

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE
DISTRICT COURTS, MAGISTRATE COURTS, AND MUNICIPAL COURTS
AND THE CRIMINAL FORMS**

The Ad hoc Committee on Rules for Mental Health Proceedings has recommended amending Rules 5-602, 6-507, and 8-507 NMRA and adopting proposed new Rules 5-602.1, 6-507.1, and 8-507.1 NMRA and proposed new Forms 9-404A and 9-514 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments and new material set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://nmsupremecourt.nmcourts.gov/> or sending your written comments by mail, email, or fax to:

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Your comments must be received by the Clerk on or before April 6, 2016, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

5-602. Insanity; [incompetency;] lack of capacity.

A. Defense of insanity.

(1) Notice of the defense of "not guilty by reason of insanity at the time of commission of an offense" must be given at the arraignment or within twenty (20) days thereafter, unless upon good cause shown the court waives the time requirement of this rule.

(2) When the defense of "not guilty by reason of insanity at the time of commission of an offense" is raised, the issue shall be determined in nonjury trials by the court and in jury trials by a special verdict of the jury. If the defendant is acquitted on the ground of insanity, a judgment of acquittal shall be entered, and any proceedings for commitment of the defendant because of any mental disorder or developmental disability shall be pursuant to law.

[B. ~~Determination of competency to stand trial.~~

~~(1) The issue of the defendant's competency to stand trial may be raised by motion, or upon the court's own motion, at any stage of the proceedings.~~

~~(2) The issue of the defendant's competency to stand trial shall be determined by the judge, unless the judge finds there is evidence which raises a reasonable doubt as to the defendant's competency to stand trial.~~

~~(a) If a reasonable doubt as to the defendant's competency to stand trial is raised prior to trial, the court shall order the defendant to be evaluated as provided by law. Within sixty (60) days after receiving an evaluation of the defendant's competency, the court, without a~~

jury, may determine the issue of competency to stand trial; or, in its discretion, may submit the issue of competency to stand trial to a jury, other than the trial jury.—

~~(b) If the issue of the defendant's competency to stand trial is raised during trial, the trial jury shall be instructed on the issue. If, however, the defendant has been previously found by a jury to be competent to stand trial, the issue of the defendant's competency to stand trial shall be submitted to the trial jury only if the court finds that there is evidence which was not previously submitted to a jury which raises a reasonable doubt as to the defendant's competency to stand trial.~~

~~(3) If a defendant is found incompetent to stand trial:—~~

~~(a) further proceedings in the criminal case shall be stayed until the defendant becomes competent to stand trial;~~

~~(b) the court where appropriate, may order treatment to enable the defendant to attain competency to stand trial, and, upon a determination by clear and convincing evidence that the defendant is dangerous, order the defendant detained in a secure facility;—~~

~~(c) the court may review and amend the conditions of release pursuant to Rule 5-401.—~~

~~(4) If the finding of incompetency is made during the trial, the court shall declare a mistrial.—~~

~~C. **Mental examination.** Upon motion and upon good cause shown, the court shall order a mental examination of the defendant before making any determination of competency under this rule. If a defendant is determined to be indigent, the court shall pay for the costs of the examination from funds available to the court.—~~

~~D. **Continuing judicial review.** Upon committing a defendant to undergo treatment to attain competency to stand trial, the court, not less than once every twelve (12) months, shall review the progress of the defendant in attaining competency to stand trial.—~~

~~E. **Statement made during mental examination.** A statement made by a person during a mental examination or treatment subsequent to the commission of the alleged crime shall not be admissible in evidence against such person in any criminal proceeding on any issue other than that of the person's sanity, ability to form specific intent or competency to stand trial.]~~

[F-]B. **Notice of incapacity to form specific intent.** If the defense intends to call an expert witness on the issue of whether the defendant was incapable of forming the specific intent required as an element of the crime charged, notice of such intention shall be given at the time of arraignment or within twenty (20) days thereafter, unless upon good cause shown, the court waives the time requirement of this rule.

[As amended, effective August 1, 1989; November 1, 1991; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The requirement of a notice of the defense of “not guilty by reason of insanity” under Subparagraph (1) of Paragraph A of this rule replaces the plea of not guilty by reason of insanity, eliminated by the 1982 enactment of Sections 31-9-3 and 31-9-4 NMSA 1978. *See State v. Page*, 100 N.M. 788, 676 P.2d 1353 (Ct. App. 1984). See also, Rule 5-303 NMRA for the types of permissible pleas. A similar notice is required by Rule 12.2 of the Federal Rules of Criminal Procedure.

Notice of incapacity to form specific intent pursuant to Paragraph [F] B of this rule does not constitute notice of insanity as a defense under Subparagraph (1) of Paragraph A of this rule. *See State v. Padilla*, 88 N.M. 160, 161, 538 P.2d 802 (Ct. App.), *cert. denied*, 88 N.M. 318, 540 P.2d

248 (1975). Also, a motion for psychiatric examination which states that counsel does not know whether defendant was sane when he committed the acts resulting in criminal charges and that the examination is sought for the purpose of making such a determination, does not constitute notice under Subparagraph (1) of Paragraph A of this rule. *State v. Silva*, 88 N.M. 631, 545 P.2d 490 (Ct. App.), *cert. denied*, 89 N.M. 6, 546 P.2d 71 (1976).

Subparagraph (2) of Paragraph A of this rule replaced former Section 41-13-3, 1953 Comp., which was repealed at the time of the adoption of the rule. In the event that the defendant is found not guilty by reason of insanity, he is acquitted of the crime and may be confined as mentally ill only through the civil commitment procedures.

~~[Paragraph B meets the constitutional requirements of due process in dealing with a defendant who is allegedly not competent to stand trial. See *Pate v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966). See also, *Drope v. Missouri*, 420 U.S. 162, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975). See generally, 81 Harv. L. Rev. 455 (1967). The issue of the defendant's competency to stand trial may be raised by motion or by the court. The issue may not be waived by the defendant. In *Pate v. Robinson*, *supra*, the court stated: "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently "waive" his right to have the court determine his capacity to stand trial."~~

~~— In *State v. Mendoza*, 108 N.M. 446, 774 P.2d 440, 459 (1989) the New Mexico Supreme Court stated: a failure to make a determination of competency when reasonable grounds appear constitutes fundamental constitutional error. —~~

Right to trial by jury:

~~— Section 31-9-1.5 NMSA 1978, enacted by the 1988 Legislature, provides that a hearing to determine competency shall be conducted without a jury. This violates the right to trial by jury as set forth in the New Mexico Constitution if there is a reasonable doubt as to competency. If the question of the defendant's competency to stand trial is raised, the court must make an initial determination regarding competency. The court makes a final determination if there is no reasonable doubt regarding the issue of competency. If the judge finds a reasonable doubt as to the competency of the defendant, then the issue is submitted to the jury at the close of the case. *State v. Ortega*, 77 N.M. 7, 18, 419 P.2d 219 (1966); *State v. Noble*, 90 N.M. 360, 563 P.2d 1153 (1977). See also, *State v. Chavez*, 88 N.M. 451, 541 P.2d 631 (Ct. App. 1975) and *State v. Lujan*, 87 N.M. 400, 534 P.2d 1112 (1975). —~~

~~— If the issue of present competency is raised prior to trial, the trial judge, in his discretion, may without a jury determine whether the defendant is competent to stand trial or may submit the issue to a jury other than a jury which is to determine the guilt or innocence of the defendant. If the issue is raised at trial and there is evidence which has not been previously considered by a jury on the issue of competency to stand trial, which the trial court finds raises a reasonable doubt as to the defendant's competency, the jury is instructed to consider the issue prior to considering the defendant's guilt. See UJI 14-5104 NMRA. A mistrial shall be declared if the defendant is found incompetent. —~~

~~— The defendant has the burden of proving lack of competence to stand trial by a preponderance or greater weight of the evidence. *State v. Armstrong*, 82 N.M. 358, 482 P.2d 61 (1971). See also the committee comment to UJI 13-304 NMRA. —~~

~~— The defendant is competent to stand trial if the defendant: (1) understands the nature and gravity of the proceedings against him; (2) has a factual understanding of the criminal charges; and (3) is capable of assisting in his own defense. See, *State v. Ortega*, 77 N.M. 7, 18, 419 P.2d 219 (1966); *State v. Chapman*, 104 N.M. 324, 327, 721 P.2d 392 (1986); and UJI 14-5104.~~

— If a defendant is found incompetent to stand trial, the trial court may order such medical treatment as may be necessary to enable the defendant to attain competency to stand trial. It is suggested that if the defendant is in need of treatment, including the taking of drugs, the trial court may impose as a condition of release that the defendant submit to such treatment if required to allow the defendant to stand trial.

— If the defendant is found incompetent to stand trial, the court may also review and amend the conditions of release previously imposed. In determining conditions of release, the court shall take into account the defendant's character and mental condition. The court may not, without a showing of dangerousness, impose more stringent standards of release simply on a showing of incompetency.

— If the court determines that the defendant is not competent to stand trial, it may then determine if the defendant may be committed as mentally ill under laws governing civil commitment. Strict compliance with the commitment statutes must be observed. *See Blevins v. Cook*, 66 N.M. 381, 348 P.2d 742 (1960); *State v. Sanchez*, 80 N.M. 438, 457 P.2d 370 (1969); *State v. Valdez*, 88 N.M. 338, 540 P.2d 818 (1975). A commitment under such laws is considered to be official confinement for the purpose of credit against any sentence eventually imposed. *State v. LaBadie*, 87 N.M. 391, 534 P.2d 483 (Ct. App. 1975).

— If the defendant is found incompetent to stand trial after the trial has commenced by a special verdict of the jury prior to its returning a verdict as to the guilt or innocence of the defendant, the court must declare a mistrial.—

“Dangerous” defined; Section 31-9-1.2.—

— The term “dangerous” person is defined by Section 31-9-1.2 NMSA 1978 to mean a person who, if released, presents a serious threat of inflicting great bodily harm on another or of violating Section 30-9-11 or 30-9-13 NMSA 1978.

— Under Section 31-9-1.2, *supra*, the defendant must present a serious threat of inflicting great bodily harm on another or a serious threat of committing a sex crime other than criminal sexual contact of an adult or indecent exposure. Federal Law, 18 USCA Section 4246, provides a more general standard of “dangerousness”, that is, if the court finds by clear and convincing evidence that the defendant is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury or serious damage to property of another, the court shall commit the person.

— In *Jackson v. Indiana*, 406 U.S. 715, 92 S. Ct. 1845, 32 L. Ed. 2d 435 (1972), the United States Supreme Court held that a defendant who was not shown to be dangerous could not be subjected to more lenient commitment standards and to more stringent standards of release than those generally applicable to persons subject to commitment who are not charged with a criminal offense. The supreme court stated that.—

“... a person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.—

— The court distinguished the federal commitment statute from the Indiana commitment statute on the basis that the federal law has been “construed to require that a mentally incompetent

defendant must also be found 'dangerous' before the defendant can be committed indefinitely". The supreme court went on to state that:—

“Without a finding of dangerousness, one committed . . . [under federal law] can be held only for a ‘reasonable period of time’ necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not in fact improve, then he must be released or granted Sections 4247-4248 hearing”. *Jackson v. Indiana*, *supra*, at 733.—

Court ordered mental examination

— Paragraph C of this rule, providing for a court ordered mental examination of the defendant, is substantially the same as former Section 41-13-3.2, 1953 Comp. For cases dealing with the sufficiency of the examination, see Annot., 23 A.L.R. Fed. 710 (1975). The defendant must show good cause before the court is required to order the examination. *State v. Jaramillo*, 89 N.M. 179, 538 P.2d 1202 (Ct. App. 1975).—

Admissibility of statement

— Paragraph E of this rule provides that a statement by the defendant made during any mental examination or treatment subsequent to the commission of the crime may be admissible only on the issue of the defendant’s sanity, ability to form specific intent or competency to stand trial. Compare this rule with 18 U.S.C. Section 4244. See also, *United States v. Julian*, 469 F.2d 371 (10th Cir. 1972). Under Rule 11-504 of the Rules of Evidence a court ordered mental examination is privileged except for the particular purpose for which the examination was ordered.—

— In *State v. Milton*, 86 N.M. 639, 526 P.2d 436 (Ct. App. 1974), a letter written by the defendant to his court-appointed psychiatrist was intercepted by the sheriff and copied. At trial, the copy was admitted and one sentence containing an “admission” was read to the jury. The court of appeals held that the letter was not a privileged communication under Subparagraph (2) of Paragraph D of Rule 11-504 as the letter was not a communication “made for the purposes of diagnosis or treatment of the defendant’s mental condition”. There is no discussion of Paragraph E of this rule by the court, and either the defendant raised no issue concerning the limiting instruction required by the rule or the instruction was given.—

— In *State v. Jackson*, 97 N.M. 467, 641 P.2d 498 (1982), the Supreme Court held that the voluntary disclosure of the results of a court ordered examination constitutes a waiver of the defendant’s right against disclosure.]

Notice of incapacity to form specific intent

Paragraph [F]B of this rule requires the defendant to give notice to the state if he intends to call an expert witness on the issue of his ability to form the specific intent element of the crime charged. Compare Rule 12.2(b) of the Federal Rules of Criminal Procedure. For a discussion of what crimes include an element of specific intent, see generally, Thompson & Gagne, “The Confusing Law of Criminal Intent in New Mexico,” 5 N.M.L. Rev. 63 (1974).

[As revised, September 12, 1991; as amended by Supreme Court Order No. _____, effective _____.]

PUBLISHER'S NOTE

Paragraphs J and M of proposed new Rule 5-602.1 NMRA, below, refer to Rule 5-602.2 NMRA for further proceedings after a defendant has been found not competent to stand trial. The committee is still in the process of drafting Rule 5-602.2 and plans to recommend it for publication for comment at a later date.

[NEW MATERIAL]

5-602.1. Competency.

A. **Purpose; scope.** This rule is intended to provide a timely, efficient, and accurate procedure for resolving whether a defendant is competent to stand trial. Competency to stand trial is distinct from other questions about mental health, such as the defendant's sanity at the time of the alleged offense and capacity to form specific intent. A party shall not use this rule for purposes unrelated to the defendant's competency to stand trial, such as to obtain information for mitigation of sentence, to obtain a favorable plea negotiation, or to delay the proceedings against the defendant.

