

BAR BULLETIN

Official Publication of the STATE BAR of NEW MEXICO

NOVEMBER 2, 2007 • VOLUME 46, SPECIAL ISSUE

SPECIAL ISSUE

PROPOSED REVISIONS TO THE CHILDREN'S COURT RULES



"Stagecoach to Mesilla with Organ Mountains" by L.B. Porter (see page 3)

Weems Gallery, Albuquerque



5th Annual Children's Law Section Art Contest

All members of the State Bar are invited to a reception honoring the winners of the "What other people think of me/What I think of myself" art contest.

Masks decorated by children in D-homes and drug court will be on display.

3 to 5 p.m., Friday, Nov. 9

Conference rooms A and B, Juvenile Justice Center, Albuquerque

Refreshments will be served!

Special thanks to the following donors whose contributions made the contest possible.

Susan Alkema
Abyad Temple Ballut
Kari Brandenburg
Elizabeth Collard
Jean Conner
James Cook
Sara Crecca
Fine Law Firm
Tim and Judy Flynn-O'Brien
Fry Law Firm
Jewish Community Center

Whitney Johnson
Jeffrey Kauffman
Peter Klages
Joan Kozon
Elizabeth Mason
Frederick Mowrer
Susan Page
Mary Ann Shaening
Johnna Studebaker
Kelly Waterfall
Dathan Weems



STATE BAR
of **NEW MEXICO**



Contributions and announcements to the *Bar Bulletin* are welcome but the right is reserved to select material to be published. Unless otherwise specified, publication of any announcement or statement is not deemed to be an endorsement by the State Bar of New Mexico of the views expressed therein, nor shall publication of any advertisement be considered an endorsement by the State Bar of the product or service involved. Editorial policy is available upon request.

Board of Commissioners—Officers

Dennis E. Jontz, President
Craig A. Orraj, President-Elect
Henry A. Alaniz, Vice President
Stephen S. Shanor, Secretary-Treasurer
Virginia R. Dugan, Immediate-Past President

Board of Editors

David M. Berlin, Esq.
Janet Blair
Paul A. Bleicher, Esq.
Joel Carson, Esq.
Martin R. Esquivel, Esq.
Mark Glenn, Esq.
Kathryn Morrow, Esq.
Steve Sanders, Esq.
Stacey E. Scherer, Esq.
Elizabeth Staley, Esq.

Executive Director – Joe Conte

Editor – Dorma Seago
(505) 797-6030 • E-mail: notices@nmbar.org

Graphic Designer – Julie Schwartz

E-mail: jschwartz@nmbar.org

Account Executive – Marcia C. Ulibarri,
(505) 797-6058 • E-mail: ads@nmbar.org

Pressman – Brian Sanchez

Print Shop Assistant – Richard Montoya

Mail Handler – Chris Knowles

Cite officially as *Bar Bulletin*

(ISSN 1062-6611).
November 2, 2007, Vol. 46, Special Issue.
Subscription price \$80 per year.
Subscriptions are nonrefundable
once purchased.
Published weekly by the State Bar,
5121 Masthead NE, Albuquerque, NM 87109
(505) 797-6000 • (800) 876-6227
Fax: (505) 828-3765
E-mail: bb@nmbar.org • www.nmbar.org

Periodicals Postage Paid At: Albuquerque,
NM 87101 • ©2007, State Bar of New Mexico
• Postmaster send address changes to: Gen-
eral Administrator • Bar Bulletin • PO Box 92860,
Albuquerque, NM 87199-2860 or address@
nmbar.org.

PROPOSED REVISIONS TO THE CHILDREN'S COURT RULES

Within this special issue of the *Bar Bulletin*, the Supreme Court's Children's Court Rules Committee is proposing comprehensive amendments to the Children's Court Rules. The committee's extensive proposed amendments could not be published in a single, regular edition of the *Bar Bulletin*. In an effort to allow the bench and bar to review the totality of the proposal, the entire proposal is published in this special edition. To assist the reader in reviewing the proposed changes, the Committee is providing both a table of contents for the new rules and a table of corresponding rules. The latter contains a list of the existing rules and indicates where to find them in the proposed rules.

As early as the year 2000, the Children's Court Rules Committee began an ambitious effort to recompile and update the rules. The committee sought to reorganize the rules, fill in some gaps and update a number of the provisions. Most recently, the committee has been drafting revisions to the rules to reflect the changes to the Children's Code that were enacted in 2005. The Committee has also been reviewing the *Committee Commentary*, which is outdated and refers to rules and cites to statutes that no longer exist.

Over the past six years, it has proved almost impossible to ready the entire set of Children's Court rules and forms for consideration by the Court at one time. Hence, the Committee decided to propose changes to Articles 1, 2 and 3 while it continued to work on the forms. Furthermore, it has not tried to rewrite every rule. There are rules that would benefit from revision but that are being proposed just for renumbering at this time. The Committee determined that if it postponed the recompilation to rewrite every rule, the undertaking would never end. The Committee also knows that it will benefit greatly from hearing the comments and suggestions of the bench and bar. Accordingly, to comment on the proposed amendments set forth below before they are submitted to the Court for final consideration, send written comments to:

Kathleen J. Gibson, Clerk
New Mexico Supreme Court
PO Box 848
Santa Fe, New Mexico 87504-0848

Comments must be received by the clerk on or before November 26, 2007, to be considered by the Court.

Cover Artist: L.B. Porter is a noted painter, educator, writer, illustrator, lecturer, muralist, photographer and art juror. An ultra-realist, he works with acrylics, and his subject matter is primarily the land and people of the Southwest. In 1964, he pioneered a new concept by introducing nudes as subjects in contemporary Southwestern scenes and landscapes, which won him significant awards and recognition. His unique style was developed by his use of strong contrasts between light and shadow, or chiaroscuro.

RULES/ORDERS

From the New Mexico Supreme Court

www.supremecourt.nm.org

PROPOSED REVISIONS TO THE CHILDREN'S COURT RULES

PROPOSED TABLE OF CONTENTS OF ARTICLE 1 RULES

ARTICLE 1. GENERAL PROVISIONS; ALL PROCEEDINGS

Scope of Rules; Commencement; Service of Process, Pleadings, Motions and Notices of Hearing

- 10-101. Scope; definitions; title.
- 10-102. Commencement of action.
- 10-103. Process.
- 10-104. Service and filing of pleadings and other papers; notice of hearings.
- 10-104.1 Notice to foster parents, pre-adoptive parents and relative care givers by department.
- 10-105. Service and filing of pleadings and other papers by facsimile.
- 10-106. Electronic service and filing of pleadings and other papers.
- 10-107. Time.

Pleadings and Motions

- 10-111. Motions; how and when presented.
- 10-112. Pleadings and papers; captions.
- 10-113. Form of papers.
- 10-114. Form of pleadings.
- 10-115. Signing of pleadings, motions and other papers; sanctions.

