complaint. The summons must contain the name of the court and city in which it is filed, the docket number of the case and 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, prosecutor, or private citizen filing the complaint.

- Service must be made at least 10 days before the defendant is required to appear. If service is made by mail, an additional three days are added. Service by mail is complete upon mailing.

- Following personal service, the person making service completes the certificate of service and returns the original and a copy to the court.

- The court retains a copy of the complaint, summons and certificate of service in the defendant's case file.

## 2.3.4 Arrest Without a Warrant

In all municipal court cases, if the defendant is arrested without a warrant, a criminal complaint must be prepared and given to the defendant prior to transferring the defendant to the custody of the detention facility. Rule 8-201(E). If the defendant is in custody, the complaint should be filed with the municipal court at the time it is given to the defendant. If the court is not open at that time and the defendant remains in custody, the complaint must be filed the next business day. If the defendant is not in custody the next business day, the complaint is to be filed with the court as soon as practicable.

An officer may make a warrantless arrest for a petty misdemeanor only if the officer has probable cause to believe that the suspect is committing a misdemeanor in the officer's presence; that the suspect was present at the scene of a motor vehicle accident; or that the suspect is charged with a crime in another jurisdiction as further explained in §66-8-125.

## 2.3.5 Preliminary Rights

The defendant has a number of rights prior to arraignment or first appearance. These preliminary rights include:

- Telephone calls. The statutory right to three telephone calls beginning no later than 20 minutes after detention. §31-1-5(A).

- Copy of criminal complaint. In warrantless arrest cases, the defendant has the right to be given a copy of the criminal complaint prior to transfer to a detention facility. The right to be given a copy of the complaint is the same right as provided by statute for those accused of motor vehicle violations. Under §66-8-123(A), the arresting officer must give the defendant a copy of a traffic citation.

  The rules requiring that a copy of the criminal complaint be provided to a defendant arrested without a warrant prior to being taken to jail were adopted to ensure constitutional rights are protected. Article 2, Section 10 of the New Mexico Constitution requires a "written showing of probable cause" for the arrest of a person. A defendant who has been arrested without a warrant has a federal constitutional right to a prompt probable cause determination by a judge. Requiring a written criminal complaint at the time of arrest makes it possible to satisfy this constitutional requirement and avoid delays in making a judicial probable cause determination. A criminal complaint no longer must be sworn to before a notary or judicial officer before it is filed with the court. There is no absolute requirement that a copy of a criminal complaint be given to a defendant who, because of drugs, alcohol or rage, is unable to read and understand the charges. Rather, it is a better practice to place the complaint with other belongings of the defendant until such time as the defendant can understand the nature of the charges.

  There is no precise definition as to the point in time at which a defendant is deemed to have been transferred to the custody of a detention facility. Nothing in court rules prevents the police from temporarily detaining a defendant in a

detention facility pending completion of preliminary police investigatory procedures as long as the police have not transferred jurisdiction over the defendant to the detention facility. The police, however, must be free to release the defendant if charges are not filed after this preliminary investigation and screening.

- Failure to comply. 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. Delay in holding a probable cause determination is generally not grounds for voiding a conviction or dismissing the criminal proceedings. Failure to provide the defendant with access to a telephone within 20 minutes is generally not grounds for dismissing the charges. Unlike the 6-month trial rules, neither of these violations requires dismissal of the complaint. However, a municipal court may dismiss criminal charges for denial of the right to three phone calls, the right to a copy of the criminal complaint and the right to a prompt probable cause determination if all of the following conditions are met:

    - The case is within the jurisdiction of the court.
    - The court finds that the law enforcement officers acted in bad faith.
    - The denial of one or more of these rights resulted in prejudice to the defendant.

## 2.3.6 Probable Cause Determination

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. To satisfy this constitutional requirement, the judicial determination of probable cause must be prompt, although delay up to 48 hours may be constitutionally permissible. The burden is on the government to prove a delay beyond 48 hours is reasonable. Weekends and holidays are not to be considered as permissible excuses for delays beyond 48 hours.

The probable cause determination is non-adversarial and is usually held in the absence of the defendant and of counsel. A showing 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 witnesses might be useful for finding no probable cause. In other words, the judge must find that there was probable cause to arrest the defendant without a warrant.

If the complaint and any attached statements fail to make a written showing of probable cause, the police officer or prosecutor may file either an amended complaint or a separate "statement of probable cause" which sets forth sufficient facts to detain the defendant. Rule 8-202(B).

If the court finds that there is no probable cause to believe that the defendant has committed an offense, the court dismisses the complaint without prejudice and orders the release of the defendant. If the court finds probable cause that the defendant committed an offense, the court reviews the conditions of release. If no conditions of release have been set and the offense is a bailable offense, the court sets bail. The court's finding of probable cause must be in writing. Rule 8-202.

### 2.3.7 Arrest Warrant

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 8-203(B). If the defendant is arrested pursuant to a warrant, an additional probable cause determination is not necessary after arrest.

If the defendant fails to appear in person, or by counsel when it is allowed by statute, at the time and place specified in the summons, the judge may issue a type of arrest warrant known as a "bench warrant." Rule 8-206.

Note: Only the judge is authorized to sign any type of warrant.

## 2.4 Arraignment

### 2.4.1 Definition and Waiver of Arraignment

The arraignment is the proceeding at which the defendant is brought before the judge for the first time after arrest or in response to a criminal summons. An arraignment may be waived by the defendant filing a written plea of not guilty no later than 48 hours before the arraignment. Rule 8-501.

### 2.4.2 Explanation of Rights

(For examples of how to do an arraignment see the scripts and checklists section of this Manual.) At the arraignment of the defendant, the judge must inform the defendant of all the following:

- The offense charged.
- The maximum penalty and any mandatory minimum penalty provided by law for the offense charged. If a specific penalty is not provided, the defendant is informed of the penalty for a petty misdemeanor, that is, 90 days in jail and/or a five hundred dollar fine.

- The right to bail, if the person was arrested and is still in custody.

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

- 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.

- The right to the assistance of counsel at every stage of the proceedings, if a jail sentence is being considered by the judge.

- The right to representation by an attorney at the municipality's expense, if the defendant is an indigent and a jail sentence is being considered by the judge.

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

- The right to testify at trial, but if the right is exercised the defendant is subject to cross-examination.

- That if defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if defendant is represented by an attorney, the court shall determine that defendant has been advised of those consequences by his or her attorney.

The court may allow the defendant reasonable time and the opportunity to make telephone calls and consult with an attorney.

### 2.4.3 Representation by Counsel

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

If the defendant is not represented by counsel, the judge may allow the defendant reasonable time and opportunity to make telephone calls to seek and consult with counsel before the proceedings continue.

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

If the judge decides that no imprisonment will be imposed, then all of the following apply:

- The defendant is not entitled to appointed counsel.

- No determination of indigency is necessary.

- No waiver of counsel is necessary, except in the case of driving while intoxicated.

If the judge decides to reserve the option to impose a sentence of imprisonment, then a determination of indigency is necessary. In such case, an indigent defendant is entitled to appointed counsel at the expense of the municipality.

The court clerk assists defendant in completion of "Eligibility Determination for Indigent Defense Services," Form 9-403. The clerk affixes court seal or notarizes defendant's signature verifying the identity of the defendant. §31-15-12

If the judge approves appointed counsel for the defendant being the clerk prepares "Order of Appointment" and sends it to the attorney. Form 9-403A; §35-5-8

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. If counsel is waived, a written waiver should be obtained before the defendant is allowed to appear on his or her own behalf.

Some offenses, for example driving while intoxicated, provide for an enhanced penalty if a defendant is convicted a second or subsequent time for the same offense. If the defendant was sentenced to jail for the first conviction, even if the sentence was suspended, the penalty for the second conviction can be enhanced only if the defendant had been represented by counsel or had waived counsel in the first case. Therefore, a waiver of counsel must always be obtained from a non represented DWI defendant regardless of whether it is a first or subsequent offense. If the defendant chooses **not** to be represented by counsel, the judge or court clerk prepares a "Waiver of Counsel" form for the defendant to sign. Form 9-401A The judge also signs the form certifying that the form was signed by the defendant. §31-16-6

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. 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. The judge may not force a lawyer upon a criminal defendant when the defendant insists on conducting his or her own defense.

## 2.4.4 Entry of Plea

The defendant is required to plead to the complaint after receiving the explanation of rights and an opportunity to consult with counsel, if counsel is present, unless counsel is not required or is waived. Rules 8-302, 8-502.

If the defendant refuses to plead or stands mute, the judge enters a plea of not guilty for the defendant.

The plea must be one of the following:

- Not guilty.

- Not guilty by reason of insanity.

- *Nolo contendere* (no contest), if permitted by the judge. This plea has the same legal effect as a plea of guilty for purposes of the case before the court, but the plea may not be used against the defendant as an admission of guilt in any collateral proceeding (e.g., a civil lawsuit).

- Guilty.

**Not Guilty Plea**

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

At any point in the proceedings, the defendant may request to withdraw a not guilty plea and enter a guilty plea or, if permitted, a *nolo contendere* plea. In determining whether or not to accept the change of plea, the judge applies the standards of knowing and voluntariness discussed below.

**Insanity or Incompetency**

If the defendant pleads not guilty by reason of insanity, or if a question is raised about the competency of the defendant to stand trial, the judge must transfer the defendant to district court. Rule 8-507. The judge notes on the transcript of criminal proceedings that the case is being transferred to district court because the defendant has pled not guilty by reason of insanity to offense(s) within the municipal court jurisdiction or because the competency of the defendant was questioned by the judge.

The defendant may change a not guilty plea to not guilty by reason of insanity at any time before the beginning of trial. The defendant's competency may also be raised by the court's own motion at any time during the proceedings.

***Nolo Contendere* Plea**

If the defendant pleads *nolo contendere*, before accepting the plea the judge must be sure that the plea is voluntarily made, that the defendant realizes that the plea of *nolo contendre* will have the same effect as a guilty plea in municipal court, and that the defendant understands the consequences of the plea. The defendant should be personally questioned for these purposes using Form 9-406, even when represented by counsel.

**Guilty Plea**

Before accepting a guilty plea, the judge must make sure that the plea is voluntarily made, that the defendant realizes the consequences of the plea, and that there is a factual basis for the guilty plea. The defendant should be personally questioned for these purposes using Form 9-406, even when represented by counsel. The factual basis that is required for the

plea of guilty, but not for the plea of *nolo contendere*, may be established by simply asking the defendant: "What did you do that makes you believe you are guilty of this offense?" The answer the defendant gives should establish every element of the offense, including the criminal intent required.

### Voluntary Nature of Plea

In the case of a *nolo contendere* plea or a guilty plea, the judge should use a checklist to make sure the plea is voluntary and otherwise acceptable and proper. Criminal Form 9-406A (Guilty Plea Proceeding) should be used as a checklist.

For a plea of guilty or *nolo contendere* to be voluntary, it must be of the defendant's own free will, with a full understanding of all rights and possible consequences. The plea must not have been induced by threats or by promises. A plea agreement is not considered a promise that renders the plea involuntary. The judge shall address the defendant personally, in open court, and ask the defendant both of the following questions:

- Is your guilty plea (or plea of *nolo contendere*) voluntary and not the result of force or threats or promises apart from a plea agreement?

- Is your willingness to plead guilty (or *nolo contendere*) the result of prior discussions between the attorney for the city and either you or your attorney?

### Plea Agreement

A plea agreement should be in writing and presented to the judge for approval. The judge must not take any part in the plea discussions or negotiations. The judge’s task is to approve or disapprove the agreement negotiated by the parties. If approved, the judge signs the plea agreement. The plea agreement is filed in the court file.

If the judge rejects the prosecutor's recommendations for reduced or dismissed charges or sentencing, if any, that have been accepted by the defendant, the defendant must be afforded the opportunity to withdraw a plea of guilty or no contest.

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 is not an abuse of discretion. 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 *nolo contendere*.

After a plea of guilty or *nolo contendere* has been accepted, the judge may order a pre-sentence investigation and report.

If the judge does not accept a plea of guilty or *nolo contendere*, a plea of not guilty is entered and the case is set for trial as soon as possible.

If a plea agreement is reached which is confirmed in writing on the standard Plea and Disposition Agreement form (Form 9-408A), the defendant waives certain rights. This includes the right to appeal unless constitutional invalidities are later alleged. The defendant also cannot be relieved of one provision of a plea agreement without giving up all of the other benefits received in the bargain.

### 2.4.5 Scheduling Trials or Hearings

If the defendant pleads not guilty, the court clerk schedules the date for trial. Certain information may be recorded when setting a hearing date. The date, time, type of proceeding, docket number, and names of plaintiff and defendant (or counsel) may be entered on the calendar. Appropriate notations may be made on the calendar when a hearing has been canceled or rescheduled.

There are a variety of ways to handle court scheduling. The most common are a "trailing docket" and calendaring.

- A trailing docket consists of all cases set for trial at the same time. They are heard in the order determined by the court.

- Calendaring consists of cases scheduled to be heard at a particular time on a particular date.

Once the trial date has been determined, the court clerk mails, faxes or electronically sends the "Notice of Trial," to all parties involved. Rule 8-209; Rule 8-210; Form 9-501

Trial must be scheduled as soon as possible. Cases that have been pending for more than 182 days from the date of arrest or the filing of complaint or citation must be dismissed with prejudice, unless the defendant was responsible for the delay. Rule 8-506(B)(E)

The clerk shall issue subpoenas for witnesses upon request by prosecution or defense. Rule 8-602

Clerk must send copies of all notices or orders issued by the court, or any action taken by the court, to all parties involved, including counsel.

## 2.5 Dismissal

### 2.5.1 Definitions

Dismissal with prejudice means that the offense which is dismissed may not be charged again in any court.

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

## 2.5.2 Voluntary Dismissal by Prosecution

The prosecution may file a notice of dismissal at any time before trial. Dismissal is without prejudice unless otherwise stated in the notice of dismissal. Rule 8-506A(A).

The judge signs the notice of dismissal, and the original is filed with the court. The prosecution is responsible for serving the notice of dismissal on the defendant.

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

Additionally, the prosecution may file a document called a Nolle Prosequi. This document literally means that the prosecution declines to prosecute the case. It is a dismissal of all or some of the charges and does not require the judge's signature. These dismissals are without prejudice unless otherwise stated.

## 2.5.3 Dismissal for Failure to Prosecute

The judge is required to dismiss a petty misdemeanor complaint with prejudice according to Rule 8-506(E) if all of the following conditions are met:

- The charge has been pending for more than 182 days from the date of the arrest, the filing of the complaint, or the filing of a uniform traffic citation against the defendant, whichever is later, and
- The trial has not commenced, and
- The defendant was not responsible for the delay.

This is known as a violation of the six-month rule. If the judge determines, after a hearing, that the defendant was responsible for the failure of the court to commence trial, the judge must not dismiss the complaint for failure to prosecute.

If the defendant contributed to the delay by a motion for continuance but there was additional delay for which the defendant was not responsible, the court may add to the six-month period the length of the delay caused by the defendant. If in weighing all the factors that caused the delay the court determines that the defendant was not responsible for the failure to commence the trial within six months, the charges must be dismissed with prejudice.

Failure to strictly follow pretrial procedures is generally not in itself grounds for dismissal of a criminal complaint.

To calculate the 182-day period, use Rules 8-104, which covers computation of time in municipal courts, and 8-506(E). For example, if the defendant was arrested on Sunday, January

4, 2004, and the Uniform Traffic Citation was filed on Monday, January 5, 2004, the Court begins counting 182 days from January 6 (because the day from which the period runs is not be counted). The 182d day is Monday, July 5, a legal holiday, so it is not counted. The 182-day period therefore ends at the end of business on Tuesday, July 6, 2004, assuming no delays created by the defendant.

## 2.6 Other Preliminary Matters

### 2.6.1 Discovery

Discovery is the process where the parties exchange information that they will be using at trial. Discovery rules were enacted so that there would be full disclosure and no surprises at trial. Discovery is governed by Rule 8-504. The prosecution must disclose and make available for inspection and copying any records, papers, documents or other tangible evidence in its possession, custody and control that meet one or more of the following conditions:

- Is material to the preparation of the defense.
- Is intended for use by the prosecution at trial.
- Was obtained from or belongs to the defendant.

The defendant must 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 that:

- The defendant intends to introduce in evidence at trial.

The prosecution and defendant must exchange a list of the names and addresses of witnesses each intends to call at trial, along with any recorded statement made by the witness, no later than ten days prior to trial. If requested by a party, any witness on either list must be made available for interview prior to trial.

Each party has a continuing duty to promptly disclose any additional material or witnesses that the party would have previously been required to disclose.

If a party fails to comply with the discovery rule or an order issued pursuant to it, the court may take any of the following actions:

- Order the party to disclose the information.
- Grant a continuance.

- Prohibit the party from calling an undisclosed witness or introducing undisclosed evidence at the trial.

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

All discovery must be completed no later than 10 days prior to the start of the trial.

## 2.6.2 Pretrial Conference

The purpose of a pretrial conference is to enable the judge to clarify the pleadings or consider other matters that may aid in the disposition of the case. Rule 8-505.

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

At the request of a party, the court may issue subpoenas for witnesses to attend the pretrial conference.

Pretrial conferences are not required and many municipal courts never have them.

## 2.6.3 Motions

Any defense or objection that is capable of determination without trial of the general issue may be raised by motion before trial. Rule 8-304. For example:

- A defendant challenging a search and seizure may make a motion for return of the property and suppression of its use as evidence in trial.

- A defendant challenging a confession, admission or other evidence may make a motion to suppress its use as evidence in trial.

An application to the court for an order shall be by motion and made in writing, unless the request is made during a hearing or trial. The motion shall state with particularity the grounds on which it is based and shall set forth the specific relief or order sought. Motions shall be served on each party as set forth in Rule 8-208. Rule 8-304(C).

Motions shall state that agreement of the opposing side was requested or shall specify why no such request was made. The party making the motion shall request agreement from opposing counsel unless the motion is one of the following: a motion to dismiss; a motion regarding bonds and release conditions; a motion for a new trial; a motion to suppress evidence; or a motion to modify a sentence pursuant to Rule 8-801. Together with opposed motions, legal briefs or a legal memorandum with reference to legal authority, as well as affidavits, statements depositions or other supporting documentary evidence may be filed. Rule 8-304(E). Unless otherwise specifically provided for in the Rules, any written response

to a motion shall be filed within fifteen (15) days after service of the motion. Rule 8-304(F). Affidavits, statements, depositions or other documentary evidence in support of the response may also be filed.

When a pretrial motion is made, the judge must set a hearing and give notice to the parties. The judge cannot rule on a pretrial motion without a hearing. Some motions may be heard as part of the trial with the judge hearing testimony relevant to the motion and ruling at the appropriate time. In this way, the evidence will be heard only once.

## 2.6.4 Filing and Service by Fax

Pleadings and other papers can be filed and served by facsimile in accordance with Rule 8-209. Fax transmissions can be used as follows:

- A party may file a copy of any pleading or other paper by faxing it directly to the court. A fax copy has the same effect as any other filing for all procedural and statutory purposes. A document faxed to the court is acceptable only if all of the following conditions are met:
    - No fee is required for filing.
    - Only one copy of the pleading is required to be filed.
    - The pleading is not more than 10 pages long.
    - A cover sheet is included with the names and phone numbers of the sender and recipient.
- The court may fax any notice, order, writ or receipt of an affidavit.
- Parties may serve documents by faxing them to a party or attorney who has listed a fax number on papers filed with the court, listed a fax number on letterhead, or has agreed to be served by fax.

Proof of service by fax must include all of the following:

- A statement that the pleading or paper was transmitted by fax and reported as complete.
- The time, date and telephone numbers of both the sending and the receiving fax machines.
- The name of the person who made the fax transmission.

A party has the right to inspect and copy the original of any faxed pleading or paper, if the document was signed under oath or affirmation or penalty of perjury.

A faxed document is properly signed if it has an original signature, a copy of an original signature, a computer-generated signature or any other legally authorized type of signature.

## 2.6.5 Filing and Service by Electronic Transmission

Pleadings and other papers may be filed and served by electronic transmission, which is the transfer of data from one computer to another, other than by fax. Rule 8-210. Electronic transmissions can be used as follows:

- A party may file pleadings and papers electronically with the court if both of the following apply:
    - The court has adopted technical specifications for electronic transmission.
    - There is either no filing fee or payment is made at the time of filing.

  *Note:* Whenever a rule requires that multiple copies of a document be filed only a single transmission is necessary.

- The court may send documents electronically to the following:
    - Attorneys registered with the Supreme Court clerk as accepting documents by electronic transmission.
    - Any other person who has agreed to receive documents electronically.

- Parties may serve documents electronically to the following:
    - Attorneys registered with the Supreme Court clerk as accepting documents by electronic transmission.
    - Any other person who has agreed to service electronically.

Proof of service by electronic transmission must be made to the court by an attorney certificate or non-attorney affidavit and include all of the following:

- The name of the person who sent the document.
- The time, date and electronic address of the sender.
- The electronic address of the recipient.
- A statement that the document was successfully served by electronic transmission.

A party has the right to inspect and copy any document that was electronically filed or served, if the document was signed under oath or affirmation or penalty of perjury.

# 2.7 Excusal and Recusal

## 2.7.1 Excusal

Unlike in other courts in New Mexico where a party can excuse a judge as a matter of right, a party has no right, statutory or otherwise, to excuse a municipal judge. Rule 8-106(A). This means that no party has the automatic right to disqualify the judge from hearing a case to which that judge has been assigned. If a party asks the judge to excuse him or herself, the judge should inform the party that excusal is not allowed in municipal court. However, when judges feel that they should not hear a case, recusal is the method by which they remove themselves.

## 2.7.2 Recusal

A judge cannot hear any case where the judge is disqualified by the requirements of the state constitution or the Code of Judicial Conduct. Rule 8-106(B). In that event, the judge must give notice of recusal to all the parties. For cases filed on or after January 22, 2008, Form 9-102B is to be used for the certificate of recusal and notification of that action to the parties.

**Grounds for Disqualification and Recusal**

The Code of Judicial Conduct states that a judge is disqualified and must recuse him or herself in any proceeding in which the "judge's impartiality might reasonably be questioned." Rule 21-400(A).

Some of the circumstances described in the Code for when a judge must recuse him or herself are listed below. However, under the Code, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, even if the judge's situation does not fall within any of the listed circumstances.

According to Rule 21-400(A), a judge must recuse him or herself from a case when any of the following circumstances apply:

- The judge has a personal bias or prejudice concerning a party or a party's lawyer.
- The judge has personal knowledge of disputed evidentiary facts concerning the case.
- The judge, while a judge or a candidate for judicial office, has made a public statement that commits, or appears to commit, the judge with respect to either (a) an issue in the proceeding; or (b) the controversy in the proceeding.
- The judge knows that the judge or the judge's spouse, parent or child, or any other family member residing in the judge's household, has one of the following:

  - A financial interest in the subject matter in controversy.
  - A financial interest in a party to the case.
  - Any other significant interest that could be substantially affected by the outcome of the case.

- The judge or the judge's spouse, or any person related to them within the third degree, or the spouse of any of those related people, meets one of the following:
  - Is a party to the case, or is an officer, director or trustee of a party.
  - Is acting as a lawyer in the case.
  - Is known by the judge to have a significant interest that could be substantially affected by the outcome of the case.
  - Is to the judge's knowledge likely to be a material witness in the case.

Judges are required to use reasonable efforts to keep informed about their own personal and fiduciary financial interests and the personal financial interests of their spouse and minor children residing in the household.

A judge who is disqualified for any reason other than personal bias or prejudice concerning a party can disclose this fact on the record and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. The judge will be permitted to hear the case only if all the parties and their lawyers, without participation by the judge, agree in writing that the judge should not be disqualified. The agreement must be incorporated in the record of the proceeding. Without unanimous written agreement by all the parties and their lawyers, the judge remains disqualified and must recuse him or herself from the case.

**Procedure for Questioning a Judge's Impartiality**

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 alleged reason for disqualification. Following receipt of the notice, the judge must file a response and take action accordingly. If a party believes the judge has failed or refused to acknowledge a valid disqualification, then:

- Any party may certify that fact by letter to the district court of the county in which the case is pending.
- The district court must investigate as it deems warranted and enter an order, either disqualifying the judge from proceeding further or striking the filed notice of excusal as insufficient or groundless.

## 2.7.3 Procedure for Replacing a Judge Upon Recusal

Upon recusal or disqualification of the original judge, the case will be assigned to the alternate (temporary) municipal judge if one has been appointed. If there is no alternate judge, or if the alternate judge is unable to hear the case, the governing body may appoint any registered voter of the municipality to serve as alternate judge to hear the case. §35-14-5. If the governing body does not do so, the municipal judge or any party may certify that fact by letter to the district court, which then must designate a qualified elector of the municipality to hear the case. Rule 8-105(A).

The recused or disqualified judge must give the alternate or designated judge a copy of all the proceedings in the case prior to its transfer. The new judge includes that copy in the case records and keeps a record of all the subsequent proceedings in the same manner as if the case had originally been filed with the new judge. Rule 8-105(B).

# CHAPTER 3

# Release and Bail

This chapter covers:

- General bail bond information including definitions, methods of posting bail, and requirements of bond agencies.
- Conditions of release, including the constitutional right to release, factors the court must consider, conditions the court can impose, procedures, continuation and review of conditions, failure to comply with conditions, and failure to appear.
- Bonds, including unsecured and secured appearance bonds, execution and discharge of bail bonds, exoneration of bonds, and forfeiture of bonds.
- Clerk responsibilities.

## 3.1 General Bond information

### 3.1.1 Definitions

Appearance Bond: The defendant is released on a written promise to appear. If the defendant fails to appear, the amount of bond must be paid to the court.

Bail Bond: A document through which one agrees to accept responsibility for a defendant and insure his/her appearance in court. By signing the form, the person posting the bond agrees to forfeit the bond if the defendant fails to appear in court as ordered.

Bond Designee: A person designated by the judge to set the bond and conditions of release when the judge is unavailable. The person cannot be related by blood or marriage to a licensed surety. The judge must put the designation in writing. Rule 8-401(H)

Cash Bond: The defendant deposits with the court the amount of bond money set by the court.

Paid Surety: One who signs a bond and guarantees to pay money if the defendant fails to appear in court as ordered. A paid surety will charge the defendant a percentage of the bond as payment.

Released Own Recognizance: The defendant is released on a written promise to appear. No bond is required. Conditions of release are set.

Surety Bond: A bond purchased at the expense of the estate to insure the executor's proper performance.

Third Party Custodian: A person who agrees to be responsible for ensuring that the defendant appears at the date and time ordered by the court.

## 3.1.2 Purpose of Bail

Bail is used to ensure the appearance of the defendant at any relevant proceeding of the court and to ensure the orderly administration of justice. The judge has the discretion to release the defendant on his/her own recognizance, on an unsecured appearance bond, or determine the amount of bail.

## 3.1.3 Methods of Posting Bail

If bail is required in a criminal case (meaning in the event the defendant is not released upon the defendant's own recognizance), it can be posted in one of the following ways:

1. Cash
2. personal check, cashier check, or money order
3. Paid surety (bondsperson)

The court may, by local rule or written policy, determine which of the above will be accepted.

## 3.1.4 Requirements of Bonding Agencies

A bond company must file the following documents with each court in the area prior to posting any bonds:

- A copy of the license of the bondsperson posting bonds in the court.
- Copy of the power of attorney for a surety bondsperson for the total amount of the allowed bonds.
- Irrevocable letter of credit for a property bondsperson. Form 9-311.
- The court may also require the bondsperson to provide a picture ID when submitting the required paperwork.

Each time the bonding agency posts a bond for a defendant the following documents should be provided to the court:

- Power of attorney for the amount of the bond for the defendant.

- For property bondspersons, a current list of all outstanding bonds, encumbrances and claims against the property each time a bond is posted, using the court approved form. Form 9-305.
- A bail bond form which conforms to the Supreme Court Form 9-304.

# 3.2 Conditions of Release

## 3.2.1 General

The right to bail is granted by the New Mexico Constitution to any arrested person except for a person charged with a capital offense (for example, murder) where the proof of guilt is evident or the presumption of guilt is great.

Although an arrested person has a right to release, certain restrictions or requirements for release may be imposed. Rule 8-401(A), regarding bail, specifically provide that "[t]he court shall not deny bail before conviction to a person charged with an offense within the court's trial jurisdiction." Pending trial, a defendant must be released on personal recognizance or the execution of an unsecured appearance bond in an amount set by the court, subject to other release conditions, unless the court determines that this release will not reasonably assure the defendant's appearance. Rule 8-401(A). If a defendant is not released on personal recognizance or an unsecured appearance bond the court must make a written finding that such release will not reasonably assure the appearance of the person. Rules 8-401(A)

If the court finds that the defendant poses a danger to the complaining witness or alleged victim in the case, the court may refuse to allow the complaining witness or alleged victim to post bond on the defendant's behalf. However, such prohibition does not prevent the use of community funds belonging to the defendant and the complaining witness and/or alleged victim in order to post bond. Rule 8-401(A).

If the court determines that these measures will not secure the defendant's appearance or will endanger the safety of any other person or the community, then in addition to any release conditions the court must order release using one of the following secured bonds:

- A bail bond in a specified amount executed by the defendant and secured by a cash deposit of 10% of the amount set for bail or a greater or lesser amount as reasonably necessary to assure the defendant's appearance. The cash deposit may be made by a paid licensed surety if the surety also executes a bail bond for the full amount of the bail.

- A bail bond executed by the defendant or by unpaid sureties in the full amount of the bond with the pledging of real property (i.e. land and permanent buildings).

- A bail bond executed by licensed sureties or an appearance bond executed by the defendant with a 100% cash deposit with the court of the amount set for bail.

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

- Release on own recognizance, i.e. release based on the defendant's promise to appear. No bail is required. Release on own recognizance without any other conditions is the least restrictive form of release.

- Release subject to bond conditions.

- Release subject to conditions in addition to recognizance or bond requirements.

There are two reasons for imposing bond and conditions for release:

- The primary purpose is to assure the defendant's appearance at court proceedings.

- The second purpose is to restrict the activities of the defendant if there is a danger that he or she will unlawfully interfere with the orderly administration of justice or endanger the safety of any other persons or the community.

Only the bond or other conditions of release necessary to assure the appearance of the defendant or to prevent interference with the administration of justice should be imposed.

The court has great discretion in setting the condition or combination of conditions that will assure the appearance of the defendant. Each defendant's conditions of release must be considered individually.

## 3.2.2 Factors in Setting Conditions

Under Rule 8-401(B), all of the following factors must be considered prior to determining the type of bail and the conditions of release that will reasonably assure the appearance of the defendant and the safety of any other person and the community:

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

- The weight of the evidence against the defendant.

- The defendant's history and characteristics, including:

    - Character and physical and mental condition.

    - Family ties.

    - Employment status, employment history and financial resources.

    - Past and present residences.

- Length of residence in the community.
- Facts tending to indicate the defendant has strong ties to the community.
- Facts indicating the possibility that the defendant will commit new crimes if released.
- Past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings.
- Whether at the time of the offense or of arrest the defendant was on probation, parole, or other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law.

- The nature and seriousness of the danger to any person or the community that would be posed by the defendant's release.
- Any other facts tending to indicate the defendant is likely to appear.

### 3.2.3 Specific Conditions

Under Rule 8-401(C), the court may set any of the following conditions of release to assure the orderly administration of justice:

- Prohibition against committing a federal, state or local crime during the period of release.
- The least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice. The judge may require that the defendant:
  - 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 defendant will appear as required and will not pose a danger to the safety of any other person or the community.
  - Maintain employment, or, if unemployed, actively seek employment.
  - Maintain or commence an educational program.
  - Comply with restrictions on personal associations, place of abode or travel specified by the court.
  - Avoid all contact with the alleged victim of the crime and with any potential witness who may testify about the offense.

- Report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant.
- Comply with a specified curfew.
- Refrain from possessing a firearm, destructive device or other dangerous weapon.
- 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.
- 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.
- Submit to a urine analysis or alcohol test upon request of a person designated by the court.
- Return to custody for specified hours following release for employment, schooling, or other limited purposes.
- Be restricted by electronic monitoring.
- Satisfy any other condition that is reasonably necessary to assure the defendant's appearance as required and to assure the safety of any other person and the community.

## 3.2.4 Release Proceedings

**Bond List**

Many courts provide the jail and/or the police department with a bond list. This list should include charges and bonds for each charge. It may also include conditions of release for some offenses. Providing a bond list to these entities authorizes them to be bond designees. If a court provides this list, the court is authorizing the entity to release persons only upon the posting of bail in the amount on the list. The designee must follow the bond list, there is no discretion. If a person meets the criteria the judge has specified, the person may be released on the bond amount listed and with any conditions of release listed. If the person does not meet the criteria, or if the jail has any questions, the judge should be consulted or the person sent to the court for a bond hearing.

The jailer must issue a release order and deliver the original of the order to the judge along with the original of any appearance or bail bond that may have been executed. The jailer gives a copy of the release order to the defendant.

## Arraignment

When the defendant appears for arraignment, the judge may revise or modify the terms and conditions of release previously set.

If the defendant is still in custody, the judge issues a release order containing any conditions of release, including bond requirements.
Non-bond conditions (such as restrictions on travel, association, etc.) may be imposed as part of release on own recognizance as well as release on bond.

## Additional Conditions of Release

The judge may impose additional conditions to assure the orderly administration of justice. The conditions are imposed at the same time as the imposition of conditions to assure appearance. One release order covering both types of conditions is used. Rule 8-401(F).

## Judicial Hearing on Conditions Imposed by Designee

The judge may impose the additional conditions at a new hearing, after the original release order has been issued.

- The judge may issue an amended release order, containing only the additional conditions. The judge should note on the release order that the new conditions are in addition to the previous conditions which remain in effect, and that they are for the purpose of preventing interference with the orderly administration of justice.

- If the additional conditions are inconsistent with the previous conditions, the judge issues a new release order.

- If the defendant is unable to meet the additional conditions, he or she is entitled to a hearing to review the conditions of release.

## Evidence

In all hearings relating to bail, the court may receive and act on credible hearsay, as the Rules of Evidence do not apply to bail matters. Rule 8-401(I).

## Change of Conditions of Release

At any time, upon motion of a party or upon the court's own motion, the judge may have the defendant arrested and brought to court to amend the conditions of release or amount of bail set. A defendant who is detained after the new conditions or bail are imposed has the right to a hearing to review the additional or different conditions of release. Rule 8-401(E).

A defendant may petition the district court for release if new or additional conditions of release

are imposed and after 24 hours the defendant remains detained due to inability to meet the new conditions or the defendant is released on a condition which requires he return to custody after specified hours. Rule 8-403(B).

A person who is unable to meet the conditions of release and continues to be detained in custody for longer than 24 hours is entitled to have the judge review the conditions of release or the amount of bond. The court which set the conditions of release shall conduct the review. Rule 8-401(E).

If the conditions or amount of bail resulting in custody or partial release are not removed, the judge must enter on the release order the reason for continuing the conditions.

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.

## 3.2.5 Release Forms

At the time of release or setting of conditions, the judge or jail issues the appropriate order and bond to serve as a record of the release and any conditions which are imposed.

- The original is filed in the court, and a copy is provided to the defendant or the defendant's attorney or surety.

- If the original order is amended or modified, a new release order is issued.

The judge may use the record of responses to questions at hearing to determine indigency in order to determine release and conditions of release. The judge may orally question the defendant, the defendant's attorney, the arresting officer or other law enforcement officer, and/or the prosecutor.

If the defendant is to be released on recognizance, the judge must do one of the following:

- Write on the release form the time and place for the next appearance of the defendant, and make the defendant promise to appear at such a time and place.

- If the time and place of the next appearance are not known, make the defendant promise to appear when notified.

If the judge does not so notify or order the defendant, the defendant cannot be charged with failure to appear if he or she does not appear.