B. **Definitions.** For purposes of this rule, the following definitions shall apply.

(1) **Competency.** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant understands the nature and significance of the criminal proceedings against him, has a factual understanding of the criminal charges, and is able to assist his attorney in his defense.

(2) **Competency evaluation.** A competency evaluation is an examination of the defendant by a qualified mental health professional, appointed by and acting on behalf of the court, limited to determining whether the defendant is competent to stand trial. Unless otherwise ordered by the court, a competency evaluation shall be limited to a determination of the defendant's competency and shall not state opinions about other matters including the defendant's sanity at the time of the offense or ability to form a specific intent.

C. **Who may raise.** The issue of the defendant's competency to stand trial may be raised by a motion for a competency evaluation by a party or upon the court's own motion at any stage of the proceedings.

D. **Motion for competency evaluation; contents.**

(1) **By motion of a party.** When a question of competence is raised by a party, a motion for a competency evaluation shall be in writing and shall contain the following:

(a) a statement that the motion is based on a good faith belief that the defendant may not be not competent to stand trial;

(b) a recital of the specific facts, observations, and conversations with the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without invading the attorney-client privilege;

(c) a statement that the motion is not filed for purposes of delay;

(d) a statement of whether the motion is opposed as provided in Rule 5-120 NMRA; and

(e) a request for a competency evaluation.

(2) **Upon the court's own motion.** When raised by the court, the court shall make a record of the specific facts, observations, and statements of the defendant that form the basis for the motion.

E. **Effect of filing of motion; proceedings not stayed.** The filing of a motion for a competency evaluation shall not stay the proceedings or toll any time limits in the case, provided that the court shall not take any action affecting the defendant's substantial rights while the motion is pending or the question of the defendant's competency remains unresolved. For the purposes of this paragraph, an action affecting the defendant's substantial rights includes, for example, consideration of a plea of guilty or nolo contendere, holding an evidentiary hearing, or proceeding to trial, and does not include addressing discovery disputes or setting or reviewing the conditions of release.

F. **Resolution of motion; probable cause.** A motion for a competency evaluation shall not be opposed, except on the grounds that the motion is advanced for an improper purpose such as harassment or delay. In considering a motion, the court shall comply with the following procedures.

(1) **Unopposed.** Within forty-eight (48) hours of the filing of a motion that is unopposed under Subparagraph (D)(1)(d) of this rule, the court shall file an order substantially in the form approved by the Supreme Court finding whether the motion is supported by probable cause to believe that the defendant is not competent to stand trial. The determination shall be based solely upon the allegations in the motion and upon the court's own observations of the defendant.

(2) **Opposed.** A response in opposition to a motion for a competency evaluation shall be in writing, shall cite specific facts in opposition to the motion, and shall be filed within five (5) days of the filing of the motion or be deemed waived. Upon the filing of a response in opposition, the court shall do one of the following:

(a) unless the court determines that a hearing on the motion is necessary, file an order substantially in the form approved by the Supreme Court within forty-eight (48) hours finding whether there is probable cause to believe that the defendant is not competent to stand trial; or

(b) within five (5) days of the filing of a response under this Subparagraph, hold a hearing on the motion and file an order substantially in the form approved by the Supreme Court finding whether there is probable cause to believe that the defendant is not competent to stand trial.

(3) **Sanctions.** If the court finds that either party lacked reasonable grounds to file or oppose the motion, the court may initiate contempt proceedings consistent with Rule 5-112 NMRA.

G. **Evaluation order.** An order finding probable cause under Paragraph F of this rule shall order the defendant to undergo a competency evaluation. Within two (2) days of filing the order, the court shall deliver a copy to the evaluator designated to perform the evaluation. The order shall be in a form substantially approved by the Supreme Court and shall include the following:

(1) the name of the evaluator;

(2) a provision requiring the evaluator to file a written report with the court in accordance with Paragraph H of this rule within twenty-one (21) days of the entry of the order if the defendant is in custody and within thirty (30) days of the entry of the order if the defendant is at liberty, unless the court orders the report to be filed at another time; and

(3) if the motion for a competency evaluation was filed before the start of a trial by jury, a provision requiring the parties to return to court for a hearing on the question of the defendant's competency within thirty (30) days of the entry of the order if the defendant is in custody and within forty-five (45) days if the defendant is at liberty.

H. **Report; contents.** The report ordered under Subparagraph (G)(2) of this rule shall be filed with the court and made available to the parties and shall address only the following:

(1) **Conclusion about competency.** The report shall clearly state the evaluator's conclusion about the defendant's competency and shall not include qualifications about the defendant's competency such as "marginally competent" or "minimally competent"; and

(2) **Basis for the conclusion.** The report shall include only those matters which form the basis for the evaluator's conclusion about the defendant's present competency. The report shall not include a description of the defendant's criminal or employment history; prior bad acts; or version of events before, during, or after the offense, unless specifically related to the defendant's present competency.

I. Effect of report; final resolution of competency.

(1) **Motion filed before the start of a trial by jury.** If the motion for a competency evaluation was filed before the start of a trial by jury, the court and the parties shall proceed as follows after receiving the report filed under Paragraph H of this rule.

(a) **Stipulations; objections.** Within seven (7) days of the filing of the report, the parties shall confer and file with the court one of the following:

(i) a joint motion to adopt the conclusion; or

(ii) specific, written objections.

(b) **Hearing.** The hearing ordered under Subparagraph (G)(3) of this rule shall be held within thirty (30) days of the filing of the order for a competency evaluation.

(i) If the parties agree with and the court concurs in the conclusion set forth in the report, the court may vacate the hearing and proceed under Subparagraph (1)(c) of this paragraph.

(ii) If a hearing is necessary, the purpose of the hearing shall be to determine based upon a preponderance of the evidence whether the defendant is not competent to stand trial.

(iii) The conclusion set forth in the report shall be prima facie evidence about the defendant's competency, subject to rebuttal by the party challenging the report.

(c) **Final order on competency.** Within three (3) days of the conclusion of the hearing held under Subparagraph (1)(b) of this paragraph, the court shall file an order resolving the question of the defendant's competency. Upon request of the parties, the order shall include findings of fact and conclusions of law and may incorporate by reference the report filed under Paragraph H of this rule. If the court concludes that the defendant is not competent, the court shall proceed under Paragraph J of this rule.

(2) **Motion filed after the start of a trial by jury.** If the motion for a competency evaluation was filed after the start of a trial by jury, the court shall submit the question to the jury at the close of evidence. The jury shall decide by a preponderance of the evidence if the defendant is competent to stand trial before considering the defendant's guilt or innocence beyond a reasonable doubt.

J. Defendant found not competent to stand trial. Upon a finding that the defendant is not competent to stand trial, the court shall proceed under Rule 5-602.2 NMRA to determine whether the case should be dismissed. [PLEASE SEE PUBLISHER'S NOTE ABOVE]

K. Extensions of time. The time limits provided in this rule may be extended by the court for good cause shown, provided that the aggregate of all extensions granted by the court shall not exceed sixty (60) days from the day that the motion for a competency evaluation is filed, except upon a showing of exceptional circumstances. An order extending time shall be in writing and shall state the reasons supporting the extension. An order extending time beyond the sixty (60)-day limit

set forth in this paragraph shall not rely on circumstances that were used to support a previous extension.

L. Effect of noncompliance with time limits.

(1) The court may deny an untimely motion for extension of time or may grant it and impose other sanctions or remedial measures, as the court may deem appropriate in the circumstances.

(2) In the event the question of the defendant's competence is not resolved within the time limits provided in this rule, including any court-ordered extensions, the case shall be dismissed without prejudice.

M. Cases transferred to the district court; remand. In a case transferred to the district court under Rules 6-507 or 8-507 NMRA, the court shall do the following:

(1) open a case and order a competency evaluation under Paragraph G of this rule within (5) days of receiving the order transferring the case;

(2) proceed under this rule to determine whether the defendant is competent to stand trial, and

(a) if the defendant is found competent, remand the case within forty-eight (48) hours to the court in which the case is pending; or

(b) if the defendant is found not competent and the court determines that dismissal is appropriate under Rule 5-602.2 NMRA, the court shall remand the case to the court in which the case is pending within forty-eight (48) hours. [PLEASE SEE PUBLISHER'S NOTE ABOVE]

N. Statements inadmissible. A statement made by a person during a competency evaluation subsequent to the commission of the alleged crime shall not be admissible against that person in any criminal proceeding on any issue other than the person's competency to stand trial. [Approved by Supreme Court Order No. _____, effective _____.]

Committee commentary. — An evaluation ordered under Paragraph G of this rule shall be provided at no cost to the defendant as provided by NMSA 1978, Sections 31-9-2 and 43-1-1. This rule is not intended to preclude a defendant from requesting leave of the court to obtain a competency evaluation at the defendant's expense.

[Approved by Supreme Court Order No. _____, effective _____.]

6-507. Insanity [~~or incompetency~~]; transfer to district court.

If the defendant pleads "not guilty by reason of insanity" [~~or if an issue is raised as to the mental competency of the defendant to stand trial~~], the action shall be transferred to the district court for further proceedings pursuant to the Rules of Criminal Procedure for the District Courts. The magistrate court shall retain jurisdiction over the defendant and conditions of release until the action is filed in district court.

[As amended by Supreme Court Order No. 11-8300-041, effective for cases filed on or after December 2, 2011; as amended by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

6-507.1. Competency; transfer to district court.

A. **Purpose; scope.** This rule is intended to provide a timely, efficient, and accurate procedure for resolving whether a defendant is competent to stand trial. Competency to stand trial is distinct from other questions about mental health, such as the defendant's sanity at the time of the alleged offense and capacity to form specific intent. A party shall not use this rule for purposes unrelated to the defendant's competency to stand trial, such as to obtain information for mitigation of sentence, to obtain a favorable plea negotiation, or to delay the proceedings against the defendant.

B. **Definitions.** For purposes of this rule, the following definitions shall apply.

(1) **Competency.** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant understands the nature and significance of the criminal proceedings against him, has a factual understanding of the criminal charges, and is able to assist his attorney in his defense.

(2) **Competency evaluation.** A competency evaluation is an examination of the defendant by a qualified mental health professional, appointed by and acting on behalf of the court, limited to determining whether the defendant is competent to stand trial. Unless otherwise ordered by the court, a competency evaluation shall be limited to a determination of the defendant's competency and shall not state opinions about other matters including the defendant's sanity at the time of the offense or ability to form a specific intent.

C. **Who may raise.** The issue of the defendant's competency to stand trial may be raised by a motion for a competency evaluation by a party or upon the court's own motion at any stage of the proceedings.

D. **Motion for competency evaluation.**

(1) **By motion of a party represented by counsel.** When a question of competence is raised by a party who is represented by counsel, a motion for a competency evaluation shall be in writing and shall contain the following:

(a) a statement that the motion is based on a good faith belief that the defendant may not be competent to stand trial;

(b) a recital of the specific facts, observations, and conversations with the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without invading the attorney-client privilege;

(c) a statement that the motion is not filed for purposes of delay;

(d) a statement of whether the motion is opposed as provided in Rule 6-304 NMRA; and

(e) a request for a competency evaluation.

(2) **By motion of a self-represented defendant or upon the court's own motion.**

When a question of competence is raised by a party who is self-represented or upon the magistrate court's own motion, the magistrate court shall dispose of the motion by filing an order substantially in the form approved by the Supreme Court that addresses the following:

(a) whether the motion is based on a good faith belief that the defendant is not competent to stand trial;

(b) the specific facts, observations, and conversations with the defendant that have formed the basis for the motion;

(c) whether the motion is advanced for purposes of delay;

(d) whether the motion is opposed; and

(e) whether a competency evaluation is requested.

E. Resolution of motion; probable cause. A motion for a competency evaluation shall not be opposed, except on the grounds that the motion is advanced for an improper purpose such as harassment or delay. In considering a motion, the court shall comply with the following procedures.

(1) **Unopposed.** Within forty-eight (48) hours of the filing of a motion that is unopposed under Subparagraph (D)(1)(d) of this rule, the court shall file an order substantially in the form approved by the Supreme Court finding whether the motion is supported by probable cause to believe that the defendant is not competent to stand trial. The determination shall be based solely upon the allegations in the motion and upon the court's own observations of the defendant.

(2) **Opposed.** A response in opposition to a motion for a competency evaluation shall be in writing, shall cite specific facts in opposition to the motion, and shall be filed within five (5) days of the filing of the motion or be deemed waived. Upon the filing of a response in opposition, the court shall do one of the following:

(a) unless the court determines that a hearing on the motion is necessary, file an order substantially in the form approved by the Supreme Court within forty-eight (48) hours finding whether there is probable cause to believe that the defendant is not competent to stand trial; or

(b) hold a hearing on the motion and file an order substantially in the form approved by the Supreme Court within fifteen (15) days of the filing of the response finding whether there is probable cause to believe that the defendant is not competent to stand trial.

(3) **Sanctions.** If the court finds that either party lacked reasonable grounds to file or oppose the motion, the court may initiate contempt proceedings consistent with Rule 6-111 NMRA.

(4) **Review.** A party aggrieved by an order finding no probable cause to believe that the defendant is not competent to stand trial may petition the district court for review of that order.

F. Transfer to district court; effect on magistrate court proceedings. An order finding probable cause that the defendant is not competent to stand trial under Paragraph E of this rule also shall transfer the case to the district court for further proceedings under Rule 5-602.1 NMRA. When such an order is filed, jurisdiction over the defendant and any conditions of release shall be transferred to the district court. Any conditions of release and any bond set by the magistrate court shall continue in effect unless amended by the district court. The magistrate court shall suspend its case pending remand from the district court.

[Approved by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The magistrate court shall transfer a case to the district court for a competency determination when the court finds probable cause that the defendant is not competent to stand trial. Probable cause may arise from the court's own observations or from the factual allegations in a party's motion. If the magistrate court finds probable cause that the defendant is not competent, the magistrate court shall suspend the proceedings and transfer the case to district court for a determination of competency.

[Approved by Supreme Court Order No. _____, effective _____.]

8-507. Insanity [or incompetency]; transfer to district court.

If the defendant pleads “not guilty by reason of insanity” [~~or if an issue is raised as to the mental competency of the defendant to stand trial~~], the action shall be transferred to the district court for further proceedings pursuant to the Rules of Criminal Procedure for the District Courts. The municipal court shall retain jurisdiction over the defendant and conditions of release until the action is filed in district court.