Parties

- 10-121. Parties.
- 10-122. Intervention.

Discovery and Disclosure

- 10-131. Persons before whom depositions may be taken.
- 10-132. Stipulations regarding discovery procedure.
- 10-133. Depositions; statements.
- 10-134. Audiotaped and videotaped depositions.
- 10-135. Use of depositions in court proceedings.
- 10-136. Depositions; failure to make discovery; sanctions.
- 10-137. Continuing duty to disclose; failure to comply.
- 10-138. Depositions; statements; protective orders.

Hearings, Evidence, etc.

- 10-141. Rules of evidence.
- 10-142. Judicial notice and determination of foreign law.
- 10-143. Subpoena.
- 10-144. Harmless error; failure to comply with time limits.
- 10-146. Dismissal of actions.
- 10-147. New adjudicatory hearing; relief from judgment or order.

Judgment and Appeal

- 10-151. Stay pending appeal; application in the Court of Appeals.
- 10-152. Judgments or orders on mandate.

Case Management

- 10-161. Designation of children's court judge.
- 10-162. Peremptory challenge to a children's court judge; recusal; procedure for exercising; disability.

- 10-163. Special masters.
- 10-164. Court appointed special advocates.
- 10-165. Attorney appearances; withdrawal and substitution of counsel; signing of pleadings.

PROPOSED TABLE OF CONTENTS OF ARTICLE 2 RULES

ARTICLE 2. DELINQUENCY PROCEEDINGS

General Provisions

- 10-201. Delinquency proceedings; scope.

Initiation of Proceedings

- 10-211. Preliminary inquiry; filing of petition.
- 10-212. Joinder of offenses and parties; severance.
- 10-213. Youthful offender proceedings; filing of notice.
- 10-214. General rules of pleading.
- 10-215. Warrants.

Pretrial Proceedings

- 10-221. Placing child in detention.
- 10-222. Probable cause determination.
- 10-223. Appointment of counsel; payment of fees.
- 10-224. First appearance; explanation of rights.
- 10-225. Detention hearing; conditions of release.
- 10-226. Plea agreements.
- 10-227. Admissions; no contest pleas.
- 10-228. Consent decrees; extension, revocation or termination of consent decree.

Discovery and Disclosure

- 10-231. Disclosure by the state.
- 10-232. Disclosure by respondent child.
- 10-233. Notice of alibi; entrapment defense.
- 10-234. Videotaped depositions; testimony of certain minors who are victims of sexual offenses.

Adjudication and Disposition

- 10-241. Insanity at time of commission of delinquent act; notice of incapacity to form specific intent.
- 10-242. Determination of competency to stand trial.
- 10-243. Adjudicatory hearing; time limits.
- 10-244. Adjudicatory hearing; general procedure.
- 10-245. Jury trial.
- 10-246. Dispositional proceedings.

Judgment and Appeal

- 10-251. Judgments and appeals.
- 10-252. Modification of judgment.

Special Proceedings

- 10-261. Probation.
- 10-262. Automatic sealing of records.

PROPOSED TABLE OF CONTENTS OF ARTICLE 3 RULES

ARTICLE 3. ABUSE AND NEGLECT PROCEEDINGS AND FAMILIES IN NEED OF COURT ORDERED SERVICES

General Provisions

- 10-301. Abuse and neglect proceedings; families in need of court ordered services; scope.

Commencement of Proceedings

- 10-311. Ex parte custody orders.
- 10-312. Filing of petition; amendment of petition; appointment of guardian ad litem or attorney.
- 10-313. Appointment of attorney for child turning fourteen.
- 10-314. Explanation of respondent’s rights at first appearance; appointed counsel.
- 10-315. Custody hearing; abuse and neglect.

Pleadings and Motions

- 10-321. Joinder of parties; severance.
- 10-322. Defenses and objections; when and how presented; by pleading or motion.

Discovery and Disclosure

- 10-331. Disclosure by the department.
- 10-332. Disclosure of evidence and witnesses by the respondent.
- 10-333. Disclosure of evidence and witnesses by the child’s guardian ad litem or attorney.
- 10-334. Court-ordered discovery.
- 10-335. Court ordered diagnostic examinations and evaluations.

Hearings

- 10-341. Witness immunity.
- 10-342. Admissions and consent decrees.
- 10-343. Adjudicatory hearing; time limits; continuances.
- 10-344. Dispositional hearings; time limits.
- 10-345. Permanency and permanency review hearings.
- 10-346. Judicial review.
- 10-347. Termination of parental rights; form of motion.

Judgment and Appeal

- 10-351. Findings of fact and conclusions of law.
- 10-352. Dismissal of actions.
- 10-353. Judgments and appeal.

Table of Corresponding Rules

This table reflects the existing rule and the rule as renumbered.

<u>Existing Rule</u>	<u>Proposed Rule</u>
Article 1	
10-101	10-101
10-103	Withdrawn, <i>see</i> 10-114, 10-115 and 10-322
10-103.1	10-111
10-103.2	10-146, 10-352
10-103.3	10-113
10-104	10-103
10-104.1	Withdrawn, <i>see</i> 10-103
10-105	10-104
10-105.1	10-105
10-105.3	10-104.1
10-105.2	10-106
10-106	10-107
10-107	10-112
10-108	10-121, 10-122
10-109	10-143
10-110	Withdrawn, recompiled as 10-341
10-111	10-163
10-112	10-162
10-113	10-165
10-115	10-141
10-117	10-144

- 10-118
- 10-119
- 10-120
- 10-121
- 10-131
- 10-132
- 10-133
- 10-134
- 10-135
- 10-136
- 10-137
- 10-138

Article 2

- 10-204
- 10-204.1
- 10-205
- 10-206
- 10-207
- 10-208
- 10-208A
- 10-208B
- 10-209
- 10-211
- 10-213
- 10-214
- 10-217
- 10-219
- 10-220
- 10-221
- 10-222
- 10-224
- 10-224.1
- 10-225
- 10-226
- 10-227
- 10-228
- 10-229
- 10-230
- 10-230.1
- 10-231
- 10-232
- 10-233
- 10-211
- 10-212
- 10-223
- 10-215
- Withdrawn, *see* 10-221
- 10-221
- 10-222
- 10-224
- Withdrawn
- 10-225
- 10-231
- 10-232
- 10-234
- 10-233
- 10-241
- 10-242
- 10-213
- 10-227
- 10-226
- 10-228
- 10-243
- 10-244
- 10-245
- 10-246
- 10-251
- 10-252
- Withdrawn
- 10-261
- 10-262

Article 3

- 10-301
- 10-303
- 10-304
- 10-305
- 10-305.1
- 10-305.2
- 10-306.1
- 10-307
- 10-308
- 10-309
- 10-310
- 10-320
- 10-321
- 10-325
- 10-330
- 10-331
- 10-350
- 10-311
- 10-315
- 10-314
- 10-312
- 10-321
- 10-313
- 10-335
- 10-342
- 10-331
- 10-332
- 10-333
- 10-343
- 10-344
- 10-345, 10-346
- 10-347
- Withdrawn, *see* 10-314
- 10-353

10-101. Scope; ~~and~~ definitions; title.