Release forms include:

- 9-302 Order Setting Conditions of Release and Appearance Bond
- 9-303 Order Setting Conditions of Release Bail Bond
- 9-303A Release Order and Bond

## 3.2.6 Continuation and Review of Release

Normally, a person released pending trial continues on release under the same conditions during the trial, pending imposition of sentence and pending the outcome of any appeal. Rule 8-402. However, the judge may determine that other conditions of release are necessary for any of the following reasons:

- To assure the defendant's presence during trial.
- To assure that the conduct of the defendant will not interfere with the orderly administration of justice.
- If the surety has been released or discharged after sentencing. Rule 8-402(B).

If the judge imposes other conditions of release, the defendant is entitled to a hearing if the person cannot meet the conditions of release or is granted partial release.

If the judge increases the amount of bond previously imposed and if the original bond is still in effect because the surety has not been discharged, a separate bond is furnished in the amount additionally required. If the judge does not increase the bond amount as previously imposed and if the original bond is still in effect, a new bond is not necessary.

## 3.2.7 Failure to Comply with Conditions

If a person willfully fails to comply with conditions of release, the judge may issue a bench warrant or may notify the defendant to appear for a review of the conditions of release.

Upon review, the judge may:

- Without a hearing, impose any of the conditions authorized under court rules, including conditions to assure the orderly administration of justice. Rule 8-403(A)(1). The defendant is then entitled to a hearing if he or she cannot meet the conditions of release or is granted partial release.
- After a hearing, revoke bail or recognizance if the defendant has been indicted on a serious crime allegedly committed while the defendant was on release on a prior charge. Rule 8-403(A)(2).

If new conditions are imposed to assure the orderly administration of justice or if bail or recognizance is revoked, the defendant is entitled to a review of the conditions or the revocation.

### 3.2.8 Failure to Appear

If a person fails to appear as required in the conditions of release, the judge may do any of the following:

- Issue a bench warrant for the arrest of the defendant.
- Revoke the conditions of release.
- If there is a breach of a condition of the bond, declare forfeiture of bail.

If a person willfully fails to appear as required, the person may be charged with a petty misdemeanor.

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

## 3.3 Bonds

### 3.3.1 General

The judge determines the type and amount of bond. The original form and copies of the bond should be distributed as follows:

- The original is filed with the court.
- A copy is given to the defendant.
- For a bail bond, a copy is given to the surety.

### 3.3.2 Appearance Bond: Unsecured

An unsecured appearance bond requires the defendant to pay the full amount of the bond if he or she fails to appear as required or fails to comply with any other conditions of release which may be imposed. Form 9-302 or 9-303A

### 3.3.3 Appearance Bond: Partial Cash Deposit

As a condition of release, the defendant may be required to execute an appearance bond and deposit with the court a percentage of the amount of the bond.

The court, in its discretion, establishes the amount of the bond and the percentage of cash deposit required. For cases filed on or after January 22, 2008, Supreme Court Form 9-312A is to be used to provide the payor the cash receipt.

The deposit must be made in cash or an approved cash substitute, such as a money order or

cashier's check.

When the conditions of the bond have been performed and the defendant is discharged from all obligations, the court returns the deposit to the person to whom the receipt was issued, or to another individual upon written assignment by the person to whom the receipt was issued. For cases filed on or after January 22, 2008, the court shall return the cash deposit only to the payor as indicated in the cash receipt. Rule 8-401(G).

### 3.3.4 Appearance Bond: Full Cash Deposit

As a condition of release, the defendant may be required to execute an appearance bond and deposit with the court the full amount of the bond.

The deposit must be made in cash or an approved cash substitute.

### 3.3.5 Bail Bond: Execution

As a condition of release, the defendant may be required to obtain a bail bond.

A bail bond differs from an appearance bond in that a bail bond is executed by surety or sureties on behalf of the defendant. A surety agrees to pay the amount of bond if the defendant fails to comply with the conditions of the bond or any additional conditions of release.

Sureties who are allowed to execute bail bonds are uncompensated sureties or bail bondsmen. Rule 8-401A.

Uncompensated sureties are usually friends or relatives of the arrested person. They sign as surety or a cosigner on an unsecured or secured bond.

The terms "compensated surety," "corporate surety," and "paid surety" are used to refer to a bail bondsman or corporation authorized to execute bail bonds. Rule 8-401B.

If the surety is not licensed as a bail bondsman or able to show other authorization to execute bail bonds, the surety is assumed to be an uncompensated surety.

Normally when a bail bond is required, no money is deposited with the court. However, the bail bondsman charges the defendant a certain percentage of the amount of the bond plus costs.

A paid surety who is licensed under the Bail Bondsman Licensing Law may deposit cash with the court instead of a surety or property bond provided that the paid surety executes an appearance bond. If real property is submitted as bond by a compensated surety, the solicitor or bondsman must be licensed as a property bondsman and must file in each court in which he posts bonds an irrevocable letter of credit in favor of the court and a signed draft made payable to the court along with a copy of his license.

## 3.3.6 Bail Bond: Discharge of Surety

**Uncompensated Surety**

An uncompensated surety desiring to be discharged from the obligations of a bail bond before final disposition of the charges against the defendant must do all of the following:

- Arrest and take the defendant to the office of the sheriff in the county where the action is pending.
- Deliver to the sheriff a certified copy of the release order and the bail bond.
- Apply in writing to the court for a written order discharging the surety from the obligations of the bail bond.

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

**Compensated Surety**

The judge must order the discharge of a paid surety if one of the following apply:

- There has been a final disposition of all charges against the defendant.
- The defendant is deceased.
- Circumstances have arisen which the surety could not have foreseen at the time of becoming a paid surety for the defendant.
- The contractual agreement (the bond and its conditions) between the surety, the defendant, and the municipality has been terminated.

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.

If the motion is based on unforeseen circumstances or on a claim that the contract of the bond has been terminated, the surety must return the defendant to custody. In such cases, the surety must do both of the following:

- Arrest and return the defendant to custody.
- Deliver to the custodial authorities a certified copy of the release order and the bail bond, at the time of the return of the defendant to custody.

## 3.3.7 Exoneration

A bail bond may be automatically exonerated (cleared) by the municipal court under one of the following conditions:

- If no charges against the defendant for the underlying offense have been filed after six months.

- At any time prior to entry of judgment of default on the bond if the city attorney approves. Rule 8-406(A).

An unpaid surety bond may also be exonerated upon surrender of the defendant.

## 3.3.8 Forfeiture

If a defendant fails to appear as required, the judge may declare forfeiture of the bail bond or appearance bond. Rule 8-406.

- The court makes a declaration of forfeiture in the form of a written notice to the surety within four (4) working days of the defendant's failure to appear. §31-3-2(B)(2)(b) Form 9-307

- The declaration must contain a statement by the judge that the defendant was required to appear, that due notice was given and that the defendant did in fact fail to appear as required.

- A Notice of Forfeiture and Order to Show Cause is served on the surety or on the clerk of the court. If served on the clerk, the clerk must mail copies of the notice to the sureties at their last known address.

- The court is required to hold a hearing on the forfeiture 30 or more days after the notice is served.

- The judge has the discretion to allow extensions in order for the surety to bring the defendant in to court.

Prior to entry of judgment, the judge after a hearing may set aside, in whole or in part, the declaration of forfeiture for one of the following reasons:

- Upon a showing of good cause why the defendant did not appear as required.

- If the defendant is surrendered into custody prior to entry of judgment of default on the bond.

- Form 9-308 Order Setting Aside Bail Bond Forfeiture should be completed by the judge and included in the defendant's file. A copy should also be provided to the defendant and surety.

Upon forfeiture, the defendant (in the case of an appearance bond) and/or the surety (in the case of a bail bond) is required to pay the amount of the bond. When the court has received the forfeiture money it shall be deposited in the general fund of the municipality.

### Obligation of Principal and Sureties

In case of forfeiture the defendant and the uncompensated surety or cosigner are jointly and severally liable for the full amount of an appearance bond. The defendant surety or cosigner receives credit for any cash deposited, because it is also forfeited.

A bail bond is a bond to assure appearance, but it requires sureties. A bail bond is signed by the defendant, as principal, and by one or more sureties. In case of forfeiture, the defendant and all sureties are jointly and severally liable for the full sum of the bond. The government can collect the amount only once, but the government is not required to get a portion from the defendant, another portion from a surety, and so forth. The full amount can be collected from anyone obligated on the bond, and in that case the surety who pays must seek any reimbursement from the defendant or other sureties.

### Default Judgment

If any part of a judgment on default remains unpaid for 10 days, then an execution of judgment may be issued.

The following forms should be used for a default judgment on a bond:

- 9-309 Default Judgment on a Bond
- 9-310 Default Judgment on a Cash Bond

In cases involving a paid surety, if the judgment is not paid, the court gives written notice to the superintendent of insurance. The superintendent of insurance notifies the bonding company that unless the judgment is paid (or an appeal is made within 30 days of judgment), it will forfeit the right to do business in New Mexico. If the judgment is still not paid, the superintendent revokes the right to do business in New Mexico. In addition the court may contact the presiding judge of the district in which the municipal court is located and advise of the failure to pay a default judgment.

## 3.3.9 Appeal Bonds

Once the defendant is found guilty by the municipal judge the surety must be discharged so, if required, a new bond will have to be posted by the defendant. §31-3-10

After imposition of a judgment and sentence, upon defendant's motion, the judge must set conditions of release pending appeal. In setting the conditions, the judge may consider the fact that there was a conviction and the length of sentence imposed.

## 3.4 Court Clerk's Responsibilities

### 3.4.1 When the Bond is Posted

The court clerk is responsible for collecting all bonds whether cash or surety. This may mean that the clerk accepts and receipts the cash from an individual who is posting bond for another or it may mean that the clerk collects the bond from the detention facility when a person has been released from jail after posting a bond. All paperwork associated with the bond should be inserted in the case file of the defendant. All cash should be deposited in a non-interesting bearing account, such as a trust account, separate from all other accounts held by the court.

In addition to a receipt, Form 9-312A should be completed by the court clerk or designee for all cash bonds. This form provides for conversion from bond to fine and fees if the defendant is found guilty or has already been convicted but failed to pay as agreed.

### 3.4.2 When the Bond is Exonerated or Converted

When the defendant has appeared as ordered or a trial has been held, the bond will be discharged.

If the unpaid third party signed Form 9-312A agreeing to allow the bond to be converted for fines and fees the clerk proceeds with the conversion process. If the fines and fees are less than the bond the clerk should notify the person that they need to contact the court to receive the excess bond.

The court and paid sureties should agree on a process for notification of the discharged bond.

### 3.4.3 Forfeiture Procedures for Court Clerks

When a defendant fails to appear as ordered by the court the clerk should set a date for the forfeiture hearing. The Notice of Forfeiture and Order to Show Cause should be sent to the surety within four (4) days of the failure to appear. The date of the hearing should be no less than 30 days from the date a notice is served. A copy of the completed form should be included in the defendant's file.

Once the forfeiture hearing has been held and the surety is ordered to make full payment of the bond within 10 days, the clerk should keep track of the payment due date. If the surety makes payment within the allotted time, the funds are deposited in the general fund of the municipality. If the surety fails to make payment the clerk should notify the judge. A letter

should be written to the Superintendent of Insurance for the State of New Mexico naming the bonding company, the amount owed why it is owed. The address for the Superintendent of Insurance is P. O. Box 1269, Santa Fe, NM 87504.

# CHAPTER 4

# Searches and Search Warrants

This chapter covers:

- The constitutional right against unreasonable searches and seizures.
- Searches with warrants, including issuance, execution, return, and filing of paperwork.
- Searches without warrants, including evidence in plain view, searches incident to arrest, exigent circumstances, consent, motor vehicle searches, roadblocks, and inventory searches.
- Motions to suppress evidence, including who may file and grounds for suppression.

## 4.1 General

The U.S. and New Mexico Constitutions guarantee citizens the right to be free of unreasonable searches and seizures. U.S. Const., Amend. IV and N.M. Const., Art II, Sec. 10. These provisions give a judge the responsibility to determine when law enforcement officers may reasonably conduct searches.

Some aspects of the law governing search and seizure are unsettled or evolving. This chapter provides general guidelines for judges, but is not intended to address all issues that may arise.

## 4.2 Search Warrants

Municipal judges have authority to issue search warrants to law enforcement officers to search premises located within the municipality, but only related to offenses within the court's jurisdiction. Rule 8-207(A). Before issuing a search warrant, the judge must make an independent determination of whether there is probable cause to believe that evidence relating to the commission of a crime exists on the premises or person to be searched. Rule 8-207(F).

Search warrants should not be issued routinely or "rubber stamped." They should be issued only after the judge carefully and impartially reviews the facts of each case as presented in the affidavit supporting the request for the warrant. Only a judge may sign a search warrant. See Criminal Form 9-213, Affidavit for Search Warrant, and Criminal Form 9-214, Search Warrant.

A search warrant must be specific about the place to be searched and the objects searched for.

## 4.2.1 Issuance

Under Rule 8-207(A), the court may issue a warrant to search for and seize the following type of property:

- Property that has been obtained or is possessed in a manner that constitutes a violation of a municipal ordinance.
- Property designed or intended for us, or which is or has been used, as the means of committing a violation of a municipal ordinance.
- Property that would be material evidence in a prosecution for a violation of a municipal ordinance.

The warrant must contain or have attached a sworn written statement of facts showing probable cause for its issuance and the name of any person whose sworn written statement has been taken in support of the warrant. Rule 8-207(B). The 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 that there is a factual basis for the information furnished. Rule 8-207(F). Before ruling on a request for a warrant, the court may require the person making the affidavit, and any supporting witnesses, to appear personally and testify before the court. In that case, the additional evidence must be put in writing under oath or affirmation and served with the warrant. Rule 8-207(F).

The judge's review is almost always *ex parte*; the subject of the search warrant does not usually receive notice.

## 4.2.2 Execution and Return

A municipal search warrant must be executed by a municipal police officer, a full-time salaried state or county law enforcement officer, a campus security officer, an Indian tribal or pueblo law enforcement officer or a federal civil officer authorized to enforce or assist in enforcing any federal law. Rule 8-207(B).

The warrant must be executed within 10 days from its issuance. Rule 8-207(D). It must be served between the hours of 6:00 a.m. and 10:00 p.m. unless the issuing judge, for reasonable cause shown, authorizes its execution at any time. Rule 8-207(B).

The officer who seizes property under the search warrant must give the person from whose possession or premises the property was taken a copy of the affidavit, the search warrant and an inventory of the property taken. Or the officer must leave these copies at the place from which the property was taken. Rule 8-207(D).

The inventory of property must be made in the presence of the applicant for the warrant and the person from whose possession or premises the property was taken, if they are present, or in the presence of at least one credible person other than the applicant for the warrant or the person from whose possession or premises the property was taken. The inventory shall be signed by the officer and the person or persons in whose presence the inventory was taken. Rule 8-207(E).

The return to the municipal court must be made promptly after execution of the warrant. The return is accompanied by a written inventory of any property taken.

## 4.3 Searches Without Warrants

### 4.3.1 General

The law permits law enforcement officers to conduct searches without warrants in certain limited circumstances listed below, where the need or the opportunity for the officer to search immediately is especially obvious. Searches without warrants generally come to the attention of a judge in the form of motions made by defendant to suppress evidence. If the prosecutor attempts to introduce evidence that was seized after a warrantless search, the defendant may seek to have the evidence suppressed on the grounds that a warrant should have been obtained.

### 4.3.2 Evidence in Plain View

If an officer sees contraband or other incriminating evidence in plain view while he or she is conducting a lawful investigation, the officer may seize such property without benefit of a warrant, and if the seized property establishes probable cause, may make a warrantless arrest. Seeing contraband in plain view does not constitute a search. However, the officer cannot enter a place, such as a vehicle or a home, and seize evidence in plain view without a warrant or some other lawful reason. The officer must be in a place where he or she is allowed to be in order to seize the evidence. For example, if an officer stops a vehicle and, upon approaching the driver, notices illegal drugs on the passenger seat, the officer may not enter the vehicle and seize the drugs. The officer must either get a warrant or consent from the driver to enter the vehicle unless exigent circumstances exist.

### 4.3.3 Searches of Persons and Places

**Incident to Arrest**

An arresting officer may make a valid warrantless search of the person whom he or she is

arresting and the portion of the premises within the arrestee's control.

- The search and seizure will be invalid if the arrest is invalid.
- The arrest should be made before the search.
- The search should be made immediately after the arrest.
- An arrest is not valid if it is merely used as an excuse to search a person or place.

A valid warrantless arrest may be made if based upon information obtained from an unidentified informant, if the information is corroborated by other information such as police reports or verification of informant's description by the police.

**Exigent Circumstances**

Premises may be searched without a warrant if exceptional circumstances exist (also known as "exigent circumstances").

- A situation requiring swift action to prevent imminent danger of life or serious damage to property: The claim of an extraordinary situation is measured by the facts known to the officers at the time they are called upon to act.
- Imminent escape: This situation is not limited to a chase but also includes those situations where swift action is needed to prevent an escape. The "imminent escape" emergency justifies a warrantless entry into the residence of a suspect for the purpose of an arrest.
- Contraband: An officer may search without a warrant when he or she has cause to believe that contraband may be immediately removed or destroyed.

Even if a law enforcement officer has legal possession of sealed boxes, the officer may not conduct a warrantless search by opening those boxes without exigent circumstances.

**Voluntary Consent**

A person may voluntarily consent to a search. By voluntarily consenting the person waives the right to be free from a search without a warrant. Any evidence found during a consensual search may be lawfully seized.

- The person who consents must know that he or she has a right to refuse a warrantless search.
- The consent must be given voluntarily; that is, the person must not be under duress or be coerced by the officer requesting the search.

- The consent must be clearly and explicitly given. Permission to enter premises is not permission to search the premises.

- The scope of the search must be limited to the consent given.

**Consent of Co-Possessor**

Where two or more people have common use of or joint access to the premises, a relationship to the premises based on right of occupancy, possession of a key to premises, individually owned property on the premises, or community property interests, and where only the consent of one of these people has been given, the search is a valid consensual search. The police cannot, however, search an area reserved for a non-consenting individual's exclusive use. In other words, if several people live in a house, any one of those people could consent to a search of the "common area" of the house and any area under that person's exclusive control, such as a kitchen or living room, but not another person's bedroom.

However, a recent United States Supreme Court case stated that, if two people have equal rights to the premises, and one consents to a search, but the other specifically does not consent, the search may not be done. In this case both parties were present. There is no requirement that law enforcement seek out all joint possessors of a premises prior to searching.

**Private Person Conducts Search**

A private person who conducts a search for private purposes does not need a search warrant. Security searches made by airline employees acting under federal tariff regulations, for example, are private searches and do not require a search warrant.

**Public Schools**

Public school officials may conduct a warrantless search of a student's person if he or she has a reasonable suspicion that a crime has been committed or the official has reasonable cause to believe that the search will reveal evidence of the student's violation of school laws or rules.

## 4.3.4 Searches of Motor Vehicles

Probable cause is always needed to search a motor vehicle, whether the vehicle is parked, stopped for a license and registration check, or stopped for an investigation. Because a motor vehicle differs inherently from a residence or office due to its mobility and possibility of movement outside an officer's jurisdiction, a motor vehicle may be searched without a warrant on facts that would not necessarily justify a warrantless search of a residence or office.

The scope of a warrantless search based on probable cause is no narrower and no broader than what would be authorized by a warrant. The scope of a search must be supported by probable cause. If an officer has probable cause to search an automobile for contraband, the officer can search every part of the vehicle (including the trunk), including all containers and packages,

where the contraband might be found. The scope of a warrantless search of an automobile for contraband is not defined by the nature of the container (e.g. luggage or paper bag) in which the contraband is secreted. The object of the search and the places in which there is probable cause to believe that the object may be found define the scope of the search.

Before a vehicle can be stopped, the officer must have an articulable and reasonable suspicion that a motorist is unlicensed, that an automobile is unregistered, or that either the vehicle or occupant is otherwise in violation of the law. The stopping of only certain automobiles and the detaining of the driver in order to check license or registration constitute an infringement of a person's Fourth Amendment rights. The random stopping of vehicles does not constitute a general roadblock.

- Random stopping and detaining constitute a "seizure," even if the purpose of the stop is limited and the detention brief.

- At the same time that an automobile may be subject to governmental regulations, a person operating or traveling in an automobile does not lose his or her reasonable expectation of privacy.

For a warrantless search of a vehicle to be valid, there must first be a justifiable reason for stopping the vehicle.

- An officer may stop a vehicle for the lawful arrest of the driver for a violation of the Motor Vehicle Code. Once the defendant is arrested, the officer may search the defendant and that portion of the vehicle that is within the defendant's reach. In other words, the officer may search the passenger compartment of the vehicle and any containers within the passenger compartment without a warrant. This is known as a search incident to a lawful arrest. (The arresting officer may broaden the search to the entire vehicle if the officer is going to impound the vehicle. This broadened search is an inventory search, not a search incident to a lawful arrest, and may include the trunk as well as the passenger compartment of the vehicle. See below for more information on inventory searches.) The existence of a Motor Vehicle Code violation must not be used as an excuse for searching the vehicle for evidence of another crime.

- As long as an officer has a reasonable suspicion, not merely a hunch, that a crime has been or is being committed, the officer may stop a vehicle for the purpose of investigating possible criminal activity, even though there is no probable cause to make an arrest. Radio dispatches from investigating officers or an eyewitness description of a vehicle at the scene of a crime are examples of cause for making a valid investigatory stop of a vehicle. When a car is being driven erratically near a border patrol check point where it is common to let illegal aliens out to walk around the check point, and where occupants of the car give evasive answers to the officer's questions, there is sufficient probable cause to search an auto without a search warrant.

## Roadblocks and Checkpoints

Officers have authority to set up general roadblocks or checkpoints for purposes of checking sobriety, licenses and vehicle registrations. However, this may not be used as an excuse for searching the vehicle for evidence of another crime. In *City of Las Cruces v. Betancourt*, 105 N.M. 655 (Ct. App. 1987), the New Mexico Court of Appeals set forth eight standards for determining the validity of roadblocks and guidelines useful in testing that standard. These guidelines must be used in determining the reasonableness of a roadblock. All of these guidelines are important and must be considered when deciding whether a checkpoint is valid, however, only the Role of Supervisory Personnel and Restrictions on the Discretion of Field Officers are dispositive. This means that if one of these is not complied with the checkpoint will be considered invalid. Those guidelines are as follows:

- Role of supervisory personnel. The selection of the site and procedures for conducting the roadblock must be made by supervisory law enforcement personnel rather than officers in the field. Ideally, roadblock decisions should be made by the chief of police or other high-ranking supervisory officials.

- Restrictions on discretion of field officers. For a valid roadblock, it is important that the discretion of field officers be restricted. Automobiles should not be stopped randomly. It would be proper to stop every automobile. Alternatively, the procedural plan may include a mathematical selection formula, for example, stopping every third automobile. It is also wise to instruct officers orally or in writing on uniform procedures to be utilized when stopping motorists. As nearly as possible, each motorist should be dealt with in precisely the same manner.

- Safety. The safety of the motoring public and the field officer should also be given proper consideration. This includes safety measures aimed at warning approaching traffic, the degree to which the roadblock causes traffic congestion, and whether the roadblock is set up in such a way so as to put the motoring public and officers in unnecessary peril.

- Reasonable location. The location of the roadblock is significant in determining the degree of intrusiveness and safety of the public and police. It will also impact on the deterrent effect of the sobriety roadblock and its detection value. Obviously, a location chosen with the actual intent of stopping and searching only a particular group of people, e.g., Hispanics, African-Americans, etc., would not be tolerated.

- Time and duration. This factor also bears on the intrusiveness and effectiveness of the roadblock. Reasonableness is the standard. For example, sobriety checkpoints established during the late evening hours on a weekend may be reasonable to detect drunk drivers, while continuing the roadblock through Monday morning during rush hour might not be reasonable.

- Indications of official nature. The official nature of the roadblock should be

immediately apparent. Officers in the field should be uniformed, police cars should be marked, and warning or stop signs, flares and pylons are advisable. The scene should strike an appropriate balance to provide for high visibility at the roadblock, yet minimize the potential fear and apprehension to the public. In addition to being important for safety reasons, these indications will reassure motorists that the stop is duly authorized.

- Length and nature of detention. The average length of time that a motorist is detained at the roadblock and the degree of intrusiveness should be minimized. This will avoid lengthy delays and traffic congestion. Initially, motorists should be detained only long enough to be informed of the purpose of the stop and to look into the vehicle for signs of intoxication. Where facts within the observation of the officer warrant further investigation, the suspected motorist should be asked to pull into a separate testing area to avoid inhibiting the flow of traffic.

- Advance publicity. The deterrence value of any roadblock and its reasonableness for sobriety checks will be enhanced if given widespread advance publicity. See also *State v. Clark*, 112 N.M. 500 (Ct. App. 1991).

**Arrest for Motor Vehicle Code Violation**

After a valid license or registration check or a valid investigatory stop, there is probable cause for a warrantless search of the vehicle if the officer:

- Sees contraband or other evidence of a crime in plain view. See previous discussion of Plain View.

- Smells marijuana and there are exigent circumstances necessitating immediate action. The mobility of a vehicle is not enough to establish exigency.

As in other searches, if the driver of a vehicle gives consent and consent is unlimited in scope, and if the stop and/or arrest is initially valid, there is no issue of illegal search and any contraband found can be properly seized.

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.

- The vehicle is regularly parked in a specific location, like a person's driveway.

- The vehicle travels a regular route, for example, a delivery truck.

- The vehicle is in a garage for repairs.

- Probable cause to search has developed after a vehicle has been impounded.

**Inventory Search**

An inventory search is performed to protect the contents of the vehicle. It is done to ensure that anything the driver has in the vehicle is returned to the driver when the vehicle is released (assuming the items in the vehicle are not contraband). A warrantless inventory search of a vehicle is lawful if all of the following requirements are met:

- The vehicle is in police control and custody.
- The inventory is made pursuant to established police regulations.
- The search is reasonable, to protect the owner's property or to protect the law enforcement officer from false claims or potential danger.

If the evidence of crime that is discovered is property, the possession of which is prohibited by law, no search warrant is required before seizing the property. Inventory searches must be limited to the extent necessary to carry out the caretaking function. If the vehicle is left on the road for a long time before being taken into custody, a warrantless search is not authorized.

An inventory search of a defendant's automobile, lawfully parked at the scene of the crime, made after defendant has been arrested and booked, is lawful. The evidence obtained from the parked car will not be suppressed even if the only connection between the car, the defendant and the crime is that the defendant is the owner of the car and the keys are found in the defendant's possession during booking.

A warrantless search of an automobile will not be invalid just because it reveals evidence of a crime by a passenger who does not own the vehicle because the defendant/passenger does not have a legitimate expectation of privacy in an automobile belonging to another. In other words, the defendant/passenger has no standing to object to a warrantless search of the driver’s vehicle, even though the passenger was being transported in the automobile.

# 4.4 Motion to Suppress

## 4.4.1 General

A person contesting a search and seizure may make a motion for return of the property and suppression of its use as evidence. Rule 8-304(B)(1). A municipal judge may hear and decide a motion to suppress only if the search and seizure was in connection with a case filed in his or her municipal court.

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). A defendant's testimony at a hearing on a motion to suppress cannot be used as substantive evidence against the defendant at trial, unless it is used to impeach his or her testimony at trial.

In cases where the search and seizure occurred without a warrant and a motion to suppress is made, the prosecution has the burden of proving by a preponderance of the evidence that circumstances existed which justified the officer's acting without a warrant.

If after a hearing the judge grants a motion to suppress, the property is returned unless otherwise subject to lawful detention, such as illegal drugs or other contraband. Charges may or may not be dismissed based upon the granting of the motion. It is up to the prosecution to determine whether they can prove their case beyond a reasonable doubt without the suppressed evidence.

## 4.4.2 Who May File Motion

Filing a motion to suppress the use of seized property as evidence challenges the legality of the search and seizure. Not everyone who claims an illegal search and seizure has a right to challenge it. The constitutional right for a person to be secure from unreasonable searches and seizures is a personal right. Therefore, only a person whose right to privacy has been infringed by a search and seizure has the right to challenge the search and seizure.

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. 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.

A motion to suppress should not be granted if the person making the motion had no reasonable expectation of privacy in the area searched. 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.

## 4.4.3 Grounds for Suppression

### With a Warrant

When the search was made pursuant to a search warrant, and the "good faith" exception to the exclusionary rule does not apply (see below), the following may be grounds for granting a motion to suppress:

- The search and seizure was not conducted within the limits and for the reasons stated in the search warrant.
- The search and seizure was conducted in an unreasonable manner.
- The property obtained was not described in the warrant.
- The search was made more than ten days after the warrant was issued.
- The search and seizure was conducted between 10:00 p.m. and 6:00 a.m. without having been authorized.

- There was no substantial basis established by the affidavit for determining the existence of probable cause, or the affidavit upon which the warrant was based is proved to be false and the falsity is known or should have been known by the person making the affidavit.

The U.S. Supreme Court has adopted a "good faith" exception to the exclusionary rule to the effect that evidence seized by police officers who are acting in reasonable reliance upon a search warrant issued by a detached and neutral judge, but ultimately found to be invalid, is admissible at trial. Suppression of evidence should be ordered only on a case-by-case basis and only in those unusual cases in which exclusion will further the purposes of the exclusionary rule.

**Without a Warrant**

When the search was made without a warrant, the following may be grounds for granting a motion to suppress:

- The arrest preceding the search, whether with or without an arrest warrant, was invalid.
- The search following the arrest was made too long after the arrest.
- The search following the arrest extended beyond that portion of the premises within the arrestee's control.
- The circumstances surrounding the warrantless search were not "exceptional." For example, there was no imminent peril to life or limb.
- Consent to search was not voluntarily given.
- It was practical under the circumstances to obtain a search warrant to search a motor vehicle.
- The initial stop of the motor vehicle was invalid.

# CHAPTER 5

# Arrest Warrants and Bench Warrants

This chapter covers:

- Arrest warrants, including issuance and contents.
- Bench warrants, including issuance and contents.
- Execution and return.

## 5.1 Arrest Warrants

Arrest warrants in municipal court are governed by Rules 8-203 and 8-205. Although the court may issue either a summons or an arrest warrant upon the commencement of a case, the rules contain an explicit preference for a summons. The court is required to issue a summons instead of an arrest warrant unless, in its discretion and for good cause shown, the court finds the interests of justice better served by an arrest warrant. Rule 8-203(B). **Only a judge may sign an arrest warrant.**

### 5.1.1 Issuance

The following checklist can used as a guide in determining whether to issue an arrest warrant. In every case, the judge must make an independent and unbiased decision based on the information submitted. 9-213 and 9-214

An arrest warrant can be issued only if all of the following requirements, as applicable, are satisfied.

| **Check** | **Required Elements** |
|---|---|
| ____ | 1. A criminal action is commenced by the filing of a complaint or a citation. |
| ____ | 2. A written affidavit for an arrest warrant is submitted. |
| ____ | 3. The affidavit contains: *(check all)* |
| | ____ a. A sworn statement of facts showing probable cause that an offense has been committed. |

____ b. Substantial evidence on which to base showing of probable cause.

If hearsay information is supplied by an informer/third party, the affidavit establishes by substantial evidence that: *(check both*)

____ (1) The informer is believable because: *(check one)*

____ The informer is a truthful person.

____ The informer has a particular motive or reason to be truthful about this information.

____ The information is sufficiently corroborated by other adequate, detailed and trustworthy information.

____ If there is a deficiency in the believability of the hearsay, it is overcome by independent corroboration of the criminal allegations, and not simply corroboration of innocent details.

____ (2) The informer has a factual basis for the information provided because: *(check one)*

____ The informer got the information in a reliable manner.

____ The information is based on the informer's personal knowledge or on reliable information received by the informer.

____ If there is a deficiency in the factual basis of the hearsay, it is overcome by independent corroboration of the criminal allegations, and not simply corroboration of innocent details.

____ c. Information that is sufficiently current to establish that probable cause exists now.

____ d. An allegation that the offense occurred within the court's jurisdiction.

____ e. Signature of the person swearing to or affirming the affidavit.

____ f. Signature and title of a person authorized to administer oaths or affirmations.

____ g. Date of the oath or affirmation.

____ 4. *(Optional)* The court may order the person who signed the affidavit, and any of that person's witnesses, to testify under oath prior to issuing an arrest warrant, provided that any such additional evidence is: *(check both)*

____ a. Put in writing.

____ b. Supported by oath or affirmation.

## 5.1.2 Contents

An arrest warrant must contain all of the following elements.

| Check | Required Elements |
|---|---|
| ____ | 1. Be signed by the judge. |
| ____ | 2. Be directed to a municipal police officer, full-time salaried state or county law enforcement officer, campus security officer or Indian tribal or pueblo law enforcement officer. |
| ____ | 3. Identify the defendant, by either: *(check one)* |
| | ____ Containing the name of the defendant, if known. |
| | ____ If the defendant's name is not known, containing any name or description by which the defendant can be identified with reasonable certainty. |
| ____ | 4. Describe and give the section number of the offense charged. |
| ____ | 5. Designate where the warrant may be executed, either: *(check one)* |
| | ____ Within the county where the municipality is located, for a non-DWI charge. |
| | ____ Statewide, for a DWI charge. |
| ____ | 6. Direct that the warrant be entered into a law enforcement information system. |
| ____ | 7. Command that the defendant be brought before the court. |
| ____ | 8. Conform substantially to Criminal Form 9-210. |

## 5.2 Bench Warrants

A bench warrant is a written court order to arrest a person for allegedly violating an order or requirement of the court. The bench warrant commands any authorized officer of the municipality to arrest and bring the person to court to answer the allegation. Form 9-212(A)

### 5.2.1 Issuance

At the time of issuance, the judge indicates on the bench warrant the alleged violation or violations for which it is being issued.

- If the judge has personal knowledge of the violation, the judge makes a notation to that effect in the file and issues the bench warrant.

- If the judge does not have personal knowledge of the violation, the judge cannot issue a bench warrant unless a person with knowledge submits an affidavit showing probable cause to issue the warrant. Form 9-211

- Before issuing a bench warrant for failure to appear as required in a written notice, the judge should first verify that service of the written notice was made.

The judge also indicates on the bench warrant the conditions under which the person can be released (e.g. payment of outstanding court fines or costs) or the amount of bond required for release, if the judge will not be available when the person is arrested. **Only a judge may sign a bench warrant.**

A bench warrant may be issued for any of the following allegations:

- A defendant did not appear for a court-ordered appearance.

- A subpoenaed witness failed to appear at trial or failed to produce subpoenaed documents prior to trial.

- A defendant violated conditions of release pending trial.

    - When the defendant is brought before the court, the judge reviews the conditions of release and determines whether to continue them unchanged, amend them or revoke them.

    - If a defendant allegedly violated the conditions of release by being indicted or bound over for committing another crime pending trial on the original charge, the court must determine whether the new judge revoked the previous conditions of release when the defendant appeared before that judge on the new charge. If so, the original judge cannot issue a bench warrant

because the previous conditions of release were no longer in effect.

- A defendant violated conditions of probation that were imposed for a suspended or deferred sentence. This can include failure to complete one of the educational programs ordered by the court, such as DWI School or Driver Improvement School When the defendant is brought before the court, the judge determines whether the probation should be continued or should be revoked with a jail sentence imposed.

- A defendant failed to pay fines or court costs that had been ordered by the court. Usually a bench warrant for failure to pay is not issued until after reasonable attempts have been made to collect the amount due.

- A defendant failed to complete the required number of hours of community service that had been ordered in lieu of paying fines or court costs.