[As amended by Supreme Court Order No. 11-8300-041, effective for cases filed on or after _____.]

[NEW MATERIAL]

8-507.1. Competency; transfer to district court.

A. **Purpose; scope.** This rule is intended to provide a timely, efficient, and accurate procedure for resolving whether a defendant is competent to stand trial. Competency to stand trial is distinct from other questions about mental health, such as the defendant’s sanity at the time of the alleged offense and capacity to form specific intent. A party shall not use this rule for purposes unrelated to the defendant’s competency to stand trial, such as to obtain information for mitigation of sentence, to obtain a favorable plea negotiation, or to delay the proceedings against the defendant.

B. **Definitions.** For purposes of this rule, the following definitions shall apply.

(1) **Competency.** The terms competency, competence, and competent are used interchangeably throughout this rule and refer to whether the defendant understands the nature and significance of the criminal proceedings against him, has a factual understanding of the criminal charges, and is able to assist his attorney in his defense.

(2) **Competency evaluation.** A competency evaluation is an examination of the defendant by a qualified mental health professional, appointed by and acting on behalf of the court, limited to determining whether the defendant is competent to stand trial. Unless otherwise ordered by the court, a competency evaluation shall be limited to a determination of the defendant’s competency and shall not state opinions about other matters including the defendant’s sanity at the time of the offense or ability to form a specific intent.

C. **Who may raise.** The issue of the defendant’s competency to stand trial may be raised by a motion for a competency evaluation by a party or upon the court’s own motion at any stage of the proceedings.

D. **Motion for competency evaluation.**

(1) **By motion of a party represented by counsel.** When a question of competence is raised by a party who is represented by counsel, a motion for a competency evaluation shall be in writing and shall contain the following:

(a) a statement that the motion is based on a good faith belief that the defendant may not be competent to stand trial;

(b) a recital of the specific facts, observations, and conversations with the defendant that have formed the basis for the motion. If filed by defense counsel, the motion shall contain such information without invading the attorney–client privilege;

(c) a statement that the motion is not filed for purposes of delay;

(d) a statement of whether the motion is opposed as provided in Rule 8-

304 NMRA; and

(e) a request for a competency evaluation.

(2) ***By motion of a self-represented defendant or upon the court's own motion.***

When a question of competence is raised by a party who is self-represented or upon the magistrate court's own motion, the magistrate court shall dispose of the motion by filing an order substantially in the form approved by the Supreme Court that addresses the following:

- (a) whether the motion is based on a good faith belief that the defendant is not competent to stand trial;
- (b) the specific facts, observations, and conversations with the defendant that have formed the basis for the motion;
- (c) whether the motion is advanced for purposes of delay;
- (d) whether the motion is opposed; and
- (e) whether a competency evaluation is requested.

E. Resolution of motion; probable cause. A motion for a competency evaluation shall not be opposed, except on the grounds that the motion is advanced for an improper purpose such as harassment or delay. In considering a motion, the court shall comply with the following procedures.

(1) ***Unopposed.*** Within forty-eight (48) hours of the filing of a motion that is unopposed under Subparagraph (D)(1)(d) of this rule, the court shall file an order substantially in the form approved by the Supreme Court finding whether the motion is supported by probable cause to believe that the defendant is not competent to stand trial. The determination shall be based solely upon the allegations in the motion and upon the court's own observations of the defendant.

(2) ***Opposed.*** A response in opposition to a motion for a competency evaluation shall be in writing, shall cite specific facts in opposition to the motion, and shall be filed within five (5) days of the filing of the motion or be deemed waived. Upon the filing of a response in opposition, the court shall do one of the following:

- (a) unless the court determines that a hearing on the motion is necessary, file an order substantially in the form approved by the Supreme Court within forty-eight (48) hours finding whether there is probable cause to believe that the defendant is not competent to stand trial; or
- (b) hold a hearing on the motion and file an order substantially in the form approved by the Supreme Court within fifteen (15) days of the filing of the response finding whether there is probable cause to believe that the defendant is not competent to stand trial.

(3) ***Sanctions.*** If the court finds that either party lacked reasonable grounds to file or oppose the motion, the court may initiate contempt proceedings consistent with Rule 8-110 NMRA.

(4) ***Review.*** A party aggrieved by an order finding no probable cause to believe that the defendant is not competent to stand trial may petition the district court for review of that order.

F. Transfer to district court; effect on municipal court proceedings. An order finding probable cause that the defendant is not competent to stand trial under Paragraph E of this rule also shall transfer the case to the district court for further proceedings under Rule 5-602.1 NMRA. When such an order is filed, jurisdiction over the defendant and any conditions of release shall be transferred to the district court. Any conditions of release and any bond set by the municipal court shall continue in effect unless amended by the district court. The municipal court shall suspend its case pending remand from the district court.

[Approved by Supreme Court Order No. _____, effective _____.]

Committee commentary. — The municipal court shall transfer a case to the district court for a competency determination when the court finds probable cause that the defendant is not competent to stand trial. Probable cause may arise from the court’s own observations or from the factual allegations in a party’s motion. If the municipal court finds probable cause that the defendant is not competent, the municipal court shall suspend the proceedings and transfer the case to district court for a determination of competency.

[Approved by Supreme Court Order _____, effective _____.]

[NEW MATERIAL]

9-404A. Order on motion for competency evaluation; transfer.

[For use with Magistrate Court Rule 6-507.1 NMRA
and Municipal Court Rule 8-507.1 NMRA]

STATE OF NEW MEXICO
[COUNTY OF _____]
[CITY OF _____]
_____ COURT

STATE OF NEW MEXICO
[COUNTY OF _____]
[CITY OF _____]

v.

No. _____

_____, Defendant.

**ORDER ON MOTION FOR COMPETENCY EVALUATION
[AND TRANSFERRING CASE]**

The Court, having considered the motion for competency evaluation [and the response in opposition] and being otherwise fully advised in the premises, FINDS and CONCLUDES:

1. An issue as to the defendant’s competency to stand trial has been raised by motion of:
[] the defense;
[] the prosecution; or
[] the court.
2. A limited hearing to determine the propriety of the motion:
[] was held; or
[] was not held.
3. The parties:

- stipulate that this case should be transferred to the district court for a competency determination; or
- do not stipulate that this case should be transferred to the district court for a competency determination.

4. The motion:

- is based on a good faith belief that the defendant is not competent to stand trial.
- is not based on a good faith belief that the defendant is not competent to stand trial.

5. The motion:

- is not advanced for purposes of delay.
- is advanced for purposes of delay.

6. The court FINDS:

- There IS probable cause to believe that the defendant is not competent to stand trial based upon the following:

- The facts alleged in the motion for a competency evaluation, which are
 - set forth in the written motion and incorporated herein; or
 - described as follows: _____

_____;

- The court's observations of the defendant, described as follows: _____

_____;

- Other: _____

_____.

OR

- There IS NOT probable cause to believe that the defendant is not competent to stand trial.

7. It is ORDERED that the proceedings in this case:

- shall be suspended, and this case shall be transferred to the district court for a determination of competency; or
- shall not be transferred to the district court because the allegations are insufficient to demonstrate probable cause that the defendant is not competent to stand trial.

Judge

Prosecutor - approved as to form

Defendant - approved as to form

USE NOTES

1. Although the ultimate determination of the defendant's competency to stand trial is made by the district court, the magistrate or municipal court should determine, prior to transferring a case to district court, whether the factual allegations of incompetency are sufficient to demonstrate probable cause that the defendant is not competent to stand trial. *See* Rule 6-507.1 NMRA.

2. A defendant is competent to stand trial if the defendant (1) understands the nature and gravity of the proceedings, (2) understands that he or she is being charged on a serious crime, and (3) is capable of assisting in his or her own defense. *See State v. Chapman*, 1984-NMSC-078, ¶ 5, 101 N.M. 478, 684 P.2d 1143; *see also* UJI 14-5104 NMRA.

[Approved by Supreme Court Order No. _____, effective _____.]

[NEW MATERIAL]

9-514. Order on motion for a competency evaluation.

[For use with Rule 5-602.1 NMRA]

STATE OF NEW MEXICO
COUNTY OF _____
_____ DISTRICT COURT

[STATE OF NEW MEXICO]
[COUNTY OF _____]
[CITY OF _____]

v. _____ No. _____

_____, Defendant.

ORDER ON MOTION FOR COMPETENCY EVALUATION

The Court, having considered the motion for competency evaluation [and the response in opposition] [and after a hearing] and being otherwise fully advised in the premises, FINDS and CONCLUDES:

[] The motion is well-taken and is GRANTED because there is probable cause to believe that the defendant is not competent to stand trial based upon the following:

The facts alleged in the motion for a competency evaluation;

The court's observations of the defendant, described as follows: _____

_____;

Other: _____

_____.

The motion is not well-taken and is DENIED.

(Complete the following only if the motion is GRANTED)

The Court therefore ORDERS the following:

1. The competency evaluation shall be performed by _____.

2. The evaluation shall be completed and a written report shall be filed with the court within

21 days of the filing of this order if the defendant is in custody; or

30 days of the filing of this order if the defendant is at liberty.

3. The report filed under Paragraph 2 of this order shall include only those matters which form the basis for the evaluator's conclusion about the defendant's present competency and shall clearly state the evaluator's conclusion. The report SHALL NOT include a description of the defendant's criminal or employment history; prior bad acts; or version of events before, during, or after the offense, unless specifically related to the defendant's present competency.

4. Any party who objects to the conclusion set forth in the report filed under Paragraph 2 of this order shall file such objections in writing within 7 days of the filing of the report.

5. The parties shall return to court for a hearing on the question of the defendant's competency on _____ (*date—not to exceed 30 days from the date of this order if the defendant is in custody or 45 days if the defendant is at liberty*) at _____ (*time*), unless the court, upon its own motion or upon the motion of the parties, rules at an earlier time on the defendant's competency without a hearing.

6. Other: _____

_____.

IT IS SO ORDERED.

District Court

Attorney for the State

Attorney for the defendant

[Approved by Supreme Court Order No. _____, effective _____.]

Proposed Rule Changes Comment Form.

Name: Rebecca Salwin

Phone: 505-219-2837

Email: rebecca.salwin@lopdm.us

Rule No: 5-602.1(F)

Comments:

This provision needs clarification in two regards:

First, the proposed rule says that unopposed motions for an evaluation must be decided within 48 hours, but that the State has 5 days to file its opposition response. If the State is unreachable for its position on the motion before the motion is filed (which happens often), then should the court wait 48 hours or 5 days?

Second, there should be discussion of consequences for the failure to adhere to these time requirements.

SUPREME COURT OF NEW MEXICO
FILED

MAR - 9 2016



Proposed Rule Changes Comment Form.

Name: Rebecca Salwin

Phone: 505-219-2837

Email: rebecca.salwin@lopdm.us

Rule No: 5-602.1(E)

Comments:

Proceedings Not Stayed

This proposed rule seems to conflict with LR 2-400, the Court Management Order in the Second Judicial District. LR 2-400 imposes swift, mandatory, immovable pre-trial and trial deadlines.

The proposed rule allows competency to be raised at any time but does not stay the case. It also forbids any significant court proceeding while competency is being evaluated. This creates a conflict.

For example, imagine if competency is raised the day before a trial that is at the end of a trial deadline (say, has already been continued before). The court cannot move the trial date under LR 2-400 but also cannot proceed with trial under this proposed rule. The case would need to be dismissed.

SUPREME COURT OF NEW MEXICO
FILED

MAR - 9 2016



Proposed Rule Changes Comment Form.

Name: Rebecca Salwin
Phone: 505-219-2837
Email: rebecca.salwin@lopdnm.us

Rule No: 5-602.1(H)

SUPREME COURT OF NEW MEXICO
FILED

MAR - 9 2016



Comments:

Report Cannot be Filed With Court Under the Fifth Amendment of the U.S. Constitution

Reports should not be required to be filed with the court and disclosed to the prosecutor, and certainly not unless they are filed under seal. Considering the sensitive, embarrassing, and self-incriminating statements that are elicited at an evaluation, this would violate client-patient confidentiality and undermine the validity of the evaluation.

During an evaluation, the evaluator asks questions about the specific facts in the defendant's pending criminal proceeding. This is necessary to determine if the defendant understands the case enough to proceed with a trial. In light of the 5th Amendment's right against self-incrimination, it is not clear that a court even has the authority to require that such self-incriminating statements be disclosed to the very judge and prosecutor who are assigned to the case.

Of particular concern, this proposed rule would require the defendant to incriminate himself even if the evaluation comes back competent, such that the case will proceed to trial. In such a case, the defendant's attorney would not have grounds to request a competency hearing anyway. So the results of the evaluation would have no relevant purpose, other than to embarrass and incriminate the defendant.

Zimbra

suptls@nmcourts.gov

Comments on proposed adoption of rules regarding competency to stand trial

From : Kevin Nault <KNault@da.state.nm.us>
Subject : Comments on proposed adoption of rules regarding competency to stand trial
To : 'nmsupremecourtclerk@nmcourts.gov' <nmsupremecourtclerk@nmcourts.gov>

Tue, Mar 15, 2016 12:34 PM
 SUPREME COURT OF NEW MEXICO
 FILED

MAR 15 2016

The following are my comments on the proposed rule changes and new rules regarding competency. 

Initially, I am gratified at the effort to apply clear procedure to what has thus far been a rather fuzzy process that creates a great deal of delay – sometimes years – in resolving criminal cases.

As a general comment, I feel that the attempt to impose time limits to the competency process are commendable, but will need to be backed up by judges issuing orders to show cause to evaluators who are laggards about making evaluation appointments and/or submitting evaluation reports. Many times, I have seen judges issue orders stating that the evaluation is to be done in 30 days, but when no appointment is made, or the evaluator cancels a trip to evaluate a defendant in custody, nothing is done and three to six months later no progress has been made.

On a related note, the rule should clarify for the courts and counsel who pays for evaluations. Currently, at least in the Eighth District, the evaluator invariably appointed is one who has a contract through the Department of Health. The Department of Health then pays for the evaluation, but because only one contract is awarded, and that evaluator has contracts with several law enforcement agencies and other government divisions, there can be legitimate difficulties with evaluator availability. I also know that I, and others, have concerns about the professionalism of that evaluator's reports, which frequently read in such a way that the conclusion (almost invariably incompetence) is unsupported by reported answers on, for instance, courtroom roles that are rough-and-ready but essentially accurate from a defendant's point of view. If appointments are truly at the judge's discretion and not bound to the Department of Health contracts, this should be clarified in the Rule or comments.