A. **Scope.** Except as specifically provided by these rules, the following rules of procedure shall govern proceedings under the Children's Code:

(1) the Children's Court Rules govern procedure in the children's courts of New Mexico in all matters involving children alleged by the state:

(a) to have committed a delinquent act as defined in the Delinquency Act;

(b) to be members of families in need of court-ordered services as defined in the Famil[y]ies in Need of Court-Ordered Services Act;

(c) to be abused or neglected[;] as defined in the Abuse and Neglect Act[;] including proceedings to terminate parental rights which are filed pursuant to the Abuse and Neglect Act;

(2) the Rules of Criminal Procedure for the District Courts govern the procedure:

(a) in all proceedings in the district court in which a child is alleged to be a "serious youthful offender"[;] as defined in the Children's Code;

(b) in all proceedings in the Children's Court in which a notice of intent has been filed alleging the child is a "youthful offender"[;] as that term is defined in the Children's Code. If the indictment or bind over order does not include a "youthful offender" offense, any further proceedings for the offense shall be governed by the Children's Court rules;

(3) the Rules of Criminal Procedure for the Magistrate Courts govern all proceedings in the magistrate court in which a child is charged as a "serious youthful offender" or "youthful offender"[;] as those terms are defined in the Children's Code;

~~[(4) the Rules of Criminal Procedure for the Metropolitan Courts govern all proceedings in the metropolitan court in which a child is charged as a "serious youthful offender" or "youthful offender" as those terms are defined in the Children's Code;]~~

~~[(5) (4) the Children's Code and the Rules of Civil Procedure for the District Courts govern the procedure in all other proceedings under the Children's Code. In case of a conflict between the Children's Code and the Rules of Civil Procedure for the District Court, the Children's Code shall control;~~

(5) unless otherwise provided, the rules and forms governing abuse and neglect proceedings shall apply to court-ordered services pursuant to the Families in Need of Court-Ordered Services Act.

B. **Construction.** These rules are intended to provide for the just determination of children's court proceedings. [They] These rules shall be construed to secure simplicity in procedure, fairness in administration, elimination of unjustifiable expense and delay and to assure the recognition and enforcement of constitutional and other rights.

C. **Definitions.** As used in these rules and the forms approved for use with these rules:

(1) "respondent" includes a defendant;

(2) "petitioner" includes a plaintiff;

(3) "process" is the means by which jurisdiction is obtained over a person to compel the person to appear in a judicial proceeding and includes a:

(a) summons and complaint;

(b) summons and petition;

(c) writ or warrant; and

(d) mandate; and

(4) "service of process" means delivery of a summons or other process in the manner provided by Rule 10-104 NMRA of

these rules.

~~[C:] D. **Title.** These rules and forms shall be known as "Children's Court Rules".~~

~~[D:] E. **Citation form.** These rules and forms may be cited as Rule 10-_____ NMRA [(19___)].~~

Committee Commentary.

Although there are various statutory provisions authorizing the supreme court to adopt rules of procedure in civil and criminal cases, including rules for the children's court, the rulemaking power of the supreme court is a constitutional power which inherently belongs to the judicial branch of government under the doctrine of separation of powers. *See* State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936); State v. Arnold, 51 N.M. 311, 183 P.2d 845 (1947).

~~[The rulemaking power traditionally extends only to proceedings conducted by the judicial branch of government. Thus the supreme court in the original rules of procedure governing the children's court did not establish procedures to be followed by the human services department (formerly the health and social services department) regarding alleged neglected children until formal court action had begun. The standing committee on criminal proceedings in the district court recommended to the supreme court that expanded neglect rules be adopted to assure uniformity in proceedings and eliminate any confusion caused by the absence of a clearly defined procedure. The supreme court accepted the recommendation and as of November 1, 1978, Children's Code provisions governing neglect prior to the onset of formal court action are modified by these rules. Effective February 1, 1982, these rules apply to abused children cases.~~

~~—The supreme court did not believe this was a departure from its traditional view of its rulemaking procedure since Section 32-1-4 NMSA 1978 authorizes the supreme court to adopt rules of procedure in children's court proceedings and the Children's Code itself envisions that the human services department will be primarily responsible in neglect and abuse situations. See Section 32-1-15 NMSA 1978.~~

~~—A more complete discussion of the rulemaking power of the supreme court is found at the beginning of the commentaries to the Rules of Criminal Procedure for the District Courts.—~~

~~Rules 10-101 and 10-102 set forth the scope, purpose and construction of the Children's Court Rules of Procedure. The scope of the rules is specifically limited to children's court proceedings in which a child is alleged to be delinquent, in need of supervision, neglected or abused. Section 32-1-10 NMSA 1978 of the Children's Code gives the children's court exclusive original jurisdiction of a number of other proceedings. These rules are not intended to establish procedures for these other proceedings, nor do they apply to court proceedings involving juveniles who allegedly have violated municipal ordinances or Motor Vehicle Code provisions which are not governed by the Children's Code under Sections 32-1-30 and 32-1-48 NMSA 1978.~~

~~—As of January 1, 1982 no judicial district had established a family court division under Section 32-1-4 NMSA 1978. If such a division were to be established, these rules would apply only to proceedings in which a child is alleged to be delinquent, in need of supervision, neglected or abused. Other proceedings over which a family court would have jurisdiction pursuant to Section 32-1-10 NMSA 1978 are not intended to be within the scope of these rules.~~

~~—In terms of purpose and construction, it must be emphasized that the procedures set forth in these rules supersede many of the~~

procedures set forth in the Children's Code in effect at the time of adoption of the original rules and the revised rules.]

[NEW MATERIAL]

10-102. Commencement of action.

A children's court action is commenced by filing a petition with the court. Upon the filing of the petition, the clerk shall endorse thereon the time, day, month and year that it is filed.

[WITHDRAWN; RECOMPILED IN RULES 10-114,
10-115 and 10-322]

[10-103. General rules of pleading:

—A. **Pleadings.** There shall be a petition and, except for the child in a delinquency proceeding, a response:

—B. **Response.** Except for a child alleged to be a delinquent child, every respondent shall serve a response within thirty (30) days after being served with the summons and petition.

—C. **Form.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number and a designation as to the type of pleading. In the petition the title of the action shall include the names of all parties, but in other documents filed with the court it is sufficient to state the name of the first party on each side with an appropriate indication of other parties:

—D. **Adoption by reference.** Statements made in one part of a pleading may be adopted by reference in another part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

—E. **Name of respondent.** In any pleading, the name of the respondent shall be stated, or, if the respondent's name is not known, the respondent may be described by any name or description by which the respondent can be identified with reasonable certainty, together with a statement that respondent's name is not known.

