

PROPOSED REVISIONS TO THE CHILDREN'S COURT RULES AND FORMS

The Children's Court Rules Committee has recommended proposed new Rule 10-340 NMRA and proposed new Form 10-571 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed 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:

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

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.

[NEW MATERIAL]

10-340. Testimony of a child in an abuse or neglect proceeding.

A. **Request to permit testimony by alternative method.** The court may permit a child witness to testify by an alternative method upon request of a party, a child witness, or an individual determined by the court to have a sufficient connection to the child to act on behalf of the child. A hearing on the request must be concluded on the record after reasonable notice to all parties, any non-party requestor, and any other person the court specifies. The child's presence is not required at the hearing unless ordered by the court. In conducting the hearing, the court is not bound by the Rules of Evidence except the rules of privilege.

B. **Alternative method.** The court may allow a child witness to testify by an alternative method if the court finds by a preponderance of the evidence that allowing the child to testify by an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the court. In making this finding, the court shall consider the following:

- (1) the nature of the hearing;
- (2) the age and maturity of the child;
- (3) the relationship of the child to the parties in the proceeding;
- (4) the nature and degree of mental or emotional harm that the child may suffer in testifying; and
- (5) any other relevant factor.

C. **Further considerations.** If the court finds that the requirements of Paragraph B of this rule have been met, the court shall consider

- (1) alternative methods reasonably available for protecting the interests of or reducing mental or emotional harm to the child;
- (2) available means for protecting the interests of or reducing mental or emotional harm to the child without resort to an alternative method;

- (3) the nature of the case;
- (4) the relative rights of the parties;
- (5) the importance of the proposed testimony of the child;
- (6) the nature and degree of mental or emotional harm that the child may suffer if an alternative method is not used; and
- (7) any other relevant factor.

D. Ruling regarding testimony by alternative method. The alternative method ordered by the court shall be no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order. An order allowing a child witness to testify by an alternative method shall set forth the court’s findings and conclusions that support allowing the child to testify by an alternative method, including findings that demonstrate that an alternative method is necessary to serve the best interests of the child or enable the child to communicate with the court and that the alternative method allowed by the court protects the rights of the parties in light of the nature of the proceedings. An order allowing a child witness to testify by an alternative method also shall

- (1) state the method by which the child is to testify;
- (2) list any individual or category of individuals allowed to be in, or required to be excluded from, the presence of the child during the testimony;
- (3) state any special conditions necessary to facilitate a party’s right to examine or cross-examine the child;
- (4) state any condition or limitation upon the participation of individuals present during the testimony of the child; and
- (5) state any other condition necessary for taking or presenting the testimony.

[Approved by Supreme Court Order No. _____, effective for cases pending or filed on or after _____.]

Committee Commentary. — This rule is intended to supplement the Uniform Child Witness Protective Measures Act, NMSA 1978, §§ 38-6A-1 to -9. The rule provides standards for requesting and permitting an alternative method for a child to testify in an abuse and neglect proceeding. In considering the request, the court must balance the needs of the child (“to serve the best interests of the child or enable the child to communicate with the court”) with the due process rights of the parties (“no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order”). *See also In re Pamela A.G.*, 2006-NMSC-018, ¶¶ 18, 139 N.M. 459, 134 P.3d 746 (“[T]rial judges should explore alternatives for the questioning of a child in order to help the fact-finder test the reliability of the child’s statements while also protecting the child’s emotional state.”).

[Approved by Supreme Court Order No. _____, effective for cases filed and pending on or after _____.]

[NEW MATERIAL]

10-571. Motion to permit testimony by alternative method.

STATE OF NEW MEXICO
 COUNTY OF _____
 _____ JUDICIAL DISTRICT
 IN THE CHILDREN’S COURT

STATE OF NEW MEXICO *ex rel.*

CHILDREN, YOUTH AND FAMILIES DEPARTMENT

No. _____

In the Matter of

_____, (a) Child(ren), and Concerning
_____, Respondent(s).

MOTION TO PERMIT TESTIMONY BY ALTERNATIVE METHOD

COMES NOW _____,¹ Movant, and requests leave for _____, Child, to testify before the Court by alternative method. In support of this Motion, Movant states the following:

1. Movant's relationship to Child is as follows: _____
_____.
2. Child is expected to testify at the _____ (type of hearing) set before the Court on _____ (date) at _____ (time).
3. Movant seeks an order of the Court permitting Child to testify via the following alternative method²: _____.
4. Permitting Child to testify by alternative method is necessary to serve Child's best interests or to enable Child to communicate with the Court.³
5. The reasons supporting testimony by alternative method are as follows: (*select and explain your reasoning for all that apply*)
 The nature of the hearing: _____
_____.
 The age and maturity of Child: _____
_____.
 The relationship of Child to the parties in the proceeding: _____
_____.
 the nature and degree of mental or emotional harm that Child may suffer in testifying: _____
_____.
 other: _____
_____.
6. Other alternative methods reasonably available for protecting the interests of or reducing mental or emotional harm to Child include: _____

Movant, however, requests the particular method described in this Motion because _____
_____.