## 5.2.2 Contents

A bench warrant must contain all of the following elements.

| **Check** | **Required Elements** |
|---|---|
| ____ | 1. Be signed by the judge. |
| ____ | 2. Be directed to a municipal police officer, full-time salaried state or county law enforcement officer, campus security officer or Indian tribal or pueblo law enforcement officer. |
| ____ | 3. Contain the name of the defendant and other identifying information including date of birth, last known address, and Social Security number if known. |
| ____ | 4. Identify reason for the issuance of the bench warrant by checking the appropriate statement on the bench warrant. |
| ____ | 5. Complete the section indicating the bond or payment requirements |
| ____ | 6. Designate where the warrant may be executed, either: *(check one)* |
| | ____ Within the county where the municipality is located, for a non-DWI charge. |
| | ____ Statewide, for a DWI charge. |

____ 7. Direct that the warrant be entered into a law enforcement information system.

____ 8. Command that the defendant be brought before the court.

____ 9. Conform substantially to Criminal Form 9-212C.

## 5.3 Execution and Return

The court gives the original and a copy of the arrest or bench warrant to the sheriff or local law enforcement agency. At the time of arrest, the law enforcement officer gives the copy of the warrant to the person arrested. If it is an arrest warrant a copy of the complaint is also given to the person arrested. The officer completes the return portion on the original of the warrant indicating the date of arrest. If it is a bench warrant the officer should also indicate release on bond. Once the officer completes the return on a warrant it is filed with the court. The court clerk adds the signed arrest or bench warrant in the defendant's case file.

Whenever possible, the officer brings the person before the judge immediately. A person arrested pursuant to a warrant is entitled to the same rights as any other arrested person.

# CHAPTER 6

# Subpoenas

This chapter covers:

- Issuance of subpoenas, for witnesses to testify and for production of documents.
- Service of subpoenas, in person or by mail.
- Motions to quash subpoenas, for unreasonableness or improper issuance.
- Failure to comply with subpoenas, and the court's options.

## 6.1 Issuance

A person does not have to be subpoenaed in order to appear or to produce documentary evidence. The person may appear and produce the material voluntarily at the request of a party. A subpoena is a court order compelling a person to do one or both of the following:

- Testify at a specified time and place for a deposition or trial.
- Produce specified documents or other tangible things.

Subpoenas are generally governed by Rule 8-602. There are two subpoena forms:

- Form 9-503, Subpoena, which is for use with Rule 8-602.
- Form 9-504, Order for Production (formerly called "Subpoena to Produce Document or Object"), which is for use with Rule 8-504, Discovery.

Subpoenas may be issued by the judge, court clerk, or an attorney who represents a party in the case. Rule 8-602(A)(3). At the request of a party, the judge or clerk can issue a blank subpoena that is signed and sealed. The party fills it in before it is served.

For subpoenas to compel the attendance of a witness, the following points apply:

- The same subpoena cannot be used for more than one witness.
- The subpoena must contain the name of the court, the name of the case, the name

of the person to whom it is directed, and the time and place for the person to attend and give testimony. The subpoena must be signed and dated by the judge or clerk.

For subpoenas to compel the production of documentary evidence such as books, papers or other tangible things (also known as a subpoena *duces tecum*), the following points apply:

- The subpoena must specify the papers or other documents and the place and time where they are to be produced, which can be before or at the trial. The subpoena must be signed and dated by the judge or clerk.

- In municipal court, only the defendant can subpoena the opposing party for production of documentary evidence.

## 6.2 Service

The party requesting the subpoena is responsible for having it served. Usually the court gives the signed subpoena (original and one copy) to the requesting party, who then handles the arrangements for service. Alternatively, the court may give the signed subpoena directly to a police officer or sheriff for service.

Service can be made by one of the following methods:

- In person: by delivering a copy of the subpoena to the named individual within the county in which the municipality is located. Service in person can be made by any of the following people:

    - The sheriff, a deputy sheriff or a municipal police officer.

    - Any person who is at least eighteen years of age and not a defendant in the case.

- By mail: by sending a copy of the subpoena in the manner provided for serving the summons, complaint and answer.

Return of service (a signed certificate that the subpoena was served) is made on the original of the subpoena, which is then filed with the court.

## 6.3 Motion to Quash

The person subpoenaed may file with the court a motion to quash the subpoena. Quashing the subpoena relieves the person of the obligation to appear or produce documents.

A motion to quash a subpoena must be made at or before the time specified in the subpoena for compliance. If the motion is made in writing, a copy must be served on the person who

requested the subpoena in the manner provided for service of pleadings and other papers. A hearing is normally held on this motion, after notice to the person subpoenaed and the party who requested the subpoena.

The judge may quash or modify a subpoena under any of the following circumstances:

- The subpoena is unreasonable or oppressive, e.g. all the records of a business are subpoenaed instead of only those records relevant to the case.
    - For subpoenas to produce documentary evidence, the judge may require the person who requested the subpoena to pay the reasonable costs of producing the specified materials.
- The subpoena was improperly issued, e.g. the subpoena fails to specify the time of appearance or the documents to be produced.
- The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies.

The judge can issue an order on the motion to quash a subpoena in one of the following ways:

- Orally, but only if both the subpoenaed person and the party who requested the subpoena are present.
- In writing, and served in the manner provided for service of pleadings and other papers.

## 6.4 Failure to Comply

If a subpoenaed person fails to comply as specified in the subpoena, the judge may do any of the following:

- Grant a continuance of the proceeding.
    - The party who subpoenaed a witness who failed to appear may agree to have the proceeding take place without the witness.
- Issue a bench warrant to arrest and bring the person before the court. Normally, the judge consults with the party who requested the subpoena before issuing a bench warrant.
- After notice and hearing, hold the person in contempt of court if the person does not have an adequate excuse for the failure to comply.
    - If the subpoena was served by mail, the judge cannot hold the subpoenaed

person in contempt unless additional evidence is presented, beyond just the proof of mailing, that the person actually received the subpoena or that the subpoena was also personally served on the person in accordance with the requirements for personal service.

# CHAPTER 7

# Trials

This chapter covers:

- Starting a trial, including calling the case, swearing in witnesses, excluding witnesses from hearing other testimony, and opening statements.
- Presentation of evidence, including order of presentation, witness testimony, defendant as witness, introduction of documentary evidence, objections and confessions.
- Closing arguments, including order of presentation.
- Verdict.
- Dispositive motions, including motions for directed verdict and motions to dismiss.
- Clerk's role in the courtroom during trials.
- Preservation and disposition of exhibits.

## 7.1 Start of Trial

### 7.1.1 Calling the Case

(For examples of how to conduct trials, see the scripts and checklists section of this Manual.)
The judge begins the trial by calling the case. The judge or clerk may say:

- Court is now in session.
- The case of City/Town/Village of _____ versus (*name of defendant*) is now before this court for trial.

### 7.1.2 Readiness to Proceed

The judge then inquires whether all parties are present and ready to proceed with trial.
If all parties are not present, the judge may:

- Reset the date of trial upon good cause shown for nonappearance. See Rule 8-601A.
- If the defendant is absent without good cause, issue a bench warrant for the defendant
- If the prosecution is not present, dismiss the case. The judge completes an Order Dismissing Criminal Complaint with Prejudice, signs, and dates it. Form 9-414

If the parties are present but are not ready to proceed with trial, the judge may do one of the following:

- Upon good cause shown, grant a continuance (postponement) of the trial. See Rule 8-601A.
- Require the parties to proceed.
- If a subpoenaed witness has not appeared and is essential to the trial, issue a bench warrant for the nonappearing witness and grant a continuance.

### 7.1.3 Witness Oath

If the witnesses are to be administered the oath as a group, the oath is given at this time. Otherwise, each witness is administered the oath at the time the person is called to testify.

The following oath is set forth in Rule 8-601(C):

> Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?

Any party giving testimony must take this oath. Since some people, for any number of reasons, do not want to swear an oath, the above allows the person to swear or affirm. Do not ask whether the person is swearing or affirming. Reading the oath as above is sufficient.

Interpreters used to translate testimony in municipal court must take an oath that they will make a true and impartial translation in an understandable manner using their best skills and judgment in accordance with the standards and ethics of their profession.

### 7.1.4 Exclusion of Witnesses

A party may make a motion or the judge asks if the parties wish to "invoke the rule" excluding witnesses. Rule 11-615.

If either party invokes the rule, the judge excludes the witnesses, other than the parties, 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.

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

The witness exclusion rule does not authorize the exclusion of the defendant or other person whose presence is essential, such as the arresting officer who is to assist the prosecution.

### 7.1.5 Opening Statements

In most cases in municipal court, opening statements are unnecessary. Even when there are attorneys present, either or both sides may waive opening statements.

An opening statement is an outline of anticipated proof in the case. Its purpose is to give the judge introductory information about facts and issues so the judge will be able to understand the evidence. No exhibits may be introduced or witnesses examined in an opening statement and no argument is permitted. Basically, the remarks included in the opening statements should all come after the introductory phrase, "We will show that…" The opening statements, and any comments made by the attorneys, are not testimony. They are not evidence to be considered when deciding the case.

After the prosecution 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 he or she desires to do so. The defendant may waive the right to make an opening statement until after the prosecution's case has been presented.

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

## 7.2 Presentation of Evidence

### 7.2.1 Order of Presentation

The prosecution calls and examines the witnesses for the prosecution, each of whom may be cross-examined by the defense. The prosecution then rests.

The judge hears appropriate oral motions, which either party may make at this point in the proceedings such as a defense motion for a directed verdict. If the case is not dismissed at this point, the defendant may present his or her case.

If they choose to do so, the defense calls and examines the witnesses for the defense, each of whom is subject to cross-examination by the prosecution, and then rests.

- 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.

- The defendant is not required to present any evidence or call any witnesses.

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

- If the defendant did not call witnesses or present any evidence, the prosecution cannot call rebuttal witnesses.

- Rebuttal witnesses are called only to rebut evidence that has previously been introduced by the defense.

After both parties have rested their entire cases, the judge hears oral motions and closing arguments, which may be made by either party. The judge then rules on the case.

## 7.2.2 Witness Testimony

After each witness has been examined by the party calling him or her (called direct examination), the opposing party may cross-examine the witness.

Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Rule 11-611(B).

Although the extent of the cross-examination is within the discretion of the trial judge, the judge may not restrict cross-examination if it might be of assistance to the defendant or if it concerns subjects on which the defense is entitled to cross-examine.

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

At the discretion of the judge, the party who cross-examined the witness may "re-cross-examine" the witness, but only if new subject matter was brought out during the redirect examination. Re-cross is limited to that new subject matter.

A party or attorney may object to questions, but even if he or she fails to do so, the judge may interrupt on his or her own initiative to prevent questions which are valueless or harassing. It must be remembered, however, that the right to confront witnesses in criminal cases is of constitutional origin, so be cautious when restricting the defense.

The judge may ask appropriate questions of a witness at any point during the presentation of evidence. However, the judge should not ask questions that will “help” the prosecution or defense with their case or that could constitute an implied comment on the case. Rule 11-

614(B). Generally, the judge's questions should focus on clarification of confusing testimony.

- In general, a witness may not testify to a matter unless the witness has personal knowledge of the matter. Rule 11-602.

- Hearsay evidence is not admissible unless allowed by the Rules of Evidence. Rules 11-801 to 11-806.

- Statements made by the defendant during plea negotiations are not admissible in evidence for any purpose including impeachment of the defendant. Rule 11-410.

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.

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

A judge cannot consider a defendant's refusal to testify against him or her in determining guilt.

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

### 7.2.3 Defendant as Witness

A defendant has an absolute right not to testify. A defendant has the same privilege as any other witness to invoke the Fifth Amendment and refuse to answer any question in any criminal proceeding. However, the defendant may not simply select which testimony to give and which to withhold.

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

- When testifying on his or her own behalf, except as limited by the Rules of Evidence.

- 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.

A defendant may be questioned about prior convictions under certain circumstances. Rule 11-609(A).

- Rule 11-609(A)(1) allows cross-examination regarding any felony conviction if the judge finds its probative value outweighs the prejudice to the defendant.

- 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.

- 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. Rule 11-609(B).

A defendant may not be questioned about a prior conviction under any of the following circumstances:

- The answer could expose the defendant to an enhanced sentence or deprive him or her of liberty.

- The conviction is for a misdemeanor not involving the truthfulness of the defendant and is therefore irrelevant to the defendant's credibility.

- The conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

- 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.

When testifying as a witness, the defendant may not be questioned about post-arrest silence relating to any issue in the case when the defendant's silence lacks probative value.

## 7.2.4 Introduction of Documentary Evidence

A party examining a witness may introduce written documents or other things as evidence during examination of the witness. For guidance, see Rules 11-901 to 11-903. The procedure for introduction of evidence is as follows:

- A party asks to have the exhibits numbered in sequence and marked as exhibits. This is usually done by the court clerk or the judge. Each exhibit is labeled as a “City” or “Prosecution” exhibit (letter or number sequence) and “Defendant” exhibit (letter or number sequence). To prevent confusion, courts may use numbers for one party’s exhibits and letters for the other party’s exhibits.

- The witness being examined then identifies the exhibit that has been marked and states his or her personal knowledge of the exhibit.

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

- A party may offer an exhibit to be admitted as evidence at any time before ending the

party's side of the case. The judge rules on whether the exhibit is admissible.

Once the exhibit has been admitted into evidence, it may be used in the examination of other witnesses and considered by the court in reaching its verdict. The court may not rely on evidence that has not been admitted.

Documentary evidence that is hearsay is not admissible unless allowed by the Rules of Evidence.

## 7.2.5 Objections

The opposing party may object to any of the following:

- A question asked a witness.
- An answer given by a witness.
- The introduction of documents or other things as evidence.

The objection must be raised at the time of the question, answer or introduction of evidence. When an objection is raised to a question or exhibit, the party must state the reason for the objection. The opposing party may respond, then the judge either sustains (agrees with) or overrules (disagrees with) the objection. Rule 11-103.

## 7.2.6 Confessions

Generally, a confession of 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.

**Voluntary v. Involuntary**

A confession that was not freely and voluntarily made is generally not admissible in evidence against the defendant except to the extent that it may be used to impeach the defendant's testimony if the defendant chooses to testify. *Miranda v. Arizona,* 384 U.S. 436 (1966). The government must prove by a preponderance of the evidence that the confession was voluntary.

**Miranda Warnings**

Miranda warnings, arising out of the U.S. Supreme Court decision in *Miranda v. Arizona*, 384 U.S. 436 (1966), inform individuals of their constitutional right against self-incrimination and their constitutional right to assistance of counsel. A law enforcement officer must give Miranda warnings to an individual prior to custodial interrogation. The warnings are intended to protect against any coercive effect of custodial police interrogation. If the warnings are not given and the individual does not waive his rights, nothing the individual says during custodial interrogation can be used as evidence against him. The individual's statements can be used only

if the Miranda warnings were given and the individual made a valid waiver of rights.

Prior to custodial interrogation, a person "must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda,* 384 U.S. at 444. Although the Supreme Court did not require that a specific script be followed, Miranda warnings (also called "Advice of Rights") typically state:

> You have the right to remain silent.
>
> Anything you say can and will be used against you in a court of law.
>
> You have the right to talk to an attorney for advice before we ask you any questions and to have a lawyer present with you while we ask you questions.
>
> If you cannot afford an attorney, one will be appointed at no cost to you before we ask you any questions, if that is your desire.
>
> If you decide to answer questions now, without a lawyer present, you will still have the right to stop answering my questions at any time. You also have the right to stop answering my questions at any time until you talk to a lawyer for advice.

*State v. Rascon*, 89 N.M. 254 (1976).

**Custodial Interrogation**

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. General on-the-scene questioning of citizens in the fact-finding process of the police is not considered "custodial" even though there may be coercive aspects to the questioning. Miranda warnings apply only when a person is in custody or deprived of his freedom of action in any significant way.

A defendant who is questioned during a police investigation or stopped in a routine traffic stop is not entitled to Miranda warnings. The United States Supreme Court has said that persons temporarily detained pursuant to noncoercive ordinary traffic stops are not "in custody" for the purposes of Miranda. *Berkemer v. McCarty,* 468 U.S. 420 (1984). The roadside questioning of a motorist pursuant to a routine traffic stop does not constitute custodial interrogation. Miranda warnings are required only if the 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." Miranda warnings are not required even if the defendant believed he was temporarily detained or the arresting officer believed he would have restrained the defendant. The only relevant inquiry is whether a reasonable person in the suspect's position would have understood himself to be in custody or under restraint comparable to those associated with a formal arrest.

**Case Law**

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 he or she was in police custody, there was "custodial interrogation" and the Miranda rule applies.

The New Mexico Court of Appeals also has held that statements made by a criminal defendant were voluntary even though such statements were made after a police officer had advised defendant of his Miranda rights and after a police officer played a tape recording to the defendant of a conversation between the defendant and a co-defendant made in the officer's patrol car. *State v. Lucero*, 96 N.M. 126 (Ct. App. 1981).

Once an accused in custody has expressed the desire to deal with police through counsel, the person is not to be subjected to further interrogation until counsel is made available to the accused unless the accused voluntarily initiates further communication with the police. If counsel is not provided for the accused and then the accused gives a statement or confession to the police, such statement or confession is inadmissible against the defendant at trial.

When an accused requests an attorney after Miranda warnings are given, in order to establish the admissibility of a subsequently obtained statement, the municipality must show the following existed at the time the statement was made:

- The statement was voluntary; and
- The defendant made a knowing and intelligent waiver of the right to counsel prior to giving the statement.

A field sobriety test does not necessarily entitle a defendant to Miranda warnings. *Armijo v. State ex rel. Transp. Dep't*, 105 N.M. 771 (1987).

There are numerous New Mexico and federal court decisions that include an interpretation of the *Miranda v. Arizona* decision and the rules regarding when Miranda warnings must be given to an accused. It is useful to study these cases as situations arise concerning the admissibility of a confession or other statement by a defendant. If a question comes up, it is appropriate to ask the attorneys to brief the issue to assist the court in making a decision.

# 7.3 Closing Arguments

## 7.3.1 Definition

The closing argument is the opportunity for each side to summarize its case for the judge. Unlike the opening statements, where the attorneys or parties may only summarize the evidence they plan to present, in closing arguments they may analyze and argue the facts and law of the case. No evidence may be introduced or witnesses examined in doing so, however. As with

opening statements, closing arguments are frequently waived in municipal court. The closing arguments are not testimony. They are not evidence to be considered when deciding the case.

### 7.3.2 Order of Presentation

The prosecution gives his or her argument first.

The defendant's closing argument follows the prosecution's closing argument.

- The defendant may give a closing argument even if the prosecution does not give one first.

- The defendant is not required to give a closing argument.

After the defendant's closing argument, the prosecution may offer a rebuttal argument.

The prosecution is prohibited from making any statement either in opening or closing argument which can be construed as a comment on the defendant's failure to testify, and the court should not consider this in its rulings.

The attorneys in closing argument may comment concerning the failure of a party (the municipality or the defendant) to call a witness other than the defendant to testify in the case.

## 7.4 Verdict

The judge orally announces his or her decision after the parties have rested their cases and have given closing arguments.

No statute or court rule allows for taking a case under advisement or delaying a verdict; the decision is given at the conclusion of the trial.

The judge prepares a judgment and sentence form in accordance with the decision unless a sentencing hearing is to be held at a later date. The judge signs the form and gives a copy to each party.

## 7.5 Dispositive Motions

### 7.5.1 Motion for Directed Verdict

A motion for directed verdict is a request by the defendant, asking the judge to decide the case in the defendant's favor without having to present the defense case. By making this motion, the defendant claims that the evidence is so clearly in his or her favor that there is nothing for the judge to consider. In other words, the defense claims that the prosecution has not met its burden of proving all of the elements of the offense.

The motion can be made at one or more of the following points during the trial:

- After presentation of the prosecution's case.
- After presentation of defendant's case.

The judge may rule on the motion or may take the motion under advisement until a later stage in the proceedings.

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.

The motion must state the specific grounds on which it is based.

The judge may grant the motion only after doing both of the following:

- Considering all evidence in the light most favorable to the prosecution (for purposes of the motion only).
- Arriving at the conclusion that the evidence, as a matter of law, is insufficient to justify a verdict in the prosecution's favor.

If the judge grants the motion, the final order on criminal complaint form is used. In addition to showing that the judge found the defendant not guilty, a notation is entered that a motion for directed verdict was granted.

### 7.5.2 Motion for Dismissal

Any of the following motions for dismissal may be made by the defendant, normally at the beginning of the trial:

- Motion for dismissal due to lack of jurisdiction.
- Motion to dismiss on the grounds that the time limit for bringing the action has expired.
- Motion to dismiss because of an evidentiary issue.

The defendant must state the specific reasons for making the motion.

The judge may delay ruling on the dismissal motion until after the prosecution’s or defendant's case has been presented.

The defendant does not waive the right to present evidence if the motion is denied.

If the judge grants the motion, all of the following occur:

- The judge writes "Dismissed" and the reason on the court's copy of the criminal complaint and also enters the date and signature.
- The case is dismissed with prejudice unless the court specifically orders otherwise.
- No judgment is entered.

Dismissal by stipulation of the parties may occur at any point during the trial and must be granted by the judge.

## 7.6 Clerk's Role in the Courtroom During Trial

If there are two or more clerks working in a court one may have the responsibility of assisting the judge during court processes. Each judge will have his/her list of the duties to be performed by the clerk who sits in the courtroom during trial. There are some courts that will not have a clerk in the courtroom because of staffing concerns. Most courts will provide a desk and other equipment such as a computer for the clerk to use during court. The desk should be next to or in close proximity to the bench to allow the judge and clerk to work together.

Some of the duties may include:

- Prior to the court session the clerk should ensure that all case files for the day, forms, supplies, and other documents (ordinances, fee schedules, Benchbook, etc.) are on the judge's bench and that the clerk's desk is supplied with necessary items.
- Announcing that court is now in session and asking those in the courtroom to rise as the judge enters.
- Announcing the next case on the docket referred to as "calling the case."
- Swearing in the witnesses using the oath referred to in Rule 8-601(C).
- Management of exhibits submitted by defense or prosecution.
- Complete the Judgment and Sentence form based on the judge's sentence in court. This may be done manually or by computer if one is in the courtroom.
- Ensure security is maintained in the courtroom. If the court does not have a bailiff, it may become the clerk's duty to identify possible problems and take steps to ensure the safety of the judge and others in the courtroom. In most instances this will mean contacting the police department prior to an emotional

case and requesting an officer to be present during the trial. Examples of this type of case include: animal cases, assault and battery, or damage to personal property.

- Prepare paperwork for DWI school, community service, Agreement to Pay, and other sentencing orders.

- Provide procedural information to defendants. This information may include simple responses such as where to report for community service or more complicated questions on the process for filing for an appeal. At no time should the clerk give legal advice to the defendant.

- Assist the judge with any questions she/he may have about the case. The clerk may respond to a judge's question about the case file or fines/fees but should never tell the judge how she/he should rule or sentence in a case. The clerk is only there to assist the judge with procedures.

- The clerk should refer all payments and/or detailed discussions to the staff in the court offices rather than take payment in the courtroom. This policy will encourage defendants to show proper respect for the court and reduce noise and distractions in the courtroom.

Note: Some of the duties noted may be handled by the judge or a bailiff if the court has one.

## 7.7 Preservation and Disposition of Exhibits

*Note*: There is no municipal court rule dealing with this subject. The information below is taken from Magistrate Court Rule 7-112 and Metropolitan Court Rule 6-112. If a municipal court chooses not to follow these procedures, the court could develop its own written procedures and local court rule on this topic.

### 7.7.1 Preservation

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.

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.

### 7.7.2 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 or be responsible for bringing the exhibits to the de novo trial in district court.

### 7.7.3 Final Disposition

All exhibits retained by 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.

# CHAPTER 8

# Judgment, Sentence and Appeal

This chapter covers:

- Judgment and sentence procedures.
- Sentencing, including presentence reports, sentencing options, conditions of probation, and violation and revocation of probation.
- Court costs that must be imposed.
- Appeals, including the right to appeal, filing requirements, record on appeal, conditions of release on appeal, and disposition of appeals.

## 8.1 Judgment and Sentence

### 8.1.1 Procedures

For examples of how to conduct a sentencing, see the scripts and checklists section of this Manual.) The judge orally announces the judgment and sentence in open court after the judge finds the defendant guilty or not guilty, or after the defendant pleads guilty or *nolo contendere* (no contest). The oral judgment and sentence must be followed by the entry of a written order by the judge. Rule 8-701. The judge must inform a convicted defendant of the right to appeal.

If the judge needs more information prior to imposing sentence, the judge may schedule a sentencing hearing for a later date.

If the defendant is found not guilty, the judge immediately discharges the defendant from custody and releases the defendant from any bail obligations or other conditions of release. The judge may not impose any fines, fees or costs on a defendant who has been found not guilty.

For the written order, the judge must use the court-approved judgment and sentence form or the final order on criminal complaint form. The judgment and sentence form is used if the sentence involves imprisonment, including a suspended jail term, or if the judge defers sentencing. The final order on criminal complaint is used if there is no jail sentence (fine only), or if the judge finds the defendant not guilty.

### 8.1.2 Sentencing Forms

A Judgment and Sentence form must be completed in every case regardless of the sentence. The back of a citation will no longer serve as a Judgment and Sentence form. When a defendant is Sentence form must be completed and given to the defendant.

Supreme Court has approved forms to be used when sentencing a defendant. The forms were developed for different circumstances so the judge has the option to decide which one to use.

- Judgment and Sentence (Commitment or Probation) Form 9-601
  This form is very detailed and includes information for sentences of DWI offenders so will assist the judge in including all sentencing requirements for this crime.

- Judgment and Sentence Form 9-602
  This form is a simpler form that does not include as much of the required sentencing for DWI.

- Final Order on Criminal Complaint Form 9-603
  This form may be used when the defendant is being fined or has been found not guilty of the charge.

- Final Order on Criminal Complaint Form 9-603A
  This form is used when the judge is deferring the sentence of the defendant.

Once the sentencing form has been completed and signed by the judge, the original should be added to the case file and a copy provided to the defendant. Copy distribution may be done at the time of the hearing or may be sent to the defendant following the trial. The defendant will have fifteen days from the signing date of the form to appeal the judge's decision.

## 8.2 Sentencing

### 8.2.1 Presentence Report

In the municipal court, the judge may order a presentence report or evaluation prior to imposing any sentence. This report could include screening for potential alcohol or drug problems, an evaluation to determine if there is a need for a specific type of counseling, or any other type of evaluation the judge thinks will be helpful in determining an appropriate sentence. There are no 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.

### 8.2.2 Sentencing Options

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 limits for punishment are contained in one of the following:

- The ordinance designating the offense and the penalty.
- The general punishment provisions applicable to petty misdemeanors in municipal court, if no other penalty is specifically provided. §3-17-1C(1).

If the sentence is not deferred, the sentencing options available for each count charged using the judgment and sentence form are as follows:

- Imposition of jail sentence.
- Imposition of both jail sentence and fine.
- Suspension of jail sentence and imposition of fine.
- Imposition of jail sentence and suspension of fine.
- Suspension of both jail sentence and fine.

If the defendant is convicted on one count, a sentence of both a fine and jail sentence may be imposed. The court cannot both impose a sentence and defer a sentence of either a jail term or a fine for the same crime. The proper procedure would be for the court to do one of the following:

- Impose a jail sentence and impose a fine.
- Impose a jail sentence and impose no fine.
- Impose no jail sentence and impose a fine.
- Impose and suspend all or part of a jail sentence and/or fine.
- Defer the sentence.

If the defendant is convicted on more than one count, the court may impose a fine and/or a jail sentence on one count and defer the sentence on the other counts.

If the defendant is convicted of more than one count and is sentenced to a jail term, 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 be served concurrently or consecutively, the sentences must be served concurrently.

The judge may select from among the sentencing options described below.

**Suspended Sentence**

- The sentence is imposed but the execution of the sentence is suspended in whole or part, and a term of probation is imposed. The judge can suspend all or a portion of a jail sentence or fine. For example, a defendant may be sentenced to 60 days in jail with all but ten days suspended.

- Costs are adjudged against the defendant because they must be collected upon conviction.

- If the probationary period is satisfactorily completed, without revocation, the defendant is discharged from further obligations but the conviction on the charge remains.

- If the probationary period is not satisfactorily completed, the judge must hold a probation violation hearing and may require do one of the following:

    - Require the defendant to serve the balance of the sentence which was originally imposed but suspended or any lesser sentence, after credit for time spent on probation is given. See New Mexico DWI Benchbook for special rules governing DWI.

    - Continue the probation with the same conditions.

  No credit for time spent on probation need be granted from the date of the violation to the date of arrest, unless the court finds that a warrant to arrest the defendant for violating his probation could not be served.

**Deferred Sentence**

- There is no sentence, but the judge reserves the power to sentence at a later time.

- Costs are adjudged against the defendant because they must be collected upon conviction.

- If the defendant is placed on supervised or unsupervised probation for all or some portion of the period that sentencing is deferred, and if the probationary period is satisfactorily completed, the charges are dismissed.

- If the probationary period is not satisfactorily completed, the judge must sentence the defendant for the first time, with credit for time spent on probation. See the New Mexico DWI Benchbook for special rules governing DWI.

*Note:* Under the Motor Vehicle Code, a defendant convicted of DWI who receives a deferred sentence and successfully completes probation is still considered to be a first offender, and therefore would be a subsequent offender if convicted of any future DWI charges. §66-1-4.6(C), §66-1-4.16(R).

Suspending or deferring a sentence and imposing probation is an act of clemency, not a right of the defendant. In general, conditions of probation should relate to the education and rehabilitation of the defendant with regard to the best interests of both the public and the offender.

## 8.2.3 Conditions of Probation

By imposing conditions on a deferred or suspended sentence, the judge places the defendant on probation. The court includes in its order the conditions necessary to ensure that the defendant complies with the law during the period of suspension or deferral. The judge decides whether to place the defendant on probation for all or some portion of the period of deferment or suspension and whether the probation is to be supervised or unsupervised.

The conditions of probation are at the discretion of the judge as long as they are reasonably related to the rehabilitation of the defendant. For example, the judge may order the defendant to:

- Undergo medical or psychiatric treatment and enter and remain in a specified institution, when required for treatment.
- Serve the probationary period under supervision of probationary authorities.
- Serve a period of time in volunteer labor (community service) that benefits any public, charitable or educational entity or institution.
- 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.
- Satisfy any other conditions reasonably related to the defendant's rehabilitation, such as requiring the offender not to associate with the victim(s).

A fine and a jail term are penalties authorized by law and may not be imposed as a condition of probation.

The judge should make certain that the terms and conditions of probation are made clear in the judgment and sentence form. If no terms and conditions of probation are specified, the defendant cannot violate the conditions.

The length of the probation period should be specifically entered on the judgment and sentence form. If a fixed probation period is not specified, the probation period can be assumed to be the same as the maximum allowable sentence. In no case may the term of probation exceed one year. §35-15-14.

If multiple suspended or deferred sentences are to be imposed consecutively, the individual probation periods for each sentence are likewise "stacked," that is, imposed one after the other for a combined total period that may exceed the maximum sentence for one offense. If multiple suspended or deferred sentences are to be imposed concurrently, the probation period is effective only for the duration of the longest of the probation periods imposed. If the judge does not specify in the sentence or terms of probation that the terms for each count are to run consecutively, the sentences or probation periods will run concurrently.

## 8.2.4 Violation and Revocation of Probation

See Rule 8-802.

If the defendant violates the conditions of probation, the following judicial steps may be taken:

- The prosecution may file a motion with the judge for revocation of the suspended sentence, or the court may make its own motion.
- If this motion is made, the judge must schedule a hearing, with notice to the defendant of the conditions alleged to have been violated and the alleged manner of violation.
- The court must issue one of the following forms for the defendant’s appearance at the probation violation hearing:
    - Criminal Summons for Failure to Appear or Comply with Court Rules Form 9-216
    - Order to Show Cause Form 9-611
- The court must issue a bench warrant for the defendant if any of the following apply:
    - The summons cannot be served.
    - The defendant fails to appear.
    - For other good cause shown.
- If the bench warrant cannot be served, the defendant is a fugitive from justice.

Upon arrest and subsequent hearing, the court must determine whether to credit the time from the violation to the date of arrest as time spent on probation.

- At the hearing, the defendant must be given an opportunity to show, if possible, that probation was not violated or that mitigating circumstances occurred which explain why probation should not be revoked.

- The standard for establishing a violation is "reasonable certainty as to satisfy the conscience of the court."

If the judge finds that the defendant violated a condition of probation under a **suspended** sentence, the judge may do one of the following:

- Continue the probation with the same conditions.

- Require the defendant to serve the balance of the sentence that was originally imposed but suspended, or any lesser sentence.

    - A new judgment and sentence form is prepared, with a notation on the original judgment and sentence form that the suspended sentence is revoked.

    - The new judgment and sentence may not impose a fine or jail sentence greater than what was originally imposed.

    - Time served on probation must be credited against any sentence imposed, except for any period when the defendant was a fugitive from justice. See the New Mexico DWI Benchbook for special rules governing DWI.

If the judge finds that the defendant violated a condition of probation under a **deferred** sentence, the judge may do one of the following:

- Continue the probation with the same conditions.

- Sentence the defendant for the first time, imposing any sentence which could have been originally imposed.

    - A new judgment and sentence form is prepared, with a notation that the sentence is being imposed as a result of a violation of the conditions of probation under a deferred sentence.

    - Time served on probation must be credited against the sentence imposed. See the New Mexico DWI Benchbook for special rules governing DWI.

- After the period of the deferred sentence has ended, the judge cannot revoke probation and impose a sentence.

### 8.2.5 Modification of Sentence

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 8-801. No sentence can be modified without prior notification to all parties and a hearing on the matter.

## 8.3 Court Costs

Court costs must be assessed against all defendants who are convicted of violating one of the following:

- Any ordinance relating to the operation of a motor vehicle.
- Any ordinance enforceable by a term of imprisonment.

A defendant is convicted by any of the following means:

- After a trial with a finding of guilt.
- A plea of guilty.
- A plea of *nolo contendere*.

Court costs cannot be assessed against defendants who are not convicted, e.g. the case was dismissed or the defendant was found not guilty. Court costs are collected when a sentence is deferred even if the charges are later dismissed based upon satisfactory completion of the probationary period.

The required court costs are set forth in §35-14-11. They are:

- A corrections fee of $20.
- A judicial education fee of $2 for cases filed before July 1, 2009, or $3 for cases filed on or after July 1, 2009.
- A court automation fee of $6.

A person convicted of violating an ordinance against driving under the influence of drugs or liquor must be assessed the following two fees, in addition to the required court costs:

- A fee of $65.00 to defray the costs of chemical or other tests to determine the influence of liquor or drugs. §31-12-7(A).

- A fee of $75.00 to fund comprehensive community programs for the prevention of driving while under the influence of liquor or drugs, and for other traffic safety purposes. §31-12-7(B).

A person convicted of violating an ordinance against distribution or possession of a controlled substance must be assessed the following fee, in addition to the required court costs:

- A fee of $75.00 to defray the costs of chemical tests and other analysis of controlled substances. §31-12-8(A).

Court costs and fees are paid to the municipal court, which disperses the money as provided by statute.

When court costs and fees are assessed against a defendant, and also if a fine is imposed, the following apply:

- Payment must be made on the date of sentencing, unless the defendant properly completes an Agreement to Pay in installments.

- Payment may be made by check, cash or money order. The judge may specify the method of payment. The defendant must be given a receipt.

- If the defendant is unable to pay the required court costs, and/or a fine, the court in its discretion may permit the defendant to perform community service in lieu of all or part of the amount. §31-12-3.

    - The community service must be meaningful and benefit the public at large or any public, charitable or educational entity or institution.

    - The community service cannot be suspended or deferred.

    - The defendant cannot be paid for the work, but receives a credit against the amount due at the rate of the prevailing federal hourly minimum wage.

    - The court cannot order or allow the defendant to contribute money to charity in lieu of paying court costs or fines.

## 8.4 Appeal

### 8.4.1 Right to Appeal and Filing Requirements

Unless the defendant has pled guilty or no contest, when entering the judgment and sentence or final order the judge must advise the defendant of his or her right to a new trial in district court. The judge also must 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. Rules 8-702 to 8-705.

The city also has a right to appeal in certain limited circumstances, such as if the judge rules that a city ordinance is invalid or unconstitutional or if the judge finds that a complaint is not legally sufficient. §35-15-11.

The defendant must file a notice of appeal form (Form 9-607) and proof of service with the district court, and pay the docket fee or submit an affidavit of indigency. The defendant must request a trial date at the time of filing the notice of appeal.