—F. **Defects, errors, omissions and clerical mistakes.** No pleading shall be deemed invalid, nor shall the inquiry, hearing, judgment or other proceeding thereon be stayed or in any manner affected because of any defect, error, omission, imperfection or inconsistency therein which does not prejudice the substantial rights of the respondent on the merits. The court may at any time prior to an adjudication on the merits cause the pleadings to be amended to cure errors, defects, omissions, imperfections or variances if substantial rights of the respondent are not prejudiced. Upon ordering such an amendment of a petition or other pleading, the court shall grant a continuance to any party whose ability to present the party's case has been affected by the amendment. Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

—G. **Amendment of offense; delinquency proceedings.** At any time prior to commencement of the adjudicatory hearing in a delinquency proceeding and subject to the provisions of Rule 10-107, the court may allow the petition to be amended to charge the respondent with an additional or different offense. Upon allowing such an amendment and upon the request of the respondent, the court shall grant a continuance to allow further time for preparation.

—H. **Defenses; how presented.** Except in delinquency proceedings, every defense, in law or fact, to a claim for relief in any pleading, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may, at the

option of the pleader, be made by motion:

— (1) lack of jurisdiction over the subject matter;

— (2) lack of jurisdiction over the person;

— (3) improper venue;

— (4) insufficiency of process;

— (5) insufficiency of service of process;

— (6) failure to state a claim upon which relief can be granted;

— (7) failure to join a necessary party. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the trial any defense in law or fact to that claim for relief.

—I. **Signing of pleadings.** Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion or other paper and state the party's address and telephone number. Except when otherwise specifically required by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay. If a pleading, motion or other paper is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule, an attorney or party may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted. A "signature" means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.]

[**Committee commentary.** — No substantive changes were made in this rule in 1978. The rule contains the basic guidelines for pleadings in children's court proceedings.

— Paragraphs A and B are identical to Rule 5-202 of the Rules of Criminal Procedure for the District Courts. Forms adopted by the supreme court show the proper caption for the pleadings.

— Paragraph C is substantially identical to Rule 5-202 of the Rules of Criminal Procedure for the District Courts.

— Paragraph D is patterned after Paragraph A of Rule 5-204 of the Rules of Criminal Procedure for the District Courts and is designed to prevent challenges to pleadings based on technical defects, errors, omissions or variances. The court may allow the pleadings to be amended to cure such technical defects if the request is made prior to the conclusion of the adjudicatory hearing and if substantial rights of the respondent are not prejudiced. If such an amendment affects the ability of a party to present his case, a continuance must be granted.

— Paragraph E is designed to allow the addition of a new or different offense to a petition if the motion to amend is made before the adjudicatory hearing begins and the amendment conforms to the requirements of Rule 10-107 for joinder of offenses. The respondent in such a case is entitled to a continuance if he requests

it. A continuance at the request of the state is left to the discretion of the court.

Paragraph F is identical to Rule 5-206 of the Rules of Criminal Procedure for the District Courts.

It should be noted that in children's court proceedings, the term "offense" has an expanded meaning and includes not only violations of criminal statutes and ordinances, but also violations of those standards of conduct defined by the Children's Code in 32-1-3 NMSA 1978 as constituting "need of supervision" and "neglect."

New Mexico has enacted an Electronic Authentication Documentation Act which provides for the Secretary of State to register electronic signatures using the public key technology. See Section 14-15-4 NMSA 1978.]

[10-104]10-103. [Summons.] Process.

[A. **Scope.** Parties in children's court proceedings, except the respondent in a delinquency proceeding, shall be served with a copy of the petition and summons as provided in this rule. Service of the petition and summons upon the respondents in delinquency proceedings shall be made pursuant to Rule 10-104.1 of these rules.]

— B. **Form.** The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the party to be served and state the name and address of the petitioner or the petitioner's attorney. It shall also state the time within which the party must respond, and notify the party that failure to do so may result in a judgment against the party for the relief demanded in the petition. The court may allow a summons to be amended. The summons shall be substantially in the form approved by the Supreme Court.]

— C. **Issuance.** Upon or after filing the petition, the state shall present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal and issue it to the state for service upon the party. A summons, or a copy of the summons if addressed to multiple parties, shall be issued for each party to be served.]

— D. **Service with petition; by whom made.**

— (1) A summons shall be served together with a copy of the petition. The petitioner is responsible for service of a summons and petition within the time allowed under Paragraph K of this rule and shall furnish the person making service with the necessary copies of the summons and petition.]

— (2) Service may be made by any person who is not a party and who is at least eighteen (18) years of age. At the request of the petitioner, however, the court may direct that service be made by the sheriff, a deputy sheriff or other person or officer specially appointed by the court for that purpose.]

— E. **Service upon parties within the United States.** Unless otherwise provided by law, service upon a party, other than a minor or an incompetent person, may be made within the United States by delivering a copy of the summons and of the petition to the party personally or by leaving copies thereof at the party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.]

— F. **Service upon parties in a foreign country.** Unless otherwise provided by federal law, service upon a party, other than a minor or an incompetent person, may be made in a place not within the United States:]

— (1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague

convention on the Service Abroad of Judicial and Extrajudicial Documents;]

— (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:]

— (a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;]

— (b) as directed by the foreign authority in response to a letter rogatory or letter of request; or]

— (c) unless prohibited by the law of the foreign country, by]

— (i) delivery to the party personally of a copy of the summons and the petition; or]

— (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or]

— (3) by other means not prohibited by international agreement as may be directed by the court.]

G. Service upon minors and incompetent persons.

— (1) Service within the United States upon a minor, as defined in this rule, may be made by delivering a copy of the summons and petition, in the manner provided by Paragraph E of this rule, to the respondent child and to a custodial parent, custodian, guardian or conservator of the minor. Notice of the proceedings shall be given to any known guardian ad litem. Notice to any known guardian ad litem shall be served as provided in Rule 10-105 of these rules.]

— (2) Service in the United States upon an incompetent person, as defined in this rule, may be made by service of the summons and petition in the manner provided by Paragraph E of this rule:]

— (a) on the incompetent person's guardian ad litem, if any; or]

— (b) if there is no guardian ad litem, by service upon a conservator of the estate or guardian of the person.]

— (3) Service upon an infant or incompetent outside the United States shall be made in a manner prescribed by Subparagraph (2)(a) or (2)(b) of Paragraph F of this rule or by such means as the court may direct.]

— (4) Notwithstanding any other provision of this rule, a party who is an alleged abused or neglected child shall be served by service on the guardian ad litem appointed to represent the child in the proceeding.]

— H. **Service upon governmental entities.** Service of a summons upon a federal, state or local governmental entity shall be made in the manner as provided in the Rules of Civil Procedure for the District Courts.]