Rule 5-602: The comments note that defense counsel may need to move for an evaluation to determine whether an issue of insanity exists or existed at the time of offense, but the deadlines set in the amended Rule do not take that possibility into account. I would suggest that such a motion be filed within the 20 days unless good cause is shown, with a further requirement that notice be given within 15 days of receipt of such a report.

Rule 5-602.1: In paragraph B, proceedings should not be stayed, but time limits *should* be tolled, since (for example) preliminary examinations (which can be held in District Court) have inflexible deadlines for the State with permissive extensions for the defense, but explicitly cannot be held. Speedy trial issues can also arise, since some evaluators simply refuse to produce timely reports regardless of the Court's orders. Defense attorneys may also be placed in a bind by time limits; for instance, if a potentially incompetent defendant wants to assert a time-limited defense like an alibi, defense counsel may need to determine the client's level of competence to determine how to proceed. See Rule 16-114(A).

Paragraph G should suggest remedies if the deadlines set in the order are not met – appointment of an alternative evaluator, an order to the evaluator to show cause, etc. Presently, the remedy in this Rule for an evaluator simply not performing an evaluation is dismissal of the case. See paragraph (L)(2).

Paragraph H should require the *factual* bases of the conclusion to be disclosed. There is a world of difference between "Defendant is incompetent because [s]he does not understand courtroom proceedings" and listing the answers the defendant gave as to courtroom roles for counsel and the judge to review independently.

Paragraph H should also require the report to address whether the incompetency can be addressed. Returning

to understanding courtroom proceedings, the question is not only whether the defendant understands the role of the judge, but whether that understanding can be acquired if the roles are explained.

Typically, the movant has the burden to show by preponderance of the evidence that the relief requested is merited. Paragraph (I)(1)(b)(iii) shifts this burden by enshrining the conclusion of the evaluator's report without regard to its reliability. More appropriate would be to make the report admissible without authentication at the hearing but to permit the judge and parties to argue its reliability. In my experience, even evaluators who are generally extremely good can produce highly questionable reports (I once had to point out severe errors that took three drafts to fix – referencing tests that were not given, etc.) The reality is also that not all forensic evaluators are extremely good, and as a result any given report may not be as reliable as this subparagraph assumes. The reports are valuable evidence, but can hardly be presumed to be flawless.

Paragraph L, subparagraph 2, seems to say that if a defendant or evaluator ignores the timelines in the rule, it is the *State* that is sanctioned with dismissal. This seems ... odd. A more appropriate general remedy would be denial of the competency motion and resumption of proceedings, with the possibility of a new motion remaining open. Otherwise, all a defendant has to do is refuse to appear to be evaluated and the case can be dismissed, which is obviously open to exploitation.

Paragraph N prohibits both impeachment and perjury charges if a defendant makes admissions to an evaluator and subsequently tells a different story under oath. While I understand and approve of the desire to promote honesty with the evaluator, the facts of the offense are not necessary for the evaluator to determine whether the defendant understands the charges (s)he faces. It would therefore be better to prohibit the use of a defendant's statements in a prima facie case, but permit them for impeachment or collateral proceedings so that a defendant cannot "play crazy" and then proceed with a cynical defense strategy if the evaluator is not fooled.

Finally, the comments should address how judges should handle *pro se* defendants; this issue is addressed in Rule 6-507.1, and while it is rare in District Court, some defendants resist having counsel appointed for them.

Form 9-514: I incorporate my suggestion above that the report be ordered to include the factual bases of any conclusions.

I have no further comments on the other proposed Rules.

Thank you for your time, attention, and effort on this matter.

Kevin L. Nault
Assistant District Attorney
8th Judicial District Attorney's Office
100 Court Street, Ste. 6
Clayton, NM 88415
(575) 374-2569
Fax: (575) 374-2179

Zimbra

suptis@nmcourts.gov

Comments on Proposed New Competency Rules proposed by the Ad Hoc Committee on Rules for Mental Health Proceedings

From : Ricardo Berry <RBerry@da.state.nm.us>
Subject : Comments on Proposed New Competency Rules proposed by the Ad Hoc Committee on Rules for Mental Health Proceedings
To : 'nmsupremecourtclerk@nmcourts.gov' <nmsupremecourtclerk@nmcourts.gov>

Fri, Mar 18, 2016 10:09 AM
**SUPREME COURT OF NEW MEXICO
FILED
MAR 18 2016**

To Whom It May Concern,



Below are my comments on the new competency rules proposed by the Ad Hoc Committee on Rules for Mental Health Proceedings. Thank you for your attention to this matter.

Ricardo Berry
Deputy District Attorney
Office of the 7th Judicial District Attorney
(575) 835-0052
(575) 835-0054 - fax

+++++

Comments on Proposed New Competency Rules proposed by the Ad Hoc Committee on Rules for Mental Health Proceedings
General Comments

- Separating the issue of competency from insanity and putting it into a separate rule is a good idea as it avoids conflating the two issues.
- It is premature to ask for comments on proposed Rule 5-602.1 when subsections (J) and (M) of the rule refer to a proposed rule not yet available for review. If the proposed rules interrelate then both proposed rules should be available for review at the same time.

Specific Comments

Rule 5-602.1(D)

The proposed Rule 5-602.1(D) requirement that a party raising competency provide some good faith reason for doing so is a good idea.

Rule 5-602.1(D)(1)(a)

Proposed Rule 5-602.1(D)(1)(a) appears to have an extra "not" which creates a double negative. It reads: "a statement that the motion is based on a good faith belief that the defendant *may not be not* competent to stand trial" (emphasis added). Removal of either "not" would work although stylistically I think it reads better as: "a statement that the motion is based on a good faith belief that the defendant may not be competent to stand trial."

Rule 5-602.1(F)(3)

The provision in proposed Rule 5-602.1(F)(3) for sanctions should not be based on a "lack of reasonable grounds" but on a good faith standard. As the rule is proposed, if a judge does not agree with an attorney, then the attorney lacks reasonable grounds and is subject to contempt proceedings. That would have a chilling effect on anyone wanting to raise competency if there is a chance the judge may not agree, even if the attorney wanting to raise competency has a good faith basis to do so. It is a good objective to discourage delay in a case from having an obviously competent defendant

evaluated for competency. It is just as important, however, that attorneys not be afraid to raise competency on defendants who may not outwardly show many signs of incompetence but who in fact may not be competent.

Rule 5-602.1(G)

The time limits for an evaluator to complete a report proposed in proposed Rule 5-602.1(G) have no provision to address when a defendant fails or refuses to meet with the evaluator, or for unusual circumstances that prevent a meeting within the time limits. Obviously, if the defendant is in custody, a meeting should be arranged as quickly as possible. It is possible, however, that a defendant may refuse to meet with the evaluator. Additionally, there are often circumstances that interfere with a meeting between a defendant and an evaluator. Some examples include: 1.) the defendant or the evaluator gets sick on the scheduled date of the meeting and cannot attend; 2.) a defendant with multiple pending cases is ordered to be in a different court at the same time that an evaluation is scheduled; 3.) a defendant is moved to a different detention facility such that he is not present for the scheduled evaluation meeting (a not uncommon problem in counties whose detention facilities cannot accommodate their inmate population and have to contract with other facilities to house people). Although proposed Rule 5-602.1(K) provides for enlargement of time for good cause, the total time of enlargement is limited.

In the case of defendants on release it is common for defendants to not show up for their meetings with evaluators. To address this issue the rule should add something to the effect that failure of a defendant to attend a scheduled competency evaluation is a violation of conditions of release and subjects the defendant to having those conditions revoked and a bench warrant issued.

Rule 5-602.1(I)

Proposed Rule 5-602.1(I) has separate provisions for whether a motion for competency is raised before trial or after a trial has started. The proposed rule should require that competency be raised before trial. If a defendant has mental issues that call into question his competency to stand trial, that should become evident long before a trial commences. In a circumstance where something happens during a trial that renders a defendant incompetent, or at least raises that issue, then the appropriate resolution is for the judge to declare a mistrial and then proceed with the competency proceedings. The provisions of proposed Rule 5-602.1(I)(2), therefore, are unnecessary.

Proposed Rule 5-602.1(L)

Proposed Rule 5-602.1(L) provides that if the time limits are not met that the case be dismissed without prejudice. There are significant problems with this provision. First, it punishes the prosecutor by dismissing the case even if the prosecutor complied with what is required of the prosecutor in the rule. If the failure to meet the time limits is due to the defense attorney failing to do what is required, why should the prosecutor, and ultimately the citizens for whom the prosecutor represents, have to suffer having to re-file the case with all the administrative burdens that entails? What if the failure to meet the time limits is due to the court not scheduling necessary hearings in a timely manner? There is no provision in this proposed rule to hold judges accountable. Dismissing the case is just one less case on the judge's docket. Requiring that cases be dismissed when the time limits have not been met does nothing to discourage judges from not tending to competency cases, and may actually serve as an incentive for judges to not deal with competency cases promptly as a way to clear their crowded dockets.

The second big problem with this provision is that it leaves the matter of competency unresolved. If the case is re-filed does the competency process start from square one? That would make no sense in terms of judicial efficiency and yet the proposed rule does not have any provision to resume the competency determination on a re-filed case at the point where it was dismissed initially. Furthermore, the proposed rule does nothing to address why the time limits were not met and to prevent a repeat on a re-filed case. For the reasons stated, proposed Rule 5-602.1(L) requires significant reworking before it should be implemented.

Rule 6-507.1(D)

- Proposed Rule 6-507.1(D) contains separate provisions for the raising of the issue of competency by a person represented by an attorney and by a *pro-se* defendant. It seems to me that a *pro-se* defendant who is able to meet the proposed rule's requirements to raise the issue of competency is probably not incompetent. Put another way, a *pro se* defendant who in fact is not competent to stand trial will never be able to raise the issue of his own incompetency under the proposed rule. Indeed, the defendant who chooses to proceed *pro se* often does so precisely because he lacks an understanding of what his case entails, and therefore fails to see the need for the assistance of an attorney. Perhaps the rule should propose that any *pro se* defendant be evaluated for competency.

Rule 6-507.1(E)

Proposed Rule 6-507.1(E) requires a magistrate court to find probable cause for a competency determination prior to transferring a case to district court for the actual determination of competency. It also sets up a procedure for doing that. I think this requirement simply adds an unnecessary layer of proceedings. Given the proposed new rules on competency seem to have as a goal a reduction in the time that competency proceedings take, this probable cause determination seems at cross purposes to speeding up and streamlining the process. I suggest that if the motion for competency meets the requirements set forth in the proposed rule that the magistrate simply transfer the case to district court and let the district court proceed with the matter.

Proposal 2016-01

Rule set 8 are the rules of procedure for municipal courts. The reference in proposed rule 8-507.1(D)(2) refers to the magistrate court. Shouldn't this be changed to "municipal court" I know this reference will be confusing.

Randall D. Van Vleck
General Counsel
New Mexico Municipal League
P.O. Box 846
Santa Fe, NM 87504
800.432.2036

SUPREME COURT OF NEW MEXICO
FILED

MAR 23 2016



Proposed Rule Changes Comment Form.

SUPREME COURT OF NEW MEXICO
FILED

Name: Steve Lee

Phone: 575 430 0032

Email: judgestevenolee@yahoo.com

MAR 23 2016

A handwritten signature in black ink, appearing to be 'J. P. Lopez', written over the date stamp.

Rule No: 8-507

Comments:

This rule needs to place a time limit on the filing into District Court. I would suggest 48 hrs. I can see where a Judge might delay the transfer to maintain jurisdiction for an extended period of time.

Proposed Rule Changes Comment Form.

Name: Douglas Wilber

Phone: 505-219-5866

Email: douglas.wilber@lopdm.us

SUPREME COURT OF NEW MEXICO
FILED

MAR 25 2016

Rule No: 5-602.1(D)



Comments:

I think the requirement that the motion raising competency be based on specific facts yet without invading privilege will be difficult to reconcile. In my experience, the vast majority of competency issues come to my attention via either behaviors or conversations with my clients that would be subject to privilege. It seems that these motions will usually contain vague assertions that do not necessarily help the trial court much.

Proposed Rule Changes Comment Form.

Name: Douglas Wilber

Phone: 505-219-5866

Email: douglas.wilber@lopdm.us

SUPREME COURT OF NEW MEXICO
FILED

MAR 25 2016

Rule No: 5-602.1(F)



Comments:

I also have serious concerns about a chilling effect resulting from the specific threat of contempt if a judge believes the issue has not been raised in good faith. While I believe a judge always has power to sanction, it seems somewhat dangerous to suggest it specifically as a remedy in this situation. Defense attorneys are often in a difficult situation if they think there is some legitimate basis, and there is a duty to the client above and beyond the general duty to seek justice and of candor to the court in a criminal context. I think that we must continue to err on the side of protecting the rights of all defendant's rather than tipping toward punishment when the point of view of a defense advocate may clash with that of a judge.

Proposed Rule Changes Comment Form.

Name: Douglas Wilber

Phone: 505-219-5866

Email: douglas.wilber@lopdm.us

SUPREME COURT OF NEW MEXICO
FILED

MAR 25 2016

Rule No: 5-602.1(H)



Comments:

The filing of the report with the court also raises serious concerns about confidentiality of statements made during the examination. It seems that the purpose of this is to allow the court itself to decide if a hearing is necessary once the parties have determined if they are challenging it, as opposed to introducing the report as an exhibit during the hearing. However, if this is truly necessary--and I am not certain that it is--at a minimum the report should be automatically sealed once filed.

Proposed Rule Changes Comment Form.

Name: Douglas Wilber

Phone: 505-219-5866

Email: douglas.wilber@lopdm.us

SUPREME COURT OF NEW MEXICO
FILED

MAR 25 2016

Rule No: 5-602.1 commentary



Comments:

The commentary indicates that this procedure is for evaluations provided at no cost. It also seems to indicate that a defendant may always proceed with obtaining one at his own expense. The issue that is raised by this is an equal protection concern: are parties who have financial resources available to pay for their own evaluation not subject to these restrictions? And if they are doing so, why would the Court need to grant leave for the defense to conduct such an evaluation? Similarly, it seems that a defendant who can afford to pay for a private competency evaluation is under no obligation to make this known until they have a completed report and decide to raise the issue. However, indigent defendants have no ability under these Rules to obtain an ex parte order for evaluation, placing them in a substantially different position than those with more financial resources. It seems to me that this subject needs some clarification.