7. Other means for protecting the interests of or reducing mental or emotional harm to Child without resort to an alternative method include: _____
_____.

Movant, however, requests the particular method described in this Motion because _____
_____.

8. This is an abuse and neglect proceeding where Child will need to testify about difficult and sensitive subject matter, including: _____
_____.

9. Child's proposed testimony is necessary to enable the Court to make a fully informed ruling in this proceeding.

10. The nature and degree of mental or emotional harm that Child may suffer if an alternative method is not used are as follows: _____
_____.

11. Other reasons supporting testimony by alternative method include⁴: _____
_____.

12. Child's best interests and the Court's interest in enabling Child to communicate with the Court outweigh the other parties' interests implicated by Child's testimony by alternative method.⁵

13. Movant requests the following additional measures to protect Child's best interests and to enable Child to communicate with the Court: _____
_____.

14. The additional measures requested in Paragraph 13 are necessary because _____
_____.

15. Counsel for the other parties [concur] [do not concur] in the relief requested in this Motion.

WHEREFORE, Movant respectfully requests the Court to enter an order as follows:

1. Finding and concluding that the alternative method of testimony requested in this Motion is necessary to serve Child's best interests or enable Child to communicate with the Court;

2. Permitting Child to testify by alternative method at the _____ (type of hearing) set in this matter on _____ (date);

3. Setting forth the following additional measures to protect Child's best interests and to enable Child to communicate with the Court: _____
_____ ; and

4. Awarding any other relief as the Court sees fit and just.

Respectfully Submitted:

By : _____
Movant's attorney

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing was mailed or faxed to all parties of record on this _____ (date).

USE NOTES

1. This motion may be brought by a party, a child witness, or an individual determined by the court to have a sufficient connection to the child to act on behalf of the child. *See* Rule 10-340(A) NMRA.

2. Alternative methods of testimony may include testimony by closed circuit television, deposition, closed forum, or any other method that would serve the best interests of the child or enable the child to communicate with the court.

3. Rule 10-340 NMRA and the Uniform Child Witness Protective Measures Act, NMSA 1978, § 38-6A-1 to -9, permit courts to allow testimony from children by alternative methods if allowing testimony by the alternative method is necessary to serve the best interests of the child or allow the child to communicate with the finder of fact. *See* Rule 10-340(B); NMSA 1978 § 38-6A-5(B). Additionally, Rule 11-611(A)(3) NMRA allows the court to control the mode and order of interrogation and presentation of testimony of a witness.

4. An alternative method of testimony may be preferable because it would enable the child to more fully express the child's position or because the child has a disability or a therapeutic need that supports an alternative method of testimony.

5. For a discussion of the rights implicated by permitting a child to testify by alternative method in an abuse and neglect proceeding, see *In re Pamela A.G.*, 2006-NMSC-019, ¶ 12, 139 N.M. 459, 463, 134 P.3d 746, 750.

6. Additional safeguards may include requiring certain individuals or categories of individuals to be allowed in or excluded from the child's presence during some or all of the child's testimony, imposing special conditions on the other parties' ability to examine or cross-examine the

child, or placing conditions or limitations upon the participation of individuals present during the child's testimony. *See* Rule 10-340(D) NMRA.

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

Proposed Rule Changes Comment Form.

SUPREME COURT OF NEW MEXICO
FILED

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MAR 31 2016



Rule No: Proposed 2016-31; 10-340

Comments:

I have mixed thoughts on this proposed rule. I have represented CYFD as a children's court attorney, but since 2009 have represented respondents.

The proposed rule mirrors existing practice. But, I oppose the proposed rule to the extent it would apply to cases of alleged sexual abuse, especially as it pertains to children 10-18 years of age, in which case I now believe a child accuser should be compelled to testify, with appropriate safeguards. This applies most particularly to a child's hearsay statements.

In this regard, I submit that clarification is needed for some attorneys and judges on Rules 11-801 and 806 as to a child's inconsistent hearsay statements about alleged acts, as they apply to a party, including a child defined as a party in neglect and abuse proceedings under Rule 10-121.B.(3). The denial of impeachment by proffering inconsistent "hearsay" statements of a child party may be an issue on appeal from a recent contested adjudication.