The defendant also must promptly file in the municipal court an endorsed copy of the notice of appeal and a copy of the receipt for payment of the docket fee (unless the defendant has a public defender or other court appointed counsel, or the appeal is by the government). The defendant must serve a notice of appeal to each party in the case or to the attorney for any party in the case.

Once the notice of appeal is filed, the municipal court loses all jurisdiction to act on the case, unless the district court returns the case to the municipal court.

## 8.4.2 Record on Appeal

The municipal court is required to send the record on appeal to the clerk of the district court within 15 days from the filing of the notice of appeal. The municipal court clerk will be the responsible for providing the information to the district court.

The record on appeal includes all of the following:

- A title page containing the caption of the case in the municipal court and the names and mailing addresses of counsel, if any. Form 9-608
- Copies of all pleadings and any exhibits retained by the court (this includes the criminal complaint, criminal summons and arrest warrant, if any).
- A copy of the judgment or final order, with the date of filing noted on the copy. The defendant's conditions of release, if any, must be included on the judgment and sentence form.

## 8.4.3 Conditions of Release on Appeal

A defendant released before trial is entitled to continue on release during an appeal to the district court under the same terms and conditions as previously imposed, unless the court

determines that other terms and conditions are necessary to assure the defendant's appearance or the orderly administration of justice. The judge may use the usual bail criteria and may also consider the fact of conviction and the length of sentence imposed.

If the court requires a bail bond in the same amount as set for release pending trial, the previous cash bond may continue pending the appeal or disposition of a motion for a new trial. If the bail bond was posted by a paid surety the court must discharge the bond and require a new bond be posted for the appeal.
If the court decides that the previous conditions are not sufficient to secure the defendant's appearance or the orderly administration of justice, the court may increase the amount of the bond on appeal or terminate the conditions of release.

After judgment or sentence, the court may release a person who was not released prior to or during trial.

## 8.4.4 Disposition of Appeal

All appeals to district court must be tried within six months after the notice of appeal is filed. The defendant is responsible for obtaining a trial date within that period. For cases filed with the municipal court on or after January 22, 2008, and which are appealed thereafter to the district court, the time for the district court de novo trial shall be within six months after the filing of the notice of appeal or within six months of specific events provided for in district court Rule 5-604(B), concerning that court's time limits for commencing a trial.

The municipal court case file will remain open pending the appeal and disposition. If the court has not received the final order in the case by the six month time limit, the court clerk should contact the district court and request the status of the case.

If the case is not heard within six months, and no extension of time has been granted, the appeal is dismissed and the conviction is automatically affirmed. The case is remanded to the municipal court for enforcement of its judgment and sentence.
The Supreme Court may grant one extension of up to 90 days after the six-month limit, upon a showing of good cause.

- The party seeking the extension must file with the clerk of the Supreme Court a verified petition containing the facts that constitute good cause. A copy of the petition must be served on the opposing party.

- Opposing counsel may file an objection within five days.

- No hearing is held unless ordered by the Supreme Court.

Upon final disposition of an appeal, the case is remanded to the municipal court. If the district court finds the defendant guilty, it imposes sentence prior to remanding the case to

the municipal court for enforcement of the district court's judgment.

If the case is remanded back to court or a new sentence is imposed by the district court, the court clerk may need to summon the defendant back to court for the judge to discuss payment of fines, incarceration, or any other sentencing requirements.

# CHAPTER 9

# Contempt

This chapter covers:

- Definition of contempt in general.
- Direct contempt, including examples and options.
- Indirect contempt, including examples and options.
- Notice and hearing requirements for contempt.
- Punishment for contempt, and appeal.

## 9.1 General

Contempt of court is an act that is calculated to lessen the authority or dignity of the court by embarrassing, hindering or obstructing the court in the administration of justice.

Under Rule 8-110, municipal judges have jurisdiction to punish contempt that consists of:

- Disorderly behavior in the presence of the court or so near the courtroom as to obstruct the administration of justice. This type of contempt may be committed in the witness room, corridors, clerk's office or judge's chamber.
- Disobedience or resistance to any lawful order, process, or rule of the court
- Misconduct of court officers in official transactions.

## 9.2 Direct Contempt

Direct contempt normally involves disorderly, contemptuous or insolent behavior toward the judge and the behavior interferes with the course of the trial or other judicial proceeding. For contempt to be direct, it must satisfy all of the following conditions:

- Committed in the presence of the court.
- Seen or heard by the judge.

- Necessary for the judge to take immediate corrective steps to restore order and maintain the dignity and authority of the court.

Under most circumstances, direct contempt may be punished summarily (no separate notice or hearing is required) 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. Before a summary order for direct contempt may be imposed and enforced, the record should be clear that the following occurred:

- The judge gave a specific warning.
- The person had an opportunity to explain.

These conditions are not required in the case of flagrant contemptuous conduct.

Any person present in the courtroom may be charged with contempt for disorderly behavior, including:

- A party to the case.
- An attorney.
- A witness.
- An observer.

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 vigorous but respectful advocacy for a position, which is not contempt, from behavior that is disruptive or shows disrespect for the court's authority, which is contempt.

If the judge finds a person in direct contempt of court, the judge must sign and enter a written order that recites the facts as well as the judgment and sentence.

## 9.3 Indirect Contempt

Indirect contempt normally involves behavior that cannot be classified as direct contempt. Examples include:

- Preventing service of process.
- Withholding evidence.
- Bribing a witness.

- Disobeying a court order.

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.

Failure of an attorney to appear in court at the time designated by the judge may be considered a direct or indirect contempt. However, if the judge lacks personal knowledge of what caused the attorney's absence, the court may not punish for contempt without first giving notice and the opportunity to present a defense. 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.

## 9.4 Notice

Notice and hearing are required before any indirect contempt may be punished. The notice must state the essential facts of the contempt charged. Notice may be given by one of the following methods:

- The judge, orally, in open court in the presence of the person charged.
- A summons.
- A bench warrant.
- An order to show cause.

The person is entitled to bail as for other criminal actions. The person must be given sufficient notice of the hearing to prepare a defense.

## 9.5 Hearing

Before or at the time of the contempt hearing, the court advises the person of his or her rights. The person has all the rights afforded a defendant in a criminal action. Counsel is provided to an indigent accused of contempt only if the judge believes a jail sentence may be imposed.

The Rules of Evidence and the Rules of Criminal Procedure apply to contempt hearings.

If the judge has become so embroiled in the contempt case that he or she cannot objectively hear the case, or if a member of the judge's staff will be a witness in the proceeding, another judge should conduct the hearing on the matter.

If the person is found not guilty of contempt, the judge enters a final order indicating this finding.

## 9.6 Punishment and Appeal

If the person is found guilty of direct or indirect contempt, the court enters judgment and sentence within the limits of the jurisdiction of the court. The penalty for contempt is the same as that for any other misdemeanor – 90 days in jail and/or a five hundred dollar fine.

A judgment of guilty is entered on the appropriate form:

- The judgment and sentence form is used if a jail term is imposed or if the sentence is suspended or deferred.

- The final order on a criminal complaint is used if the sentence consists of a fine only.

A person found guilty of contempt may appeal to the district court as for other criminal actions.

# CHAPTER 10

# Evidence in Municipal Court

This chapter covers:

- Application of the rules of evidence to courts and proceedings.
- Construction of the rules of evidence.
- General principles of evidence.
- Relevancy of evidence.
- Application of the rules of evidence to specific topics.
- Witness testimony.
- Hearsay, including the general rule, the exceptions to the rule, and constitutional limitations.
- Privileges that exempt potential witnesses from having to testify.

## 10.1 Overview

This chapter provides an introductory explanation of basic evidence principles as used by municipal courts in New Mexico. Evidence is information used to prove or disprove a fact of consequence in litigation, both civil and criminal. 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.

The New Mexico Rules of Evidence, adopted by the state Supreme Court, are found in Judicial Pamphlet 11 of the New Mexico Statutes 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.

**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.**

# 10.2 Application of the Rules of Evidence

## 10.2.1 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).

## 10.2.2 Proceedings

The rules apply to civil and criminal proceedings, and to non-summary contempt proceedings. Rule 11-1101(B).

*Note:* The court may act summarily—without notice and a separate hearing—in cases of direct contempt. Direct contempt occurs where the contemptuous behavior is committed in the presence of the court and is seen or heard by the judge, and must be dealt with immediately in order to restore the order, dignity, and authority of the court.

The evidence rules do not apply to:

- Preliminary questions of fact determined by the court prior to admission of evidence. Rule 11-1101(D)(1).

- 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; dispositional hearings in Children's Court proceedings; and issuance of ex parte custody orders, custody hearings, permanency hearings and judicial reviews in abuse and neglect proceedings. Rule 11-1101(D)(2).

The rules on privilege apply at all stages of all actions, cases and proceedings. Rule 11-1101(C).

## 10.2.3 Types of Evidence

The evidence rules 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).

# 10.3 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 shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

# 10.4 General Principles of Evidence

## 10.4.1 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.

## 10.4.2 Preliminary Questions

The court determines preliminary issues, such as the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence. Rule 11-104.

For example, a defendant who testifies on a preliminary matter, such as the admissibility of certain evidence, does not become subject to cross-examination on other issues in the case. The defendant retains the Fifth Amendment protection against self-incrimination. Rule 11-104(D).

## 10.4.3 Original Writing Rules

Photocopies or duplicates are admissible unless the authenticity of the original is questioned or under the circumstances it would be unfair to admit the duplicate in lieu of the original. Rules 11-1002, 11-1003.

The original writing rule was developed to guard against fraud and inaccuracy in duplication. The rule has broadened to reflect modern reliance on sophisticated duplication techniques and data storage mechanisms. There is no overall rule of evidence that a party must produce the "best evidence" available in a case.

## 10.4.4 Full Use of Writings

If one party introduces a writing or recorded statement, an adverse party may require the introduction of any other part of the writing or any other writing or recorded statement that in fairness ought to be considered with it. Rule 11-106.

*The purpose of this rule is to admit other recorded statements that place in context writings, which, if viewed alone, may be misleading. State v. Carr, 95 N.M. 755, 626 P.2d 292 (Ct. App. 1981).*

*In cases involving the same document, this rule applies only to other parts of the document, which are relevant and shed some light on the admitted parts. State v. Case, 103 N.M. 574, 711 P.2d 19 (Ct. App. 1985).*

### 10.4.5 Judicial Notice

The court may take judicial notice of a fact (i.e. accept as established) which commonly is 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 of a statutory provision.

*Cattle guards are common objects in New Mexico cattle country and courts can take judicial notice of their nature by appropriate books or documents of reference. Williams v. New Mexico State Hwy. Comm'n, 82 N.M. 550, 484 P.2d 770 (Ct. App. 1971).*

*The cause of leaking pipes is not a matter of such common knowledge that the court could properly have taken judicial notice thereof. Horton v. Driver-Miller Plumbing, Inc., 76 N.M. 242, 414 P.2d 210 (1966).*

## 10.5 Relevancy

### 10.5.1 Admission in General

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.

Relevancy is the fundamental basis for admission for 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.

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.

*The amount of money in the defendant's possession upon arrest, a short distance and in a short period of time after cashing a forged check, certainly tended to*

*throw light on the criminal transaction and was therefore admissible as evidence. State v. Belcher, 83 N.M. 130, 489 P.2d 410 (Ct. App. 1971).*

*An explanation of the defendant's prior conviction for commercial burglary was irrelevant to his credibility or to the charges of aggravated burglary, criminal sexual penetration and kidnapping for which he was being tried. State v. Noland, 104 N.M. 537, 724 P.2d 246 (Ct. App. 1986).*

## 10.5.2 Exclusion in General

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. Other potentially relevant evidence is excluded in order to encourage socially desirable conduct that might not occur if the evidence were admissible. Rules 11-407 (remedial measures taken after an adverse event) through 11-412 (evidence obtained under immunity). The rules on privilege, Rules 11-501 through 11-514, exclude relevant evidence to protect important relationships.

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.

Evidence also can be ruled inadmissible based on trial concerns. Relevant evidence may be excluded if "its probative value is substantially outweighed by the danger of unfair prejudice . . . or by considerations of undue delay, waste of time or needless presentation of cumulative evidence." Rule 11-403. ("Evidence has 'probative value' if it tends to prove an issue" or fact. *Black's Law Dictionary* 1203 (6th ed. 1990)). 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.

*In a criminal sexual penetration prosecution, the trial court's refusal to hear the testimony of a psychologist who had treated the victim for emotional problems and whose report on the victim had already been introduced into evidence was justified because the testimony would be merely cumulative. State v. Romero, 94 N.M. 22, 606 P.2d 1116 (Ct. App.1980).*

*A videotape and pictures of the condition and position of the murder victim's body as well as the disarray in the murder scene allowed the jury to draw an inference of a struggle prior to the victim's death and thus were relevant and admissible to show the defendant had intent to kill. State v. Hernandez, 115 N.M. 6, 846 P.2d 312 (1993).*

*Where the testimony of the seven-year old daughter of a murder victim was relevant, noncumulative and highly probative, the trial court was correct in allowing its admission despite the objection of undue prejudice. State v. Noble, 90 N.M. 360, 563 P.2d 1153 (1977).*

### 10.5.3 Authentication and Identification

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.

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.

## 10.6 Evidence on Specific Topics

### 10.6.1 Character Evidence

Character is a person's nature, general disposition, or specific disposition on traits such as honesty, peacefulness and truthfulness. 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.

Exceptions to the general rule are:

- Character evidence used for impeachment of the truthfulness of witnesses as provided in Rules 11-607 through 11-609 is admissible.

- 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.

- 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.

- 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.

- 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).

- The rules of evidence are specific about when 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.

  *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, 112 N.M. 642, 818 P.2d 420 (Ct. App. 1991).*

  *Testimony of persons having dealings with the defendant similar in nature to the victim's dealings with the defendant was properly admitted to show intent and a common scheme. State v. Schifani, 92 N.M. 127, 584 P.2d 174 (Ct. App. 1978).*

  *Defendant's seven-year-old confession to similar crimes was not admissible to show defendant's intent because intent was not a disputed issue in the case. State v. Beachum, 96 N.M. 566, 632 P.2d 1204 (Ct. App. 1981).*

## 10.6.2 Habit Evidence

Habit evidence is admissible. Habit is a person's regular response to a particular situation. Habit is a response that is repeated to the point of becoming semi-automatic, such as always signaling turns in a car. The predictability of the habit bolsters its reliability as evidence that the same response occurred in the current case. Evidence of a person's habit, or an organization's routine practice, is relevant and admissible to prove that the conduct of the person or organization was in conformity with the habit or practice. Rule 11-406. This evidence does not need to be corroborated, nor does it need eyewitnesses. It can be proved by opinion testimony or by specific instances of conduct numerous enough to warrant a conclusion that the habit or practice was routine.

For example, a person's regular practice of taking a bus home from work could be considered in connection with whether the person was a passenger on the bus on the day in question. Evidence of a company's routine manner of handling shipments can be admitted to prove proper handling of a particular shipment.

## 10.6.3 Remedial Measures

Evidence of remedial measures is not admissible to prove negligence or culpable conduct in connection with an event. Rule 11-407.

Remedial measures are those actions taken after an event which would have made the event less likely to occur if taken earlier. This evidence can be admitted for other purposes, however, such as to prove ownership or control. The policy behind this rule is that corrective actions should not be discouraged for fear of their effect on the jury. Further, the remedial measure may be motivated by a desire to exercise all possible care and may not be evidence of prior negligence.

Examples of remedial actions that are not admissible to show negligence include subsequent repairs, construction of fences around an area, installation of safety devices, changes in the operation of machinery, and warnings about harmful substances.

## 10.6.4 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.

## 10.6.5 Evidence Obtained Under Immunity

The use of evidence compelled under an order requiring testimony is unlikely to arise in municipal court. Refer to the governing rule, Rule 11-412, when necessary. This rule protects the privilege against self-incrimination by prohibiting the use of evidence against a person compelled by court order to testify.

## 10.6.6 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. Rule 11-413. 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.

*Note:* This rule will have limited application in municipal courts because most sex crimes are felonies. Included within the rule are several misdemeanors related to indecent exposure, which may come to trial in municipal court. However, evidence of the victim’s past sexual conduct is unlikely to be tendered in these cases.

# 10.7 Witness Testimony

## 10.7.1 Basic Requirements

Every person is competent to be a witness unless the rules provide otherwise. Rule 11-601. The two qualifications on this rule are:

- The witness must have personal knowledge of the matter. Rule 11-602.
- The witness must declare by oath or affirmation that the testimony will be truthful. Rule 11-603.

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.

The judge may not testify in the case. Rule 11-605.

## 10.7.2 Questioning of Witnesses

The court must exercise reasonable control over the manner and order of questioning witnesses and presenting evidence in order to promote discovery of the truth, avoid needless time in trial, and protect witnesses from harassment and undue embarrassment. Rule 11-611(A). The court may control the following:

- Cross-examination should be limited to the subject matter of the direct examination and questions affecting the credibility and bias of the witness. The court may permit examination into additional matters. Rule 11-611(B).
- Leading questions (i.e., questions that suggest the answer) should not be used in direct examination unless necessary to develop the witness's testimony or if the witness is hostile, such as identified with the opposing side. Leading questions are permitted on cross-examination. Rule 11-611(C).
- The court may call and interrogate witnesses. Rule 11-614. However, this should be a rare occurrence in criminal cases. In criminal matters, the court should be especially guarded in its questioning of a witness in order to maintain an 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.
- Before introduction of evidence and upon motion of either party or the court, the court shall exclude witnesses so they cannot hear the testimony of other witnesses. Witnesses that may not be excluded include parties to the case, an

officer or employee designated as the representative of a party, or a person whose presence is essential to the presentation of a party's case (e.g., an expert witness). Rule 11-615. This rule is intended to prevent witnesses from having their testimony influenced by that of other witnesses. Exclusion of witnesses during trial is often referred to as "invoking the rule."

- 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.

  *Note:* 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.

## 10.7.3 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, or was unable to observe the events. These questions of a witness's credibility are 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.

Specific ways in which a witness's credibility may be questioned include:

- Character. If the witness's truthful character has been attacked, the witness's credibility may be questioned by another witness's opinion on the witness's general character or reputation within the community for truthfulness or untruthfulness. Another witness may not be called to testify, however, on specific instances of conduct by a testifying witness. Such instances may only be inquired about during cross-examination of the testifying witness. Rule 11-608.

- Conviction of a Crime. Evidence of conviction within the last ten years of a crime involving dishonesty or a false statement may be admitted against any witness. Evidence of a felony conviction within the last ten years is admissible on the issue of credibility against any witness. However, a felony conviction is admissible against a defendant only if its probative value outweighs its prejudicial effect. Rule 11-609.

*The prosecutor's questioning of the defendant on cross-examination regarding his use of an altered driver's license to carry out forgeries for which he had been convicted was proper to show a specific instance of conduct which was probative of his truthfulness. State v. Clark, 105 N.M. 10, 727 P.2d 949 (Ct. App. 1986).*

*Questions concerning embezzlement, burglary, auto theft and larceny involve dishonesty, are probative as to truthfulness, and are proper under cross-examination under this rule. State v. Wyman, 96 N.M. 558, 632 P.2d 1196 (Ct. App. 1981).*

*In a case of battery against a police officer, the prosecution was permitted to question the defendant about his prior misdemeanor conviction for shoplifting on cross-examination because a shoplifting conviction bears on the defendant's honesty and credibility. State v. Melendrez, 91 N.M. 259, 572 P.2d 1267 (Ct. App. 1977).*

- Prior Inconsistent Statements under Oath. A witness may be impeached by a showing that the witness's out-of-court statement under oath is inconsistent with the in-court testimony. When questioning a witness concerning a prior statement, the statement need not be shown to the witness but on request it must be shown to opposing counsel. Extrinsic evidence (i.e., evidence other than the witness's testimony) of a prior inconsistent statement by a witness is not admissible unless the witness has an opportunity to explain or deny the statement, and the opposite party has an opportunity to examine the witness. Rule 11-613.

## 10.7.4 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.

- 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).

*Where a person has an opportunity to observe the movement of a vehicle, he may give an opinion as to its speed at the time. Dahl v. Turner, 80 N.M. 564, 458 P.2d 816 (Ct. App. 1969).*

*The plaintiff farmer's opinion that the chemical which admittedly caused damage to two fields of corn was also the cause of the damage to the third, founded on his observation of the fields and rationally based on his own perceptions, was helpful to the causation issue and was admissible. Jesko v. Stauffer Chem. Co., 89 N.M. 786, 558 P.2d 55 (Ct. App. 1976).*

- 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.

  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.

  An expert may base his or her opinion on facts or data he or she 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.

  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.

  The court may appoint expert witnesses on its own motion or on motion of any party. Rule 11-706. See Rule 11-707 for details on admissibility of polygraph examinations.

  *Where there was no foundation for the testimony that the defendant had taken medication and alcohol on the night of the crime, a medical expert could not testify as to the particular effect of that combination on the defendant as there was no evidence or fact in issue upon which the expert could offer an opinion. State v. Guzman, 100 N.M. 756, 676 P.2d 1321 (1984).*

*The trial court properly excluded the expert witness called by the defendant to testify about the prior heroin addiction of a state's witness, because the expert had not applied any psychological test to the witness, the testimony would be highly prejudicial with little probative value on the witness's ability to recall, and the evidence would not be helpful to the jury. State v. Blea, 101 N.M. 323, 681 P.2d 1100 (1984).*

*The testimony of the witnesses, experts in their fields, was upon the ultimate issue of fact of whether the safety device on the rifle was dangerous and defective, and was properly the subject of expert testimony. Lopez v. Heesen, 69 N.M. 206, 365 P.2d 448 (1961).*

# 10.8 Hearsay

## 10.8.1 General Rule

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."

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 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.

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.

## 10.8.2 Constitutional Limitations on Hearsay

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. 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, ¶ 21, 122 N.M. 459, 926 P.2d 784.

The U.S. Constitution also imposes limits on the use of hearsay evidence. In *Crawford v. Washington*, 124 S. Ct. 1354 (2004), the U.S. Supreme Court addressed the question of whether incriminating "testimonial" hearsay evidence can be admitted in a criminal case without providing the defendant an opportunity to cross-examine the witness either before or during trial. A witness in this case made tape-recorded statements in response to 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 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.

The Supreme Court stated that the "core class" of testimonial statements that require 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:

- Affidavits.
- Depositions.
- Statements made while in police custody.
- Statements made in response to police interrogation.
- Confessions.
- Prior testimony at a preliminary hearing, before a grand jury or during a former trial that the defendant was unable to cross-examine.
- Similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
- 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.

In municipal courts, most testimonial hearsay will be excluded from evidence because the defendant will rarely have an opportunity to cross-examine the witness before trial (for example in a deposition or previous trial).

## 10.8.3 Statements that are Not Hearsay

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.

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 <u>not</u> hearsay are:

- Prior Statement by a Witness. If the witness testifies and is subject to cross-examination and the statement (a) was made under oath subject to the penalty of perjury (at a trial, hearing, other proceeding, or deposition) and was inconsistent with the witness's testimony; (b) is consistent with the testimony and offered to rebut a charge against the witness of recent fabrication or improper influence or

motive; or (c) is an identification of a person made after perceiving the person, then the statement is not hearsay. Rule 11-801(D)(1).

Note that prior inconsistent statements admissible under this rule are admissible as substantive evidence, not just to impeach the witness.

- Admission by Party-Opponent. If the statement is offered against a party and is (a) the party's own statement; (b) a statement which the party has indicated is truthful; (c) a statement by a person authorized by the party to make the statement; (d) a statement by the party's agent on a matter within the scope of agency or employment, made during that relationship; or (e) a statement by a co-conspirator of the party during the course of the conspiracy, then the statement is not hearsay. Rule 11-801(D)(2).

## 10.8.4 Exceptions to the Hearsay Rule (When Hearsay Can be Admitted)

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 considered to have a sufficient degree of reliability to support admission as evidence.

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. See the discussion of *Crawford v. Washington*, 124 S. Ct. 1354 (2004), above.

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.

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:

- 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(A).

- Excited Utterance. A statement relating to a startling event made while under the stress and excitement of the event is admissible. Rule 11-803(B). Note, however,

that 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, ¶ 21, 122 N.M. 459, 926 P.2d 784.

- 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(C).

- 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(D).

- Recorded Recollection. A statement or record made when a witness had knowledge but no longer has sufficient recollection is admissible. Rule 11-803(E).

The rules contain a catchall exception allowing admission of other hearsay that has equivalent guarantees of trustworthiness. For cases filed on or after November 1, 2007, the catchall, or residual, exception to the prohibitions against hearsay is located in the newly-adopted Rule 11-807. The catchall exception provided for in Rule 11-807 applies to both hearsay Rules 11-803 and 11-804.

Rule 11-804 allows admission of the following hearsay statements only when the declarant is unavailable to testify:

- Former Testimony. Testimony given as a witness in another hearing is admissible under certain circumstances. Rule 11-804(B)(1**).**

- Statement Under Belief of Impending Death. A statement made while believing one's death is imminent, concerning the cause or circumstances of that death, is admissible. Rule 11-804(B)(2).

- Statement Against Interest. A statement that at the time it was made was so contrary to the person's interests, or so tended to expose the person to civil or criminal liability, or makes a claim by the person against another invalid, that a reasonable person would not have made the statement unless true, is admissible. Rule 11-804(B)(3).

- Statement of Personal or Family History. A statement of the person's birth, adoption, marriage, divorce or other fact of personal or family history is admissible. Rule 11-804(B)(4).

- Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. Rule 11-804(B)(5).

- Other Exceptions. As noted earlier, statements not specifically covered by either Rules 11-804 or 11-803 but having equivalent guarantees of trustworthiness may be admissible under the residual exception to the prohibitions against hearsay. Rule 11-807.

# 10.9 Privileges

## 10.9.1 General Rule

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.

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.

## 10.9.2 Exceptions to the Rule

The rules recognize the following privileges:

- 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.

- 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.

- 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.

- Husband-Wife 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

husband-wife 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).

- 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.

- Political Vote Privilege. Every person has a privilege to refuse to disclose the person's vote at a political election conducted by secret ballot unless the vote was cast illegally. Rule 11-507.

- Trade Secrets Privilege. A person has a privilege to refuse to disclose and to prevent others from disclosing a trade secret owned by the person, if this will not conceal fraud or cause injustice. Rule 11-508.

- Communications to Juvenile Probation Officers and Social Service Workers Privilege. A child alleged to be delinquent or in need of supervision and a parent who allegedly neglected a child have a privilege to refuse to disclose and to prevent others from disclosing confidential communications between the child, parent, probation officer or social services worker made during the course of a preliminary inquiry. Rule 11-509.

- Identity of Informer Privilege. The federal, state or local government has a privilege to refuse to disclose the identity of a person who provided information in a criminal or legislative investigation. Rule 11-510.

- News Media-Confidential Source Privilege. A person employed in the news media for the purposes of gathering news for the general public has a privilege to refuse to disclose the confidential source from whom any information was obtained and any confidential information obtained in the course of professional activities. Rule 11-514.

## 10.9.3 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.

## 10.9.4 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.

# CHAPTER 11

# Traffic & DWI Procedures for Courts

This chapter covers:

- Traffic offenses.
- Traffic case types.
- Traffic case processing.
- Failure to appear or pay by New Mexico residents.
- Failure to appear or pay under the Non-Resident Violator Compact (NRVC).

Note: For additional information refer to the Traffic Citation Manual and the DWI Benchbook produced by the Judicial Education Center.

## 11.1 Traffic Offenses

The scope of offenses for traffic violations ranges from penalty assessments to traffic misdemeanors.

Most municipalities have adopted the Uniform Traffic Ordinances (UTO) which in most cases mirrors the state traffic statues.

Uniform Traffic Code traffic misdemeanors carry a potential period of imprisonment up to 90 days and a fine up to $500 unless otherwise specified. §3-17-1.

If the person is charged with a misdemeanor traffic offense other than a penalty assessment misdemeanor, and if the officer is not required by law to bring the person before the court immediately, the officer provides the person an opportunity to sign a notice to appear indicating the date and time to do so.

- The notice appear portion of the citation should indicate the date and time for the defendant to appear before the judge.
- The notice to appear must be signed by the person at the time the citation is issued.

- The person must appear before the judge at the time and place entered on the citation. This appearance is an arraignment in many courts. The judge will read the defendant his/her rights and take a plea. If the plea is guilty or no contest, the judge will usually sentence the defendant at this time. If the plea is not guilty a trial date will be set. Some courts combine the arraignment and trial. In this case the officers will also be available at the time and date noted on the citation.

# 11.2 Traffic Case Types

## 11.2.1 Penalty Assessment Misdemeanors. §66-8-116 to §66-8-116.2

The legislature has designated certain petty misdemeanor traffic violations as penalty assessment misdemeanors. In this type of traffic offense there is a set fine for each type of violation. The violator has the option of appearing in court or admitting guilt and mailing in the required assessment plus the fees. The clerk can process a citation as a penalty assessment misdemeanor if it is listed in municipal ordinances.

Municipalities may adopt or establish by ordinance a penalty assessment program, provided it is similar to the program established under the Uniform Traffic Code. §66-8-130

## 11.2.2 Mandatory Court Appearance.

As the name implies, a mandatory court appearance means that the violator must appear in court. These are violations other than those identified as penalty assessments. The most frequent violations of the Uniform Traffic Code that requires mandatory court appearance involve not carrying the necessary paperwork, e.g., not having one's driver's license or proof of financial responsibility. §66-5-16 (no driver's license in possession) and §66-5-229 (no valid proof of insurance in possession) provide that a person shall not be convicted of the charge if that person can produce proof that the insurance or driver's license was valid at the time of issuance of the citation. A copy of the driver's license or insurance card should be included in the file. Both of these offenses are mandatory court appearances, but non-arrestable offenses.

## 11.2.3 Arrestable Offenses

Whenever any person is arrested for any violation of the Uniform Traffic Code or municipal traffic violations or other laws relating to motor vehicles punishable as a misdemeanor, that person shall be taken before an available judge who has jurisdiction of the offense when the following occurs (usually occurs when the defendant remains in custody until arraigned by the judge):

- person is charged with driving while under the influence of intoxicating liquor or narcotic drugs;

- person is charged with failure to stop in the event of an accident causing death, personal injuries or damage to property;

- person is charged with reckless driving;

- person refuses to give his written promise to appear in court or acknowledge receipt of a warning notice;

- person is charged with driving when his privilege to do so was suspended, or revoked, pursuant to §66-8-111, or pursuant to a conviction for driving while under the influence of intoxicating liquor or drugs.

Whenever the defendant is arrested without a warrant, a traffic citation may suffice as a criminal complaint.

If the criminal complaint does not contain sufficient probable cause for the arrest, it must be accompanied by a probable cause statement. Rules 8-202B; Form 9-215 .

## 11.3 Traffic Case Processing

When the citation has been submitted to the court by the police officer the clerk enters the information in the computer case management system, creates a folder, and files the case with open case files.

The court should have a system for identifying case files that should be pulled for that court day or when penalty assessments are due to be paid. Most court software systems have the ability to provide this information through reports.

Once the case has been adjudicated through a trial or plea of guilty, or the penalty assessment has been paid, the clerk should process the citation abstract and send it to Division of Motor Vehicles (DMV) within 10 days. §66-8-135 If the defendant is found not guilty at trial the same rule applies. NOTE: With the exception of a DWI citation the abstract is the second copy of the citation and states “Abstract Copy” at the bottom of the page in the yellow bar. The DWI citation abstract is the top page of the form.

- Deferred sentence: If the sentence is deferred by judge, the clerk should note when a defendant’s period of deferment is completed. In cases where the penalty has been deferred, the abstract is not mailed to the DMV until the period of deferment is complete. If the defendant meets the conditions of probation, the citation is marked dismissed and sent to DMV. If the defendant doesn’t meet the conditions of probation, that person may be sentenced on the defendant’s original plea. The fees shall be collected on citations in which the sentence has been deferred. §35-14-11

- Suspended sentence: If the judge has suspended the sentence the citation abstract should be sent to DMV within the 10 day period required by statute. The fees shall be collected on citations in which the sentence has been suspended.

- DWI citation abstracts are to be completed and mailed within ten (10) days of conviction, even if the sentence is deferred or suspended.

## 11.4 Court Procedures for Failure to Appear or Pay by New Mexico Residents

### 11.4.1 Failure to Pay or Appear

When a New Mexico resident fails to appear as ordered or pay an assessed traffic fine, the clerk may perform one or more of the following procedures:

- Issue Criminal Summons Failure to Appear or Comply with Court Rules Form 9-216 or an Order to Show Cause Form 9-611. These forms may be mailed to the defendant following the time constraints identified in Rule 8-104D.

- Issue a Bench Warrant for the arrest of the defendant as described in Rule 8-206A

- Notify the DMV of the failure by submitting a Notice of Failure to Appear to suspend the defendant's driver's license. DMV Form 10079.

### 11.4.2 Violator Pays or Appears

Several reasons will cause a New Mexico resident to contact the court to handle a late payment or appearance on a traffic citation. These reasons may include an arrest based on a bench warrant issued by the court or a suspended driver's license based on the court's suspension notice.

- If a bench warrant has been issued and the defendant appears before the court the judge may choose to have an officer serve the warrant on the defendant and make an arrest. The judge may instead choose to have the warrant canceled or "quashed" without having the defendant arrested.

- If a bench warrant has been issued it should be removed from the Law Enforcement Information System. This should be done by the officer if the defendant is arrested or by the judge/clerk if the defendant is not arrested. In either instance it should be removed from the system immediately. There should be a signed note indicating the date and time of the cancelation of the warrant in the person's file. This can be written on the court's copy of the warrant.

- When the defendant appears and has been charged with contempt for not complying with a court order a hearing should be held on the contempt charge.

- If the defendant's driver's license has been suspended through DMV and the defendant has met all conditions and obligations to the court, the clerk should prepare the Rescind Notice for New Mexico residents. A copy should be sent to DMV, a copy kept in the court file, and a copy given to the defendant for proof of payment. The form is one of the copies attached to the Notice of Failure to Appear form.

- After all conditions have been met and paperwork distributed the clerk closes the file.

## 11.5 Court Procedures for Failure to Appear or Pay by Non-Resident Violators

The Division of Motor Vehicles (DMV) has developed a procedure to assist courts to persuade out-of-state drivers to comply with the instructions on traffic citations. The court may have the out-of-state driver's license suspended through the Non-Resident Violator's Compact. DMV has developed a procedure and guidelines to be followed when doing this type of suspension. The following information was provided by the Division of Motor Vehicles of the Taxation & Revenue Department.

### 11.5.1 Procedures for the Non-Resident Violator's Compact (NRVC) §66-8-137.1

Effective January 1, 1985, New Mexico became a member of the Non-Resident Violator's Compact (NRVC). The NRVC is a reciprocal agreement between party states that assures non-resident motorists receiving citations for minor traffic violations the same treatment afforded to resident motorists. With few exceptions, the procedure is very similar to the penalty assessment procedure with which courts are all familiar. §66-8-116.

The NRVC applies only to citations issued against non-residents on or after January 01, 1985. NRVC procedures are initiated by the court advising the penalty assessment unit of the Division of Motor Vehicles that a non-resident cited for one of the covered offenses has failed to appear in court pursuant to his written promise to appear on the citation. The Division of Motor Vehicles is notified when the court sends the NRVC abstract to the Division. The Penalty Assessment Unit assumes the responsibility of notifying the non-residents home jurisdiction of the failure to take care of the citation. The non-resident is then required to clear the citation or face suspension of his license in/by his home state.

The court must first determine whether the non-resident violator appeared in court on his written promise to appear. If the non-resident violator made payment arrangements and whether there was compliance with such arrangements. The abstract copy of the citation must reflect the final disposition and compliance. If the non-resident appears in court and pays the fine regular receipting procedures should be followed. If there is a voluntary appearance and compliance by the violator no further action is needed.