I. **Service by publication.** Service upon a party may be made by publication upon the filing of a certificate by the petitioner substantially in the form approved by the Supreme Court certifying that: after diligent inquiry and search efforts petitioner has been unable to serve the party; the party is deliberately concealed to avoid service of process or cannot be discovered after reasonably diligent inquiry and search efforts; and process cannot be served upon the party by any other means permitted by this rule. Upon the filing of the certificate, the clerk of the court shall cause to be issued a notice of the pendency of the proceeding substantially in the form approved by the Supreme Court. The clerk's notice of pendency of the proceeding shall be published in some newspaper

in general circulation in the county for four (4) consecutive weeks. The publication of the notice shall be established by the affidavit of the publisher, manager or agent of the newspaper, and it shall be taken and considered as sufficient service of process.

— **J. Proof of service.** The person making service shall make proof of service to the court. Proof of service in a place not within the United States shall, if made under Subparagraph (1) of Paragraph G, be made pursuant to the applicable treaty or convention, and shall, if made under Subparagraph (2) or (3) thereof, include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court. Failure to make proof of service does not affect the validity of the service. The court may allow proof of service to be amended.

— **K. Time limit for service.** If service of the summons and petition is not made upon a party within one hundred twenty (120) days after the filing of the petition, the court, upon motion or on its own initiative after notice to the petitioner, shall dismiss the action without prejudice as to that party or direct that service be made within a specified time; provided that if the petitioner shows good cause for the failure, the court shall extend the time for service for an appropriate period. This paragraph does not apply to service in a foreign country pursuant to Paragraph G.

— **L. Definitions.** As used in this rule:

— (1) “minor” means a person under the age of eighteen (18) who has not been emancipated pursuant to the provisions of the Emancipation of Minors Act or other law. The term “minor” includes a “child” or an “infant” when those terms are used in any law or court rule; and

— (2) an “incompetent” means any person who demonstrates over time either partial or complete functional impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication or other cause, except minority, to the extent that the person is unable to manage the person’s personal care or property and financial affairs.]

A. Summons; issuance. Upon the filing of the petition, the clerk shall issue a summons and deliver it to the petitioner for service. Upon the request of the petitioner, the clerk shall issue separate or additional summons. Any respondent may waive the issuance or service of summons.

B. Summons; execution; form. The summons shall be signed by the clerk, issued under the seal of the court and be directed to the respondent. The summons shall be substantially in the form approved by the Supreme Court and must contain:

(1) the name of the court in which the action is brought, the name of the county in which the petition is filed, the docket number of the case, the name of the first party on each side, with an appropriate indication of the other parties, and the name of each party to whom the summons is directed;

(2) a notice that the respondent has a right to an attorney and that a child must have an attorney or guardian ad litem;

(3) in an abuse and neglect proceeding, a notice that the proceeding could ultimately result in the termination of parental rights; and

(4) the name, address and telephone number of the petitioner’s attorney.

C. Service of process; return.

(1) If a summons is to be served, it shall be served together with any other pleading or paper required to be served by this rule. The petitioner shall furnish the person making service with such copies as are necessary.

(2) Service of process shall be made with reasonable diligence, and the original summons with proof of service shall be

filed with the court in accordance with the provisions of Paragraph J of this rule.

D. Process; by whom served. Process shall be served as follows:

(1) if the process to be served is a summons and petition, petition or other paper, service may be made by any person who is over the age of eighteen (18) years and not a party to the action;

(2) if the process to be served is a writ of habeas corpus, service may be made by any person not a party to the action over the age of eighteen (18) years designated by the court to perform such service or by the sheriff of the county where the person may be found;

(3) if the process to be served is a writ other than a writ specified in subparagraph (2) of this paragraph, service shall be made as provided by law or order of the court.

E. Process; how served; generally.

(1) Process shall be served in a manner reasonably calculated, under all the circumstances, to apprise the respondent of the existence and pendency of the action and to afford a reasonable opportunity to appear and defend.

(2) Service may be made, subject to the restrictions and requirements of this rule, by the methods authorized by this rule or in the manner provided for by any applicable statute, to the extent that the statute does not conflict with this rule.

(3) Service may be made by mail or commercial courier service provided that the envelope is addressed to the named respondent and further provided that the respondent or a person authorized by appointment, by law or by this rule to accept service of process upon the respondent signs a receipt for the envelope or package containing the summons and petition, writ or other process. Service by mail or commercial courier service shall be complete on the date the receipt is signed as provided by this subparagraph. For purposes of this rule “signs” includes the electronic representation of a signature.

F. Process; personal service upon an individual.

(1) Personal service of process shall be made upon an individual by delivering a copy of a summons and petition or other process:

(a) to the individual personally; or if the individual refuses to accept service, by leaving the process at the location where the individual has been found; and if the individual refuses to receive such copies or permit them to be left, such action shall constitute valid service; or

(b) by mail or commercial courier service as provided in Subparagraph (3) of Paragraph E of this rule.

(2) If, after the petitioner attempts service of process by either of the methods of service provided by Subparagraph (1) of this paragraph, the respondent has not signed for or accepted service, service may be made by delivering a copy of the process to some person residing at the usual place of abode of the respondent who is over the age of fifteen (15) years and mailing by first class mail to the respondent at the respondent’s last known mailing address a copy of the process; or

(3) If service is not accomplished in accordance with Subparagraphs (1) and (2), then service of process may be made by delivering a copy of the process at the actual place of business or employment of the respondent to the person apparently in charge thereof and by mailing a copy of the summons and petition by first class mail to the respondent at the respondent’s last known mailing address and at the respondent’s actual place of business or employment.

G. Service upon minor, incompetent person, custodian, guardian or fiduciary.

(1) A child who is a respondent, in either delinquency or abuse and neglect proceedings, shall be served by delivering a copy of the summons and petition to the respondent child and to a custodial parent, custodian, guardian or conservator of the minor in the manner and priority provided in Paragraph F or H of this rule as may be appropriate. If no conservator or guardian has been appointed for the minor, service shall be made on the minor by serving a copy of the process on each person who has legal authority over the minor. If no person has legal authority over the minor, process may be served on a person designated by the court. If the respondent child has a known guardian *ad litem* or attorney, notice of the proceedings shall be served on the guardian *ad litem* or attorney as provided in Rule 10-105 NMRA of these rules.

(2) A child who is alleged to be an abused or neglected child, or a child whose family is alleged to be in need of court-ordered services, shall be served by service on the child's guardian *ad litem* if the child is less than fourteen (14) years old or the child's attorney if the child is fourteen (14) years old or over.

(3) An incompetent person shall be served by serving a copy of the process to the conservator or guardian, if there is a conservator of the estate or guardian of the incompetent person, in the manner and priority provided by Paragraph F or H of this rule. If the incompetent person does not have a conservator or guardian, process may be served on a person designated by the court.