Proposed Rule Changes Comment Form.

Name: Douglas Wilber
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Email: douglas.wilber@lopdm.us

SUPREME COURT OF NEW MEXICO
FILED

MAR 25 2016



Rule No: 5-602.1 (E)

Comments:

Not staying proceedings or tolling time limits will almost certainly cause conflict with existing deadlines, especially in the Second District under LR2-400 and LR2-400.1. With the multiple deadlines and requirements for filing requests, stipulations, oppositions, and having hearings etc. under this Rule, it seems that no tolling of time limits may become unworkable. And in some cases where a defendant is truly unable to assist in preparation of his case, this may make preparing a defense doubly difficult. Perhaps there could be some triggering event to stay proceedings or toll time limits such as the entry of the order for the evaluation?

APR 01 2016



Members of the Ad Hoc Committee on Rules for Mental Health Proceedings,

Please accept these comments regarding the new proposed Rule 5-602.1. I support the intent of the rule and largely think the revised procedure is well thought out and much needed. I support the effort to clearly delineate the process and shorten the time for competency determinations. However, I have two comments and concerns.

1. My first concern relates to the required dismissal in the event the competency procedure is not timely completed under 5-602.1 (L) (2). While I understand and support the intent of the requirement, its practical application could result in unintended inequities.

The procedure will work well for those Districts that have local evaluators who can conduct evaluations on much shorter notice. Many rural Districts, however, do not have that luxury, and must depend on distant evaluators whose ability to come to the District for evaluations is limited by time, distance, and the demands of their local practice. For example, the evaluator for the Fifth Judicial District is Dr. Susan Cave, whose office is in Santa Fe, approximately 200 – 300 miles away from Chaves, Eddy and Lea counties. Dr. Cave can only schedule a very limited number of days each month to travel to the District, conduct evaluations, and return to Santa Fe. While she contracts with others to assist in conducting the evaluation, the number of days each month when evaluations can be done in the District is extremely limited. If a Defendant does not show up for a scheduled evaluation once or twice, whether intentionally or not, it could easily take the time beyond an extended time period for completion of the competency determination. That would mandate a dismissal when one is not warranted, in my opinion.

I ask that the committee consider adding language to the end of the section that allows the court to address unusual circumstances where dismissal would be draconian or inappropriate. An example of language is: “... *unless the court finds either that the delay was at least substantially the result of conduct by the defendant that prevented the evaluation and report or that dismissal would effect a manifest injustice, and the court also sets a time in which competency must be resolved no longer than absolutely necessary.*”

2. The proposed Committee Commentary contemplates that the evaluation will be at no cost to the defendant. However, the competency statute provides, “Where the defendant is determined to be indigent, the court shall pay the costs of the examination from funds available to the court.” NMSA 1978, §31-9-2 (1967). This suggests that a non-indigent defendant is responsible for the cost of the evaluation absent an order from the court. Is there a conflict between the intent of the Rule and the statute? It is also my understanding that the evaluators’ contracts limit their obligation to provide evaluations to indigent defendants, and they require defendants represented by private attorneys to pay for the evaluation. If I am correct (and I may not be), is what is contemplated by the commentary consistent with the statute and with the

contractual arrangements that have been made for evaluations? Perhaps the statute and the contracts need to be amended to be consistent with the proposed Rule and current practice.

Thank you for considering my comments. I compliment the committee for its hard work and an excellent work product. I think the proposed Rule could go a long way towards timely competency determinations and benefit everyone involved in the process.

Jim Hudson

James M. Hudson

District Judge

Fifth Judicial District

P.O. Box 1776

Roswell, NM 88202

Phone: (575) 624-0859

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Judge Matt Reynolds
Chief Judge, Seventh Judicial District

APR 04 2016

COMMENTS:



This is my comment in regard to proposed Rule 602.1(E), which provides that a case is not tolled once a competency motion is filed. What this new rule will mean is a dismissal of charges in a number of cases for speedy trial violations because an evaluator does not complete the evaluation in a short period of time. We have one out-of-state provider for our entire district, who also works with other districts. We try to keep allegedly incompetent people out of jail while their competency is at issue, but sometimes they keep violating conditions of release or commit new crimes. If approved by the Supreme Court, this rule will result in meritorious cases being dismissed for the wrong reason. Therefore, I object to its adoption.

Zimbra

suptls@nmcourts.gov

Comments

From : Mail <rebldg@gmail.com>

Mon, Apr 04, 2016 09:30 AM

Subject : Comments

To : nmsupremecourtclerk@nmcourts.gov

I wish I had more time to go through this in more detail. Please consider:

If a person is incompetent, he or she is incompetent. Trying to limit when the issue is raised may seem to keep the process moving, but we need to deal with reality. The incompetent person needs to be dealt with appropriately and we all need to be protected.

Please amend the proposed changes to have the court determine whether the person did the acts charged and have an appropriate verdict instead of saying a simple not guilty, then determine what is appropriate to accomplish the goal of keeping everyone, possibly including the incompetent person from being victimized.

Thank you for your consideration.

**SUPREME COURT OF NEW MEXICO
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APR 04 2016



Proposed Rule Changes Comment Form.

Name: Marjorie C. Jones
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Email: aztdmcj@nmcourts.gov

SUPREME COURT OF NEW MEXICO
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APR 04 2016



Rule No: 5-602.1 (Proposal 2016-01)

Comments:

RE: 5-602.1

As a staff attorney for a district court, I would like to see proposed rule 5-602.1 acknowledge, in the commentary or otherwise, the requirement of rule 5-123, "Public inspection and sealing of court records." Rule 5-123 (C)(5) states that "all court records. . . shall be automatically sealed . . . in proceedings to determine competency." If Rule 5-602.1 is adopted, I believe the court clerk would be required, pursuant to Rule 5-123, to automatically seal:

- 5-602.1 (D)(1) written motion
- 5-602.1 (D)(2) court's record (if committed to writing)
- 5-602.1 (F) (G) court's probable cause finding and order for evaluation
- 5-602.1 (F)(2) response in opposition to motion
- 5-602.1 (H) competency evaluation report
- 5-602.1 (I)(1)(a) stipulations or objections
- 5-602.1 (I)(1)(c) court's final order on competency
- 5-602.1 (I)(2) motion for competency evaluation during trial
- 5-602.2 Any written document required to be "filed"

If I am mistaken that rule 5-123 would require the automatic sealing of the papers described above which rule 5-602.1 says are to be "filed," then rule 5-602.1 should explicitly address why the automatic sealing rule of 5-123 does not apply. If the automatic sealing rule does not apply, then defendants whose competency is raised in the district court would be treated differently from those defendants in transfer cases (in which competency is raised at the magistrate/municipal court level). This is because in a transfer case, competency proceedings in the district court are automatically sealed as a function of the statewide court management system, Odyssey. (See comments on transfer cases below)

If I am correct about the applicability of rule 5-123, it would be helpful to district court clerks across the state to include in rule 5-602.1 a reference to rule 5-123 or some type of directive that these records are to be automatically sealed. Without a

clarification on this, I think there will be some district courts that seal these papers and some that do not.

RE: 6-507.1 and 8-507.1. Transfer cases

The question of whether papers relating to competency should be sealed in the district court does not arise in transfer cases because all papers are automatically sealed. Why? Because a transfer case opens a new case in the district court and I am told that the Odyssey system requires transfer cases to be opened and docketed in the district court as a new sequestered case (the "SI" case category).

The disconnect between the magistrate/municipal court and the district court in transfer cases is that while the district court treats these cases as sealed and sequestered, nothing is done at the lower court level to do the same. It seems like now would be a good time for the Rules Committee to address this disconnect.

Conclusion:

Whether papers relating to competency cases should be sealed in the court records at all levels (even in the magistrate and municipal courts that are not courts "of record") should be addressed in the new rules.

Proposed Rule Changes Comment Form.

Name: Candace Coulson
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SUPREME COURT OF NEW MEXICO
FILED

APR 05 2016

Rule No: 5-602.1



Comments:

5-602.1(B)(2)

Specifically limiting evaluations to competency alone is heartening and necessary. It has become a rare occasion that specific intent, dangerousness, or general insanity is not also addressed in a competency evaluation.

5-602.1(D)

Subsection 1: Requiring a statement as to the facts that give rise to the questioning of a defendant's competency to stand trial is appropriate and in accordance with case law. Some defense attorneys feel that this will force them to breach attorney-client privilege, however, general statements can be made as to the results and observations during attorney-client conversations that do not amount to a breach of the privilege. This requirement will also further the ability for the court to determine if the raising of the issue is indeed made in good faith and not for the purposes of delay.

Additionally, the requirement of the opposing party position is heartening and much appreciated. This circumvents the inappropriate use of ex-parte orders which leave one party in the dark about events in its case and without proper notice to prepare their case accordingly.

Subsection 2: Requiring a record of specific reasons for the questioning of a defendant's competency to stand trial by the court puts the parties on equal footing at the beginning of the process allowing for proper preparation of the case.

5-602.1(E)

Not issuing a stay or tolling any time limits is understandable when taken in conjunction with the reason this rule is being proposed, however, it conflicts with LR 2-400 and LR 2-400.1. Perhaps a stay of proceedings should be issued with a specific time limit that coordinates with the proposed competency time frames. If this

subsection is adopted in its present form, the majority of Second Judicial District cases where competency is an issue could be dismissed for failure to comply with the Local Rules and never reach the issue of competence. Cases will then be re-indicted thus wasting judicial resources.

5-602.1(H)

Defendant's waive all confidentiality before an evaluation is conducted and are told that the results will be provided to the court as well as the prosecution. Requiring evaluations be produced to the everyone involved will avoid the never-ending fights over when a court should see an evaluation or when one should be provided to the State. Competency to stand trial is a part of our judicial process and should never have been treated as a secret weapon.

5-602.1(K)

Because there are a great many moving parts in the process of competency evaluations and many of them rely on resources beyond control of the attorneys or the court, it would be preferable to increase the aggregate limit to one hundred-twenty days. Because a court is not required to grant any extension request this would allow courts to manage the process as necessary for the situation in their district. Those districts with local evaluators will not have the necessity to grant extensions due to evaluator unavailability, while those without local evaluators will be able to accommodate the travel necessary by their evaluators.

5-602.1(L)

To mandate dismissal if the process is not completed timely does not promote confidence in the system nor judicial efficiency. As the rule stands now, all a defendant must do is refuse to cooperate with the evaluator and the case will be dismissed. The result is not just. Rather than mandate dismissal, the rule should make allowance for the reason a deadline is not met. Discretion should remain with the court as to what remedy is appropriate depending on the situation in the case presently before him or her.

Proposed Rule Changes Comment Form.

Name: Craig La Bree
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Email: clabree@windstream.net

Rule No: Proposal 2016-01

SUPREME COURT OF NEW MEXICO
FILED

APR 05 2016



Comments:

The committee has done a good job of making sure that the motions are filed in good faith but the issue of dismissal in bad faith has not been addressed.

Example:

The Defendant has been transferred to District Court and during the proceeding a Different attorney or someone from the same office appears and files a Dismissal of the Transfer. The Defendant is remanded back to the Magistrate Court. Where his original or new attorney files a second good faith motion that the Defendant is not competent and the whole procedure starts again.

It would seem to me that the same standard for filing the Transfer should be used for its dismissal.

Proposed Rule Changes Comment Form.

Name: Craig La Bree

Phone: 575-390-5183

Email: clabree@windstream.net

Rule No: Proposal 2016-01

SUPREME COURT OF NEW MEXICO
FILED

APR 05 2016



Comments:

I would like to suggest that the time of 48 hours be changed to Two (2) Days. Assume that the motion is filed at 3:55 PM on Friday. Assume a normal weekend without extra holidays you would only have one day to do the Order because of the Rule on Time. If you want to be consistent with the rest of the time it should be Two (2) Days not forty-eight Hours.

Zimbra

SUPREME COURT OF NEW MEXICO
FILED

suptls@nmcourts.gov

Proposal 1 - Competency

APR 06 2016

From : Ibarra, Jonathan <jonathanl.ibarra@lodnm.us>
Subject : Proposal 1 - Competency
To : nmsupremecourtclerk@nmcourts.gov



Wed, Apr 06, 2016 03:57 PM

Mr. Moya,

Please accept this email as my comments on Proposal 1 in the 2016 Rule set, regarding competency proceedings.

I have worked as a prosecutor, as a district court judge, and now as a defense attorney. This breadth of experience leads me to have big questions and serious specific issues regarding this proposal.

First, I have to agree with other comments that it seems to be premature to have rules proposed when other rules that are mentioned are not present yet. There isn't anything in here that has to happen so quickly that it can't all be done at the same time. I am not thrilled about commenting without knowing what else is coming. That said, clearly these are being proposed now.

It seems, though it isn't exactly explicit in the proposal, that the committee has proposed to make it clear that the evaluation of issue is from an expert considered to be the Court's expert, as opposed to a defense expert. My initial thought is that this was correct, and it is certainly how I have always thought about it. However, it has come to my attention that this is not necessarily true. Though the Court currently allows the appointment of the expert, the Court doesn't actually pay for the expert. So it seems to me to be an open question as to exactly whose expert the evaluator is. There are legitimate concerns expressed by people who have commented about the effect of these rules on confidentiality, etc. Those, of course, make even more sense if the experts are viewed as defense experts than as court experts. Other comments I understand to be forthcoming certainly reach this issue, and likely with greater understanding than mine.

I think that the Supreme Court has to answer the question of whose expert the evaluator is, and it needs to do so explicitly. I will continue with my comment on the rules as if the presumption by the committee is correct that it is the Court's expert, but I am not convinced that's the case. And it does bring certain difficulties with it. I feel it necessary to get into some of those difficulties below.

I have seen the comment sent in earlier today by Ms. Kieval. I find that comment, which is more about the procedural changes generally rather than the proposed rules specifically, to be incredibly important for the Committee and the Supreme Court to consider. I don't believe that the road that the Committee is taking is the correct one, and Ms. Kieval says better than I ever could why. Thus, I essentially join in her comment. However, I feel it necessary to address the specifics of the proposal.