NRVC abstract must be addressed and mailed separately to: Motor Vehicle Division, Penalty Assessment Unit, PO Box 1028, Santa Fe, NM 87504-1028. Attn: NRVC. Mail the abstracts and Notice of Failure to Appear in Court to this address in a separate package from all other abstracts sent to the DMV. The Motor Vehicle Division will then forward the proper documents to the violator's home state for action. Non-resident violators will then be instructed to remit the total amount due to the Motor Vehicle Division. If however, the court should receive any money from the non-resident, the money should be kept and deposited.

If the court has accepted payment and had reported it as a non payment, they must notify the Motor Vehicle Division by completing Form DMV 10947-Rescission of Notice of Failure to Appear in Court. Monies collected for Magistrate Courts will be distributed to the Administrative Office of the Courts and they will reimburse the Court. Monies collected for Municipal Courts will be distributed directly to individual courts from which citations were received.

All of the following criteria must be met for the non-resident violator to be suspended under the NRVC process:

1. The violator must reside in one of the participating states.

   PARTICIPATING STATES ARE:

| | | | |
|---|---|---|---|
| Alabama | Arizona | Arkansas | Colorado |
| Connecticut | Delaware | District of Columbia | Florida |
| Georgia | Hawaii | Idaho | Illinois |
| Indiana | Iowa | Kansas | Kentucky |
| Louisiana | Maine | Maryland | Massachusetts |
| Minnesota | Mississippi | Missouri | Nebraska |
| Nevada | New Hampshire | New Jersey | New Mexico |
| New York | North Carolina | North Dakota | Ohio |
| Oklahoma | Pennsylvania | Rhode Island | South Carolina |
| South Dakota | Tennessee | Texas | Utah |
| Vermont | Virginia | Washington | West Virginia |
| Wyoming | | | |

2. The violator must not reside in one of the following states:

   NON-PARTICIPATING STATES ARE:

| | | |
|---|---|---|
| Alaska | California | Michigan |
| Montana | Oregon | Wisconsin |

3. NRVC applies only to the penalty assessment violations indicated in the statute listing the violations. §66-8-116

4. The following citations are not covered by the compact:
   - Offenses which mandate personal appearances
   - Moving traffic violations which alone carry suspensions or

revocations
- Equipment violations
- Inspection violations
- Size and weight violations
- Parking violations
- Transportation of hazardous material violations

5. Citations to be suspended under the NRVC must be submitted within six months of the violation.

# Notice of Failure to Appear in Court

STATE OF NEW MEXICO – MOTOR VEHICLE DIVISION
NOTICE OF FAILURE TO APPEAR IN COURT
(UNDER NON-RESIDENT VIOLATOR COMPACT)

N
R
V
C

REPORTING COURT'S COMPLETE NAME AND ADDRESS
REPORTING DATE
NAME
ADDRESS
COURT CODE
CITY, STATE, ZIP CODE
VIOLATOR'S NAME (Last, First & Middle Initial)
DATE OF BIRTH (Mo./Day/Yr.)
LICENSE STATE
DRIVER'S LICENSE NUMBER
CITATION NUMBER
VIOLATION DESCRIPTION:
COURT CLERK'S SIGNATURE
DATE
ADDITIONAL COMMENTS:

**Mandated Information**

Complete all boxes

Citation must include county + agency + citation number

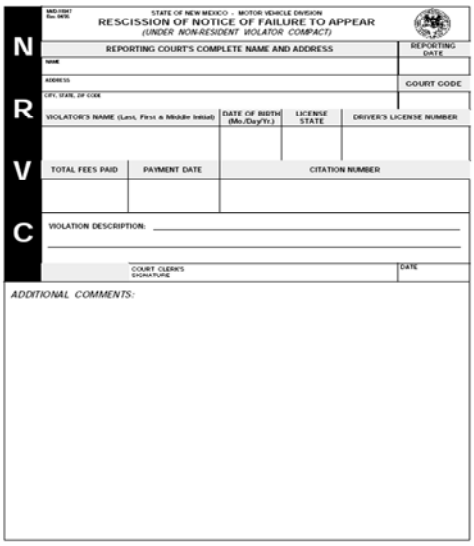
If this is for failure to pay insert the total amount due after the violation description

Attach a copy of original citation

Mail to:

MVD
Penalty/NRVC Unit
PO Box 1028
Santa Fe, NM 87504-1028

**Rescission**
**of**
**Notice of Failure to Appear in Court**



STATE OF NEW MEXICO – MOTOR VEHICLE DIVISION
RESCISSION OF NOTICE OF FAILURE TO APPEAR
(UNDER NON-RESIDENT VIOLATOR COMPACT)

N
R
V
C

REPORTING COURT'S COMPLETE NAME AND ADDRESS
REPORTING DATE
NAME
ADDRESS
COURT CODE
CITY, STATE, ZIP CODE
VIOLATOR'S NAME (Last, First & Middle Initial)
DATE OF BIRTH (Mo./Day/Yr.)
LICENSE STATE
DRIVER'S LICENSE NUMBER
TOTAL FEES PAID
PAYMENT DATE
CITATION NUMBER
VIOLATION DESCRIPTION:
COURT CLERK'S SIGNATURE
DATE
ADDITIONAL COMMENTS:

Complete all boxes

Citation must include county + agency + citation number

Attach a copy of original citation

Mail to:
MVD
Penalty/NRVC Unit
PO Box 1028
Santa Fe, NM 87504-1028

## 11.5.2 Procedures for Failure to Appear/Pay for Non-Residents

When an out-of-state resident fails to appear as ordered or pay an assessed traffic fine much of the process is similar to in-state resident violators. The court may set a policy to follow one or more of the following procedures:

- Issue a Criminal Summons Failure to Appear or Comply with Court Rules Form 9-216 or an Order to Show Cause Form 9-611. These forms may be mailed to the defendant following the time constraints identified in Rule 8-104D.

- Issue a Bench Warrant for the arrest of the defendant as described in Rule 8-206A.
- Suspend the driver's license using DMV Form 10048 Notice of Failure to Appear in Court (Under Non-Resident Violator Compact) and follow the procedures outlined in Section 11.5.1 above.

## 11.5.3 Procedures for Violator Payments under NRVC

- If the court receives payment through DMV, the payment should be posted to the violator's file and the case closed.

- If the court receives payment from the nonresident, the clerk notifies Motor Vehicle Division by completing Form DMV Form 10947, "Notice of Compliance

for Failure to Appear in Court." Motor Vehicle Division will clear the record and notify the home state of the violator's compliance.

- If a bench warrant has been issued it should be removed from the Law Enforcement Information System. This should be done by the officer who arrests the defendant or by the judge/clerk if the defendant is not arrested. In either instance it should be removed from the system immediately. There should be a signed note indicating the date and time of the cancelation of the warrant in the person's file. This may be written on the court's copy of the warrant.

- After all conditions have been met and paperwork distributed the clerk closes the file.

# CHAPTER 12

# Administrative and Financial Procedures

This chapter covers:

- Processing mail.
- Procedures relating to records inspection requests.
- Collection of fines, fees, and costs.
- Guidelines for daily deposits.
- Cash bonds.
- Monthly report.
- Retention schedules.

## 12.1 Processing Mail

The court will receive all types of mail. There will be payments from defendants, notices from attorneys, letters from defendants or family members, and more. In most cases it will be the clerk's responsibility to open the mail. It should be date stamped and processed daily.

Confidential mail shall be distributed to the appropriate person without being opened. The exception to this rule is a letter to the judge from a defendant or a defendant's family member. The defendant or family member may be trying to influence the judge prior to a final decision in a case. This would be considered ex parte communication so the judge should not read the letter until after the case has been heard. It may be difficult to know if the letter is an ex parte communication or a personal letter that does not have anything to do with a case. The judge and clerk should decide on a policy for letters that will protect privacy and avoid an ex parte communication.

## 12.2 Procedures Relating to Records Inspection Requests

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 courts and the official acts of the judges and clerks. §14-2-1 through §14-2-12.

## 12.2.1 Procedure for Requesting Records

- Any person wishing to inspect public records may submit an oral or written request to the court. However, the procedures set forth in the Inspection of Public Records Act shall be carried out in response to a written request. The failure to respond to an oral request shall not subject the judge or clerk to any penalty.

- The Inspection of Public Records Act does not require that a record be created in order to comply with the inspection request.

- 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.

- A court clerk receiving a written request shall permit the inspection immediately or as soon as is practicable under the circumstances, but not later than fifteen (15) days after receiving a written request. The three-day period shall not begin until the written request is delivered to the court.

- In the event that a written request is not made to a person not having possession of or responsibility for the public records requested, the person receiving the request shall promptly forward the request to the record's custodian of the requested public records and notify the party making the request. The notification to the requestor shall state the reason for the absence of the records from that person's custody or control, the correct location of records and the name and address of the custodian of records.

- The court clerk should charge the appropriate fee for copying and certification, which shall not exceed $1.00 per page. §14-2-9.

## 12.2.2 Responding to Written Requests for Inspection

- A written request is received when it is delivered to the clerk responsible for the court's records.

- If the records cannot be made available for inspection within three business days after receipt, the clerk shall give written notice of when the records will be available.

- The clerk shall provide records for inspection no later than fifteen calendar days after receipt of the request unless the request is extremely burdensome or broad.

- If a request is extremely burdensome or broad, the clerk shall give written notice within fifteen (15) calendar days of receipt that additional time is needed. The records must be provided within a reasonable time. §14-2-10.

- If requested, the court clerk can certify documents to be a true and correct copy of the original.

### 12.2.3 Penalties for Not Responding to Written Requests

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

All written requests are deemed denied if the records are not provided for inspection within fifteen 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.

## 12.3 Financial Management

### 12.3.1 Collection of Fines, Fees, and Costs

A major portion of a clerk's responsibilities includes processing payments of fines, fees and costs. Every municipality is required to enact an ordinance requiring assessment of fines, fees, and costs in criminal proceedings in which the defendant pleads or is found guilty in municipal court. Every municipal judge is required to collect any assessed fines and all fees and costs from convicted persons. §35-14-11.

While the fines are deposited in the general fund of each municipality the fees should be separated as noted in the statutes. Money collected by the municipal court must be turned in to the respective municipal treasurer by the 10th of each month. §35-14-7 All fees collected must be remitted on a monthly basis to the Administrative Office of the Courts with the exception of the judicial education fee and the corrections fee. A list of fees collected by municipal courts is included in Section 8.3 of this manual.

See Appendices for the New Mexico Judicial Education Center Monthly Report and Administrative Office of the Courts Monthly Report.

### 12.3.2 Guidelines for Daily Deposits

All funds collected by the municipal court should be deposited daily. Some courts have a bank account while others deposit funds with the municipality to deposit into a bank account. Both ways of doing business are fine. The courts that maintain a bank account must remit the funds to the municipality no later than the tenth of each month. The court must also provide instructions on how the money is to be dispersed.

The court should have receipts that:

- Are in numeric sequence.

- Designate the amount that goes to fines and the different fees that are collected by municipal court

- Have three copies. The defendant receives the original, a copy is kept with the payment, and one is retained in the receipt book.

When preparing deposits for the municipal treasurer, the finance department, or directly for deposit to the bank:

- Account for all receipts in numeric sequence. Any receipt missing from the day's sequence should be attached to the daily deposit with an explanation and a supervisor's signature.

- The cash register should be balanced by the clerk who receipted the money, and then given to the chief clerk (or designee of the chief clerk) to verify the deposit. If the court has only one clerk it is recommended that someone within the municipal government is assigned to assist with this process. This is a protection for the clerk and the court.

- Document cash total and list check numbers and individual checks by payors' names. Reconcile the daily deposit slip, total cash, and individual checks. The clerk making the deposit should obtain the deposit slip that has been validated by the bank or city.

- Keep all records related to the daily deposit together.

- In order to safeguard against loss or theft, courts should deposit all monies. Monies should not be left in the court overnight. If overnight deposits are available at your banking facility, make a deposit at the end of the business day. Exceptions to this will be those courts unable to reach a banking facility.

- If the money cannot be deposited until the following day, make a note on the bank deposit slip. In the event the money or change fund is held at the court overnight, it must be secured in the safe.

## 12.3.3 Cash Bonds

- The municipal court must deposit all cash bonds into a non-interest-bearing trust account, either maintained by the municipal court or the municipality's finance department.

- The following information should be recorded in a journal or notebook:

    - Defendant's name;
    - Name of the individual who posted the bond;
    - Case number;

  - Receipt number;
  - Amount of bond; and
  - Date receipt was issued.

- As with the daily deposit procedure, all receipts should be kept in numeric sequence.

- Court shall review its outstanding Cash Bond Report to ensure that appropriate action is being taken on the cases. For example, outstanding bonds should be refunded, converted, or forfeited. Action to remove bonds from the cash bond record should be timely.

- After the court has determined that a cash bond is to be returned to the payor, the court shall return the bond by issuing the check out of the Trust Account in the amount of the bond. Every attempt should be made to refund the bond immediately. This can be done in person or by mail, to the current address. To avoid audit findings, the court should obtain copies of the bond receipts from the detention center or jail and verify the name, address and correct amount of the bond. Upon receipt of this information, it should be placed in the physical case file and a check may be issued and mailed to the person who posted the bond. Form 9-312A

- If the person who posted the bond dies, and there is no conversion or assignment, the person requesting the refund must provide sufficient proof of appointment as personal representative of the decedent. Proof may include Affidavit as Successor in Interest, or, Order of Appointment as Personal Representative. Form 9-312A

## 12.4 Monthly Report

Each municipal court is required by law to submit a written monthly report for the previous month to the governing body no later than the tenth of each month. The report shall include a statement showing the name of the person who paid the fine and fees, the violation for which the fine was levied, and the amount of fines and fees paid. Most court computer software provides this information through a report that may be printed and submitted. §35-14-7 and §35-14-8

## 12.5 Retention Schedule

The records retention and disposition schedule (RRDS) was developed as a guideline for government entities in their records and information management programs. The state records administrator may advise and assist municipal officials in the formulation of programs for the disposition of public records maintained in municipal offices. This RRDS does not have the effect of law until it is incorporated by each municipality into its records and information management program through municipal resolution. Before incorporation it may be modified to meet the particular needs of the municipality.

The current schedule may be found by accessing the New Mexico Commission of Public Records web site at http://www.nmcpr.state.nm.us/nmac/parts/title01/01.019.0009.htm.

# APPENDIX 13.1

# Time Limitations for Court Procedures

**Appeal:**

1. Notice of appeal - The notice of appeal shall be filed in the district court within fifteen (15) days after the judgment or final order appealed from is file stamped in the municipal court. Rule 8-703A

2. Record on appeal - Within fifteen (15) days after the appellant files a copy of the notice of appeal in the municipal court the municipal court shall file with the clerk of the district court the record on appeal taken in the action in the municipal court. Rule 9-703F

**Arraignment**: within 30 days of the arrest, issuance of a criminal complaint, or traffic citation. Rule 8-506A

**Bail Bond Forfeiture:**

1. Notice of forfeiture- Within four (4) days of the failure to appear or comply the clerk will prepare and send Form 9-307, Notice of Bond Forfeiture and Order to Show Cause to the surety that bonded the defendant out of jail §31-3-2(B)(2)(b)

2. Hearing on the forfeiture – the forfeiture hearing shall be held thirty (30) or more days after service of the Notice of Forfeiture and Order to Show Cause Rule 8-407; Rule 8-406C

**Citation Abstracts to MVD:** citation abstracts should be submitted to the MVD within ten (10) days of the entry of a conviction of violating a traffic ordinance. Exception: the abstract for a deferred sentence on a regular citation should be held until the end of the probation time and then submitted. §66-8-135(B)

**Computing Time:** computation of time shall not include the day of the process, weekends, or holidays. Rule 8-104A

1. Motions or affidavits**:** shall be served not later than five (5) days before the time specified for the hearing. Rule 8-104C

2. Service by mail**:** three (3) days shall be added to the prescribed period. Rule 8-104D

**Discovery:** not less than ten (10) days before the trial both the prosecution and defense shall disclose and make available for inspection all pertinent information. Rule 8-504A & B

**Dismissal of Actions (with prejudice):** a case will be dismissed with prejudice if it has been pending for more than one hundred eighty-two (182) days. Rule 8-506E

**Entry of Appearance by an Attorney:** a written entry of appearance is filed within 3 days of an oral communication from an attorney. Rule 8-107A

**Monthly Reports and Remittances:** the reports shall be filed and the money collected shall be paid to the municipality not later than the tenth day of the month following collection. §35-14-7

**Payment of a Default Judgment by a Surety:** the surety is to pay the default judgment within ten (10) days after it is filed. Rule 8-406E

**Probable Cause Determination:** within forty-eight (48) hours after custody commences and no later than the first appearance of the defendant whichever occurs earlier. Rule 8-202A

**Prosecution of a Petty Misdemeanor Offense:** one (1) year from the date the offense was committed. §30-1-8(D)

**Service of a Summons:**

1. Personal service: shall be made at least ten (10) days before the defendant is required to appear.

2. Service by mail: an additional three (3) days shall be added pursuant to Rule 8-104D.

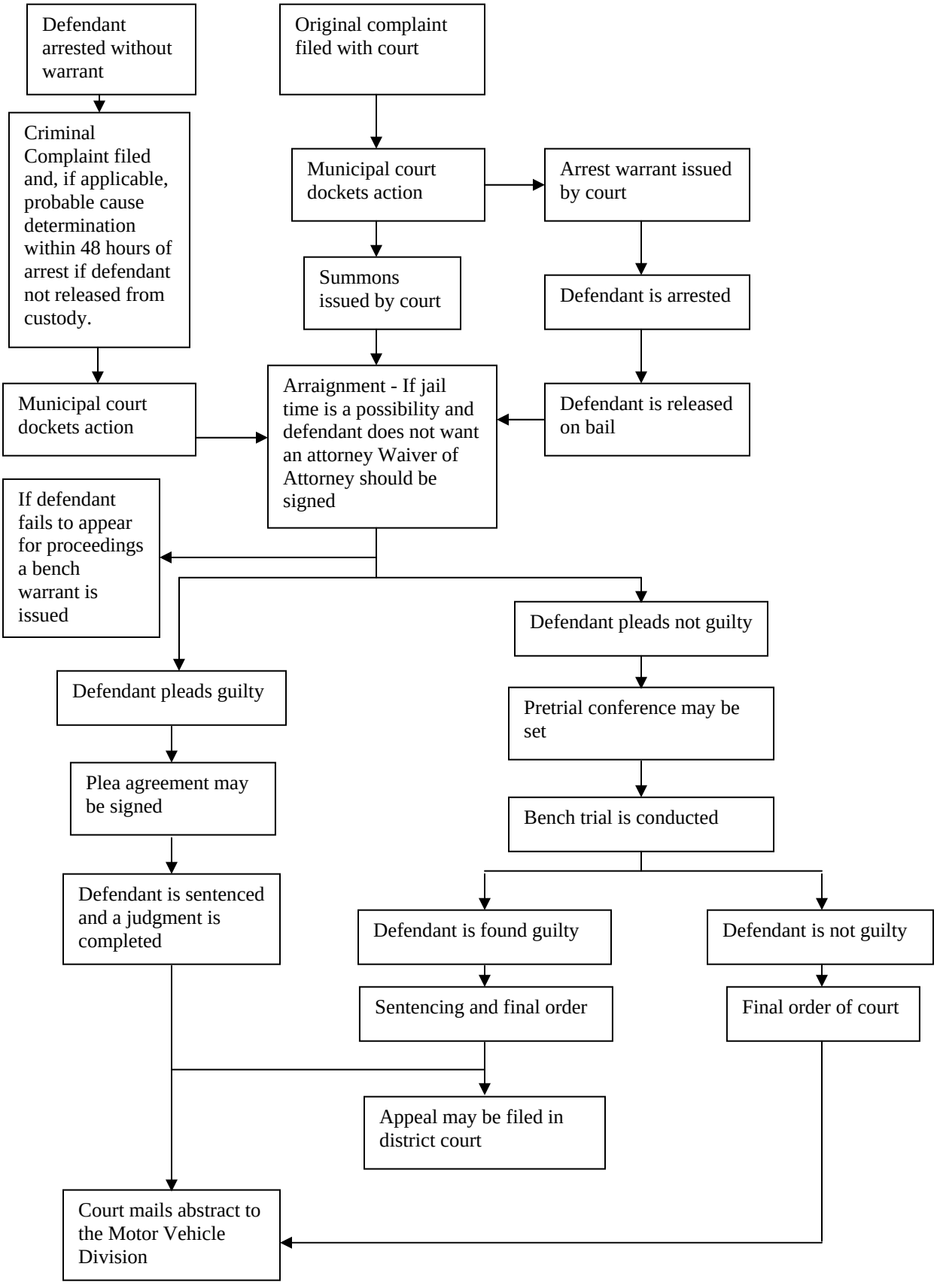
**Trials:** a trial must be commenced (started) within 182 days of arraignment. Rule 8-506B

**Voluntary Dismissal (without prejudice) and Refile Procedures:** if a case has been dismissed without prejudice the prosecution may refile it within the unexpired time of the 182 days from the first arraignment of the defendant on the charges. Rule 8-506A

**Witness Disclosure:** not less than ten (10) days before the trial, the prosecution and defendant shall exchange a list of the names and addresses of the witnesses each intends to call at the trial. Rule 8-504C

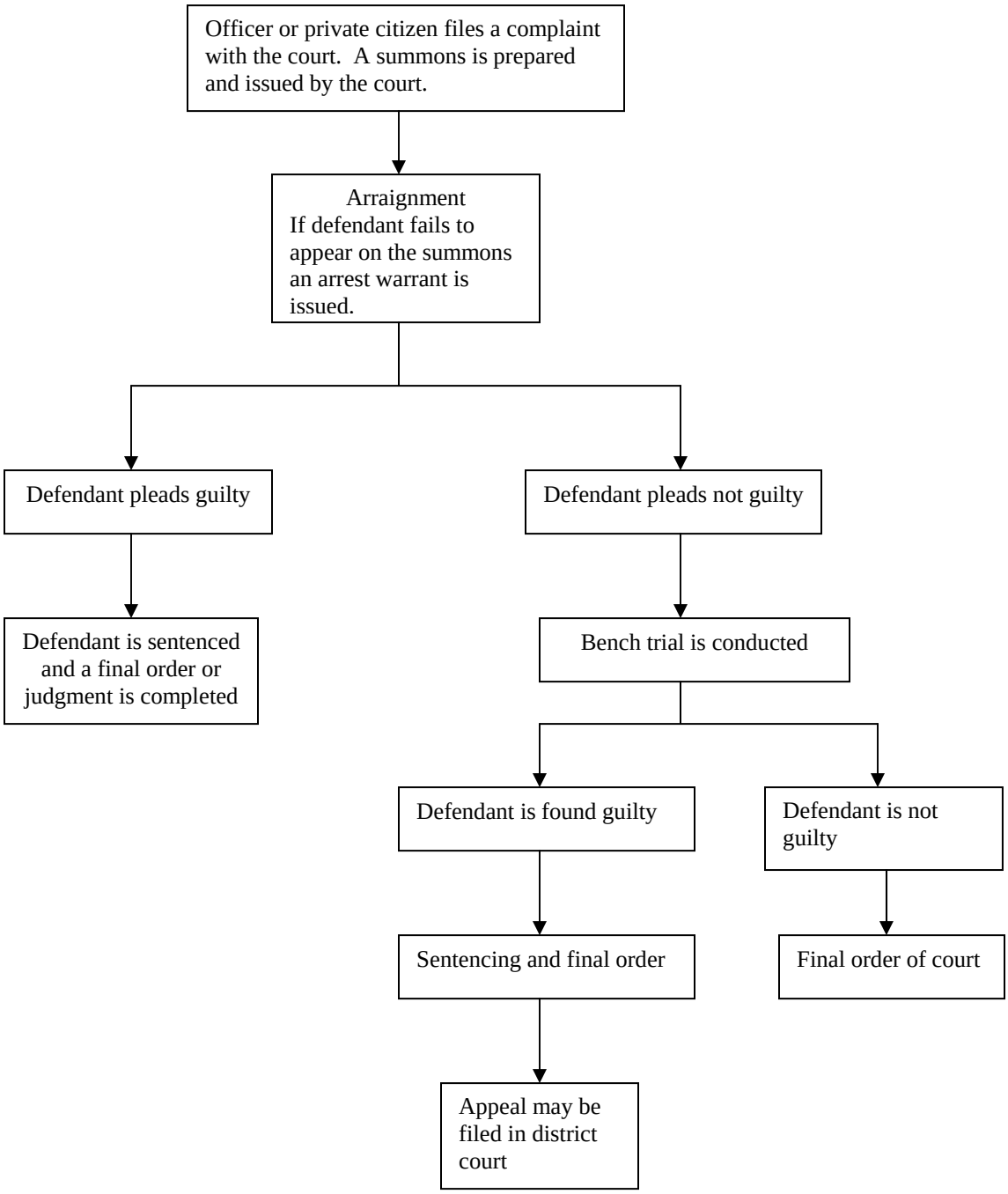
# APPENDIX 13.2

## Municipal Arrestable (Including DWI) Offense Flow Chart



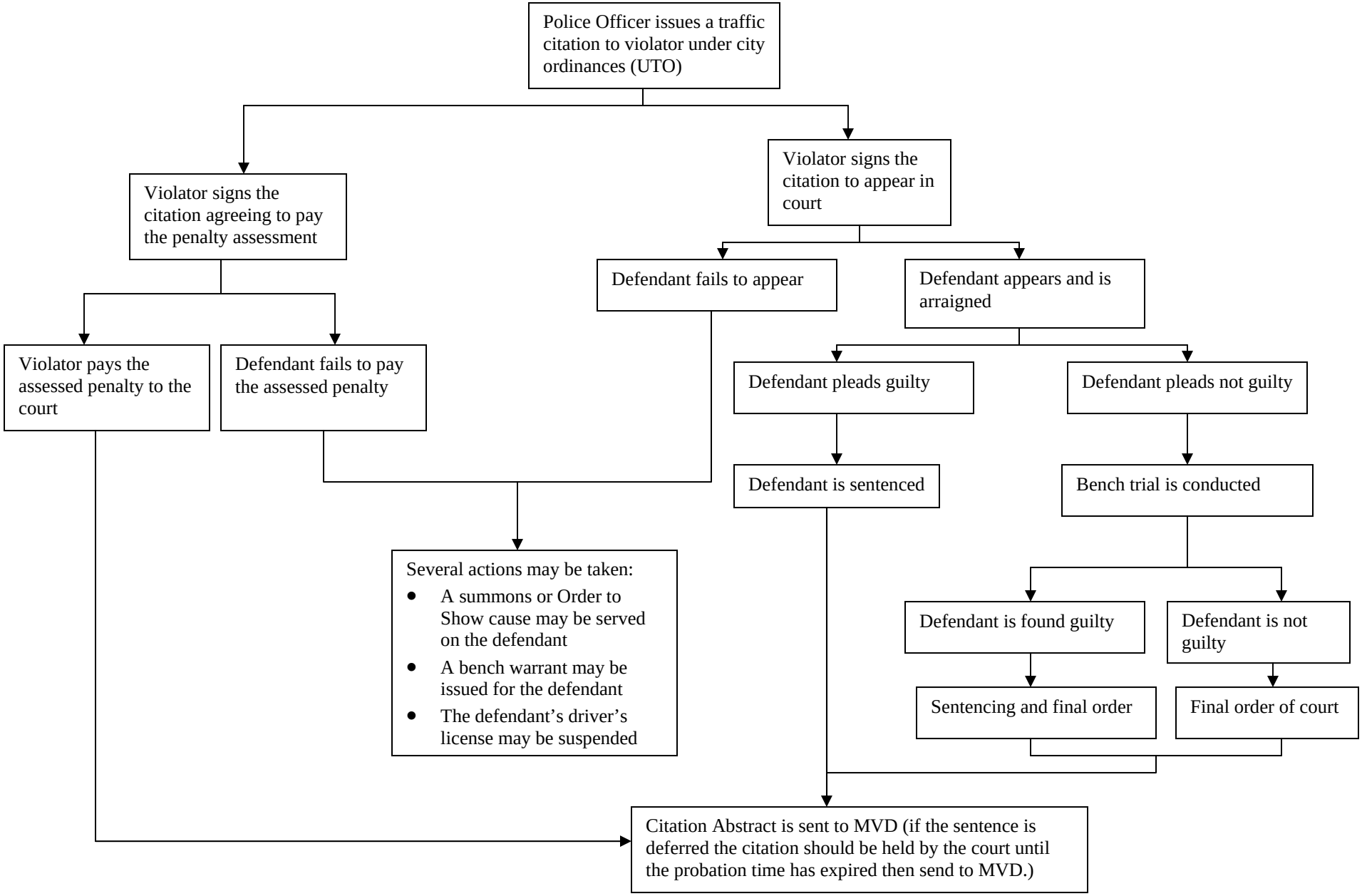
# APPENDIX 13.3

# Municipal Petty Misdemeanor Offense Flow Chart



# APPENDIX 13.4

# Municipal Traffic Offense Flow Chart



# APPENDIX 13.5

**NEW MEXICO JUDICIAL EDUCATION CENTER**
**MSC11 6060**
**1 University of New Mexico**
**Albuquerque, NM 87131-0001**

## MUNICIPAL COURT JUDICIAL EDUCATION FEE MONTHLY REPORT

NAME OF MUNICIPALITY:

REPORT FOR THE MONTH OF: 20

DATE SUBMITTED:

PLEASE COMPLETE THIS REPORT REGARDLESS OF WHETHER FEES HAVE BEEN COLLECTED. **MAIL TO THE NEW MEXICO JUDICIAL EDUCATION CENTER** AT THE ABOVE ADDRESS.

Judicial Education Fee, pursuant to NMSA 1978, §35-14-11 (B)(2), to be used for the education and training, including production of bench books and other written materials, of municipal judges and other municipal court employees. **$**

**TOTAL TRANSMITTED TO JEC:** **$**

SIGNATURE OF COURT'S CONTACT PERSON:

PRINTED NAME OF COURT'S CONTACT PERSON:

ADDRESS:

CITY, STATE AND ZIP CODE:

TELEPHONE NUMBER:

EMAIL:

# APPENDIX 13.6

**ADMINISTRATIVE OFFICE OF THE COURTS**
**FISCAL SERVICES DIVISION**
**237 Don Gaspar Room 25**
**Santa Fe, NM 87501**

## MUNICIPAL COURT MONTHLY REPORT

**Name of Municipality: _____**

**Report for month of: _____ 20_____**

**Date submitted: _____**

Please complete this report regardless of whether fees have been collected. **Mail to:**
**Administrative Office of the Courts, Fiscal Services Division, Attention: Remittance**

Sum of $65.00 fee, pursuant to §31-12-7(A) to defray the costs of chemical and other tests for influence of liquor and drugs **(DWI Lab Fee)** _____

Sum of $75.00 fee, pursuant to §31-12-7(B) to fund programs for the prevention of DWI **(DWI Prevention Fee)** _____

Sum of $75.00 fee, pursuant to §31-12-8(A), to defray the costs of chemical and other analyses of controlled substances **(Substance Abuse Fee)** _____

Sum of $6.00 fee, pursuant to §35-14-11(B), for purchase and maintenance of court automation systems in the municipal courts **(Municipal Court Automation Fee)** _____

**Total remitted to AOC** _____

Signature of court's contact person: _____

Printed name of court's contact person: _____

Court address: _____

City, state and zip code: _____

Court phone number: _____

# APPENDIX 13.7

# Resources for Municipal Courts

## Online Resources

The following links are for online resources useful to court clerks and judges.

**Judicial Education Center**
http://jec.unm.edu
The Judicial Education Center's website provides a variety of information for judges and court staff. There are numerous training tutorials and virtual trials, online copies of benchbooks and manuals, flow charts, and links to other related sites.

**Code of Judicial Conduct**
http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0

**Court Staff Ethics**
http://www.nacmnet.org/codeofconduct.html
This website provides a model code of conduct for all court staff.

**DUI Online Resource Center**
http://nasjedui.unm.edu/
This website provides information on DUI issues nationally.

**New Mexico Courts: The Judicial Branch of New Mexico**
http://www.nmcourts.com/
This website is provided for the courts of New Mexico and offers contact information for all branches of the court system.

**New Mexico Commission of Public Records and Records Management**
http://www.nmcpr.state.nm.us/records/records_hm.htm
This website will provide the judge and clerk with information on developing a records retention and management process along with the rules for destruction of court records.

**New Mexico Compilation Commission**
http://www.nmcompcomm.us/printProducts.htm
The New Mexico Compilation Commission provides the statute books to the courts. They may be ordered as needed.

**New Mexico Justice**
http://www.nmjustice.net/website/controller.php
This website consolidates and provides access to various New Mexico state and local criminal justice and juvenile justice agency data sources.

**New Mexico Municipal League**
http://www.nmml.org/
This website provides information about the Municipal Judges' and Court Clerks' Associations along with other subsections of the League.

**New Mexico State Bar: Bar Bulletin**
http://www.nmbar.org/Attorneys/PubReptSurv/barbulletin.html
This link will provide the Bar Bulletin published by the NM State Bar. Included in the bulletin are cases heard by the Supreme Court and Court of Appeals, new rules and forms that are being considered or have been approved, and other information of interest to the courts.

**New Mexico Transportation Law Center**
http://ipl.unm.edu/traf/
This website provides a variety of information on traffic and DWI issues in New Mexico.

## Manuals and Benchbooks

The following manuals and benchbooks are available to the courts. The court may contact the agency listed for a copy.

**Available from the Judicial Education Center**
(also available online through the website)

- New Mexico Municipal Court Manual for Judges and Staff
- Judicial Ethics Handbook
- Traffic Citations Manual
- DWI Benchbook

**Available from the New Mexico Compilation Commission**

- New Mexico Statutes Annotated 1978 ™
- 2008 Annual Supplements, Replacement Pamphlets, and Index
- 2009 New Mexico Rules Annotated
- 2008 New Mexico Criminal and Traffic Law Manual

# New Mexico Statutes, Rules and Forms
## Instructions for Accessing Online

1. Click on or enter the following URL
   http://www.conwaygreene.com/nmsu/lpext.dll?f=templates&fn=main-h.htm&2.0

2. Click on folder that says "New Mexico Statutes and Rules

**Statutes**

1. Click on "Statutory Chapters in New Mexico Statutes Annotated 1978"
2. Click on chapter of the statute (this number is the first in the statute "**35-** - ")
3. Click on the article of the statute (this is the second number in the statute "35-**14**- ")
4. Click on the section of the statute (this is the third number "35-15-**11")**

**Rules for Municipal Courts**

1. Click on "Contents of Judicial Volume"
2. Click on Set **8** "Rules for Municipal Courts"
3. Click on the Article number of the rule being researched (8-**1**___)
4. Click on the rule number being researched (8-**102**)

**Criminal forms**

1. Click on Set 9 "Criminal Forms "
2. Click on the article number of the form needed (9-**2**____)
3. Click on the form number (9-**201**)

# CHECKLISTS AND SCRIPTS FOR MUNICIPAL COURT

**Arraignment** **Page**



**Pretrial Release, Bond and Bail**



**Plea Agreement**



**Criminal Trial**



**Judgment and Sentencing at Arraignment or Trial**



**Sentencing at a Separate Hearing**



**The scripts contain suggested, not mandatory, language. They are provided only for guidance and do not need to be followed verbatim. Feel free to adapt them to suit your needs.**

# 14.1: Arraignment
# Proceedings Where Jail May Be Imposed

# Checklist

(Use in all cases involving DWI, Reckless Driving, and Driving on a Suspended or Revoked License; all criminal cases with a mandatory jail sentence; and all cases where the judge has reserved the right to impose a jail sentence.)

_____ 1. Call the case (by saying the name of the case, the case number, and the date).

_____ 2. Ask the defendant to stand.

_____ 3. State the defendant's name as it appears in the court file and ask the defendant if it is accurate. (If necessary, amend the court documents.) Have the court clerk confirm the defendant's address privately, but do not read the address in open court.

_____ 4. Inform the defendant of his or her constitutional rights:

- _____ The right to bail if the defendant was arrested and remains in custody;
- _____ The right to see, hear, question, and cross-examine the witnesses who testify against the defendant at trial;
- _____ 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;
- _____ The right to assistance of counsel at every stage of the proceedings;
- _____ The right to representation by a court-appointed attorney if the defendant is indigent;
- _____ The right to remain silent;
- _____ That any statement made by the defendant may be used against him or her;
- _____ The right to testify at trial; and
- _____ That if the defendant testifies at trial, he or she will be subject to cross-examination.

