

**PROPOSED REVISIONS TO THE RULES OF CIVIL PROCEDURE
FOR THE DISTRICT COURTS
PROPOSAL 2020-009**

March 3, 2020

The Rules of Civil Procedure for State Courts Committee has recommended amendments to the committee commentary for Rule 1-030 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> 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 2, 2020, 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.

1-030. Depositions upon oral examination.

A. **When depositions may be taken.** After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. The parties shall confer in good faith regarding the date, time and place of each deposition to be taken. A party serving a notice of deposition shall make a good faith effort to avoid scheduling conflicts of parties, witnesses and counsel. Leave of court, granted with or without notice, shall be obtained only if the plaintiff seeks to take a deposition prior to the expiration of thirty (30) days after service of the summons and complaint upon any defendant or service made under Paragraph F of Rule 1-004 NMRA, except that leave is not required

(1) if a defendant has served a notice of taking deposition or otherwise sought discovery; or

(2) if the notice

(a) states that the person to be examined will be unavailable for examination or is about to go out of the state and will be unavailable for examination in the state unless the person's deposition is taken before expiration of the thirty (30) day period; and

(b) sets forth facts to support the statement.

If a party shows that, when the party was served with notice under this subparagraph, the party was unable through the exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party.

The attendance of witnesses may be compelled by subpoena as provided in Rule 1-045 NMRA. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

B. Notice of examination; general requirements; special notice; nonstenographic recording; production of documents and things; deposition of organization; deposition by telephone.

(1) A party desiring to take the deposition of any person upon oral examination shall give at least ten (10) days notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by nonstenographic means.

(3) With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

(4) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 1-028 NMRA and shall begin with a statement on the record by the officer that includes

- (a) the officer's name and business address;
- (b) the date, time and place of the deposition;
- (c) the name of the deponent;
- (d) the administration of the oath or affirmation to the deponent; and
- (e) an identification of all persons present. If the deposition is recorded

other than stenographically, the officer shall repeat items (a) through (c) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 1-034 NMRA for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 1-034 NMRA shall apply to the request.

(6) A party may, in the party's notice and in a subpoena, name as the deponent a public or private corporation or a partnership or association or governmental agency and describe

with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph does not preclude taking a deposition by any other procedure authorized in these rules.

(7) A deposition may be taken by telephone or other remote electronic means.

C. Examination and cross-examination; record of examination; oath; objections.

Examination and cross-examination of witnesses may proceed as permitted at the trial under the New Mexico Rules of Evidence, except Rules 11-103 and 11-615 NMRA. The examination shall commence at the time and place specified in the notice or within thirty (30) minutes after the time specified. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. If the deposition is to be stenographically recorded, the court reporter shall administer the oath or affirmation to the deponent. The testimony shall be taken stenographically or recorded by any other method authorized by Subparagraph (2) of Paragraph B of this rule. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings, shall be noted by the officer upon the record of the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. Any party who shows a document to the witness during examination shall provide a copy to all other parties before the deposition begins or when the document is shown to the witness. The officer may go off the record only with the agreement of all parties, which shall not be unreasonably withheld. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

D. Objections; duration; motion to terminate or limit examination.

(1) Any objection during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. Objections to form or foundation may be made only by stating "objection – form", or "objection – foundation". No specification of the defect in the form or foundation of the question or the answer shall be stated unless requested by the party propounding the question. Argumentative interruptions shall not be permitted. When a question is pending, or a document has been presented to the deponent, no one may interrupt the deposition until the answer is given, except when necessary to preserve a privilege, to enforce a limitation directed by the court or to present a motion under Subparagraph (2) of this paragraph.

(2) Unless otherwise authorized by the court or stipulated by the parties, a deposition of a person other than an expert witness is limited to one day and lasting no more than seven (7) hours on the record. The court must allow additional time consistent with Subparagraph (2) of Paragraph B of Rule 1-026 NMRA if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(3) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as

unreasonably to annoy, embarrass or oppress the deponent or party, the court in which the action is pending or the court in the county where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Paragraph C of Rule 1-026 NMRA. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of this rule apply to depositions being taken for use outside New Mexico. The provisions of Subparagraph (4) of Paragraph A of Rule 1-037 NMRA apply to the award of expenses incurred in relation to the motion.