I agree with other commenters that separating competency from insanity makes sense, so I'm fine with 5-602.

In regard to 5-602.1, I offer the following comments:

(A) - I find the tenor of the subsection fairly insulting to defense attorneys. Any party can raise competency, but the types of things listed in the rule for which this rule may not be used are all things that imply they are coming from a defense attorney.

(B)(2) - This goes directly to the question that needs to be addressed specifically by the Court - whether the evaluator is working directly on behalf of the court. This subsection should probably also say that the evaluator is not to be looking at dangerousness, although the whole dangerousness section of the proposed rules isn't provided yet, so I don't know if that's accurate. I guess (based on presumed continuance of the publishing cycle) I won't know until next year?

(D)(1)(a) - Another commenter correctly pointed out the grammar error.

(D)(1)(b) - In many cases, it will be difficult for defense counsel to explain what about their interactions with their client regarding the case would lead them to believe that the client is not competent without getting into confidential information. That can come up when the client's recitation of the facts of what happened show a fundamental lack of understanding about such facts. Or, for that matter, reality. But it would also get into the specific facts of the incident, which is something that the Committee says it wants kept out of everything. There needs to be an explicit understanding that the Court and the State must take it as fact if the defense counsel states as an officer of the court that they can not reveal the nature of the reason why they believe there is a competency issue. Even getting into arguments about why it is confidential is likely to show what the nature of that confidential information is.

I would note here that the comment by Marjorie Jones is entirely accurate. Other commenters mentioned sealing, but not as clearly and completely as Ms. Jones. It needs to be explicit that everything on this issue be sealed pursuant to the rules.

(E) - I think that this subsection is ill-advised. I understand what the Committee was trying to address, but it did it in the wrong way. Instead, I believe that it should be explicit that time limits are tolled, but that it does not preclude the court from addressing issues for which the defendant's assistance is not needed (purely legal or procedural issues), or addressing conditions of release. (Conditions of release are, of course, something where the defendant's assistance would be important, but are also something that the court has to have the ability to deal with during a competency stay.) Even doing pretrial interviews on a case while competency is pending can be difficult, as the client may not be able to advise his attorney as to such interviews, or who might be needed to be called and interviewed on his behalf. I don't think that, either way, this subsection would conflict with LR2-400, as that rule specifically exempts the 2nd from any Rule of Criminal Procedure that would be in conflict with the local rule. But the point is still valid on cases outside the 2nd. There is no way to keep moving forward on everything except substantive issues, when both procedural and substantive issues and deadlines are typically all tied to trial dates. Under the old Rule 5-604, the entry of an order for a competency evaluation tolled the proceedings. That makes the most sense here.

(F) - This subsection does not specifically address the issue of what should happen if the opposing party either does not respond regarding a position or takes no position on the motion, just what happens when stipulated or opposed. That should be fixed. My initial thought is that a "no position" should be taken as a stipulation for purposes of this subsection, and that a lack of response should be taken as opposition for purposes of this subsection. This clarification should either be in this subsection or in (D)(1)(d). It is accurate, as Ms. Salwin commented, that many times getting a position from opposing counsel can be difficult, so a clarification is

certainly in order.

I also think that a "probable cause" standard at this point, while likely intended to be low, might still be too high. Often attorneys are working from a position of not knowing a great deal. Especially as much information will have to come from medical records, etc. I think that a good faith basis ought to be enough to get to an evaluation, and to protect the rights of the parties.

(F)(2)(b) – These timelines, while clearly designed to bring everything to a resolution quickly one way or another, are likely not practical. District courts can't even be bothered to set hearings for weeks on conditions of release for clients who have been placed in custody for alleged violations, and they are suddenly going to find time to set and hold a hearing within 5 days on a competency evaluation? Not to mention the issues with counsel for both parties having to move things around in their schedule for essentially an emergency hearing, and getting notice for the hearing to defendants in that time period – especially potentially incompetent defendants, many of whom are more likely than the average defendant to be harder to contact or be homeless. I just don't think it likely that five days is enough time to hold such a hearing, and I don't see a good reason to make the hearing happen that quickly.

Frankly, this subsection, and others that I will address soon, reflect what I think is a worrisome inclination by the Committee to value efficiency over the rights of the parties. While there have certainly been problems with cases on competency stays taking too long to resolve, and while I appreciate that the Committee is trying to resolve that issue, these proposed rules go way too far to the other side.

(F)(3) – I agree with commenters about the potential chilling effect this would have on attorneys raising competency, as they would have to balance doing what they think they need to do on a case with the possibility of **criminal charges** for being wrong. Specifically mentioning sanctions, while still extreme, is one thing. Talking about contempt (which pretty clearly would have to be indirect criminal contempt) is something else entirely. I also agree with other commenters that if the judge rules against having an evaluation, he has essentially found that there was not reasonable grounds to bring it, as the standard to get an evaluation in the first place should be awfully low, to make sure that the rights of the defendants are protected. I think that saying good faith rather than reasonable grounds makes more sense. I do think that it makes sense to include the opposition of such a motion in here, as I think it patently unreasonable how often prosecutors oppose motions for competency evaluations without any justification. When I was a prosecutor, I don't remember ever opposing such a motion (if I even saw it, since they were more often *ex parte*), and can't imagine a circumstance where I would have done so. That seems not to be the case any longer, as part of a pattern of opposing everything regarding potential incompetence. This is a sad development, and I do appreciate the Committee addressing it.

(G) – Again, the Committee attempts to move too quickly. It is also unclear to me how the court could even comply with such a requirement at all, much less in two days. At the current time, the trial courts have no contact with any evaluators directly until the hearing. Is the rule intending to propose that AOC or the district courts themselves are going to be specifically assigning evaluators? How is any of that going to possibly work?

(G)(2) & (G)(3) – Again, the timelines are likely not reasonable. Even in the 2nd, getting clients evaluated quickly can be a real issue due to the number of evaluations being sought, and working out appointment times. This is clearly a bigger issue in parts of the State where evaluators don't live, and for which they have to schedule trips. Further, sometimes defendants (again, especially potentially incompetent defendants who might be hard to contact or homeless) miss appointments. That is at least as likely (probably far more likely) to be due to the same reasons that make them incompetent than it is to any dilatory tactics. Beyond that, there are times when the evaluator might need more information to make more reasoned decisions. Often, that involves getting medical records or the like. Are we going to punish evaluators for wanting to do the job correctly? The time lines need to be longer, and there needs to be provisions to make it even longer than that for good cause.

(H) – I presume that the Committee proposal that the evaluation, regardless of the findings, must be filed with the court flows from the idea that the evaluator is the court's, not the defendant's. However, there is no reason to mandate that every evaluation be filed with the court and made part of the public record. This is especially true if there is information that would otherwise be protected under HIPAA. Comments from others about sealing such evaluations are also very relevant here. But if, for instance, the evaluation comes back with the defendant competent, and the defense attorney has no argument with that finding, then there is no reason to have the report entered into the court record at all – a notice withdrawing the issue of competency should be sufficient.

(H)(1) – I don't understand why the Committee is seeking to restrict how the doctor makes the finding. If the evaluator has a reason to use a qualifier on the determination, they do so for a reason. And if the point of the rule is for the court and the parties to all have the information, then they should have all of the information.

(H)(2) – The Committee, I believe, seriously underestimates how likely it is that the barred information will be necessary to the evaluation. Typically criminal history won't be relevant to the determination on competency, but job history could be (especially if the concern is mental retardation). The factual understanding of the charges absolutely is extremely relevant to many evaluations.

Mr. Nault comments that included in the report should be whether the lack of competence is treatable. This, of course, would be contrary to other parts of the rule. I presume that in the forthcoming rules it will be discussed how to deal with that issue. But, again, we don't have those rules yet.

(I) - I feel I should respond to comments already posted. Mr. Nault feels that the evaluation should not be taken as *prima facie* evidence, but instead admissible without any weight attached to it. This ignores two different issues. First, there is no provision in the rule thus far (waiting on future rules, I guess) for the defendant to have actually made a motion to dismiss at this point. Thus, there isn't a movant who would bear the burden of persuasion. Second (and related), if the evaluator is the court's expert, then it would make sense that the court would take as *prima facie* evidence that its own expert did the work it was supposed to do appropriately. Obviously, this is a rebuttable presumption. It is also noteworthy that there does not appear to be a requirement in the rule that the evaluator appear to testify at any hearing, though obviously either party could presumably subpoena the evaluator.

Mr. Berry has comments regarding what happens if competency is raised during trial. I believe that the comment does not show an adequate understanding of how lack of competency might manifest itself at different times. Many people who are not competent are able to hide that fact in shorter interactions, or outside of stressful situations. However, once dealing with a client up close and personal in trial, an attorney could certainly realize issues that may have been there all along but weren't known to the attorney. That said, I think Mr. Berry may be correct in that a mistrial is the appropriate way to deal with competency being raised at that late date. Either that or an evaluation is going to have to be done on an emergency basis, and the judge is going to have to rule on the issue before it is submitted to the jury, and other rules are going to have to be relaxed for who is able to testify at trial as new evidence is now at issue. All of that can happen, but a mistrial likely makes more sense.

(J) – see other comments.

(K) – This answers some of the issues raised above about how fast the deadlines are set, though it doesn't relieve the rule from the necessity of having reasonable,

manageable timelines in the first place. "Good cause" and "exceptional circumstances" are obviously vague – I'm not sure if that is a good or bad thing.

(L) – I agree entirely with Mr. Berry's comment. Dismissal is a sanction against the State when, under these rules, there isn't anything at all for the State to do other than stipulate or oppose getting an evaluation and stipulating to or filing objections to the report. It is highly likely that any delay that could possibly be caused by the State under these circumstances is minimal, but the sanction is against the State. And, as mentioned by Mr. Berry and others, it does nothing to resolve the issue of competency. Once competency is raised, the issue needs to be resolved – even dismissing the competency issue without prejudice doesn't do anything, because the whole issue would need to be relitigated, rather than just picking up where things left off. I don't know what the answer is, but it certainly isn't this.

Committee commentary – This raises an interesting issue. Despite what the commentary says, there is no provision in this rule for what is supposed to happen if a defendant obtains a private evaluation. Under the letter of the rules, it seems like this would just be the good cause to obtain an evaluation from the court's expert. (Perhaps in the forthcoming rules, it addresses that issue, but, of course, we don't know yet. And that seems unlikely, as the forthcoming rules seem to be about what happens after the court has found the defendant incompetent.) But this raises more problems than it solves. First, why would a defendant have to request leave from the court to obtain an evaluation at their own expense? And what happens if they do get such a report? If they don't have to request the court's permission to get a private evaluation, why is an indigent client who can not afford a private evaluation subject to provisions (such as filing of a report finding him competent) when a similarly situated defendant who had a private eval is not subject to those provisions? Does a non-indigent defendant who can not afford to pay for a private evaluation have to pay for this evaluation? If a defendant does have to get permission to get an outside evaluation, does that mean that they are then required to give that evaluation to everyone? I think that there are serious Equal Protection issues at play here which are not remotely addressed by the Committee. It is of note that the *ex parte* system for obtaining DoH evaluations and the current system for what happens after an evaluation is completed are far better at treating defendants equally.

I would also note that the current rule for competency has a long commentary section. Much of that will presumably go to the forthcoming rules regarding what happens after an evaluation. However, some of the information, such as the citation to *Mendoza*, and to *Pate v Robinson*, is awfully relevant, and ought to be included in the commentary. The commentary is wholly deficient in explaining why these changes are being made or the legal basis for such changes or really anything that would be helpful to practitioners.

My previous comments would, where appropriate, apply to the Magistrate and Municipal rules. What about the Metro Court rules?

It seems, under the Magistrate and Municipal rules, and Form 9-404A, as though those defendants would have to have two different judges pass on whether or not good cause exists for an evaluation. It seems that either the Magistrate/Municipal judge's decision should be good enough, or that they shouldn't get to make a decision. There are probably arguments both ways, but it certainly doesn't make sense to have to go through the whole process twice.

Thank you for your attention to my comments on this issue. Sorry to write so long, but these are important issues. I strongly believe that these rules should be repropose when the other rules are ready, presumably with any appropriate changes made, so that everyone can get another pass at them. There is too much at stake to not make the rules as good as possible.

Hon. Jonathan L. Ibarra

APR 06 2016

COMMENTS ON PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE
- Rules 5-602, 5-602.1, 6-507.1 and 8-507.1

Prepared by Law Offices of the Public Defender, Mental Health Division 4-6-16

CAVEAT: Many of the present problems resulting in delay of competency proceedings could be limited were the Court to renumber existing Rule 5-602(C) as Rule 5-602(B), and existing Rule 5-602(B) as 5-602(C). At present, Rule 5-602 (C) requires an evaluation to be ordered for "good cause shown" and upon motion. Present Rule 5-602(B) instructs a court how to proceed if the Court is unable to decide based upon the report "as ordered" (*i.e.* hear the matter taking testimony from the Dr. or let a jury make the decision). This would comport with the N.M. S. Ct. decision in *Noble*, 90 N.M. 360 and clear up the confusion caused by the ruling in *Flores*, 2005 NMCA 135 which deals with requests for an evaluation after a prior determination of competence.

Renumbering these two rules as presently written would alleviate much of the perceived problems and delays in competence proceedings.

GENERAL COMMENTS AS TO THE ENTIRETY OF THE PROPOSED CHANGES.

Presently, the various Judicial Districts rely on independent contractor evaluators for each jurisdiction provided by the Human Services Department through a contract with Optum Health. Although the Judicial Districts have funds available through the Administrative Office of the Courts, neither AOC nor the various Courts in fact pay the evaluators. In order for the Court to choose the evaluators and exercise the controls set forth in the proposed rules, the **AOC will have to take over the expense from HSD** to provide evaluators. At this time, the Court bears none of the costs of these evaluations or the burden of scheduling of the evaluations. This would require an RFP to be sent out by the Court to arrange evaluators for each judicial district as well as assigning clerical personnel to schedule evaluations.

At this time, there are not enough forensic evaluators for the State willing to do evaluations for the money presently offered (approximately \$700.00 per case to

include meetings, testing, scoring and with no extra payment for in-court testimony), which is why many competency proceedings are delayed.