_____ 5. Verify that the defendant understands these rights.

_____ 6. If the defendant is not represented by counsel, can afford counsel, and wants an attorney, reschedule arraignment for another date within a reasonable amount of time (such as one week) to allow the defendant time to hire an attorney.

_____ 7. If the defendant wants an attorney, but claims that he or she cannot afford one, determine whether the defendant is indigent.

_____ If yes, appoint counsel.

_____ If no, the defendant is not entitled to appointed counsel.

_____ 8. If the defendant wants to appear pro se (without an attorney), determine whether the defendant is knowingly, voluntarily, and intelligently waiving counsel.

_____ Inform the defendant of the right to counsel and of the possible disadvantages of self-representation.

_____ Decide whether the defendant understands the consequences of waiving counsel and whether he or she is doing so voluntarily (without threats or coercion).

_____ If the defendant's waiver of counsel is knowing, intelligent and voluntary, have the defendant sign a Waiver of Counsel form, Criminal Form 9-401A.

_____ 9. If one has not been provided previously, provide the defendant with a copy of the criminal complaint (or citation).

_____ 10. Tell the defendant what the charges are.

_____ 11. Read the applicable ordinances aloud.

_____ 12. Inform the defendant of the maximum penalty and mandatory minimum penalty for each offense charged:

_____ If no specific penalty is provided for the offense, inform the defendant of the penalty for a petty misdemeanor: up to 90 days of jail and/or a fine up to $500.

_____ For DWI, read the maximum and mandatory minimum penalties for a first, second, and third offense.

_____ 13. Explain the different pleas and their possible consequences.

_____ 14. Ask the defendant to state his or her plea and enter the plea on the record. If the defendant refuses to plead, enter a plea of not guilty. If the defendant's plea is:

_____ **Not guilty**, set the case for trial as soon as possible and remand the defendant to custody, release on the defendant's own recognizance, or release with bail and set conditions.

_____ **Not guilty by reason of insanity, or guilty but mentally ill**, transfer the defendant to the district court.

_____ **Nolo contendere** (no contest), make sure that the plea is voluntarily made, that the defendant realizes the plea will have the same effect as a guilty plea, and that the defendant understands the consequences of the plea. Question the defendant personally, even if he or she is represented by counsel.

_____ Determine whether the plea is of the defendant's own free will, whether it is made with a full understanding of all rights and possible consequences, and whether it was induced by threats or promises (other than promises made as part of a plea agreement).

_____ Ask the defendant personally whether the plea is voluntary and whether the decision to plead no contest is the result of prior discussions between the prosecutor and the defendant or the defendant's attorney.

_____ Advise the defendant that if he or she is not a U.S. citizen, the plea may have an effect on his or her immigration or naturalization status. If the defendant is represented by counsel, the court must determine if the defendant has been advised by counsel of the immigration consequences of the plea.

_____ Use Criminal Form 9-406A (Guilty Plea Proceedings) as a checklist to ensure the plea is voluntary and otherwise acceptable and proper.

_____ **Guilty**, make sure that the plea is voluntarily made, that the defendant realizes the consequences of the plea, and that there is a factual basis for the guilty plea. Question the defendant personally, even if represented by counsel.

_____ The factual basis may be established by simply asking the defendant "What did you do that makes you believe you are guilty of this offense?" The defendant's answer must establish every element of the offense, including general or specific criminal intent.

_____ The plea must be of the defendant's own free will, with a full understanding of all rights and possible consequences. The plea must not have been induced by threats or promises. Ask the defendant

personally whether the plea is voluntary and whether the decision to plead guilty is the result of prior discussions between the prosecutor and the defendant or the defendant's attorney.

_____ Advise the defendant that if he or she is not a U.S. citizen, the plea may have an effect on his or her immigration or naturalization status. If the defendant is represented by counsel, the court must determine if the defendant has been advised by counsel of the immigration consequences of the plea.

_____ Use Criminal Form 9-406A (Guilty Plea Proceeding) as a checklist to ensure the plea is voluntary and otherwise acceptable and proper.

_____ 15. Determine whether a plea of guilty or no contest is acceptable.

_____ Review the plea agreement, if any. It must be in writing. (See Criminal Form 9-408A.)

_____ If acceptable, sign the agreement.

_____ If the plea is accepted, order a presentence investigation and report or go directly to sentencing.

_____ If not acceptable, allow the defendant to withdraw a plea of guilty or no contest.

_____ If the plea is not acceptable, enter a plea of not guilty, set the case for trial as soon as possible, and remand the defendant to custody, release on own recognizance, or release with bail and set conditions of release (if not already done).

# 14.2: Arraignment
# Proceedings Where Jail May Be Imposed

# Script

(Use with all DWI cases; all traffic cases with a mandatory jail sentence, such as Reckless Driving and Driving on a Revoked or Suspended License; all criminal cases with mandatory jail time; and all cases in which the Court reserves the right to impose a jail sentence.)

1. *City/Town/Village* v. _____, case number _____.

2. *[Ask the defendant to stand. State the defendant's name as it appears in the court file and ask the defendant if it is correct.]*

3. This proceeding is called an arraignment. The principal purpose of arraignment is for you to enter a plea to the charges. Before taking your plea, I will advise you of your rights and options. I will advise you of the offense(s) you are charged with and will give you a copy of the criminal complaint or citation if you do not already have one. At that point, you will enter a plea to the charges.

4. You have the right to:

    A. Plead not guilty;

    B. A trial on the charge(s);

    C. Be released on bail, if you are still in custody;

    D. The assistance of an attorney at all stages of the case. If you cannot afford to hire an attorney, the court may appoint an attorney to represent you if you qualify for such representation.

    E. See and hear the witnesses at trial and to cross-examine them or ask them questions;

    F. To present evidence in your own behalf;

    G. To have the court issue subpoenas for you directing your witnesses to be in court for trial and to testify;

    H. To remain silent and not be forced to incriminate yourself. That means that you are never required to testify. And,

I. To be presumed innocent until the prosecution proves your guilt beyond a reasonable doubt. You are not required to prove anything. The prosecution must prove the charge(s) and must do so beyond a reasonable doubt if the case goes to trial.

5. Do you understand these rights? Do you have any questions about these rights? *[If the court is uncertain that the defendant understands any of these rights, the court may ask the defendant to explain what had just been stated: e.g. "Could you please explain to me how you understand what I have just told you? I want to be certain that you are clear about what I have said."]*

6. *[<u>Always</u> ask the following questions, regardless of whether the defendant has an attorney or will appear pro se.]*

   "Do you understand that if you are <u>not</u> a U.S. citizen and you are convicted, there may be immigration and naturalization consequences to your conviction, including possible deportation?"

   *[If defendant has legal counsel:]*

   "Has your attorney explained the possible immigration and naturalization consequences to you to your satisfaction?"

7. *[If the defendant does not have counsel, you must determine whether the defendant is entitled to court-appointed counsel. ]*

   Do you understand that you have the right to have an attorney represent you and that if you cannot afford an attorney, one may be appointed for you if you qualify for such representation?

   *[If no, rephrase the question.]*

   *[If yes, ask]:* Can you afford to hire an attorney or consult with an attorney for advice?

   *[If yes, determine whether the defendant wants an attorney]:* Do you want to hire or consult with an attorney?

   *[If yes, reset the arraignment for a week later to allow the defendant a reasonable opportunity to hire an attorney or consult an attorney for advice.]*

   *[If no, determine whether the defendant is making a knowing, intelligent, and voluntary waiver of counsel by asking the following questions]:*

Do you understand that if you are convicted you may be sentenced to jail?

Do you understand the consequences of waiving counsel?

Is your decision to waive counsel made voluntarily, without threats or coercion?

Do you wish to waive your right to an attorney and represent yourself?

*[If yes to all questions, have the defendant sign a Waiver of Counsel form, Criminal Form 9-401A, and continue with the arraignment.]*

*[If no, ask]:* Do you wish to request a court-appointed attorney?

*[If yes, you must make an indigency determination and appoint counsel if indigent.]*

*[If no, you must determine whether the defendant is making a knowing, intelligent, and voluntary waiver of counsel by asking the following questions]:*

Do you understand that if you are convicted you may be sentenced to jail?

Do you understand the consequences of waiving counsel?

Is your decision to waive counsel made voluntarily, without threats or coercion?

Do you wish to waive your right to an attorney and represent yourself?

*[If yes to all questions, have the defendant sign a Waiver of Counsel form, Criminal Form 9-401A, and continue with the arraignment.]*

8. Have you received a copy of the criminal complaint or citation? *[If no, provide the defendant a copy.]*

9. You are charged with _____.
*[Read the ordinance(s) aloud.]*

10. Do you understand the charge(s)?

11. *[NOTE: If the charge is DWI or Aggravated DWI, you must inform the defendant of the maximum and mandatory minimum penalties <u>for a first, second, **and** third offense</u>.]*

    The maximum penalty for _____ *[enter charge]* is _____. *[If applicable]:* The mandatory minimum penalty for _____ *[enter charge]* is _____ .

12. As for entering a plea, you have two basic choices. First, you may plead not guilty to the charge(s). You should plead not guilty if you want to contest the charges and have a trial, if you want to talk with your family, friends or a lawyer before making a final decision, or if you want more time to think about your decision. You should plead not guilty if you are confused or not sure what to do.

13. Do you understand that you have the right to enter into plea discussions with the prosecutor? You should plead not guilty if you would like to talk to the prosecutor about a plea agreement.

14. Your second choice is to plead guilty or no contest. The court may or may not accept a no contest plea. If you plead guilty, or if you plead no contest and the court accepts the plea, you will not have a trial.

15. If you plead guilty or no contest, you will be giving up your right to a trial, your right to confront and cross-examine the witnesses against you, your right to present evidence in your own behalf and have the court subpoena witnesses of your choosing, your right to remain silent, and your right to be presumed innocent unless proven guilty beyond a reasonable doubt. If you are <u>not</u> a US citizen, there may be immigration and naturalization consequences—possibly including deportation—to your plea and conviction.

16. How do you plead to the charge(s)?

    *[Depending on the defendant's plea, follow the chart on the next page.]*

| **Not Guilty Plea** | **Guilty Plea** | **No Contest Plea** |
|---|---|---|
| 17. Your trial is set for _____ (date) at _____ (time).<br><br>*OR*<br><br>Please see the clerk, who will assign a trial date and time and provide you with a witness list that you must return to the court by the date specified.<br><br>18. *[Either set bail and/or conditions of release or place defendant in custody.]*<br><br>19. You are expected to be at trial with your attorney if you have one, to have witnesses available if you have any, and to be prepared to proceed to trial. If you fail to appear for trial, a warrant may be issued for your arrest.<br><br>20. Do you have any questions? | 17. Do you understand that by pleading guilty you are admitting that you committed the crime, you are giving up any defense you may have to the charge(s), and you are giving up the constitutional rights I described to you earlier?<br><br>18. Do you understand that if you plead guilty and are <u>not</u> a U.S. citizen, there may be immigration and naturalization consequences to your conviction, including possible deportation?<br><br>19. Are you willing to waive these rights?<br><br>20. Were any threats made to get you to plead guilty?<br><br>21. Was any force used to get you to plead guilty?<br><br>22. Were any promises made to get you to plead guilty?<br><br>23. Is your guilty plea entered of your own free will?<br><br>24. *[Obtain a factual basis for the plea by asking the defendant what he or she did to commit the offense. The factual basis must establish every element of the offense.]* What did you | 17. Do you understand that by pleading no contest you will be found guilty by the court, even though you are not admitting that you committed the crime?<br><br>18. Do you understand that if you plead no contest and are <u>not</u> a U.S. citizen, there may be immigration and naturalization consequences to your conviction, including possible deportation?<br><br>19. Do you understand that a plea of no contest will result in your criminal record showing a conviction on the charge(s)?<br><br>20. Do you understand that by pleading no contest you are giving up any defense you may have to the charge?<br><br>21. Do you wish to give up the constitutional rights I described to you earlier?<br><br>22. Were any threats made to get you to plead no contest?<br><br>23. Was any force used to get you to plead no contest?<br><br>24. Were any promises made to get you to plead no contest?<br><br>25. Is your plea entered of |

| | | |
|---|---|---|
| | do to make you believe you are guilty of this charge?<br><br>25. Are you on probation or parole for anything now?<br><br>*[If no, go to question 26.]*<br><br>*[If yes]:*<br><br>Which, probation or parole?<br><br>From which court?<br><br>What is the charge?<br><br>When were you placed on probation/parole? If you were placed on probation after the incident leading to today's charge(s), your conviction today will not affect your probation or parole.<br><br>How long is your probation/parole?<br><br>*[If the incident leading to the current charge occurred while the defendant was already on probation or parole]:* Do you understand that your guilty plea in this case could result in revocation of your probation/parole?<br><br>If your probation or parole is revoked because of this plea, do you understand that you can be given a maximum sentence in the case for which you are serving probation or parole? | your own free will?<br><br>26. *[Although not required by law for a no-contest plea, it is advisable to obtain a factual basis for this plea by asking the defendant what he or she did to commit the offense.*<br><br>*The factual basis must establish every element of the offense.]* What did you do to make you believe you are guilty of this charge?<br><br>27. Are you on probation or parole for anything now?<br><br>*[If no, go to question 28.]*<br><br>*[If yes]:*<br><br>Which, probation or parole?<br><br>From which court?<br><br>What is the charge?<br><br>When were you placed on probation/parole? If you were placed on probation after the incident leading to today's charge(s), your conviction today will not affect your probation or parole.<br><br>How long is your probation/parole?<br><br>*[If the incident leading to the current charge occurred while the defendant was already on probation or parole]:* Do you understand |

| | | |
|---|---|---|
| | 26. Do you wish to proceed with your guilty plea to the charge of _____?<br><br>27. The court finds the defendant knowingly, voluntarily, and intelligently entered a plea of guilty to the charge(s) and that there is a factual basis for the plea as evidenced by _____ *(briefly state the facts).* The plea is accepted and entered of record.<br><br>*OR*<br><br>The court finds that the defendant's plea is not knowing, intelligent and voluntary, and therefore rejects the plea of guilty. The court enters a plea of not guilty on behalf of the defendant. *[Set a date for trial and for producing witness lists; place the defendant in custody, release on own recognizance with conditions, or release with bail and conditions.]*<br><br>28. *[If the court accepts the guilty plea, either:*<br><br>*Go to sentencing (consider any evidence and arguments in mitigation and aggravation, and give the defendant an opportunity to address the court (known as the right of allocution)).* | that your conviction in this case, based on your no contest plea, could result in revocation of your probation/parole?<br><br>If your probation or parole is revoked because of this plea and conviction, do you understand that you can be given a maximum sentence in the case for which you are serving probation or parole?<br><br>28. Do you wish to proceed with your no contest plea to the charge of_____?<br><br>29. The court finds the defendant knowingly, voluntarily, and intelligently entered a plea of no contest to the charge(s) *[and that there is a factual basis for the plea as evidenced by _____ (briefly state the facts)]*. The plea is accepted and entered of record.<br><br>*OR*<br><br>The court finds that the defendant's plea is not knowing, intelligent and voluntary, and therefore rejects the plea of no contest. The court enters a plea of not guilty on behalf of the defendant. *[Set a date for trial and for producing witness lists; place the defendant in custody, release on own recognizance with* |

| | | |
|---|---|---|
| | *OR*<br><br>*Set a date for sentencing, order a presentence report, and impose release conditions or place defendant in custody.]* | *conditions, or release with bail and conditions.]*<br><br>30. *[If the court accepts the no contest plea, either:*<br><br>*Go to sentencing (consider any evidence and arguments in mitigation and aggravation, and give the defendant an opportunity to address the court (known as the right of allocution)).*<br><br>*OR*<br><br>*Set a date for sentencing, order a presentence report, and release the defendant on his or her own recognizance, release the defendant with bail and conditions, or place the defendant in custody.]* |

# 14.3: Arraignment
# Proceedings Where Jail Will Not Be Imposed

# Checklist

(Use in all traffic cases except DWI, Reckless Driving, and Driving on a Suspended or Revoked License; all criminal cases without a mandatory jail sentence; and all cases where the judge has chosen not to impose a jail sentence.)

_____ 1. Call the case (by saying the name of the case, the case number, and the date).

_____ 2. Ask the defendant to stand.

_____ 3. State the defendant's name as it appears in the court file and ask the defendant if it is accurate. (If necessary, amend the court documents.) Have the court clerk confirm the defendant's address privately, but do not read the address in open court.

_____ 4. Inform the defendant of his or her constitutional rights:

- _____ The right to bail if the defendant was arrested and remains in custody;
- _____ The right to see, hear, question, and cross-examine the witnesses who testify against the defendant at trial;
- _____ 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;
- _____ The right to assistance of private counsel at every stage of the proceedings, but no right to representation by a court-appointed attorney;
- _____ The right to remain silent;
- _____ That any statement made by the defendant may be used against him or her;
- _____ The right to testify at trial; and
- _____ That if the defendant testifies at trial, he or she will be subject to cross-examination.

_____ 5. Verify that the defendant understands these rights.

_____ 6. If the defendant wants private counsel, reschedule arraignment for another date within a reasonable amount of time (such as one week) to allow the defendant time to hire an attorney.

_____ 7. If one has not been provided previously, provide the defendant with a copy of the criminal complaint (or citation).

_____ 8. Tell the defendant what the charges are.

_____ 9. Read the applicable ordinance(s) aloud.

_____ 10. Determine whether the defendant understands the charge(s).

_____ 11. Inform the defendant of the maximum penalty and mandatory minimum penalty for each offense charged. If no specific penalty is provided for the offense, inform the defendant of the penalty for a petty misdemeanor: up to 90 days of jail and/or a fine up to $500.

_____ 12. Explain the different pleas available and their possible consequences.

_____ 13. Ask the defendant to state his or her plea and enter the plea on the record. If the defendant refuses to plead, enter a plea of not guilty. If the defendant's plea is:

_____ **Not guilty**, set the case for trial as soon as possible and remand the defendant to custody, release on the defendant's own recognizance, or release with bail and set conditions.

_____ **Not guilty by reason of insanity, or guilty but mentally ill**, transfer the defendant to the district court.

_____ **Nolo contendere** (no contest), make sure that the plea is voluntarily made, that the defendant realizes the plea will have the same effect as a guilty plea, and that the defendant understands the consequences of the plea. Question the defendant personally, even if he or she is represented by counsel.

_____ Determine whether the plea is of the defendant's own free will, whether it is made with a full understanding of all rights and possible consequences, and whether it was induced by threats or promises (other than promises made as part of a plea agreement).

_____ Ask the defendant personally whether the plea is voluntary and whether the decision to plead no contest is the result of prior discussions between the prosecutor and the defendant or the defendant's attorney.

_____ Advise the defendant that if he or she is not a U.S. citizen, the plea may have an effect on his or her immigration or naturalization status. If the defendant is represented by counsel, the court must determine if the defendant has been advised by counsel of the immigration consequences of the plea.

_____ Use Criminal Form 9-406A (Guilty Plea Proceedings) as a checklist to ensure the plea is voluntary and otherwise acceptable and proper.

_____ **Guilty**, make sure that the plea is voluntarily made, that the defendant realizes the consequences of the plea, and that there is a factual basis for the guilty plea. Question the defendant personally, even if represented by counsel.

_____ The factual basis may be established by simply asking the defendant "What did you do that makes you believe you are guilty of this offense?" The defendant's answer must establish every element of the offense, including general or specific criminal intent.

_____ The plea must be of the defendant's own free will, with a full understanding of all rights and possible consequences. The plea must not have been induced by threats or promises. Ask the defendant personally whether the plea is voluntary and whether the decision to plead guilty is the result of prior discussions between the prosecutor and the defendant or the defendant's attorney.

_____ Advise the defendant that if he or she is not a U.S. citizen, the plea may have an effect on his or her immigration or naturalization status. If the defendant is represented by counsel, the court must determine if the defendant has been advised by counsel of the immigration consequences of the plea.

_____ Use Criminal Form 9-406A (Guilty Plea Proceeding) as a checklist to ensure the plea is voluntary and otherwise acceptable and proper.

_____ 14. Determine whether a plea of guilty or no contest is acceptable.

_____ Review the plea agreement, if any. It must be in writing. (See Criminal Form 9-408A.)

_____ If acceptable, sign the agreement.

_____ If the plea is accepted, order a presentence investigation and report or go directly to sentencing.

_____ If not acceptable, allow the defendant to withdraw a plea of guilty or no contest.

_____ If the plea is not acceptable, enter a plea of not guilty, set the case for trial as soon as possible, and remand the defendant to custody, release on own recognizance, or release with bail and set conditions of release (if not already done).

# 14.4: Arraignment
# Proceedings Where Jail Will Not Be Imposed

## Script

(Use in all traffic cases except DWI, Reckless Driving, and Driving on a Suspended or Revoked License; all criminal cases without jail penalties; and all cases in which the judge has decided not to impose jail.)

1. *City/Town/Village* v. _____, case number _____.

2. *[Ask the defendant to stand. State the defendant's name as it appears in the court file and ask the defendant if it is correct.]*

3. This proceeding is called an arraignment. The principal purpose of arraignment is for you to enter a plea to the charges. Before taking your plea, I will advise you of your rights and options. I will advise you of the offense(s) you are charged with and will give you a copy of the criminal complaint or citation if you do not already have one. At that point, you will enter a plea to the charges.

4. You have the right to:

    A. Plead not guilty;

    B. A trial on the charge(s);

    C. Bail, if you are still in custody;

    D. The assistance of a private attorney at all stages of the case. You do NOT, however, have the right to a court-appointed attorney because no jail will be imposed in this case.

    E. See and hear the witnesses at trial and to cross-examine them or ask them questions;

    F. To present evidence in your own behalf;

    G. To have the court issue subpoenas for you directing your witnesses to be in court for trial and to testify;

    H. To remain silent and not be forced to incriminate yourself. That means that you are never required to testify. And,

    I. To be presumed innocent until the prosecution proves your guilt beyond a reasonable doubt. You are not required to prove anything. The prosecution

must prove the charge(s) and must do so beyond a reasonable doubt if the case goes to trial.

5. Do you understand these rights? Do you have any questions about these rights? *[If the court is uncertain that the defendant understands any of these rights, the court may ask the defendant to explain what had just been stated: e.g. "Could you please explain to me how you understand what I have just told you? I want to be certain that you are clear about what I have said."]*

6. *[Always ask the following questions, regardless of whether the defendant has an attorney or will appear pro se.]*

   "Do you understand that if you are not a U.S. citizen and you are convicted, there may be immigration and naturalization consequences to your conviction, including possible deportation?"

   *[If defendant has legal counsel:]*

   "Has your attorney explained the possible immigration and naturalization consequences to you to your satisfaction?"

7. Have you received a copy of the criminal complaint or citation? *[If no, provide the defendant a copy.]*

8. You are charged with _____.
   *[Read the ordinance(s) aloud.]*

9. Do you understand the charge (s)?

10. The maximum penalty for _____ *[enter charge]* is _____. *[If applicable]:* The mandatory minimum penalty for _____ *[enter charge]* is _____ .

11. As for entering a plea, you have two basic choices. First, you may plead not guilty to the charge(s). You should plead not guilty if you want to contest the charges and have a trial, if you want to talk with your family, friends or a lawyer before making a final decision, or if you want more time to think about your decision. You should plead not guilty if you are confused or not sure what to do. You may change your plea from Not Guilty to Guilty at any time.

12. Do you understand that you have the right to enter into plea discussions with the prosecutor? You should plead not guilty if you would like to talk to the prosecutor about a plea agreement.

13. Your second choice is to plead guilty or no contest. The court may or may not accept a no contest plea. If you plead guilty, or if you plead no contest and the court accepts the plea, you will not have a trial.

14. If you plead guilty or no contest, you will be giving up your right to a trial, your right to confront and cross-examine the witnesses against you, your right to present evidence in your own behalf and have the court subpoena witnesses of your choosing, your right to remain silent, and your right to be presumed innocent unless proven guilty beyond a reasonable doubt. If you are <u>not</u> a US citizen, there may be immigration and naturalization consequences—possibly including deportation—to your plea and conviction.

15. How do you plead to the charge(s)?
*[Depending on the defendant's plea, follow the chart on the next page.]*

| **Not Guilty Plea** | **Guilty Plea** | **No Contest Plea** |
|---|---|---|
| 16. Your trial is set for _____ (date) at _____ (time).<br><br>*OR*<br><br>Please see the clerk, who will assign a trial date and time and provide you with a witness list that you must return to the court by the date specified.<br><br>17. *[Either set bail and/or conditions of release or place defendant in custody.]*<br><br>18. You are expected to be at trial with your attorney if you have one, to have witnesses available if you have any, and to be prepared to proceed to trial. If you fail to appear for trial, a warrant may be issued for your arrest.<br><br>19. Do you have any questions? | 16. Do you understand that by pleading guilty you are admitting that you committed the crime, you are giving up any defense you may have to the charge(s), and you are giving up the constitutional rights I described to you earlier?<br><br>17. Do you understand that if you plead guilty and are <u>not</u> a U.S. citizen, there may be immigration and naturalization consequences to your conviction, including possible deportation?<br><br>18. Are you willing to waive these rights?<br><br>19. Were any threats made to get you to plead guilty?<br><br>20. Was any force used to get you to plead guilty?<br><br>21. Were any promises made to get you to plead guilty?<br><br>22. Is your guilty plea entered of your own free will?<br><br>23. *[Obtain a factual basis for the plea by asking the defendant what he or she did to commit the offense. The factual basis must establish every element of the offense.]* What did you | 16. Do you understand that by pleading no contest you will be found guilty by the court, even though you are not admitting that you committed the crime?<br><br>17. Do you understand that if you plead guilty and are <u>not</u> a U.S. citizen, there may be immigration and naturalization consequences to your conviction, including possible deportation?<br><br>18. Do you understand that a plea of no contest will result in your criminal record showing a conviction on the charge(s)?<br><br>19. Do you understand that by pleading no contest you are giving up any defense you may have to the charge?<br><br>20. Do you wish to give up the constitutional rights I described to you earlier?<br><br>21. Were any threats made to get you to plead no contest?<br><br>22. Was any force used to get you to plead no contest?<br><br>23. Were any promises made to get you to plead no contest?<br><br>24. Is your plea entered of |

| | | |
|---|---|---|
| | do to make you believe you are guilty of this charge?<br><br>24. Are you on probation or parole for anything now?<br><br>*[If no, go to question 25.]*<br><br>*[If yes]:*<br><br>Which, probation or parole?<br><br>From which court?<br><br>What is the charge?<br><br>When were you placed on probation/parole? If you were placed on probation after the incident leading to today's charge(s), your conviction today will not affect your probation or parole.<br><br>How long is your probation/parole?<br><br>*[If the incident leading to the current charge occurred while the defendant was already on probation or parole]:* Do you understand that your guilty plea in this case could result in revocation of your probation/parole?<br><br>If your probation or parole is revoked because of this plea, do you understand that you can be given a maximum sentence in the case for which you are serving probation or parole? | your own free will?<br><br>25. *[Although not required by law for a no-contest plea, it is advisable to obtain a factual basis for this plea by asking the defendant what he or she did to commit the offense.*<br><br>*The factual basis must establish every element of the offense.]* What did you do to make you believe you are guilty of this charge?<br><br>26. Are you on probation or parole for anything now?<br><br>*[If no, go to question 27.]*<br><br>*[If yes]:*<br><br>Which, probation or parole?<br><br>From which court?<br><br>What is the charge?<br><br>When were you placed on probation/parole? If you were placed on probation after the incident leading to today's charge(s), your conviction today will not affect your probation or parole.<br><br>How long is your probation/parole?<br><br>*[If the incident leading to the current charge occurred while the defendant was already on probation or parole]:* Do you understand |

| | | |
|---|---|---|
| | 25. Do you wish to proceed with your guilty plea to the charge of _____? | that your conviction in this case, based on your no contest plea, could result in revocation of your probation/parole? |
| | 26. The court finds the defendant knowingly, voluntarily, and intelligently entered a plea of guilty to the charge(s) and that there is a factual basis for the plea as evidenced by _____ *(briefly state the facts).* The plea is accepted and entered of record. | If your probation or parole is revoked because of this plea and conviction, do you understand that you can be given a maximum sentence in the case for which you are serving probation or parole? |
| | *OR* | 27. Do you wish to proceed with your no contest plea to the charge of_____? |
| | The court finds that the defendant's plea is not knowing, intelligent and voluntary, and therefore rejects the plea of guilty. The court enters a plea of not guilty on behalf of the defendant. *[Set a date for trial and for producing witness lists; place the defendant in custody, release on own recognizance with conditions, or release with bail and conditions.]* | 28. The court finds the defendant knowingly, voluntarily, and intelligently entered a plea of no contest to the charge(s) *[and that there is a factual basis for the plea as evidenced by _____ (briefly state the facts)]*. The plea is accepted and entered of record. |
| | 27. *[If the court accepts the guilty plea, either:* | *OR* |
| | *Go to sentencing (consider any evidence and arguments in mitigation and aggravation, and give the defendant an opportunity to address the court (known as the right of allocution)).* | The court finds that the defendant's plea is not knowing, intelligent and voluntary, and therefore rejects the plea of no contest. The court enters a plea of not guilty on behalf of the defendant. *[Set a date for trial and for producing witness lists; place the defendant in custody, release on own recognizance with* |

| | | |
|---|---|---|
| | *OR*<br><br>*Set a date for sentencing, order a presentence report, and impose release conditions or place defendant in custody.]* | *conditions, or release with bail and conditions.]*<br><br>29. *[If the court accepts the no contest plea, either:*<br><br>*Go to sentencing (consider any evidence and arguments in mitigation and aggravation, and give the defendant an opportunity to address the court (known as the right of allocution)).*<br><br>*OR*<br><br>*Set a date for sentencing, order a presentence report, and release the defendant on his or her own recognizance, release the defendant with bail and conditions, or place the defendant in custody.]* |

# 14.5: Pretrial Release, Bond and Bail

## Checklist: Annotated

***Applicable Law:***
N.M. Const. art. II, §13.
NMRA 8-401

***IMPORTANT NOTE:*** *Under the New Mexico Constitution, art. II, §13, defendants are presumed innocent until proven guilty and therefore* ***must*** *be given an opportunity to be released pending trial (except in certain limited circumstances not relevant to Municipal Courts, such as cases involving capital crimes). According to our constitution, defendants must be released on their own recognizance or upon an unsecured appearance bond (with or without conditions of release) unless such release will not reasonably assure the defendant's appearance in court or the safety of another or the community as a whole. In that case, the court must set a secured bond amount and appropriate release conditions. By requiring a secured bond, the court provides the defendant an opportunity to be released: if the defendant pays the bond, the defendant is released from custody with release conditions.*

_____ 1. **Is the defendant still in custody?**

_____ 2. **If yes, <u>consider the following factors</u>** *[to determine what type of release is appropriate]*:

- _____ The nature and circumstances of the offense(s) charged, including whether the offense is a crime of violence or involves a narcotic drug;
- _____ The weight of the evidence against the defendant;
- _____ Defendant's character;
- _____ Defendant's mental and physical condition;
- _____ Defendant's family ties;
- _____ Defendant's employment status, employment history, and financial resources;
- _____ Defendant's past and present residences;
- _____ Length of the defendant's residence in the community;
- _____ Facts tending to indicate the defendant has strong ties to the community;
- _____ Facts indicating the possibility that the defendant will commit new crimes if released;

_____ Defendant's past conduct, history relating to drug or alcohol abuse, criminal history, and history concerning appearances at court proceedings;

_____ Whether at the time of the offense or of arrest the defendant was on probation, parole, or other release pending trial, sentencing, appeal, or completion of an offense under federal, state, or local law;

_____ The nature and seriousness of the danger to any person or the community that would be posed by the defendant's release; and,

_____ Any other facts tending to indicate whether the defendant is likely to appear.

_____ 3. Based on those considerations, **determine whether releasing the defendant on his or her own recognizance or with an unsecured appearance bond, with or without release conditions, will**:

_____ Reasonably assure the defendant's appearance in court;

_____ Reasonably prevent the defendant from unlawfully interfering with the judicial process; and

_____ Reasonably secure the safety of all members of the community.

_____ 4. **Release Options: Unsecured and Secured Appearance Bonds**

*[Each of the following options requires the defendant to sign an appearance bond, which is a promise to appear in court at a future date. The appearance bond may be unsecured or secured.*

*An unsecured appearance bond either sets no bail at all, or sets bail at a certain amount but only requires the defendant to pay the amount if he or she fails to appear or to comply with a condition of release.*

*A secured appearance bond requires the defendant to pay or pledge a certain amount upfront, with a later refund or voiding of the pledge, as incentive for the defendant to appear in court and comply with the conditions of release. An appearance bond may be secured in a number of ways: by the defendant or a surety posting a full or partial cash deposit with the court, by execution of a bail bond by a surety, or by execution of a property bond. A surety is an individual or business that guarantees to pay the full amount if the defendant fails to appear or comply with the conditions.*

*Reminder: The N.M. Constitution requires release on the defendant's recognizance or release with an unsecured appearance bond **unless** such release will not reasonably assure the defendant's appearance in court, the safety of another, or the safety of the community. If you have determined that release on the defendant's own recognizance or on an unsecured*

*appearance bond is insufficient to meet these goals, release the defendant on the first of the following types of secured bonds that will reasonably assure the appearance of the defendant as required and the safety of any person and the community.]*

## Release on an Unsecured Appearance Bond

_____ Release on Personal Recognizance. The defendant signs an appearance bond, with no bail set. Other conditions may be imposed. (Go to #5.) *[You must release the defendant on his or her own recognizance unless you have determined that this will not assure the defendant's appearance or will not secure the safety of another or the community.]*

OR

_____ Release to the Custody of a Third Party who becomes responsible for assuring the defendant's appearance and compliance with all conditions. The defendant signs an appearance bond and agrees to remain in the custody of a Third Party. The Third Party agrees to supervise the defendant and report any violation of the conditions of release to the court. No bail is set. Other conditions may be imposed. (Go to #5.)

OR

_____ Release on an Unsecured Appearance Bond. The defendant signs an appearance bond and the court sets the amount of bail but does not require a cash deposit or pledge of property. Other conditions may be imposed. (Go to #5.)

OR

## Release on a Secured Appearance Bond

_____ Appearance Bond Secured by Bail Bond and Partial Cash Deposit. The defendant signs an appearance bond, the court sets bail, and a percentage of the amount of bail must be deposited with the court before the defendant is released. The court determines the percentage of bail to be deposited. Additional conditions may be imposed. (Go to #5.)

OR

_____ Appearance Bond Secured by Full Cash Deposit. The defendant signs an appearance bond, the court sets bail, and 100% of the amount of bail must be deposited with the court before the defendant is released. The deposit may be paid by the defendant or by a surety. Additional conditions may be imposed. (Go to #5.)