E. **Review by witness; changes; signing.** If requested by the deponent or a party before completion of the deposition, the deponent shall have thirty (30) days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Subparagraph (1) of Paragraph F of this rule whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

F. **Certification and delivery by officer; exhibits; copies.**

(1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court, the officer shall securely seal the deposition and exhibits in an envelope or package with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly send it to the attorney who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering or deterioration. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and attached to and returned with the deposition. Documents and things produced for inspection may be inspected and copied by any party, except that if the person producing the materials desires to retain them the person may

(a) offer copies to be marked for identification and attached to the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals; or

(b) offer the originals to be marked for identification, after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if attached to the deposition. Any party may move for an order that the original be attached to the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(3) Any party filing a deposition shall give prompt notice of its filing to all other parties.

G. **Failure to attend or to serve subpoena; expenses; notice of non-appearance.**

(1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the

court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because that party expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

(3) If a motion for protective order and notice of non-appearance are filed and actual notice of the non-appearance is given to all parties at least three (3) days before the scheduled deposition, then the failure of a deponent or managing agent or a party to appear at the time and place designated shall not be considered a willful failure to appear within the meaning of Paragraph D of Rule 1-037 NMRA or contemptible conduct under Paragraph E of Rule 1-045 NMRA, unless the court finds that the motion is frivolous or for dilatory purposes.

H. **Final disposition of depositions.** After a judgment in a civil action becomes final, or the case is otherwise finally closed, the original deposition may be destroyed.

[As amended, effective October 15, 1986; August 1, 1988; January 1, 1999; May 1, 2002; November 1, 2002; February 16, 2004; as amended by Supreme Court Order 06-8300-07, effective May 1, 2006; by Supreme Court Order No. 11-8300-052, effective for cases filed or pending on or after February 17, 2012.]

Committee commentary. — Paragraph E requires a deponent to sign a statement reciting any changes that the deponent makes to a deposition transcript and the reasons for those changes. The signed statement is then attached to the deposition transcript by the court reporter. Electronic transmission of documents is increasingly common, which raises the question of whether a facsimile of an original signed statement from a deponent is sufficient to meet the requirements of Paragraph E. The Committee believes that any electronically transmitted form of an original signed statement of a deponent meets the Rule's requirements. If a dispute arises regarding the authenticity of a signature to a signed statement, the burden of establishing the signature's authenticity is on the proponent of the electronically transmitted form of the original signed statement. *Cf., e.g.,* Rule 11-1003 NMRA ("A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity . . .").

Rule 1-030(C) NMRA provides that examination and cross-examination of witnesses may proceed as permitted at trial under the New Mexico Rules of Evidence, "except Rules 11-103 and 11-615 NMRA." The reference to Rule 11-615 NMRA addresses whether other potential deponents can attend a deposition. Rule 1-030(C) NMRA provides that other witnesses are not automatically excluded from a deposition simply by the request of a party. Exclusion, however, can be ordered under Rule 1-026(C)(6) NMRA when appropriate; and, if exclusion is ordered, consideration should be given as to whether the excluded witnesses likewise should be precluded from reading, or being otherwise informed about, the testimony given in the earlier depositions. Rule 1-030(C) NMRA addresses only the matter of attendance by potential deponents, and does not attempt to resolve issues concerning attendance by others, such as members of the public or press.

[Adopted by Supreme Court Order No. 14-8300-010, effective for all cases filed or pending on or after December 31, 2014; as amended by Supreme Court Order No. _____, effective _____.]



New Mexico
Courts

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Rule Proposal Comment Form

1 message

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Tue, Mar 3, 2020 at 6:04 PM

To: supjdm@nmcourts.gov, suptls@nmcourts.gov, supjls@nmcourts.gov

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Proposal Number
Proposal 2020-009 - Depositions upon oral examination [Rule 1-030 NMRA]

Comment

The commentary is unclear. If parties can now request the Court Order that witnesses be excluded from a deposition, then it would be a good idea to require a listing of all persons who will attend a deposition on the notice to take deposition. That will provide time to request the Court exclude witnesses. Currently, there is no notice and other witnesses show up at depositions. This could then lead to the cancellation of many depositions if the other party has to wait for the deposition to take place to request the Court's permission to exclude the witness.

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