The timelines in the proposed competency rules do not allow for any gathering of any medical records. One of the legitimate challenges to a competency opinion by a forensic evaluator is that too much of the finding is based on “self-reporting” by the defendant. It reasonably requires 60 days to get medical records, after a determination is made that competency “might” be an issue. Evaluators rely on medical records to confirm their test results.

Presently, Rule 5-123(C)(5) requires competency proceedings to be sealed automatically. At each stage of the new proposed proceedings, every hearing and document should be sealed. A competency evaluation ordered by the Court should only be used for the instant proceeding and sealed. Use of the evaluation for any purpose other than competency could violate a client’s 5th Amendment rights against self-incrimination. *Estelle v. Smith*, 451 U.S. 454

Proposed new rule 5-602:

General comment: Note the commentary in present Rule 5-602 that *State v. Silva*, 88 N.M. 631, stands for the proposition that an examination for the purpose of determining whether the defense of insanity is even available, recognizes that an attorney is required to seek an evaluation to determine if this defense is available. This means the Court understood that an attorney may have to raise an issue that turns out not to be meritorious for the purpose of investigation and protection of a client’s constitutional rights.

5-602(A)(1) - Defense of insanity – the requirement of notice within 20 days does not allow a sufficient period of time for a defense counsel to receive medical records and results in many cases where this issue is raised *pro forma* by defense counsel who may mistake a drug induced psychosis for an actual mental illness “of long standing” nature as required by UJI 14-1501 “insanity”. This period of time should be extended to 60 days so that defense counsel would be able to have an opportunity to investigate the defendant’s mental state prior to filing a notice of insanity.

5-602(A)(2) - Notice of incapacity – the same comment. An attorney who might file such a notice could possibly be subject to contempt proceedings for filing a frivolous document. Further many times full discovery has not been received or produced by the state. Making these two sections allow for 60 days would ensure that defense counsel has a good faith basis for filing a notice of incapacity or notice of insanity.

Proposed new rule 5-602.1:

General comments:

The Courts have no staff to schedule competency evaluations. The Courts cannot order a forensic evaluator to appear on certain days and schedule appointments at the Court's discretion. In some jurisdictions, for example the 5th Judicial District, which encompasses several counties and courthouses in multiple locations, at this time, there is no evaluator presently assigned through HSD. The Doctors from other jurisdiction are traveling to the 5th to handle evaluations. If the Courts were allowed to set arbitrary time limits, and demand that evaluators appear with no regard to their own schedules, this would end up in chaos as no doctors would be willing to provide these services to the Court or be able to comply.

The Courts proposed changes also presume that defense counsel are acting in bad faith. Proposed 5-602.1(A) states that motions for evaluations and the raising of competency shall not be used for mitigation of sentences, "or to delay the proceedings". This reflects a presumption that this is the present practice. Proposed 5-602.1(D)(1)(a) and (c) require a statement that the evaluation is not sought for delay. Defense counsel have a constitutional obligation to raise the issue of competency. *Bishop v. United States*, 350 U.S. 961 and *Cooper v. Oklahoma*, 517 U.S. 348 at 354.

This Committee should also take into account that the U.S. S. Ct. has repeatedly stated that "for a defendant, the consequences of an erroneous determination of competence are dire" when compared to the injury to the State "a conclusion

that the defendant is incompetent when he is in fact malingering-is modest".
(*Cooper* 517 U.S. at 364 and 365)

SPECIFIC OBJECTIONS:

5-602.1(A). Should read "This rule is intended to provide a timely, efficient and accurate procedure for resolving whether a defendant is competent to stand trial." The rest of the paragraph should be struck as redundant or offensive. Sanity and specific intent are addressed in the prior rule. The suggestion that counsel are not acting in good faith is offensive.

5-602.1(B)(1) should read..."whether the defendant understands the nature and significance of the criminal proceedings, has a **RATIONAL AND** factual understanding of the criminal charges, and is able to assist his attorney in his defense." (To comply with relevant case law *Rotherham*, 122 N.M. 246.)

5-602.1(B)(2) – this rule presumes that the Court has on-staff or on-call doctors. This is not the case. At this time, the various Courts and District Attorney offices frequently label the Doctors provided by HSD through their contracts as "defense experts". It would be appropriate for them to be deemed as if they are acting on behalf of the Court. The language should read "A competency evaluation is an examination of the defendant by a qualified mental health professional, furnished by the Court, and acting on behalf of the Court and limited to determining whether the defendant is competent to stand trial." Second sentence is ok.

5-602.1(C) – It should be specified that although any party may raise, neither the Court nor the District Attorney's office or any of their representatives should be allowed to have uncounseled contact with a Defendant.

5-602.1(D)(1) – A written motion is not objectionable. However:

(D)(1)(a) – not objectionable

(D)(1)(b) – it is unimaginable how a defense counsel could report on observations, conversations with the Defendant forming the basis of a motion without violating attorney client privileges and destroying an attorney/client relationship. Many of the clients who suffer from mental health issues are very

intelligent. If a defense counsel were to be required to state what their observations were, or the fact that the client's delusional beliefs have no basis in reality, many mentally ill clients would then stop talking to their attorneys. The only remedy for this would be for the Court to allow *ex parte* and *in camera* communications and that proceedings be sealed. Possible alternate wording could read "If filed by defense counsel, the motion shall not contain information which would violate attorney/client privilege".

(D)(1)(c) – this is an insulting comment by the court and should be struck. All attorneys are bound by their ethical duties to not file frivolous motions and file only motions that are supported in good faith. If a court were to reject a motion for a competency evaluation, does that mean that it the motion was done for delay or that there was no good faith basis? Defense counsel have a fine ethical line between disclosure of confidences and representing the best interests of a client and bear a great deal of responsibility in relation to protecting their clients constitutional rights. The U.S. S. Ct's concerns about competency provide that "A client's competence is such a critical phase that the defendant may not waive a judicial determination". *Pate v. Robinson*, 383 U.S. 375.

(D)(1)(d) – this should read that "A statement of whether the motion is opposed based on a good faith belief by the opposing party that the defendant is competent to stand trial" and require that party to specifically state what evidence exists to show that the defendant is competent.

(D)(1)(e) – not objectionable but should be renumbered.

5-602.1(D)(2) – should read "When raised by the Court, the Court shall make a record of the specific facts or observations or statements of the defendant that form the basis for the motion." There should be a provision for the opposing parties to object to the Court's motion.

5-602.1(E) – This paragraph contradicts itself. It provides that the proceedings are NOT stayed, and no time limits are tolled, but it in fact operates to stay the proceedings. This is contrary to LR 2-400(H)(2). It is appropriate to allow for conditions of release hearings and discovery disputes while competency is

pending. However, no evidentiary hearings as proposed prevents hearings such as in *Spriggs-Gore* 133 N.M. 479 which dealt with a suppression of a defendant's statements because she was incompetent to knowingly waive her rights, as well as incompetent to stand trial. This is inconsistent. If a client is being held on an improper charge, subject to a *Foulenfont* motion, they could be held for months while competency is litigated (a competency determination is not final until a final ruling on the issue after the 31-9-1.2 proceedings *Webb* 111 N.M. 78). If a case could be dismissed for a reason not requiring an evidentiary hearing, it should be allowed.

In *Spriggs-Gore*, the State was seeking a long-term 1.5 commitment on the Defendant and the only evidence was the Defendant's statements. If suppression had not been allowed, the Defendant could have received a possible life commitment to NMBHI under 31-9-1.5. A discovery dispute can arise as a result of information provided pursuant to atty/client privilege to a defense counsel by a defendant. How can that defendant knowingly waive his rights or insist upon their rights if they are incompetent? Any proceedings requiring client consultation must be stayed. Legal matters should be allowed to go forward.

5-602.1(F) – Once again, this is an insult to attorneys by implying that motions are brought for harassment or delay. Also, probable cause is not the standard by which competency proceedings are brought. NMSA §31-9-2 states that “**upon motion**” of a defendant the Court “**Shall**” order a mental examination. Present Rule 5-602(C) specifically states that the motion has to be made in “good faith”. (*Najar* 104 N.M. 540 says that a “good faith basis” is needed to order an evaluation.) Under present Rule 5-602(B) it is only if the Court believes that there is a reasonable doubt as to the Defendant's competency, based on the evaluation before it, does the Court proceed with a hearing. (*Noble*, 90 N.M. 360 a Supreme Court decision that still stands).

5-602.1(F)(1) – unopposed motions. It would be appropriate to seek the stipulation of the opposing party. If a party does not stipulate, the burden should be on that party to state reasons why they oppose. As the system now stands, if a Court believes that there is no “good cause”, the Courts regularly do and will

continue to question why the party raising the issue is raising the issue. Many district attorneys regularly point out to the Court that a defense counsel would not raise the issue “if the State offered a misdemeanor” instead of insisting on a felony. Further, district attorneys regular bring to the Court’s attention that a particular Defendant has been through the court system many times and “not once has competency been raised” to argue that the defense is raising the issue as a delaying factor. In every instance where this concern has been raised, the Courts have asked for, and received, further information before finding a good faith basis by counsel to order an examination. .

The Court and all parties must take into account that that “for a defendant to be competent “it is not enough for the district judge to find that the defendant is oriented to time and place and has some recollection of events.” *Dusky v. U.S.*, 362 U.S. 402 (1960). So a court or a party opposing should not be allowed to counter a request for a competency evaluation simply based on a client’s ability to sit quietly. It is a violation of a client’s due process rights to deny an evaluation when requested in good faith. *Montoya* , 2010 NMCA 067 cert. denied.

5-602.1(F)(2) – allows for 48 hours to file a response by an opposing party, and then 5 days for the Court to hold a hearing. If there are witnesses, this is insufficient time to gather and subpoena witnesses. If a defense counsel is attempting to gather medical records to support their good faith assertion, this is insufficient. And will lead to more delays. And require disclosure of attorney/client privileged information.

5-602.1(F)(3) – Sanctions. In the proposed rule, the burden has now become “reasonable grounds” to file a motion. Much less “good faith” or “probable cause”. Presently, any attorney who files any motion for delay or not based in “good faith” is subject to discipline pursuant to present Rule 5-112. Just because a court disagrees with an assertion, is that sanctionable? Will an attorney be required to balance atty/client privilege vs. fighting a contempt citation? If a court files a disciplinary complaint against a defense attorney, can that attorney represent this Defendant in the future? Should that judge recuse themselves because they have found that the defense has engaged in dilatory tactics? If an

attorney cannot obtain medical records in the time frame, can the opposing party say “this is just self-reporting” and then the Court find no basis and hold an attorney in contempt because they did not have any medical records to support their assertion when the Court set a time limit that did not allow for medical records to be received? The Court should be required to enter findings of fact that show sanctionable behavior in order to ensure that an attorney’s due process rights be protected.

NOTE: Proposed Rule 6-507.1(E)(4) allows for review of a denial of a finding of probable cause by the district court from magistrate court. In proposed 5-602.1(F), if a Court refuses to allow a competency evaluation, the only remedy would be a writ to the Appellate Courts. There needs to be a provision for an attorney who legitimately feels that competency is an issue to appeal the denial of an evaluation or to gather information to support the assertion. Once a denial of a competency evaluation is entered, and the case is presumably tried, the denial is appealable only under an abuse of discretion standard where the reviewing Court would defer to the ruling, resulting in the possible conviction of an incompetent defendant and a denial of that defendant’s constitutional right to not be convicted if incompetent.

5-602.1(G) – The Courts physically do not have the ability to comply with this Rule. The evaluator is not on staff at the Courthouse. The Court will need to hire staff or make it a clerk’s responsibility to serve as the forensic evaluator’s secretary. Where shall evaluations be done? Evaluators now do not like seeing clients in the Department of Corrections because of the oppressive nature of the location which can skew the results. Who shall prepare transport orders? Who will gather the records? Can the Court order a hospital to turn over a client’s confidential medical records without their signature on a release over the client’s objection? What if a client refuses to sign a medical record release? Are they then deemed competent? Can an incompetent client be held in contempt? Can a client be forced to participate in the prosecution of himself? If a doctor ethically believes they need more time to prepare an adequate report, can they be sanctioned for taking the time they feel necessary to complete an evaluation despite their not being a party to the action?

5-602.1(G)(1). Once again, this assumes the Court has contracted evaluators in lieu of the HSD provided evaluators. The Court would be required to send out an RFP for forensic evaluators.

5-602.1(G)(2) – this requires the evaluator to present their report within 21 days of the “entry” of the order. It should be within 21 days of the service of the order. And in fact this time limit is impossible. Can a doctor be held in contempt, although not a party to the action? A doctor needs to schedule an evaluation, gather information, administer testing, score said testing, draft a report, all while being ordered by another court to do a different evaluation with 2 days notice. Evaluators should have 45 days to complete their evaluations in order to ensure that the Court has the most accurate information.

5-602.1(H) – The contents of the report should be limited to competent/not competent. These reports cannot be made part of the record proper under Rule 5-123(C)(5) because a good forensic evaluation, based on the best practices that evaluators operate under, will probably contain HIPAA protected information such as prescriptions being taken, and diagnosis supporting their opinions. It would be improper for the report to be made part of the record.

5-602.1(H)(1) - Here, the Court is seeking to override an evaluator’s ethical obligations and forensic opinion. If an evaluator believes that a client can only be competent if certain conditions are met, their professional ethics require that they state that conclusion. Much like with the Americans With Disabilities Act, if a Court cannot comply with the physical needs of a criminal defendant to stand trial, then that client is *de facto* not competent to stand trial. Some clients can be competent and maintain their composure for limited periods of time. If this results in the Court having to slow a trial down so that the Defendant can be able to follow, so be it. All parties to the proceeding, the Court, the prosecution and the defense’s overriding concern should be that the Defendants rights are protected. *Rotherham*, 122 N.M. 246

5-602.1(H)(2) – No objection except that sometimes a client’s version of events is evidence of incompetence and is sometimes therefore relevant to the opinion.

5-602.1(I) – the only objections would relate to the timing of the reports. (I)(1)(b)(i) provides that if all parties are in agreement, and the court concurs, the court “May” vacate any hearing. This should read “Shall”.

5-602.1(K) – There is no indication as to what is good cause or constitutes exceptional circumstances. Gathering medical records? The Dr. was unable to travel? The transport of an in custody client is not effectuated due to circumstances beyond the court’s control?