OR

_____ Appearance Bond Secured by a Bail Bond Executed by the Defendant and an Unpaid Surety. An unpaid surety is someone other than a bail bondsman. Typically, an unpaid surety is a family member or close friend. The defendant signs an appearance bond, the court sets bail, and the defendant and the unpaid surety execute a bail bond in the full amount of the bail by pledging sufficient real or personal property. Additional conditions may be imposed. (Go to #5.) *[If the court uses this option, Form 9-304 (Bail Bond) must be completed.]*

OR

_____ Appearance Bond Secured by a Bail Bond Executed by the Defendant and a Paid Surety (Bail Bondsman). The defendant signs an appearance bond, the court sets bail, and the defendant and the paid surety execute a bail bond. Additional conditions may be imposed. (Go to #5.) *[If the court uses this option, Form 9-304 (Bail Bond) must be completed.]*

_____ 5. **Conditions of Release.**

*[The court must impose the least restrictive conditions that will reasonably assure the defendant's appearance, the safety of any person and the community, and the orderly administration of justice. There is no additional requirement that the conditions be reasonably related to the crime charged. For example, in a domestic violence case where no weapons were used, it is within the court's discretion to inquire about—and restrict--defendant's access to or possession of guns or other weapons.]*

The court may require the defendant to:

_____ Refrain from committing a federal, state, or local crime during release;

_____ Remain in the custody of a designated person who agrees to supervise the defendant and report any violation of a condition of release to the court. Third party custody is permissible only if the designated third party is reasonably able to assure the court that the defendant will appear and will not pose a danger to the safety of another or the community;

_____ Maintain employment or actively seek employment;

_____ Maintain or begin an educational program;

_____ Comply with restrictions on personal associations, place of abode or travel, as specified by the court;

_____ Comply with an electronic monitoring device;

_____ Avoid all contact with the alleged victim of the crime and with any potential witness who may testify about the offense, including any co-defendants;

_____ Report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

_____ Comply with a specified curfew;

_____ Refrain from possessing a firearm, destructive device or other dangerous weapon;

_____ 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;

_____ Undergo available medical, psychological, psychiatric, or substance abuse treatment, and remain in a specified institution if required for that purpose;

_____ Submit to drug or alcohol testing upon the request of a person designated by the court;

_____ Return to custody for specified hours following release for employment, schooling, or other limited purposes; and/or

_____ Satisfy any other condition that is reasonably necessary to assure the defendant's appearance as required and to assure the safety of any other person and the community.

_____ 6. **Complete Necessary Paperwork.**

_____ Order Setting Conditions of Release and Appearance Bond *[Criminal Form 9-302. To be used if the defendant is to be released on personal recognizance or an unsecured appearance bond.]*

OR

_____ Order Setting Conditions of Release and Bail Bond *[Criminal Form 9-303. To be used if the defendant is to be released on a secured appearance bond or bail bond. Note: If a surety provides bond for the defendant, Criminal Form 9-304 also must be completed.]*

OR

_____ Release Order and Bond *[Criminal Form 9-303A. This "short" form is used instead of Criminal Form 9-303 if the defendant is to be released on a secured or unsecured appearance bond or bail bond without many release conditions.]*

OR

_____ Bail Bond *[Criminal Form 9-304. To be used if a paid or unpaid surety provides bond for the defendant. If the surety is paid, only the first part of the form must be completed. If the surety is unpaid, both parts of the form must be completed. The second part of the form, "Justification of Sureties," pledges the surety's real or personal property as security.]*

# 14.6: Pretrial Release, Bond and Bail

## Checklist: No Annotations

_____ 1. **Is the defendant still in custody?**

_____ 2. **If yes, <u>consider the following factors</u>**:

_____ The nature and circumstances of the offense(s) charged, including whether the offense is a crime of violence or involves a narcotic drug;

_____ The weight of the evidence against the defendant;

_____ Defendant's character;

_____ Defendant's mental and physical condition;

_____ Defendant's family ties;

_____ Defendant's employment status, employment history, and financial resources;

_____ Defendant's past and present residences;

_____ Length of the defendant's residence in the community;

_____ Facts tending to indicate the defendant has strong ties to the community;

_____ Facts indicating the possibility that the defendant will commit new crimes if released;

_____ Defendant's past conduct, history relating to drug or alcohol abuse, criminal history, and history concerning appearances at court proceedings;

_____ Whether at the time of the offense or of arrest the defendant was on probation, parole, or other release pending trial, sentencing, appeal, or completion of an offense under federal, state, or local law;

_____ The nature and seriousness of the danger to any person or the community that would be posed by the defendant's release; and,

_____ Any other facts tending to indicate whether the defendant is likely to appear.

_____ 3. Based on those considerations, **determine whether releasing the defendant on his or her own recognizance or with an unsecured appearance bond, with or without release conditions, will**:

_____ Reasonably assure the defendant's appearance in court;

_____ Reasonably prevent the defendant from unlawfully interfering with the judicial process; and

_____ Reasonably secure the safety of all members of the community.

_____ 4. **Release Options: Unsecured and Secured Appearance Bonds**

## Release on an Unsecured Appearance Bond

_____ Release on Personal Recognizance

OR

_____ Release to the Custody of a Third Party

OR

_____ Release on an Unsecured Appearance Bond

OR

## Release on a Secured Appearance Bond

_____ Appearance Bond Secured by Bail Bond and Partial Cash Deposit

OR

_____ Appearance Bond Secured by Full Cash Deposit

OR

_____ Appearance Bond Secured by a Bail Bond Executed by the Defendant and an Unpaid Surety *[Form 9-304 (Bail Bond)]*

OR

_____ Appearance Bond Secured by a Bail Bond Executed by the Defendant and a Paid Surety (Bail Bondsman) *[Form 9-304 (Bail Bond)]*

_____ 5. **Conditions of Release**

The court may require the defendant to:

_____ Refrain from committing a federal, state, or local crime during release;

_____ Remain in the custody of a third party;

_____ Maintain or actively seek employment;

_____ Maintain or begin an educational program;

_____ Comply with restrictions on personal associations, place of abode or travel;

_____ Comply with an electronic monitoring device;

_____ Avoid all contact with the alleged victim, any potential witness, or any co-defendants;

_____ Report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

_____ Comply with a specified curfew;

_____ Refrain from possessing a firearm, destructive device or other dangerous weapon;

_____ 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;

_____ Undergo available medical, psychological, psychiatric, or substance abuse treatment, and remain in a specified institution if required for that purpose;

_____ Submit to drug or alcohol testing upon request;

_____ Return to custody for specified hours following release for employment, schooling, or other limited purposes; and/or

_____ Satisfy any other condition that is reasonably necessary to assure the defendant's appearance as required and to assure the safety of any other person and the community.

_____ 6. **Complete Necessary Paperwork**

_____ Order Setting Conditions of Release and Appearance Bond *[Criminal Form 9-302. ]*

OR

_____ Order Setting Conditions of Release and Bail Bond *[Criminal Form 9-303]*

OR

_____ Release Order and Bond *[Criminal Form 9-303A]*

OR

_____ Bail Bond *[Criminal Form 9-304]*

# 14.7: Plea Agreement: With Counsel Script

1. *[City/Town/Village]* versus _____ *[name of defendant]*, case number _____.

2. Counsel, please identify yourselves for the record.

3. A plea agreement has been filed with the court.

4. Defendant, is this your signature on the plea agreement?

5. Have you read the plea agreement?

6. Did your attorney explain the plea agreement to you?

7. Do you understand the terms of the plea agreement?

8. Do you have any questions about the plea agreement?

9. The plea agreement states that you are pleading *[guilty/no contest]* to the charge(s) of _____. Is this correct?

10. *[If applicable]:* It also provides that the sentence will be _____ *[terms of the sentence, such as probation for ___ months on the condition that you _____ ].* Is this correct?

11. In addition, the plea agreement provides that the charge(s) of _____ will be dismissed or not filed. Is this correct?

12. Do you agree to everything in the plea agreement?

13. Does the plea agreement contain everything that you agreed to?

14. You should be aware that by entering into and signing this plea agreement, it means that you are knowingly and willingly giving up certain constitutional rights, including:
    - The right to plead Not Guilty;
    - The right to a fair and impartial trial on the charge(s);
    - The right to be released on bail, if you are still in custody *[state only if applicable]*
    - The right to see, hear, and question the witness(es) who would testify against you at trial;
    - The right to present evidence at trial on your own behalf;

- The right to have the court issue subpoenas on your behalf requiring your witness(es) to appear in court for trial and to testify;
- The right to remain silent and not be forced to incriminate yourself, That means that you would never be required to testify; and
- The right to be presumed innocent unless the prosecution proves you guilty beyond a reasonable doubt. You are not required to prove anything. The prosecution must prove the charge(s) and must do so beyond a reasonable doubt if the case were to go to trial.

15. Do you understand those rights I just listed?

16. The written plea agreement states that by entering into the agreement you are giving up those constitutional rights. Do you understand that you would be giving up those rights?

17. Do you still agree to give up those rights?

18. Do you understand that if you are not a U.S. citizen, there may be immigration and naturalization consequences stemming from your plea and conviction---possibly including deportation? Has your attorney explained that to you to your understanding?"

19. Were any threats made to get you to plead *[guilty/no contest]*?

20. Was any force used to get you to plead *[guilty/no contest]*?

21. Were any promises made to get you to plead *[guilty/no contest]* that are not included in this plea agreement?

22. Is your plea of *[guilty/no contest]* entered of your own free will?

23. Before the court can accept the *[guilty/no contest]* plea, I must be sure that you understand the nature of the charge so that you do not plead *[guilty/no contest]* when you should plead not guilty. I must also be sure that you understand the range of punishment involved and your constitutional rights.

24. _____ *[name of offense]* is a charge that requires the prosecution to prove that at the time and place mentioned in the complaint, you did _____ *[elements of the offense]*. Do you understand this?

25. The maximum punishment for the charge of _____ is _____.
*[If appropriate]:* The mandatory minimum punishment is _____.

26. *[For a guilty plea, you must obtain a factual basis for the plea. Although a factual basis is not required for a no contest plea, it is advisable. The factual basis must establish each element of the offense. Although it is possible to establish the factual*

*basis from the prosecution's information or from police reports, it is preferable to obtain the factual basis from the defendant. While the defendant explains the factual basis, the court can assess whether the defendant understands the charge and what facts support the charge. In doing so, the court can determine whether the plea is knowing, voluntary, and intelligent.]*
What did you do that makes you believe you are guilty of this charge?

*27.* Are you on probation or parole for anything now?

*[If no, go to #28.]*

*[If yes, ask the following:]*

a. Which, probation or parole?

b. From which court?

c. What is the charge?

d. When were you placed on *[probation/parole]*?

e. How long is your *[probation/parole]*?

f. *[If the incident leading to the current charge occurred before the defendant was put on probation/parole]:* If you were placed on probation after the incident leading to this charge(s), your conviction today will not affect your *[probation/parole]*.

g. *[If the incident leading to the current charge occurred while the defendant was already on probation/parole]:* Do you understand that your *[guilty/no contest]* plea in this case could result in revocation of your *[probation/parole]*?

h. If your probation or parole is revoked because of this plea, do you understand that you can be given a maximum sentence in the case for which you are serving *[probation/parole]*?

28. Do you wish to proceed with your *[guilty/no contest]* plea to the charge of _____?

29. The court finds the defendant knowingly, intelligently and voluntarily entered a plea of *[guilty/no contest]* to the charge(s) and that there is a factual basis for the plea as evidenced by _____ *[briefly summarize the facts]*. The plea is accepted and entered of record.

OR

The court finds that the defendant's plea is not knowing, intelligent, and voluntary, and therefore rejects the plea of *[guilty/no contest]*. The court enters a plea of not guilty on behalf of the defendant.

30. *[If the court accepts the guilty plea, either proceed to sentencing or set a date for a sentencing hearing.*

*If sentencing now, use the Judgment and Sentencing Checklist.*

*If sentencing later, set a date for sentencing and either: (1) impose bail and/or release conditions, and order a presentence report; or (2) place the defendant in custody and order a presentence report.]*

# 14.8: Plea Agreement: Without Counsel Script

1. *[City/Town/Village]* versus _____ *[name of defendant]*, case number _____.

2. A plea agreement has been filed with the court.

3. Defendant, is this your signature on the plea agreement?

4. Have you read the plea agreement or has someone read the plea agreement to you?

5. Do you understand the terms of the plea agreement?

6. Do you have any questions about the plea agreement?

7. The plea agreement states that you are pleading *[guilty/no contest]* to the charge(s) of _____. Is this correct?

8. *[If applicable]:* It also provides that the sentence will be _____ *[terms of the sentence, such as probation for ___ months on the condition that you _____ ]*. Is this correct?

9. In addition, the plea agreement provides that the charge(s) of _____ will be dismissed or not filed. Is this correct?

10. Do you agree to everything in the plea agreement?

11. Does the plea agreement contain everything that you agreed to?

12. You should be aware that by entering into and signing this plea agreement, it means that you are knowingly and willingly giving up certain constitutional rights, including:
    - The right to plead Not Guilty;
    - The right to a fair and impartial trial on the charge(s);
    - The right to be released on bail, if you are still in custody *[state only if applicable]*
    - The right to see, hear, and question the witness(es) who would testify against you at trial;
    - The right to present evidence at trial on your own behalf;
    - The right to have the court issue subpoenas on your behalf requiring your witness(es) to appear in court for trial and to testify;
    - The right to remain silent and not be forced to incriminate yourself, That means that you would never be required to testify; and

- The right to be presumed innocent unless the prosecution proves you guilty beyond a reasonable doubt. You are not required to prove anything. The prosecution must prove the charge(s) and must do so beyond a reasonable doubt if the case were to go to trial.

13. Do you understand those rights I just listed?

14. The written plea agreement states that by entering into the agreement you are giving up those constitutional rights. Do you understand that you would be giving up those rights?

15. Do you still agree to give up those rights?

16. Do you understand that if you are not a U.S. citizen, there may be immigration and naturalization consequences stemming from your plea and conviction---possibly including deportation?

17. Were any threats made to get you to plead *[guilty/no contest]*?

18. Was any force used to get you to plead *[guilty/no contest]*?

19. Were any promises made to get you to plead *[guilty/no contest]* that are not included in this plea agreement?

20. Is your plea of *[guilty/no contest]* entered of your own free will?

21. Before the court can accept the *[guilty/no contest]* plea, I must be sure that you understand the nature of the charge so that you do not plead *[guilty/no contest]* when you should plead not guilty. I must also be sure that you understand the range of punishment involved and your constitutional rights.

22. _____ *[name of offense]* is a charge that requires the prosecution to prove that at the time and place mentioned in the complaint, you did _____ *[elements of the offense]*. Do you understand this?

23. The maximum punishment for the charge of _____ is _____.
*[If appropriate]:* The mandatory minimum punishment is _____.

24. *[For a guilty plea, you must obtain a factual basis for the plea. Although a factual basis is not required for a no contest plea, it is advisable. The factual basis must establish each element of the offense. Although it is possible to establish the factual basis from the prosecution's information or from police reports, it is preferable to obtain the factual basis from the defendant. While the defendant explains the factual basis, the court can assess whether the defendant understands the charge and what facts support the charge. In doing so, the court can determine whether the plea is knowing, voluntary, and intelligent.]*

What did you do that makes you believe you are guilty of this charge?

*25.* Are you on probation or parole for anything now?

*[If no, go to #26.]*

*[If yes, ask the following:]*

a. Which, probation or parole?

b. From which court?

c. What is the charge?

d. When were you placed on *[probation/parole]*?

e. How long is your *[probation/parole]*?

f. *[If the incident leading to the current charge occurred before the defendant was put on probation/parole]:* If you were placed on probation after the incident leading to this charge(s), your conviction today will not affect your *[probation/parole]*.

g. *[If the incident leading to the current charge occurred while the defendant was already on probation/parole]:* Do you understand that your *[guilty/no contest]* plea in this case could result in revocation of your *[probation/parole]*?

h. If your probation or parole is revoked because of this plea, do you understand that you can be given a maximum sentence in the case for which you are serving *[probation/parole]*?

26. Do you wish to proceed with your *[guilty/no contest]* plea to the charge of _____?

27. The court finds the defendant knowingly, intelligently and voluntarily entered a plea of *[guilty/no contest]* to the charge(s) and that there is a factual basis for the plea as evidenced by _____ *[briefly summarize the facts]*. The plea is accepted and entered of record.

OR

The court finds that the defendant's plea is not knowing, intelligent, and voluntary, and therefore rejects the plea of *[guilty/no contest]*. The court enters a plea of not guilty on behalf of the defendant.

28. *[If the court accepts the guilty plea, either proceed to sentencing or set a date for a sentencing hearing.*

*If sentencing now, use the Judgment and Sentencing Checklist.*

*If sentencing later, set a date for sentencing and either: (1) impose bail and/or release conditions, and order a presentence report; or (2) place the defendant in custody and order a presentence report.]*

# 14.9: Criminal Trial: With Counsel Script

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| **Call the Case** | *Either the judge or the court clerk may call the case.*<br><br>**"Court is now in session."**<br><br>**"The case of [City/Town/Village] of _____** *[name of municipality]* **versus _____** *[name of defendant]***, case number ____, is now before this court for trial."** |
| **Determine if All the Parties are Present** | **"Counsel, please state your appearances."**<br><br>*The attorney for the prosecution and the attorney for the defense will identify themselves for the record.*<br><br>**"Are all of the parties present?"**<br><br>*The parties are the prosecution (usually a city prosecutor) and the defendant, represented by a defense attorney.*<br><br>*If the prosecution is absent, the court may dismiss the case or may continue the matter to determine whether the prosecution was absent with good cause.*<br><br>*If the defendant is absent with good cause, the court may reschedule the trial.*<br><br>*If the defendant is absent without good cause or for unknown reasons, the court issues a bench warrant for the defendant's arrest. Use Criminal Form 9-212(A).* |
| **Determine if All the Parties are Ready to Proceed** | **"Are you ready to proceed?"**<br><br>*If yes, proceed with the trial.*<br><br>*If no, the court may:*<br><br>1. *Grant a continuance of the trial if there is good cause for a party being unprepared; or* |

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| | 2. *Require the parties to proceed if there is no good cause for being unprepared; or*<br><br>3. *If a subpoenaed and essential witness for the defense has not appeared, issue a bench warrant to arrest the witness and grant a continuance of the trial.*<br><br>4. *If a critical witness for the prosecution has not appeared, the court may dismiss the case (because of lack of evidence). Before dismissing, the court should consider the efforts made by the prosecution to secure the attendance of the witness.* |
| ***Optional:***<br><br>***Administer the Oath to All Witnesses*** | *The court may choose to swear in all of the witnesses at once. This is not required; each witness can be sworn-in at the beginning of his or her testimony. If the court decides to swear-in all of the witnesses at this point, have the witnesses stand and administer the following oath:*<br><br>**"Please raise your right hand: Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?"** |
| **Exclude Witnesses** | **"Would the parties like to invoke the rule to exclude witnesses?"**<br><br>*If either party or the court invokes the rule to exclude witnesses, all of the witnesses - except the parties and any person whose presence is essential to presenting a party's case, such as the arresting officer – must leave the courtroom after the court instructs them as follows:*<br><br>**"The rule to exclude witnesses 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 witnesses."** |
| **Opening Statements** | **"Would the [City/Town/Village] like to make an opening statement?"**<br><br>*The prosecution will either waive the statement or make the statement.*<br><br>**"Would defense counsel like to make an opening statement?"** |

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| | *The defense has the right to waive the opening statement, make an opening statement now, or make an opening statement at the end of the prosecution's case.* |
| | **Presentation of Evidence** |
| **<u>Prosecution</u>**<br><br>**Administer the Oath to Each Witness** | *The prosecution presents the "prosecution's case."*<br><br>*If the witnesses are not already sworn-in, administer the oath to each witness as he or she takes the stand:*<br><br>**"Please raise your right hand: Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?"** |
| **Direct Testimony**<br><br>**Cross-Examination by Defense**<br><br>**Redirect Examination by Prosecution**<br><br>**End of Prosecution's Case** | *The prosecution will call its witnesses, who will take the stand and be asked questions by the prosecution. The prosecution must not try to "lead" the witnesses by asking questions that suggest the answer or otherwise try to sway the testimony of the witnesses.*<br><br>*The defense attorney may cross-examine each of the prosecution's witnesses. Questions on cross-examination are limited to subjects raised in direct examination. Leading questions may be asked on cross-examination.*<br><br>*If the defense attorney cross-examines a prosecution witness, the prosecution may conduct redirect examination on subjects raised in cross-examination.*<br><br>*After all of the prosecution witnesses testify, the prosecution "rests its case."* |
| **Objections** | *Objections to the admission of evidence will occur throughout the trial—in both the prosecution's case and the defendant's case. When an objection is made to a question, the judge should ensure that the witness does not to respond until told to do so. If necessary, the judge may say:*<br><br>**"An objection has been made. Please do not answer the question until I tell you that you may do so. If I sustain the objection, you will not answer the question at all. I will tell you whether or not to answer."** |

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| | *In ruling on the objection, the judge should hear the full objection, hear a response from the non-objecting attorney, and then rule.*<br><br>*If the court concludes that the objection is without merit (that is, the evidence is admissible), the court will "**overrule**" the objection and tell the witness to answer.*<br><br>*If the court concludes that the objection is valid and that the evidence is inadmissible, the court will "**sustain**" the objection and tell the witness not to answer.*<br><br>*Note: Witnesses cannot object to questions, but can assert their right not to testify if their testimony would be self-incriminating or if otherwise privileged.* |
| **Physical and Documentary Evidence** | *Physical and documentary evidence must be offered into evidence by the party wishing the court to consider the evidence. When offered, an exhibit is initially marked with a sticker for identification (for example, as "Village's Exhibit 1" or "Defendant's Exhibit A"). If the exhibit is admitted into evidence, the court will note on the sticker that the exhibit is admitted. If the evidence is not admitted, the court will return the exhibit to the offering party.*<br><br>*As with objections to questions, parties may object to the admission of exhibits. When an attorney offers physical or documentary evidence for admission, the attorney must show the evidence to opposing counsel before offering it to the court. If opposing counsel objects to its admission, the court should hear the objection as well as any argument from the attorney offering the evidence. After hearing the arguments for and against admission, the court must either overrule or sustain the objection. If the court sustains the objection, the evidence will not be admitted and the court will not consider it.* |
| **Oral Motions** | *Once the prosecution rests, the court entertains any oral motions presented by the parties, such as a defense motion to dismiss or motion for a directed verdict. The court must rule on a motion for a directed verdict at this time, but may defer ruling on a motion to dismiss until the defense rests its case.*<br><br>*If the court grants either motion, the case ends and the defendant is acquitted. If the judge defers ruling or denies the motion for a directed verdict, the case proceeds to the defense.* |

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| **Defense** | The defense attorney represents the defendant and presents the "defense's case." |
| **Opening Statement** | *If the defense attorney did not make an opening statement at the beginning of the trial, he or she may make an opening statement now before calling the first witness.* |
| **Administer the Oath to Each** | *If the witnesses are not already sworn-in, administer the oath to each witness as he or she takes the stand:* |
| **Witness** | **"Please raise your right hand: Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?"** |
| **Direct Testimony** | *As with the prosecution's case, the defense will call its witnesses, including the defendant if the defendant chooses to testify, who will take the stand and be asked questions by the defense attorney. The defense attorney must not try to "lead" the witnesses by asking questions that suggest the answer or otherwise try to sway the testimony of the witnesses.* |
| **Defendant's Right Not to Testify** | *The defendant has a constitutional right not to testify. The prosecution may not comment on the defendant's choice not to testify and the court may not infer anything about the defendant's guilt or innocence based on defendant's decision not to testify. (If the defendant does testify, the defendant is subject to cross-examination just like any other witness.)* |
| **Cross-Examination by Prosecution** | *The prosecution may cross-examine each of the defense witnesses, including the defendant if the defendant chose to testify. Questions on cross-examination are limited to subjects raised in direct examination. Leading questions may be asked on cross-examination.* |
| **Redirect Examination by Defense** | *If the prosecution cross-examines a defense witness, the defense attorney may conduct redirect examination, which is limited to subjects raised in cross-examination.* |
| **End of Defendant's Case** | *After all of the defense witnesses testify, the defense "rests its case."* |
| **Prosecution's Rebuttal** | *If the defense called witnesses or otherwise presented evidence, the prosecution may recall its witnesses or call additional witnesses to rebut evidence introduced by the defense. The defense attorney may cross-examine these rebuttal witnesses. The prosecution may conduct redirect examination.* |

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| **Closing Arguments** | *As with opening statements, closing arguments are allowed but discouraged.*<br><br>**"Would the [City/Town/Village] like to make a closing argument?"**<br><br>*The prosecution will either waive the argument or make the argument.*<br><br>**"Would the defense like to make a closing argument?"**<br><br>*The defense will either waive the argument or make the argument.*<br><br>*If the defense makes a closing argument, the prosecution is entitled to make a rebuttal argument:*<br><br>**"Would the prosecution like to rebut?"** |
| **Verdict** | *If the court deferred ruling on any motions, the court must rule before declaring its verdict.*<br><br>*If the court dismisses the case (e.g., for lack of jurisdiction or for statute of limitations problems), the court writes "Dismissed" on the criminal complaint, then signs and dates the criminal complaint, but does not enter judgment.*<br><br>*If the court does not dismiss the case, the court must declare its verdict orally and in writing:*<br><br>**"It is the judgment of the court that the defendant, _____** *[name of defendant]***, is [guilty] [not guilty] of _____** *[name of offense]***."**<br><br>*If the court finds the defendant guilty, it must impose a sentence or set a sentencing hearing, complete the appropriate form, and inform the defendant of the right to appeal:*<br><br>**"You have the right to a new trial in the district court. To appeal the court's decision, you must file a notice of appeal in the district court within fifteen days of entry of the judgment and sentence."**<br><br>*If the defendant is found guilty and jail time is imposed (or suspended), the court must complete the Judgment and Sentence form.*<br><br>*If the defendant is found guilty and no jail time is imposed, the court completes the final order on the criminal complaint (not the Judgment and Sentence form).* |

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| | *If the court finds the defendant not guilty, the court announces its decision and completes the final order on the criminal complaint.* |

# 14.10: Criminal Trial: Without Counsel Script

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| **Call the Case** | *Either the judge or the court clerk may call the case.*<br><br>**"Court is now in session."**<br><br>**"The case of** *[City/Town/Village]* **of** _____ *[name of municipality]* **versus** _____ *[name of defendant]***, case number ____, is now before this court for trial."** |
| **Determine if All the Parties are Present** | **"Are all the parties present?"**<br><br>*The parties are the prosecution (usually the police officer who issued the citation or made the arrest) and the defendant.*<br><br>*If the prosecution is absent, the court may dismiss the case or may continue the matter to determine whether the prosecution was absent with good cause.*<br><br>*If the defendant is absent with good cause, the court may reschedule the trial.*<br><br>*If the defendant is absent without good cause or for unknown reasons, the court issues a bench warrant for the defendant's arrest. Use Criminal Form 9-212(A).* |
| **Determine if All the Parties are Ready to Proceed** | **"Are you ready to proceed?"**<br><br>*If yes, proceed with the trial.*<br><br>*If no, the court may:*<br><br>1. *Grant a continuance of the trial if there is good cause for a party being unprepared; or*<br><br>2. *Require the parties to proceed if there is no good cause for being unprepared; or*<br><br>3. *If a subpoenaed and essential witness for the defense has not appeared, issue a bench warrant to arrest the witness and grant a continuance of the trial; or* |

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| | 4. *If a critical witness for the prosecution has not appeared, the court may dismiss the case (because of lack of evidence). Before dismissing, the court should consider the efforts made by the prosecution to secure the attendance of the witness.* |
| ***Optional: Administer the Oath to all Witnesses*** | *The court may choose to swear-in all of the witnesses at once. This is not required; each witness can be sworn-in at the beginning of his or her testimony. If the court decides to swear-in all of the witnesses at this point, have the witnesses stand and administer the following oath:*<br><br>**"Please raise your right hand: Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?"** |
| **Exclude Witnesses** | **"Would the parties like to have the witnesses leave the courtroom until they testify?"**<br><br>*If either party or the court invokes the rule to exclude witnesses, all of the witnesses - except the parties and any person whose presence is essential to presenting a party's case, such as another officer - must leave the courtroom after the court instructs them as follows:*<br><br>**"The rule excluding witnesses 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 prosecuting officer and the defendant - but you must not do so in the presence of any other witnesses."** |
| **Opening Statements** | **"Would the [City/Town/Village] like to make an opening statement?"**<br><br>*The prosecution may make a statement or waive its right to make an opening statement.*<br><br>**"Would the defendant like to make an opening statement?"**<br><br>*The defendant may make an opening statement now, may waive its opening statement, or may reserve its opening statement until the beginning of its own case.* |

| | **Presentation of Evidence** |
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| **<u>Prosecution</u>** | *The prosecution (usually a police officer) presents the "prosecution's case."* |
| **Administer the Oath to Each Witness** | *If the witnesses are not already sworn-in, administer the oath to each witness as he or she takes the stand:*<br><br>**"Please raise your right hand: Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?"** |
| **Direct Testimony** | *The police officer and any other witnesses for the prosecution take the stand and, typically, tell their stories in a narrative fashion (without questioning). The prosecution is entitled to ask questions of the witnesses, but usually does not do so.* |
| **Cross-Examination by Defendant** | *The defendant may cross-examine each prosecution witness. Cross-examination is limited to subjects raised on direct examination.*<br><br>*Rule 8-111 permits the court, in its discretion, to allow pro se parties to ask questions of witnesses directly or through the court. By having the pro se defendant tell the court what questions he or she would like answered by the witness (rather than questioning the witness directly), the court can avoid unnecessary conflict.* |
| **Redirect Examination by Prosecution** | *If the defendant cross-examines a prosecution witness, the prosecution may conduct redirect examination. Redirect is limited to subjects raised on cross-examination.* |
| **End of Prosecution's Case** | *After all of the prosecution witnesses testify, the prosecution "rests" its case.* |
| **Objections** | *Objections to the admission of evidence will occur throughout the trial—in both the prosecution's case and the defendant's case. When an objection is made to a question, the judge should ensure that the witness does not respond until told to do so. If necessary, the judge may say:*<br><br>**"An objection has been made. Please do not answer the question until I tell you that you may do so. If I sustain the objection, you will not answer the question at all. I will tell you whether or not to answer."** |

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| | *In ruling on the objection, the judge should hear the full objection, hear a response from the non-objecting party, and then rule.*<br><br>*If the court concludes that the objection is without merit (that is, the evidence is admissible), the court will "**overrule**" the objection and tell the witness to answer.*<br><br>*If the court concludes that the objection is valid and that the evidence is inadmissible, the court will "**sustain**" the objection and tell the witness not to answer.*<br><br>*Note: Witnesses cannot object to questions, but can assert their right not to testify if their testimony would be self-incriminating or if their testimony is otherwise privileged.*<br><br>*In addition, in extreme circumstances, the court may curtail questioning that harasses the witness, questioning or testimony that is redundant, or testimony that is overly prejudicial (that is, its prejudicial impact significantly outweighs its probative value).* |
| **Physical and Documentary Evidence** | *Physical and documentary evidence must be offered into evidence by the party wishing the court to consider it. When offered, an exhibit is initially marked with a sticker for identification (for example, as "Village's Exhibit 1" or "Defendant's Exhibit A"). If the exhibit is admitted into evidence, the court will note on the sticker that the exhibit is admitted. If the evidence is not admitted, the court will return the exhibit to the offering party.*<br><br>*As with objections to questions, parties may object to the admission of exhibits. When a party offers physical or documentary evidence for admission, he or she must show the evidence to the opposing party before offering it to the court. If the opposing party objects to its admission, the court should hear the objection as well as any argument from the party offering the exhibit. After hearing the arguments for and against admission, the court must either overrule or sustain the objection. The court should not see the exhibit until it has ruled on the objection and admitted the exhibit into evidence. If the court sustains the objection, the exhibit will not be admitted and the court will not consider it.* |
| **Oral Motions** | *Once the prosecution rests, the court entertains any oral motions presented by the parties, such as a defense motion to dismiss or motion for a directed verdict. The court must rule on a motion for a directed verdict at this time, but may defer ruling on a motion to dismiss until the defense rests its case.* |

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| | *If the court grants either motion, the case ends and the defendant is acquitted. If the judge defers ruling or denies the motion for a directed verdict, the case proceeds to the defense.* |
| **<u>Defense</u>** | *The defendant serves as self-advocate, without a defense attorney, and presents the "defense's case."* |
| **Opening Statement** | *If the defendant did not make an opening statement at the beginning of the trial, he or she may make an opening statement now before calling the first witness.* |
| **Administer the Oath to Each Witness** | *If the witnesses are not already sworn-in, administer the oath as he or she takes the stand:*<br><br>**"Please raise your right hand: Do you solemnly swear or affirm that the testimony you give is the truth, the whole truth, and nothing but the truth, under penalty of perjury?"** |
| **Direct Testimony** | *As with the prosecution's case, the defendant (if he or she chooses to do so) and any other witnesses for the defense will take the stand and, typically, tell their stories in a narrative fashion (without questioning). The defendant is entitled to ask questions of the other witnesses. As noted above, the court may require the defendant to "funnel" his or her questions through the judge.* |
| **Defendant's Right Not to Testify** | *The defendant has a constitutional right not to testify. The prosecution may not comment on the defendant's choice not to testify and the court may not infer anything about the defendant's guilt or innocence based on defendant's decision not to testify. (If the defendant does testify, the defendant is subject to cross-examination just like any other witness.)* |
| **Cross-Examination by Prosecution** | *The prosecution may cross-examine each defense witness, including the defendant if the defendant chose to testify. Questions on cross-examination are limited to those subjects raised on direct examination. Here too, the judge may require the prosecution to conduct its cross-examination through the judge.* |
| **Redirect Examination by Defendant** | *If the prosecution cross-examines a witness, the defendant may conduct redirect examination on those subjects raised on cross-examination. The judge may require the defendant to conduct redirect through the judge, rather than directly questioning the witness.* |
| **End of Defendant's Case** | *After the defense presents all of its witnesses, the defense "rests" its case.* |

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| **Prosecution's Rebuttal** | *If the defendant called witnesses or otherwise presented evidence, the prosecution may recall its witnesses or call additional witnesses to rebut evidence introduced by the defendant. The defendant may cross-examine these rebuttal witnesses. The prosecution may conduct redirect examination.* |
| **Closing Arguments** | **"Would the [City/Town/Village] like to make a closing argument?"**<br><br>**"Would the defendant like to make a closing argument?"**<br><br>**"Would the prosecution like to rebut?"** |
| **Verdict** | *If the court deferred ruling on any motions, the court must rule on the motion before declaring its verdict.*<br><br>*If the court dismisses the case (e.g., for lack of jurisdiction or for statute of limitations problems), the court writes "Dismissed" on the criminal complaint, then signs and dates the criminal complaint, but does not enter judgment.*<br><br>*If the court does not dismiss the case, the court must declare its verdict orally and in writing:*<br><br>**"It is the judgment of the court that the defendant, _____** *[name of defendant]***, is [guilty] [not guilty] of _____** *[name of offense]***."**<br><br>*If the court finds the defendant guilty, it must impose a sentence or set a sentencing hearing, complete the appropriate form, and inform the defendant of the right to appeal:*<br><br>**"You have the right to a new trial in the district court. To appeal the court's decision, you must file a notice of appeal in the district court within fifteen (15) days of entry of the judgment and sentence."**<br><br>*If the defendant is found guilty and jail time is imposed (or suspended), the court must complete the Judgment and Sentence form.*<br><br>*If the defendant is found guilty and no jail time is imposed, the court completes the final order on the criminal complaint (not the Judgment and Sentence form).*<br><br>*If the court finds the defendant not guilty, the court announces its decision and completes the final order on the criminal complaint.* |

# 14:11: Judgment and Sentencing at Arraignment or Trial

## Checklist: Annotated

## Judgment

_____ 1. Announce the judgment for each charge.

_____ 2. *[If the defendant is found not guilty on all charges:]:* Release the defendant from custody, all bond obligations, and all conditions of release. Exonerate bond if no violations. Do not charge any fines or fees.

_____ 3. *[If any or all of charges are resolved by a guilty or no contest plea:]* Do not accept plea until first addressing the defendant personally in open court to advise of the following and determine that the defendant understands:

- Nature of charges to which plea is offered;
- Mandatory minimum penalty, if any, and maximum possible penalty provided by law for each offense(s) involved in the plea;
- That the defendant has the right to plead Not Guilty or continue with his Not Guilty plea if initially made;
- That if the defendant pleads Guilty or No Contest, there will be no trial and, therefore, by pleading Guilty or No Contest, the defendant is waiving the right to trial;
- That if the defendant is not a U.S. citizen, a plea of Guilty or No Contest may have an effect upon his or her immigration or naturalization status. If the defendant has legal counsel, the court must determine if the defendant has been advised by counsel about these possible consequences.