(4) Service upon a personal representative, guardian, conservator, trustee or other fiduciary in the same manner and priority for service as provided in Paragraphs F or H of this rule as may be appropriate.

H. Service in manner approved by court. Except in delinquency proceedings, upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the respondent of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.

I. Service by publication. Service by publication may be made only pursuant to Paragraph H of this rule. A motion for service by publication shall be substantially in the form approved by the Supreme Court. A copy of the proposed notice to be published shall be attached to the motion. Service by publication shall be made once each week for three consecutive weeks unless the court for good cause shown orders otherwise. Service by publication is complete on the date of the last publication.

(1) Service by publication pursuant to this rule shall be made by giving a notice of the pendency of the action in a newspaper of general circulation in the county where the action is pending. Unless a newspaper of general circulation in the county where the action is pending is the newspaper most likely to give the respondent notice of the pendency of the action, the court may also order that a notice of pendency of the action be published in a newspaper of general circulation in the county which reasonably appears most likely to give the respondent notice of the action.

(2) The notice of pendency of action shall contain:

(a) the caption of the case, as provided in Rule 10-108 NMRA, including a statement which describes the action or relief requested;

(b) the name of the respondent or, if there is more

than one respondent, the name of each of the respondents against whom service by publication is sought; and

(c) the name, address and telephone number of petitioner's attorney.

J. Proof of service. The party obtaining service of process or that party's agent shall promptly file proof of service. When service is made by the sheriff or a deputy sheriff of the county in New Mexico, proof of service shall be by certificate; and when made by a person other than a sheriff or a deputy sheriff of a New Mexico county, proof of service shall be made by affidavit. Proof of service by mail or commercial courier service shall be established by filing with the court a certificate of service which shall include the date of delivery by the post office or commercial courier service and a copy of the respondent's signature receipt. Proof of service by publication shall be by affidavit of publication signed by an officer or agent of the newspaper in which the notice of the pendency of the action was published. Failure to make proof of service shall not affect the validity of service.

K. Service of process in the United States, but outside of state. Whenever the jurisdiction of the court over the respondent is not dependent upon service of the process within the State of New Mexico, service may be made outside the State as provided by this rule.

L. Service of process in a foreign country. Service upon an individual may be effected in a place not within the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(a) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction;

(b) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(c) unless prohibited by the laws of the United States or the law of the foreign country, in the same manner and priority as provided for in Paragraph F or H of this rule as may be appropriate.

M. Failure to appear. If the respondent in a delinquency proceeding fails to appear at the time and place specified in the summons, the court may:

(1) issue a warrant for the respondent's arrest; or

(2) direct that service of such summons and petition may be made in the manner prescribed by the court.

Committee Commentary.

This rule has been rewritten to be consistent with Rule 1-004 NMRA, with special provisions on service for minors to take into consideration the unique circumstances of children. [The rule governs the issuance of summons and service of the summons and a copy of the petition. The procedure set forth is unique to children's court proceedings in two ways. First, it differs from the summons format used in civil cases and criminal cases in the district courts in that the respondent is told he must appear before the court at the time specified in the notice of adjudicatory hearing (see approved summons form). The summons itself does not specify the time and place of appearance nor does it command

the respondent to submit a written answer to the petition. No time is specified for appearance in the summons since one of the events that triggers the time limit for the commencement of the adjudicatory hearing is the date the petition is served on the respondent (Rules 10-227 and 10-308). Accordingly, it is highly unlikely that the adjudicatory hearing will have been scheduled at the time the summons is issued.

—Under Rule 10-104, the notice of adjudicatory hearing must be served at least five days before the date the hearing is set.

—The second unusual aspect of the summons procedure is the requirement for service of informational copies. See Paragraph F. The summons itself directs only the respondent to appear to answer the allegations of the petition. The parents, guardian or custodian of a child alleged to be in need of supervision cannot be ordered to answer the allegations of the petition. The parents of an alleged delinquent child may be named as parties pursuant to Section 32-1-47 NMSA 1978. In any event, as noted in the commentary to Rule 10-104, the original committee felt that the interests of the parents in the matter, even if they are not named as parties, required that they be informed of the proceedings. In *re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

—Rule 10-105 differs from Rule 10-104 in that Rule 10-105 requires that the summons and copy of the petition be served on both parents, if not living together, unless parental rights have been terminated by court order, a parent is deceased or the children's court attorney certifies that the parent cannot be located. Rule 10-104 requires that service of other pleadings and orders be made only on the parent with legal custody. The requirement of Paragraph F of Rule 10-105 is designed to assure that a parent not living in the family home is aware that his or her child has allegedly committed a delinquent act, is allegedly a child in need of supervision or is allegedly being abused or neglected by the other parent, guardian or custodian. In such situations, the absent parent, once aware of the problem, may come forward to offer assistance.

—Paragraph A of Rule 10-105 requires that a summons be issued upon the docketing of a petition. Once served, the summons will provide the basis for issuance of a bench warrant if the respondent does not appear at the adjudicatory hearing (Rule 10-206).

Paragraph B of Rule 10-105 simply provides that the summons used will be in the form approved by the supreme court.

—Paragraph C of Rule 10-105 requires that the summons and copy of the petition be served upon issuance of the summons. This requirement is intended to prevent unreasonable delays in service which might have the effect of lengthening the time limit for the commencement of the adjudicatory hearing. See Rules 10-226 and 10-308.

—Paragraph D of Rule 10-105 requires personal service of the summons and petition on a respondent alleged to be delinquent or in need of supervision, unless otherwise ordered by the court. The method of service is governed by Rule 1-004 of the Rules of Civil Procedure for the District Courts. (See also Paragraph A of Rule 5-209 of the Rules of Criminal Procedure for the District Courts.) Likewise, service on the respondent in a neglect case follows Rule 1-004 of the Rules of Civil Procedure for the District Courts. Service by publication on the respondent in a neglect case is authorized under certain circumstances. A special publication form has been approved by the supreme court for this purpose.

—Parties other than the respondent shall be served with summons pursuant to Paragraph E of Rule 10-105. Included in the category "other parties" are an alleged neglected or abused child and the parents, guardian or custodian of an accused child if, at the time of

issuance of the summons, they have been allowed to intervene in the action pursuant to Rule 10-108 or if a parent has been named as a party pursuant to Section 32-1-47 NMSA 1978.

—The guardian ad litem of the alleged neglected or abused child is served in the same manner as an attorney for a party. The guardian ad litem must be appointed no later than at the time the neglect or abuse petition is filed. See Rules 10-108 and 10-305.

Rule 10-105 supersedes the procedural aspects of Sections 32-1-20, 32-1-21 and 32-1-37 NMSA 1978. It differs from Section 32-1-20 NMSA 1978 in several ways: (1) the summons is directed to the respondent; (2) the requirement that the child's spouse, if any, be served, is dropped; (3) issuance of a summons to a person does not necessarily make that person a party to the action (see Rule 10-108); and (4) the summons need not contain an advisement of rights. The provisions of Section 32-1-21 NMSA 1978, including the time limits, have been replaced by Rule 10-105. The provisional hearing procedure set forth in Section 32-1-37 NMSA 1978 when service is by publication has been superseded.]