5-602.1(L)(2) – Much as the experience in 2d Judicial District LR 2-400 rule shows, a dismissal without prejudice is meaningless. Cases are refiled at the State’s convenience. If a client would meet the definition of “dangerousness” as presently defined in NMSA 31-9-1.2(D), the Court would be required to dismiss and release a possibly dangerous incompetent client only to have charges refiled at a later date. And then competency would be raised again (competence is a present day issue), starting the whole process over. A dismissal should be with prejudice.

COMMENTS ON RULE 6-507.1 and 8-507.1– incorporate prior comments as to each section as applicable.

Proposed form 9-404(A) requires a magistrate court to find probable cause exists to transfer the case to district court. On the reading of the proposed Order, a party raising competency would then have to demonstrate probable cause exists, again to the district court, in order to get an evaluation. A finding by a magistrate should initiate a competency evaluation, pursuant to the Rules. This form and rule allow a district court judge to rule that there is no probable cause to order an evaluation and remand the matter back to magistrate court?

6-507.1(E)(4) provides that a party aggrieved by an order finding no probable cause “may petition to the district court for review”. This should be reflected in the district court rules to allow for a challenge to a judge’s determination that there is no probably cause to order an evaluation pursuant to Rule 5-602.1

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Proposed Rule Changes Comment Form.

SUPREME COURT OF NEW MEXICO
FILED

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APR 06 2016



Rule No: 5-602.1

Comments:

1. The proposed rule does not take into consideration the facts present in State v. Serros, 2016-NMSC-008, including specifically, the interplay between the failure to decide a defendant's competency in a timely manner when that failure can be attributed to actions by defense counsel or the defendant himself, through a refusal to cooperate in a competency evaluation. Proposed Rule 5-602.1(L)(2).

Related to this, and in order to assure a complete record for appellate review, the district court should be called upon to make on the record findings that the rule is not being used for the purposes detailed in proposed Rule 5-602.1(A). These findings are included in proposed Form 9-404A (for use with proposed Rule 6-507.1 and Rule 8-507.1), but they are not included in proposed Form 9-514.

2. Proposed Rule 5-602.1(I)(2) should make clear whether the issue of competency is submitted to the jury before or after closing argument.

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SUPREME COURT OF NEW MEXICO
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Comment on Proposal 2016-01

APR 06 2016

Wed, Apr 06, 2016 09:48 AM

From : Kieval, Shira <Shira.Kieval@lupdnm.us>
Subject : Comment on Proposal 2016-01
To : nmsupremecourtclerk@nmcourts.gov



Comment on Proposal 2016-01

As a public defender, I am greatly concerned about the involvement of the public and the prosecution in what should be – at most – an ex parte and sealed preliminary proceeding to determine whether there is good cause to order a competency evaluation. I recognize that the current rules regarding competency proceedings are confusing and sometimes appear to be in conflict. But these amendments are not designed to address those problems; rather they malign criminal defense attorneys, and create a new host of problems by involving the prosecution at a stage where the rest of the country does not involve prosecutors – because prosecutors have no legitimate interest in being involved in the question of whether an evaluation should even be ordered, and they have no legitimate interest in reading an evaluation that finds a defendant competent.

As a public defender, I am required to raise the issue of competency any time I have a reason to believe that my client might not be competent to stand trial. The proposed rule presupposes that my colleagues and I raise competency in order to delay proceedings or somehow game the system. I have seen no evidence of this, nor have I seen other New Mexico court rules that presuppose bad faith on the part of a member of the bar. The idea that our state would adopt a rule presupposing the bad faith of criminal defense attorneys is offensive and troubling.

The proposed rule also attempts to gloss over the conflict between client and counsel that inevitably arises every time a defense attorney raises competency but simply stating that privilege does not apply. Generally speaking, a defense attorney must not harm her client by, for example, disclosing harmful information to the prosecution, endangering the integrity of evidence that might be used at trial, or disclosing statements her client made in confidence – although these statements are often the basis for the defense investigation. See, e.g., Rule 16-106 NMRA (Confidentiality of Information); Comment on ABA Rules of Professional Responsibility, Rule 1.7 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client”); ABA Criminal Justice Standard 4-3.5 (Conflicts of Interest: “defense counsel’s entire loyalty is due the accused”). However, to demonstrate good cause for a competency evaluation, defendant counsel is required to disclose information that, if the client is ultimately found competent, would be detrimental to plea negotiations, defense at trial and/or sentencing. Defense counsel is on the one hand required by her ethical obligations to raise the question of competency, and on the other hand is prohibited by her ethical obligations from disclosing information that could hurt her client. It does not matter that the prosecution is prohibited from introducing the client’s statements at trial, the mere fact that the prosecutor knows the otherwise-privileged information is likely to be detrimental.

Similarly, a defense counsel’s discussion of her client’s mental health problems in front of another person may alienate the client from the defense attorney. This is particularly true if the defense counsel is discussing matters that are covered by the attorney-client privilege, as this could cause a client not to trust his attorney in the future. The added presence of the public and the State at such a hearing can only add to the possible alienation, and risks causing a permanent rift that may ultimately prevent the client from being willing to work with the defense attorney (even if, after the competency evaluation, it is determined that he can assist counsel generally).

It is important to note that there is no First Amendment right to public access to competency motions or proceedings, as the first amendment right to public access only applies to those aspects of the proceeding that were publicly accessible under the common law. See, e.g., *United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013); *In re Boston Herald, Inc.*, 321 F.3d 174, 189 (1st Cir. 2003); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986); *United States v. Tomison*, 969 F. Supp. 587, 595 (E.D. Cal. 1997).

It is also important to note that sealed, ex parte proceedings occur all across the United States, almost universally without question. It was (and in some courtrooms remains) the common practice in the Second Judicial District Court for defense attorneys to request mental examinations ex parte and under seal, and to provide reasons for the request ex parte and under seal. This practice was recognized, and was not challenged or questioned, in the unpublished case *State v. Godkin*, No. 31,638, 2012 WL 2309082, * 1 (N.M. App. May 23, 2012).

In Louisiana, the use of an ex parte procedure to obtain a competency evaluation was challenged by the prosecution, but nonetheless was followed after defense counsel argued “that an open hearing would reveal privileged information”:

Prior to trial, the defense filed a Motion to Proceed Ex Parte on the basis that Ken Dohre (Dohre) believed that the Defendant was unable to assist counsel and feared that an open hearing would reveal privileged information. The trial court granted the motion and set the hearing for March 26, 2001, the first day of trial. The State objected to the ex parte hearing, and further pointed out that the Defendant did not file a motion requesting that the trial court appoint a sanity commission. Nevertheless, the trial court held an ex parte hearing, at which the defense counsel waived the Defendant’s presence.

State v. Pugh, 831 So.2d 341, 347-48 (La. App. 2002).

This same practice has been followed in Kentucky, North Carolina, Georgia, and Ohio state courts, where it is mentioned in appellate decisions, and the procedure has not been challenged or questioned (with one exception that has not been followed, explained below). See generally *Com. v. Wooten*, 269 S.W.3d 857 (Ky. 2008); see also *State v. Grooms*, 353 N.C. 50, 77 (2000); *Coney v. State*, 259 Ga. App. 525, 525 (2003); *State v. Brooks*, 92 Ohio. St. 3d 537, 538 (2001) (per curiam).

This same practice has been followed in the district courts making up the Sixth Circuit, where it is mentioned in an appellate decision, and is not challenged or questioned. See *United States v. Tinklenberg*, 579 F.3d 589, 592 (6th Cir. 2009).

It is also followed in the District of Nevada, *United States v. Christian*, No. 2:09-cr-00303-JCM-LRL, 2010 WL 2326071 (D. Nev. May 3, 2010); the Western District of Virginia, *United States v. Vaughn*, 1:08CR00024, 2009 WL 2762159, * 1 (W.D. Va. Aug. 27, 2009); and the Eastern District of Tennessee, *United States v. Bates*, 1:06-CR-69, 2008 WL 152898 (E.D. Tenn. Jan. 14, 2008). Cf. *United States v. Villaseñor-Botello*, Nos.

CR-09-6044-LRS, CV-11-5155-LRS, 2011 WL 5975272, * 2 (E.D. Wash. Nov. 29, 2011) (discussing ex parte procedure used in proceeding that caused judge to "enter[] an order appointing separate and additional counsel for the Defendant for the limited purpose of ascertaining whether a motion should be filed on behalf of Defendant requesting that his competency to enter a guilty plea be professionally evaluated"); *United States v. Brown*, 1:09-CR-30-GZS, 2009 WL 1639666 (D. N.H. June 2, 2009) (utilizing ex parte procedure per request of standby counsel to have a colloquy with defendant to determine whether or not to order a competency evaluation).

This same practice has been followed in Connecticut in a family court proceeding, where again it is mentioned and is not challenged or questioned. See *In re Arianna M.*, No. T11CP11013896A, 2013 WL 6925936, * 4 (Conn. Super. 2013) (unpublished).

I have found a single, unpublished case, that did not permit such a procedure. *Com. v. Abramson*, No. 2003-CA-000055-MR, 2004 WL 813456 (Ky. App. April 16, 2004). But the State's challenge was based on a question of statutory interpretation, and in any event that case precedes *Wooten* and is not followed by the state Supreme Court in its published opinion. See generally *Wooten*, *supra*, 269 S.W.3d 857.

I do recognize that a defense attorney sometimes raises competency late in a proceeding. But this often happens for legitimate reasons, as we are more likely to notice serious problems as we get close to preparing for trial (or reviewing plea offers) and we are working more closely with the client. While a delay caused by a request for evaluation at this point may implicate interests of the prosecution, who may have objections or suspicions at this point, there is no reason to create a blanket rule that allows prosecutors access to privileged information early in a proceeding.

I also recognize that the courts have dealt with at least one case where a defense attorney raised competency on the eve of trial after prior evaluations had determined that the client was competent. Again, it would be easy to create a rule where the defense attorney is required to tell the court whether a prior evaluation has occurred in that case, and if so the court could involve the prosecutor in determining whether there is really good cause to delay proceedings.

I have other concerns about this proposal, but my major concern is about the impossible choice I will have -- do I raise competency, as I am required to do, and also violate my duty to my client, as I am prohibited from doing?

There is no compelling reason to put me and other defense attorneys in that situation. I believe that this proposal should be rejected in its entirety, and the Rule should be rewritten with the goal of fixing the textual problems in the current rule, not creating an adversarial proceeding at a stage of the competency process where the rest of the country has recognized that an adversarial proceeding is inappropriate.

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Proposed Rule Changes Comment Form.

SUPREME COURT OF NEW MEXICO
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APR 06 2016



Rule No: 5-602.1

Comments:

The rule as a whole does not seem to appreciate the fundamental nature of competency: Trying an incompetent defendant violates due process. *Pate v. Robinson*, 383 U.S. 375 (1966); *State v. Rotherham*, 1996-NMSC-048, 122 N.M. 246, 923 P.2d 1131. The issue of competence is so critical to the fairness of the trial itself, the issue cannot be waived. *Robinson*, 383 U.S. at 385. This rule seems to be an overreaction to the *State v. Serros*, 2016-NMSC-008, decision where an attorney filed a requested a stay to determine the defendant's competency and then did nothing. Overall, proposed Rule 5-602.1 presumes that incompetency is easily determined by observations from the trial court and attorneys. This is incorrect, especially in regards to competency concerns due to intellectual impairment (what the mental health and competency code refers to as mental retardation). As far back as 1985, studies revealed that most lawyers do not recognize mental retardation in their clients. (See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L.REV. 414, 493 (1985) "[t]he limited ability of most lawyers to recognize mental retardation in their clients has been well documented.") The Texas Court of Criminal Appeals explained, "There is a reason that mental-health experts are important to this process; mildly mentally retarded individuals often learn to disguise their disabilities in a so-called 'cloak of competence.'" *Ex parte Van Alstyne*, 239 S.W.3d 815, 822-823 (Tex.Crim.App. 2007).

Rule 5-602.1 (B):

The legal definition the rule articulates for competency is incorrect; it omits the need for rational understanding by the defendant. *Dusky v. United States*, 362 U.S. 402 (1960) explained the test for competency "must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him." In other words, the defendant must demonstrate a factual understanding of the proceedings, a rational understanding of the proceedings, an ability to assist the defense including the ability to consult with the lawyer with a reasonable degree of rational understanding.

Rule 5-602.1(D)(b):

The requirement of “specific facts, observations, and conversations with defendant” that make defense counsel suspect the defendant is not competent cannot be met without invading attorney-client privilege.

5-602(F)(1):

The requirement that the motion be supported by probable cause seems to misapprehend the burden of proof for a finding of incompetency. To guard the defendant’s due process rights the only acceptable burden of proof to prove a client is incompetent is preponderance of the evidence *Cooper v. Oklahoma*, 517 U.S. 348 (1996). The United States Supreme Court has held that only a reasonable or bona fide doubt about defendant’s competency requires a determination of competency.

Robinson, 383 U.S. at 385

Further, the United States Supreme Court has explained that while a defendant’s “demeanor at trial might be relevant to the ultimate decision as to his sanity, it cannot be relied upon to dispense with a hearing on that very issue.” *Robinson*, 383 U.S. at 386. Lastly, the trial court must provide the defendant with a reasonable opportunity to demonstrate his lack of competence. *Medina v. California*, 505 U.S. 437 (1992). Requiring a standard of probable cause for a motion undercuts both the ultimate standard of proof and the reasonable opportunity to demonstrate incompetence.

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COMMENTS ON PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE - Rules 5-602, 5-602.1, 6-507.1 and 8-507.1

From : Maestas, Raymond <raymond.maestas@lupdnm.us>

Wed, Apr 06, 2016 12:04 PM

Subject : COMMENTS ON PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE - Rules 5-602, 5-602.1, 6-507.1 and 8-507.1**To :** nmsupremecourtclerk@nmcourts.gov

The disclosure requirement in subsection H of 5-602 (requiring disclosure of report of a client found "competent" to the State and Court) really treats rich clients differently than poor clients.

A rich client can pay for 10, 20, 30 evaluations and none of them are required to be disclosed to the court/state.

Whereas, a poor client who can't afford a single evaluation is forced to disclose the report of that single evaluation to the state regardless whether its ever used in court.

The disclosure of the report should be limited to evaluations which the defense "intends to introduce into evidence."

Regards,

Raymond Maestas

Albuquerque – public defender

SUPREME COURT OF NEW MEXICO
FILED

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