_____ 4. *[If trial on some charges and plea agreement on others:]* Dismiss all charges agreed to be dismissed in plea agreement (if not already done during plea agreement proceedings); if the defendant is found guilty on one or more charges, go to #5; if the defendant is found not guilty on all charges after trial, go to #1.

_____ 5. *[If the defendant is found guilty after trial, guilty plea, or nolo contendere plea:]* EITHER set a sentencing date, review the conditions of release and bond, and order a presentence report, OR begin sentencing.

## Sentencing (in same proceeding as judgment)

_____ 6. **Mitigating/Aggravating Circumstances**

Provide opportunity for:

_____ Argument of prosecutor

_____ Testimony of victim or others (on behalf of the prosecution)

_____ Argument of defense counsel

_____ Testimony of defendant

_____ Testimony of others on behalf of defendant

_____ 7. **Defer Sentencing?**

*[When the court defers sentencing, it does not impose a sentence, but delays sentencing for an identified period, during which the defendant must comply with conditions imposed by the court. If the defendant completes the deferment without violating any conditions, the court dismisses the criminal charges. If the defendant does not successfully complete the deferment, the court may impose any lawful sentence that could have been imposed at judgment, but must credit the defendant with time spent on probation.*

*The court may defer sentencing when deferment is not precluded by ordinance and when it is satisfied that deferment serves the ends of justice and the best interests of the public and the defendant. Note that under some ordinances, such as certain DWI ordinances, the penalties are mandatory and a court may not suspend, defer, or take the penalty under advisement. Before deferring a sentence, consult your ordinance.]*

_____ Ask counsel, the defendant, and the victim whether there is any reason to defer sentencing.

_____ If there is a good reason to defer, do not impose any incarceration or fines but impose PROBATION and assess COURT FEES. *[Go to numbers 8 and 9.]*

_____ 8. **Impose a Sentence**

*[Note on Suspended Sentences: Unless precluded by ordinance, the court may impose a sentence but suspend its execution. Under some ordinances, such as certain DWI ordinances, the penalties are mandatory and a court may not suspend, defer, or take the penalty under advisement. Before suspending a sentence, consult your ordinance.*

*When the court suspends a sentence, it places the defendant on probation with appropriate conditions. The court may suspend a sentence entirely or may suspend a portion of the sentence. In other words, the court may suspend both the jail and the fines; may suspend just the jail, but not the fines (or vice versa); or the judge may suspend a portion of the jail time, a portion of the fines, or a portion of both. Unlike a*

*deferred sentence, successful completion of probation under a suspended sentence does not result in dismissal of the charges.]*

_____ **A. Factors in Ordering Incarceration**

_____ Duration

_____ Credit for time served

_____ Suspend?

_____ Place in immediate custody?

_____ Allow the defendant to report at a specified time?

_____ Weekend incarceration?

_____ Work release?

_____ Consecutive or concurrent (for multiple convictions)? *[Concurrent sentences are sentences that operate at the same time; consecutive sentences are "stacked," that is, they are served one after another. For example, a defendant sentenced to serve three months on one conviction and 4 months on a second conviction, will serve a total of 4 months if the sentences are served concurrently or 7 months if the sentences are served consecutively. Unless the court indicates in its written order that multiple sentences will be served consecutively, they will be served concurrently.]*

_____ B. **Fines**

_____ Amount

_____ Due date/installment options

_____ Community service (for all or part of the fines)?

_____ Suspend?

_____ 9. **Probation**

*[Probation is imposed whenever a sentence is deferred or suspended (whether in whole or in part).*

*When a defendant is convicted of multiple charges, the court may impose multiple probations concurrently or consecutively, just as jail may be imposed consecutively or concurrently. See discussion above.]*

_____ Duration

_____ Terms and conditions

*[The conditions of probation must be reasonably related to the rehabilitation of the defendant or the safety of the community. This list is illustrative, but not exhaustive. You may impose some or all of these conditions, as well as others that are reasonable under the circumstances of the case.]*

_____ No violations of the law

_____ Supervised or unsupervised

_____ Electronic monitoring

_____ Approval before leaving the jurisdiction/state

_____ Substance abuse treatment

_____ Medical or psychiatric treatment

_____ No use of alcohol, products containing alcohol, illegal drugs, or unlawful use of prescription drugs

_____ Random drug/alcohol testing

_____ Community service

_____ Driver's education

_____ No driving

_____ Ignition interlock device for at least one year in all vehicles operated by the defendant. *[Note: This is a <u>mandatory</u> condition of probation when a defendant is convicted of Aggravated DWI or any subsequent DWI. It is not a mandatory condition for a first conviction, unless the first conviction is aggravated.]*

_____ No contact with victim

_____ No contact with co-defendants

_____ No possession of a firearm, destructive device, or other dangerous weapon

_____ Restitution

_____ Consecutive or concurrent (for multiple convictions)?

**_____ 10**. **Court Fees**

*[Court fees must be assessed against all defendants who are convicted of either violating an ordinance relating to the operation of a motor vehicle or violating an ordinance enforceable by incarceration. Court fees cannot be deferred or suspended, even if the rest of the sentence is deferred or suspended.]*

_____ Court automation fee of $6.00.

_____ Corrections fee of $20.00; and

_____ Judicial education fee of $3.00; and

_____ *[If the defendant is convicted of DWI]:*

_____ (i) $65.00 to defray the costs of chemical testing; and

_____ (ii) $75.00 to fund DWI prevention programs.

_____ *[If the defendant is convicted of distributing or possessing a controlled substance]:*

_____ (i) $75.00 to defray the costs of chemical testing

_____ Any municipal fees

_____ Due date/installment options

_____ Community service (for all or part of the fees)?

_____ 11. **Appeal**

_____ Advise the defendant of:

_____ Right to appeal.

_____ Right to lawyer on appeal.

_____ Right to court-appointed lawyer if you cannot afford a lawyer and jail was imposed.

_____ Right to a certified copy of the record and transcripts necessary for your appeal if you cannot afford them.

_____ 15-day deadline for appeal.

_____ Obtain the defendant's signature on copy of appeal rights.

_____ Review and amend or continue through appeal:

_____ Conditions of release

_____ Bond

_____ 12. **Paperwork**

_____ Complete judgment and sentencing order form *[if the defendant is found guilty and sentencing is deferred or involves incarceration, even if suspended]*.

**OR**

_____ Complete the final order on the criminal complaint *[if the defendant is found not guilty or the judge does not impose jail time.]*

# 14.12: Judgment and Sentencing at Arraignment or Trial

## Checklist: No Annotations

## Judgment

_____ 1. Announce the judgment for each charge.

_____ 2. *[If the defendant is found not guilty on all charges:]:* Release the defendant from custody, all bond obligations, and all conditions of release. Exonerate bond if no violations. Do not charge any fines or fees.

_____ 3. *[If any or all of charges are resolved by a guilty or no contest plea:]* Do not accept plea until first addressing the defendant personally in open court to advise of the following and determine that the defendant understands:

- Nature of charges to which plea is offered;
- Mandatory minimum penalty, if any, and maximum possible penalty provided by law for each offense(s) involved in the plea;
- That the defendant has the right to plead Not Guilty or continue with his Not Guilty plea if initially made;
- That if the defendant pleads Guilty or No Contest, there will be no trial and, therefore, by pleading Guilty or No Contest, the defendant is waiving the right to trial;
- That if the defendant is not a U.S. citizen, a plea of Guilty or No Contest may have an effect upon his or her immigration or naturalization status. If the defendant has legal counsel, the court must determine if the defendant has been advised by counsel about these possible consequences.

_____ 3. *[If trial on some charges and plea agreement on others:]* Dismiss all charges agreed to be dismissed in plea agreement (if not already done during plea agreement proceedings); if defendant found guilty on one or more charges, go to #5; if defendant found not guilty on all charges after trial, go to #1.

_____ 5. *[If the defendant is found guilty after trial, guilty plea, or nolo contendere plea:]* EITHER set a sentencing date, review the conditions of release and bond, and order a presentence report, OR begin sentencing.

## Sentencing (in same proceeding as judgment)

_____ 6. **Mitigating/Aggravating Circumstances**

_____ Argument of prosecutor

_____ Testimony of victim or others (on behalf of the prosecution)

_____ Argument of defense counsel

_____ Testimony of defendant

_____ Testimony of others on behalf of defendant

_____ 7. **Defer Sentencing?**

_____ Determine whether the applicable ordinance prohibits deferred sentencing.

_____ If deferred sentencing is permissible, ask counsel, the defendant, and the victim whether there is any reason to defer sentencing.

_____ If there is a good reason to defer, do not impose any incarceration or fines but impose PROBATION and assess COURT FEES. *[Go to numbers 8 and 9.]*

_____ 8. **Impose a Sentence?**

_____ **A. Factors in Ordering Incarceration**

_____ Duration

_____ Credit for time served

_____ Suspend?

_____ Place in immediate custody?

_____ Allow the defendant to report at a specified time?

_____ Weekend incarceration?

_____ Work release?

_____ Consecutive or concurrent (for multiple convictions)?

_____ **B. Fines**

_____ Amount

_____ Due date/installment options

_____ Community service (for all or part of the fines)?

_____ Suspend?

_____ 9. **Probation**

_____ Duration

_____ Terms and conditions

_____ No violations of the law

_____ Supervised or unsupervised

_____ Electronic monitoring

_____ Approval before leaving the jurisdiction/state

_____ Substance abuse treatment

_____ Medical or psychiatric treatment

_____ No use of alcohol, products containing alcohol, illegal drugs, or unlawful use of prescription drugs

_____ Random drug/alcohol testing

_____ Community service

_____ Driver's education

_____ No driving

_____ Ignition interlock device

_____ No contact with victim

_____ No contact with co-defendants

_____ No possession of a firearm, destructive device, or other dangerous weapon

_____ Restitution

_____ Consecutive or concurrent (for multiple convictions)?

**_____10**. **Court Fees**

_____ Court automation fee of $6.00.

_____ Corrections fee of $20.00; and

_____ Judicial education fee of $3.00; and

_____ *[If the defendant is convicted of DWI]:*

_____ (i) $65.00 to defray the costs of chemical testing; and

_____ (ii) $75.00 to fund DWI prevention programs.

_____ *[If the defendant is convicted of distributing or possessing a controlled substance]:*

_____ (i) $75.00 to defray the costs of chemical testing

_____ Any municipal fees

_____ Due date/installment options

_____ Community service (for all or part of the fees)?

_____ 11. **Appeal**

_____ Advise defendant of:

_____ Right to appeal

_____ Right to lawyer/right to court-appointed lawyer if you cannot afford a lawyer and jail was imposed

_____ Right to a certified copy of the record and transcripts necessary for your appeal if you cannot afford them

_____ 15-day deadline

_____ Obtain defendant's signature on copy of appeal rights.

_____ Review and amend or continue through appeal:

_____ Conditions of release

_____ Bond

_____ 12. **Paperwork**

_____ Complete judgment and sentencing order form.

**OR**

_____ Complete the final order on the criminal complaint.

# 14.13: Judgment and Sentencing at Arraignment or Trial

## Script: Annotated

1. The court having found the defendant guilty *[after trial] or [after the defendant entered a plea of guilty] or [after the defendant entered a plea of no contest]*, it is the judgment of the court that the defendant is guilty of _____ *[offense]*, committed on or about _____ *[date]*.

   *[Enter a judgment on each count.]*

2. I have reviewed *[the court file, the police report, the presentence report]* and have considered the evidence presented *[during trial] or [during arraignment] or [during plea proceedings]*.

3. Is there any evidence the parties would like to introduce in mitigation or aggravation?

4. [Prosecutor/Officer], do you wish to say anything on behalf of the *[City/Town/Village]*?

5. *[The New Mexico Constitution in Article 2, §24 and the New Mexico statutes in §31-26-4(G) guarantee victims of certain crimes, including some misdemeanors and petty misdemeanors, the right to make a statement to the court at sentencing.]* Is the victim present? *[If so]:* Would you like to speak to the court?

6. Does anyone else wish to speak on behalf of the prosecution?

7. *[Defense counsel, do you wish to say anything on behalf of your client?]*

8. Defendant, is there anything you wish to say?

9. Does anyone else wish to speak on behalf of the defendant?

### DEFER SENTENCING?

*[If a deferred sentence is not prohibited by municipal ordinance, consider whether the interests of justice and the best interests of the public and the defendant would be served by deferring sentencing.]*

10. Is there any legal reason why the court should not pronounce a sentence?

*[When the court defers sentencing, it does not impose a sentence, but delays sentencing for an identified period of time, during which the defendant must comply with conditions*

*set by the court. If the defendant completes the deferment without violating the conditions, the court dismisses the charges. If the defendant violates the conditions, the court may impose any lawful sentence that could have been imposed at the time of judgment, but must credit the defendant with time spent on probation.]*

*[If so, defer sentencing]:* It is the judgment of the court that sentencing shall be deferred for _____ *[days/months]*, during which time *[name of defendant]* shall be on probation.

*[If there is good cause to defer sentencing, announce the deferment, do not impose jail or a fine, but impose conditions of probation and all applicable court fees. Court fees must be assessed against all defendants who are convicted of either violating an ordinance relating to the operation of a motor vehicle or an violating an ordinance enforceable by incarceration.* ***Go to numbers 16 - 18 for probation; go to numbers 19 - 23 for court fees.]***

*[Note: If the defendant is convicted on multiple charges, you may: (a) impose sentences on all charges; (b) impose a sentence on some charges and defer sentencing on others; (c) impose a sentence on all charges, but suspend some or all of the sentences. In addition, when you impose but suspend a sentence, you may suspend both the jail time and the fine; just the jail time, but not the fine; or just the fine, but not the jail time.]*

## IMPOSE A SENTENCE

*[If there is no legal reason to delay or defer sentencing, select among the following sentencing options.]*

## Incarceration

*[Use this section only if you choose to impose jail time. Use this section even if the period of jail is suspended].*

11. It is the judgment and sentence of the court that the defendant be incarcerated in the _____ *[City/County]* jail for a term of _____ *[days/months]*, beginning on _____ *[date]* and ending on _____ *[date] [for the charge of _____]. [If you are sentencing the defendant on more than one charge, you should sentence for each charge separately and then determine whether to impose the sentences concurrently or consecutively. If you do not specify, the terms will be served concurrently. See number 15 below.]*

12. The court has considered the time the defendant has spent in custody on the current charge(s) and has credited the defendant with _____ *[days]* of time already served.

*[Note: The combined total of time imposed and time credited cannot exceed the maximum penalty allowed under the ordinance.]*

13. *[Choose one of the following]:*

A. The defendant is committed to the custody of the _____ *[County Sheriff, municipal police, or other appropriate official]*for _____ *[days/months]* beginning today.

OR

B. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* on _____ *[date]* at _____ *[time]* to serve this sentence.

OR

C. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* at _____ *[time]* each Friday for _____ consecutive weeks beginning on _____ *[date]* and shall be released at _____ *[time]* on the following Sunday of each weekend until the full term of incarceration is served.

OR

D. *[Choose either A or B above]* AND the defendant shall be released from custody between the hours of _____ and _____ on _____ *[days of the week]* for the purpose of employment.

OR

E. The defendant's incarceration is suspended for _____ *[days or months]*. During the period of suspension, the defendant will be on probation. The court will discuss the terms of the probation in a few moments.

14. *[Use if sentencing on multiple charges]:* It is the judgment and sentence of the court that the defendant shall serve these sentences *[concurrently] or [consecutively]*.

*[Concurrent sentences are sentences that operate at the same time; consecutive sentences are "stacked," that is, they are served one after another. Unless the court indicates that multiple sentences will be served consecutively, they will be served concurrently.]*

## Fines

15. It is the *[further]* judgment and sentence of this court that the defendant shall pay a fine in the amount of $ _____, which is payable *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid]*.

OR

It is the *[further]* judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of a fine of $ _____.

OR

The defendant's fine of $ _____ is suspended for _____ *[days or months]*.

## Probation

*[Whenever you defer sentencing or suspend a sentence that you have imposed, you have automatically placed the defendant on probation, although you need to state this in your sentencing order. When you place a defendant on probation, you must include the conditions of probation in your order.]*

16. The court finds that probation is appropriate because:
_____
_____

17. It is the judgment of this court that the execution of this sentence *[or a portion of this sentence]* be suspended and the defendant be placed on probation for a period of _____ *[days or months]* from today with the following conditions:

_____
_____
_____

*[The conditions of probation must be reasonably related to the rehabilitation of the defendant or the safety of the community, for example: supervision by probation authorities, medical or psychiatric treatment, substance abuse treatment, random drug/alcohol testing, abstinence from alcohol, community service, driver's education, and no contact with the victim or other co-defendants.]*

18. *[Use if sentencing on multiple charges]:* It is the judgment of the court that the defendant shall serve the probationary periods *[concurrently] or [consecutively]*.

*[As with jail sentences, multiple probations will be served at the same time unless the court indicates that the probations will be served consecutively.]*

## Court Fees

*[Court fees must be assessed against all defendants who are convicted of either violating an ordinance relating to the operation of a motor vehicle or violating an ordinance*

*enforceable by incarceration. Court fees cannot be deferred or suspended, even if the rest of the sentence is deferred or suspended.]*

19. It is the further judgment and sentence of this court that the defendant shall pay the following court fees:

    - A court automation fee of $6.00;
    - A corrections fee of $20.00; and
    - A judicial education fee of $3.00.

20. *[If the defendant is convicted of DWI, you must impose two additional fees]:*

    In addition, the defendant shall pay:

    - A fee of $65.00 to defray the costs of chemical testing; and
    - A fee of $75.00 to fund DWI prevention programs.

21. *[If the defendant is convicted of distributing or possessing a controlled substance, you must impose this additional fee]:*

    In addition, the defendant shall pay:

    - A fee of $75.00 to defray the costs of chemical testing.

22. *[You must also impose any municipal fees added by ordinance in a home rule municipality.]*

23. *[If the defendant is unable to pay the required court fees, you may impose community service in lieu of part or all of the fees]:*

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of $ _____ in court fees and shall pay the balance of $ _____ *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid].*

    OR

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of all court fees.

## Appeal

24. You have the right to appeal from the orders of the court and have a lawyer represent you in the appeal. If you cannot afford a lawyer, one may be appointed for you if you qualify. If you cannot afford a certified copy of the record and transcripts necessary for your appeal, they will be provided.

25. If you want to appeal, you must file a notice of appeal in the district court within 15 days from today or you will lose your right to appeal.

26. You must sign a copy of your notice of appeal rights.

27. Bond is *[continued or revised]* through the appeal.

28. *[Either announce that the court is in recess or call the next case.]*

29. *[Complete the appropriate paperwork.]*

# 14.14: Judgment and Sentencing at Arraignment or Trial

## Script: No Annotations

1. The court having found the defendant guilty *[after trial] or [after the defendant entered a plea of guilty] or [after the defendant entered a plea of no contest]*, it is the judgment of the court that the defendant is guilty of _____ *[offense]*, committed on or about _____ *[date]*.

   *[Enter a judgment on each count.]*

2. I have reviewed *[the court file, the police report, the presentence report]* and have considered the evidence presented *[during trial] or [during arraignment] or [during plea proceedings]*.

3. Is there any evidence the parties would like to introduce in mitigation or aggravation?

4. [Prosecutor/Officer], do you wish to say anything on behalf of the *[City/Town/Village]*?

5. Is the victim present? *[If so]:* Would you like to speak to the court?

6. Does anyone else wish to speak on behalf of the prosecution?

7. *[Defense counsel, do you wish to say anything on behalf of your client?]*

8. Defendant, is there anything you wish to say?

9. Does anyone else wish to speak on behalf of the defendant?

### DEFER SENTENCING?

10. Is there any legal reason why the court should not pronounce a sentence?
    *[If so, <u>defer sentencing</u>]:* It is the judgment of the court that sentencing shall be deferred for _____ *[days/months]*, during which time *[name of defendant]* shall be on probation.

    ***[Go to paragraphs 16-18 for probation; go to paragraphs 19-23 for court fees.]***

### IMPOSE A SENTENCE

*[If there is no legal reason to delay or defer sentencing, select among the following sentencing options.]*

## Incarceration

*[Use this section only if you choose to impose jail time. Use this section even if the period of jail is suspended].*

11. It is the judgment and sentence of the court that the defendant be incarcerated in the _____ *[City/County]* jail for a term of _____ *[days/months]*, beginning on _____ *[date]* and ending on _____ *[date] [for the charge of _____].*

12. The court has considered the time the defendant has spent in custody on the current charge(s) and has credited the defendant with _____ *[days]* of time already served.

13. *[Choose one of the following]:*

A. The defendant is committed to the custody of the _____ *[County Sheriff, municipal police, or other appropriate official]*for _____ *[days/months]* beginning today.

OR

B. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* on _____ *[date]* at _____ *[time]* to serve this sentence.

OR

C. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* at _____ *[time]* each Friday for _____ consecutive weeks beginning on _____ *[date]* and shall be released at _____ *[time]* on the following Sunday of each weekend until the full term of incarceration is served.

OR

D. *[Choose either A or B above]* AND the defendant shall be released from custody between the hours of _____ and _____ on _____ *[days of the week]* for the purpose of employment.

OR

E. The defendant's incarceration is suspended for _____ *[days or months]*. During the period of suspension, the defendant will be on probation. The court will discuss the terms of the probation in a few moments.

14. *[Use if sentencing on multiple charges]:* It is the judgment and sentence of the court that the defendant shall serve these sentences *[concurrently] or [consecutively]*.

## Fines

15. It is the *[further]* judgment and sentence of this court that the defendant shall pay a fine in the amount of $ _____, which is payable *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid]*.

OR

It is the *[further]* judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of a fine of $ _____.

OR

The defendant's fine of $ _____ is suspended for _____ *[days or months]*.

## Probation

16. The court finds that probation is appropriate because:
_____
_____

17. It is the judgment of this court that the execution of this sentence *[or a portion of this sentence]* be suspended and the defendant be placed on probation for a period of _____ *[days or months]* from today with the following conditions:

_____
_____
_____

18. *[Use if sentencing on multiple charges]:* It is the judgment of the court that the defendant shall serve the probationary periods *[concurrently] or [consecutively]*.

## Court Fees

19. It is the further judgment and sentence of this court that the defendant shall pay the following court fees:

- A court automation fee of $6.00;
- A corrections fee of $20.00; and

- A judicial education fee of $3.00.

20. *[If the defendant is convicted of DWI, you must impose two additional fees]:*

    In addition, the defendant shall pay:

    - A fee of $65.00 to defray the costs of chemical testing; and
    - A fee of $75.00 to fund DWI prevention programs.

21. *[If the defendant is convicted of distributing or possessing a controlled substance, you must impose this additional fee]:*

    In addition, the defendant shall pay:

    - A fee of $75.00 to defray the costs of chemical testing.

22. *[You must also impose any municipal fees added by ordinance in a home rule municipality.]*

23. *[If the defendant is unable to pay the required court fees, you may impose community service in lieu of part or all of the fees]:*

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of $ _____ in court fees and shall pay the balance of $ _____ *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid]*.

    OR

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of all court fees.

## Appeal

24. You have the right to appeal from the orders of the court and have a lawyer represent you in the appeal. If you cannot afford a lawyer, one may be appointed for you if you qualify. If you cannot afford a certified copy of the record and transcripts necessary for your appeal, they will be provided.

25. If you want to appeal, you must file a notice of appeal in the district court within 15 days from today or you will lose your right to appeal.

26. You must sign a copy of your notice of appeal rights.

27. Bond is *[continued or revised]* through the appeal.

28. *[Either announce that the court is in recess or call the next case.]*

29. *[Complete the appropriate paperwork.]*

# 14.15: Sentencing at a Separate Hearing

## Script: Annotated

1. Today is _____ *[date]*. We are here for sentencing in *[City/Town/Village]* of _____ v. _____, case number _____.

2. The court notes for the record that the defendant, *[defense counsel],* and the prosecutor are present. *[Counsel, please state your appearances.]*

3. Are the parties ready to proceed?

4. The court having found the defendant guilty *[after trial] or [after the defendant entered a plea of guilty] or [after the defendant entered a plea of no contest],* it is the judgment of the court that the defendant is guilty of _____ *[offense]*.

   *[If not already done, enter a judgment on each count.]*

5. I have reviewed *[the court file, the police report, the presentence report]* and have considered the evidence presented *[during trial] or [during arraignment] or [during plea proceedings]*.

6. Is there any evidence the parties would like to introduce in mitigation or aggravation?

7. Prosecutor, do you wish to say anything on behalf of the *[City/Town/Village]*?

8. *[The New Mexico Constitution in article 2, §24 and the New Mexico statutes in §31-26-4(G) guarantee victims of certain crimes, including some misdemeanors and petty misdemeanors, the right to make a statement to the court at sentencing.]* Is the victim present? *[If so]:* Would you like to speak to the court?

9. [Is there anyone else who would like to speak to the court on behalf of the prosecution?]

10. *[Defense counsel, do you wish to say anything on behalf of your client?]*

11. Defendant, is there anything you wish to say?

12. Is there anyone else who would like to speak on behalf of the defendant?

## DEFER SENTENCING?

*[If a deferred sentence is not prohibited by municipal ordinance, consider whether the interests of justice and the best interests of the public and the defendant would be served by deferring sentencing.]*

13. Is there any legal reason why the court should not pronounce a sentence today?

*[When the court defers sentencing, it does not impose a sentence, but delays sentencing for an identified period of time, during which the defendant must comply with conditions set by the court. If the defendant completes the deferment without violating the conditions, the court dismisses the charges. If the defendant violates the conditions, the court may impose any lawful sentence that could have been imposed at the time of judgment, but must credit the defendant with time spent on probation.]*

> *[If so, defer sentencing]:* It is the judgment of the court that sentencing shall be deferred for _____ *[days/months]*, during which time *[name of defendant]* shall be on probation.

*[If there is good cause to defer sentencing, announce the deferment, do not impose jail or a fine, but impose conditions of probation and all applicable court fees. Court fees must be assessed against all defendants who are convicted of either violating an ordinance relating to the operation of a motor vehicle or an violating an ordinance enforceable by incarceration.* ***Go to paragraphs 19-21 for probation; go to paragraphs 22-26 for court fees.]***

*[Note: If the defendant is convicted on multiple charges, you may: (a) impose sentences on all charges; (b) impose a sentence on some charges and defer sentencing on others; (c) impose a sentence on all charges, but suspend some or all of the sentences. In addition, when you impose but suspend a sentence, you may suspend both the jail time and the fine; just the jail time, but not the fine; or just the fine, but not the jail time.]*

## IMPOSE A SENTENCE

*[If there is no legal reason to delay or defer sentencing, select among the following sentencing options.]*

## **Incarceration**

*[Use this section only if you choose to impose jail time. Use this section even if the period of jail is suspended].*

14. It is the judgment and sentence of the court that the defendant be incarcerated in the _____ *[City/County]* jail for a term of _____ *[days/months]*, beginning on

_____ *[date]* and ending on _____ *[date] [for the charge of _____]*.

*[If you are sentencing the defendant on more than one charge, you should sentence for each charge separately and then determine whether to impose the sentences concurrently or consecutively. If you do not specify, the terms will be served concurrently. See paragraph 17 below.]*

15. The court has considered the time the defendant has spent in custody on the current charge(s) and has credited the defendant with _____ *[days]* of time already served.

*[Note: The combined total of time imposed and time credited cannot exceed the maximum penalty allowed under the ordinance.]*

16. *[Choose one of the following]:*

A. The defendant is committed to the custody of the _____ *[County Sheriff, municipal police, or other appropriate official]*for _____ *[days/months]* beginning today.

OR

B. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* on _____ *[date]* at _____ *[time]* to serve this sentence.

OR

C. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* at _____ *[time]* each Friday for _____ consecutive weeks beginning on _____ *[date]* and shall be released at _____ *[time]* on the following Sunday of each weekend until the full term of incarceration is served.

OR

D. *[Choose either A or B above]* AND the defendant shall be released from custody between the hours of _____ and _____ on _____ *[days of the week]* for the purpose of employment.

OR

E. The defendant's incarceration is suspended for _____ *[days or months]*. During the period of suspension, the defendant will be on probation. The court will discuss the terms of the probation in a few moments.

17. *[Use if sentencing on multiple charges]:* It is the judgment and sentence of the court that the defendant shall serve these sentences *[concurrently] or [consecutively]*.

*[Concurrent sentences are sentences that operate at the same time; consecutive sentences are "stacked," that is, they are served one after another. Unless the court indicates that multiple sentences will be served consecutively, they will be served concurrently.]*

## Fines

18. It is the *[further]* judgment and sentence of this court that the defendant shall pay a fine in the amount of $ _____, which is payable *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid]*.

OR

It is the *[further]* judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of a fine of $ _____.

OR

The defendant's fine of $ _____ is suspended for _____ *[days or months]*.

## Probation

*[Whenever you defer sentencing or suspend a sentence that you have imposed, you have automatically placed the defendant on probation, although you need to state this in your sentencing order. When you place a defendant on probation, you must include the conditions of probation in your order.]*

19. The court finds that probation is appropriate because:
_____
_____

20. It is the judgment of this court that the execution of this sentence *[or a portion of this sentence]* be suspended and the defendant be placed on probation for a period of _____ *[days or months]* from today with the following conditions:

_____
_____
_____

*[The conditions of probation must be reasonably related to the rehabilitation of the defendant or the safety of the community, for example: supervision by probation*

*authorities, medical or psychiatric treatment, substance abuse treatment, random drug/alcohol testing, abstinence from alcohol, community service, driver's education, and no contact with the victim or other co-defendants.]*

21. *[Use if sentencing on multiple charges]:* It is the judgment of the court that the defendant shall serve the probationary periods *[concurrently] or [consecutively]*.

*[As with jail sentences, multiple probations will be served at the same time unless the court indicates that the probations will be served consecutively.]*

## Court Fees

*[Court fees must be assessed against all defendants who are convicted of either violating an ordinance relating to the operation of a motor vehicle or violating an ordinance enforceable by incarceration. Court fees cannot be deferred or suspended, even if the rest of the sentence is deferred or suspended.]*

22. It is the further judgment and sentence of this court that the defendant shall pay the following court fees:

    - A court automation fee of $6.00;
    - A corrections fee of $20.00; and
    - A judicial education fee of $3.00.

23. *[If the defendant is convicted of DWI, you must impose two additional fees]:*

    In addition, the defendant shall pay:

    - A fee of $65.00 to defray the costs of chemical testing; and
    - A fee of $75.00 to fund DWI prevention programs.

24. *[If the defendant is convicted of distributing or possessing a controlled substance, you must impose this additional fee]:*

    In addition, the defendant shall pay:

    - A fee of $75.00 to defray the costs of chemical testing.

25. *[You must also impose any municipal fees added by ordinance in a home rule municipality.]*

26. *[If the defendant is unable to pay the required court fees, you may impose community service in lieu of part or all of the fees]:*

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of $ _____ in court fees and shall pay the balance of $ _____ *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid]*.

    OR

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of all court fees.

## Appeal

27. You have the right to appeal from the orders of the court and have a lawyer represent you in the appeal. If you cannot afford a lawyer, one may be appointed for you if you qualify. If you cannot afford a certified copy of the record and transcripts necessary for your appeal, they will be provided.

28. If you want to appeal, you must do so within 15 days from today or you will lose your right to appeal.

29. You must sign a copy of your notice of appeal rights.

30. Bond is *[continued or revised]* through the appeal.

31. *[Either announce that the court is in recess or call the next case.]*

32. *[Complete the appropriate paperwork.]*

# 14.16: Sentencing at a Separate Hearing

## Script: No Annotations

1. Today is _____ *[date]*. We are here for sentencing in *[City/Town/Village]* of _____ v. _____, case number _____.

2. The court notes for the record that the defendant, *[defense counsel],* and the prosecutor are present. *[Counsel, please state your appearances.]*

3. Are the parties ready to proceed?

4. The court having found the defendant guilty *[after trial] or [after the defendant entered a plea of guilty] or [after the defendant entered a plea of no contest],* it is the judgment of the court that the defendant is guilty of _____ *[offense]*, committed on or about _____ *[date]*.

   *[Enter a judgment on each count.]*

5. I have reviewed *[the court file, the police report, the presentence report]* and have considered the evidence presented *[during trial] or [during arraignment] or [during plea proceedings]*.

6. Is there any evidence the parties would like to introduce in mitigation or aggravation?

7. Prosecutor, do you wish to say anything on behalf of the *[City/Town/Village]*?

8. Is the victim present? *[If so]:* Would you like to speak to the court?

9. Is there anyone else who would like to speak to the court on behalf of the prosecution?

10. *[Defense counsel, do you wish to say anything on behalf of your client?]*

11. Defendant, is there anything you wish to say?

12. Is there anyone else who would like to speak on behalf of the defendant?

DEFER SENTENCING?

13. Is there any legal reason why the court should not pronounce a sentence today? *[If so, <u>defer sentencing</u>]:* It is the judgment of the court that sentencing shall be deferred for _____ *[days/months]*, during which time *[name of defendant]* shall be on probation.

***[Go to paragraphs 19-21 for probation; go to paragraphs 22-26 for court fees.]***

## IMPOSE A SENTENCE

*[If there is no legal reason to delay or defer sentencing, select among the following sentencing options.]*

## Incarceration

*[Use this section only if you choose to impose jail time. Use this section even if the period of jail is suspended]*.

14. It is the judgment and sentence of the court that the defendant be incarcerated in the _____ *[City/County]* jail for a term of _____ *[days/months]*, beginning on _____ *[date]* and ending on _____ *[date] [for the charge of _____]*.

15. The court has considered the time the defendant has spent in custody on the current charge(s) and has credited the defendant with _____ *[days]* of time already served.

16. *[Choose one of the following]:*

    A. The defendant is committed to the custody of the _____ *[County Sheriff, municipal police, or other appropriate official]*for _____ *[days/months]* beginning today.

    OR

    B. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* on _____ *[date]* at _____ *[time]* to serve this sentence.

    OR

    C. The defendant shall report to the _____ *[City/County]* jail at _____*[address]* at _____ *[time]* each Friday for _____ consecutive weeks beginning on _____ *[date]* and shall be released at _____ *[time]* on the following Sunday of each weekend until the full term of incarceration is served.

    OR

    D. *[Choose either A or B above]* AND the defendant shall be released from custody between the hours of _____ and _____ on _____ *[days of the week]* for the purpose of employment.

OR

E. The defendant's incarceration is suspended for _____ *[days or months]*. During the period of suspension, the defendant will be on probation. The court will discuss the terms of the probation in a few moments.

17. *[Use if sentencing on multiple charges]:* It is the judgment and sentence of the court that the defendant shall serve these sentences *[concurrently] or [consecutively]*.

## Fines

18. It is the *[further]* judgment and sentence of this court that the defendant shall pay a fine in the amount of $ _____, which is payable *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid]*.

OR

It is the *[further]* judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of a fine of $ _____.

OR

The defendant's fine of $ _____ is suspended for _____ *[days or months]*.

## Probation

19. The court finds that probation is appropriate because:
_____
_____

20. It is the judgment of this court that the execution of this sentence *[or a portion of this sentence]* be suspended and the defendant be placed on probation for a period of _____ *[days or months]* from today with the following conditions:

_____

21. *[Use if sentencing on multiple charges]:* It is the judgment of the court that the defendant shall serve the probationary periods *[concurrently] or [consecutively]*.

## Court Fees

22. It is the further judgment and sentence of this court that the defendant shall pay the following court fees:

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    In addition, the defendant shall pay:

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26. *[If the defendant is unable to pay the required court fees, you may impose community service in lieu of part or all of the fees]:*

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of $ _____ in court fees and shall pay the balance of $ _____ *[today] or [on or before _____] [in full] or [in installment payments of $ _____ each _____ [week or month], beginning on _____ [date] until the full amount is paid]*.

    OR

    It is the judgment and sentence of this court that the defendant complete _____ hours of community service in lieu of all court fees.

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28. If you want to appeal, you must do so within 15 days from today or you will lose your right to appeal.

29. You must sign a copy of your notice of appeal rights.

30. Bond is *[continued or revised]* through the appeal.

31. *[Either announce that the court is in recess or call the next case.]*

32. *[Complete the appropriate paperwork.]*