[WITHDRAWN, SEE RULE 10-103]

[10-104.1. Service of summons on child in delinquency proceeding; failure to appear:

—A. **Issuance:** Upon the filing of a petition alleging a delinquent act, upon request of the children's court attorney, the clerk shall forthwith issue a summons. Separate or additional summons may be issued against the same child.

—B. **Service:** Service of a summons on a child alleged to have committed a delinquent act shall be by mail or by personal service.

—C. **Execution; form:** The summons shall be substantially in the form approved by the Supreme Court.

—D. **Summons; time to appear:** If service is by mail, service shall be made at least ten (10) days before the child is required to appear, unless a shorter time is ordered by the court. If service is made by mail an additional three (3) days shall be added.

—E. **Summons; service by mail:** Service upon the child in a delinquency proceeding may be accomplished by mailing the summons and petition to the child by first class mail.

—F. **Failure to appear:** If a child fails to appear in person, or by counsel when permitted by these rules, at the time and place specified in the summons, the court may:

- (1) issue a warrant for the child's arrest; or
- (2) direct that service of such summons and petition may be made in the manner prescribed by the court.

—G. **Return:** If service is made by mail return shall be by the children's court attorney filing a certificate of mailing. If service is by personal service, the person serving the process shall make proof of service by a certificate of service in the form approved by the Supreme Court. Where service within the state includes mailing, the return shall state the date and place of mailing.]

[10-105]10-104. [Notice of hearings;] [s]Service and filing of pleadings and other papers; notice of hearings.

A. **[When] Service; when required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original petition [unless the court otherwise orders because of numerous respondents], every paper relating to discovery required to be served upon a party, unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, designation of record on appeal, and similar paper shall be served upon each of the parties. [No

service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 10-104 NMRA.]

B. Service; how made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney, or if the party is a child under the age of fourteen in an abuse or neglect proceeding, the child's guardian *ad litem* [~~ad litem~~], unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, or by mailing [it] a copy to the attorney or party at the attorney's or party's last known address, or, if no address is known, by leaving it with the clerk of the court. Service by mail is complete upon mailing.

[~~Delivery of a copy within this rule means:~~]

C. Definitions. As used in this rule:

[~~(1)~~] (1) "delivery of a copy" means:

(a) handing it to the attorney or to the party;
[~~(2)~~] (2) (b) sending a copy by facsimile or electronic transmission when permitted by Rule [10-105.1] 10-105 NMRA or Rule [10-105.2] 10-106 of these rules;

[~~(3)~~] (3) (c) leaving it at the attorney's or party's office with a clerk or other person in charge thereof[;], or, if there is no one in charge, leaving it in a conspicuous place therein; or

[~~(4)~~] (4) (d) if the attorney's or party's office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; and[;]

[~~(E)~~] (2) "mailing a copy" means sending a copy by first class mail with proper postage.

D. Filing; certificate of service. All papers after the petition required to be served upon a party, together with a certificate of service indicating the date and method of service, shall be filed with the court within a reasonable time after service, except that the following papers shall not be filed unless on order of the court or for use in the proceeding:

- (1) summonses without completed returns;
- (2) subpoenas;
- (3) returns of subpoenas;
- (4) interrogatories;
- (5) answers or objections to interrogatories;
- (6) requests for production of documents;
- (7) responses to requests for production of documents;
- (8) requests for admissions;
- (9) responses to requests for admissions;[and]
- (10) depositions;
- (11) briefs or memoranda of authorities on unopposed motions;

(12) offers of settlement when made; and
(13) mandatory and subsequent disclosures pursuant to these rules.

Except for the papers described in Subparagraphs (1), [(2); (3) and] (10) and (11) of this paragraph, counsel shall file a certificate of service with the court within a reasonable time after service, indicating the date and method of service of any paper not filed with the court.

[~~(D)~~] **E. Filing with the court defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and forthwith

transmit them to the office of the clerk. "Filing" shall include filing a facsimile copy or filing an electronic copy as may be permitted pursuant to Rule [1-005.1] 10-105 NMRA or Rule [1-005.2 [of these rules] 10-106 NMRA. A paper filed by electronic means in compliance with Rule [10-105.1] 10-106 NMRA constitutes a written paper for the purpose of applying these rules. The clerk shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

F. Notice of hearings. Notice of each hearing, including permanency hearings and periodic judicial review hearings, shall be given to each party.

[**Committee commentary.** — The rule establishes the basic procedure for the service of most notices and pleadings in a children's court proceeding. Notices and pleadings requiring special service are specifically excluded in Paragraph B of Rule 10-104. The procedure used to serve the notices and pleadings does not vary significantly from the procedures used in civil proceedings and adult criminal proceedings in the district courts. The persons upon whom the notices and pleadings are to be served does differ.

— Certain provisions of Rules 10-104, 10-105 and 10-108 reflect the view of the original committee that the parents, guardian or custodian of a respondent alleged to be delinquent or in need of supervision have a legitimate interest in children's court proceedings. The actions of the children's court may effectively limit or nullify the traditional right of the parents, guardian or custodian to the custody, supervision and control of their child. See *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).

— The Children's Code subjects parents to specific liabilities. In delinquency cases, the parents may be made parties, may be ordered to submit to counseling or participate in a probation, treatment or institutional treatment program, and, if made a party and have not been determined to be indigent, shall be ordered to pay the reasonable costs of support, maintenance and treatment if the child is institutionalized. See Section 32-1-47 NMSA 1978.

— In abuse, neglect and need of supervision cases, the parents may be required to pay the reasonable costs of support and treatment if legal custody is vested in someone other than the parents. See Sections 32-1-41 and 32-1-47 NMSA 1978.

— In delinquency, abuse, neglect or need of supervision proceedings, the parents may be ordered to pay the fees of the child's court-appointed attorney, the costs of medical and other examinations ordered by the court and court costs. See Section 32-1-41 NMSA 1978 and commentary to Rule 10-205.

— Nevertheless, in delinquency proceedings, it is only the child, not the parents, guardian or custodian, who is the accused and whose actual liberty may be in question. Thus, the original committee felt that the interests of the parents, guardian or custodian of the accused child in the proceedings, although not raising them to the position of "parties" unless formal intervention is sought pursuant to Rule 10-108, do require that they be informed of the status of the proceedings.

— Specifically, Subparagraph (1) of Paragraph A of Rule 10-104 requires service on each party. In delinquency proceedings, the parties are the state, the respondent and the parents of an alleged delinquent child if named pursuant to Section 32-1-47 NMSA 1978. In abuse and neglect proceedings, the parties are the state, the respondent and the child allegedly abused or neglected. See Rule 10-108.

— Subparagraph (2) of Paragraph A of Rule 10-104 requires service upon the parents, guardian or custodian of a respondent

alleged to be delinquent or in need of supervision. If the parents reside together, service of one copy of the notice or pleading suffices. If the parents do not reside together, only the parent, guardian or custodian having legal custody of the child is required to be served. The court may order that additional or different persons receive the copies of the notices and pleadings:

— If a party or person required to be served is represented by an attorney or guardian ad litem, service is to be made upon his attorney or guardian ad litem under Paragraph D of Rule 10-104.

— Written motions which may be heard ex parte are exempt from this rule. These motions include a stay pending appeal under Rule 10-118 and an ex parte custody order, Rule 10-301.

— Paragraph B of Rule 10-104 enumerates the notices and pleadings which are not covered by Rule 10-104 and which are governed by the provisions of other rules. Except for the summons and copy of the petition and the ex parte custody order, the notices are not within the provisions of Rule 10-104 because the time limits involved in the relevant proceeding are such that the five-day notice requirement of Paragraph C of Rule 10-104 is inappropriate or unworkable.

— Paragraph D of Rule 10-104 defining how service is made is substantially similar to Paragraph B of Rule 5-103 of the Rules of Criminal Procedure for the District Courts. The guardian ad litem receives service on behalf of the alleged abused or neglected child he represents. In terms of service, the role of the guardian ad litem is similar to that of the attorney for the respondent. See commentary to Rule 10-108 for discussion of the role of the guardian ad litem.

— Paragraph D of Rule 10-104 relates to service by mailing. The “outgoing mail container” referred to in Subparagraph (2) of Paragraph D of Rule 10-104 denotes a container specifically designated and used solely for the purpose of receiving outgoing mail. The contents of the container should regularly and frequently be delivered to the United States postal service.

— Paragraph C of Rule 10-104 on the filing of papers follows Paragraphs C and D of Rule 5-103 of the Rules of Criminal Procedure for the District Courts.

— Paragraph F of Rule 10-104 on proof of service follows Paragraph E of Rule 5-103 of the Rules of Criminal Procedure for the District Courts. The last sentence makes clear that failure to make proof of service is not a jurisdictional defect.

— Paragraph G of Rule 10-104 contains a unique procedure if the person entitled to service cannot be located. Paragraph B of Rule 5-103 of the Rules of Criminal Procedure for the District Courts provides that in such cases the pleading shall be left with the clerk of the court and placed in the court file. Paragraph G of Rule 10-104 (and Rule 10-105) provide that if the parents, guardian or custodian of the accused child or the respondent in an abuse or neglect action cannot be found, the children’s court attorney must file an affidavit to that effect with the court. Such a filing suspends the requirements of Rule 10-104. The notice requirements of the rule are not suspended if the person who cannot be found is the respondent in a delinquency or need of supervision proceeding. If, after the affidavit is filed, the person returns and makes his presence known, good faith and probably due process will require that such person receive all notices and pleadings filed subsequent to his return.

— If an affidavit is filed in connection with the service of summons and petition under Paragraph F of Rule 10-105, that affidavit will fulfill the requirements of Paragraph G of Rule 10-104.

— The only notice provision of the Code specifically superseded by Rule 10-104 is Section 32-1-29A(3) NMSA 1978 relating to

transfer hearings:

— The basic effect of Rule 10-104 on the Code is to put in notice time limits where none existed before, to establish a procedure for service of copies of notices and pleadings and to clarify who is to receive copies of notices and pleadings.]

[10-105.3] 104.1. Notice to foster parents, pre-adoptive parents and relative care givers by department.

In abuse and neglect proceedings, the department shall give notice of permanency hearings and periodic judicial review hearings to the child’s foster parents, pre-adoptive parents and relative care givers. The notice given shall expressly inform foster parents, pre-adoptive parents and relative care givers of their right to be heard at the permanency hearing or judicial review. Notice shall be served in the manner provided by Rule [10-105] 10-104 NMRA, and a certificate of service shall be filed with the court.

Committee Commentary

This rule was promulgated in response to 42 U.S.C. § 675(5)(G) and 42 U.S.C. § 629h(b)(1) and is consistent with Sections 32A-4-20(C) and 32A-4-27(F) NMSA 1978.

[10-105.1] 10-105. Service and filing of pleadings and other papers by facsimile.

A. Facsimile copies permitted to be filed. Subject to the provisions of this rule, a party may file a facsimile copy of any pleading or paper by faxing a copy directly to the court or by faxing a copy to an intermediary agent who files it in person with the court. A facsimile copy of a pleading or paper has the same effect as any other filing for all procedural and statutory purposes. The filing of pleadings and other papers with the court by facsimile copy shall be made by faxing them to the clerk of the court at a number designated by the clerk, except if the paper or pleading is to be filed directly with the judge, the judge may permit the papers to be faxed to a number designated by the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk. Each judicial district shall designate one or more telephone numbers to receive fax filings.

B. Facsimile [transmission] service by court of notices, orders or writs [; receipt of affidavits]. Facsimile [transmission] service may be used by the court for issuance of any notice, order or writ [or receipt of an affidavit]. The clerk shall note the date and time of successful transmission on the file copy of the notice, order or writ.

C. Paper size and quality. No facsimile [document] copy shall be filed with the court unless it is on plain paper and substantially satisfies all of the requirements of Rule [10-103.3] 10-113 NMRA of these rules.

[D. Pleadings or papers faxed directly to the court]

D. Filing pleadings or papers by facsimile. A pleading or paper may be [faxed directly to] filed with the court by facsimile transmission if:

(1) a fee is not required to file the pleading or paper;

(2) only one copy of the pleading or paper is required to be filed;

(3) unless otherwise approved by the court, the pleading or paper is not more than ten (10) pages in length excluding the facsimile cover page; and

(4) the pleading or paper to be filed is preceded by a cover sheet with the names of the sender and the intended recipient, any applicable instructions, the voice and facsimile telephone numbers of the sender, an identification of the case, the docket number and the number of pages transmitted.

E. **Facsimile copy filed by an intermediary agent.** Facsimile copies of pleadings or papers filed in person by an intermediary agent are not subject to the restrictions of Paragraph D of this rule.

F. **Time of filing.** If facsimile transmission of a pleading or paper [~~faxed~~] is begun before the close of the business day of the court in which it is being filed, it will be considered filed on that date. If facsimile transmission is begun after the close of business, the pleading or paper will be considered filed on the next court business day. For any questions of timeliness, the time and date affixed on the cover page by the court's facsimile machine will be determinative.

G. [~~Transmission by facsimile. A notice, order, writ, pleading or paper may be faxed to~~] **Service by facsimile.** Any document required to be served by Paragraph A of Rule 10-105 NMRA may be served on a party or attorney [~~who~~] by facsimile transmission if the party or attorney has:

- (1) listed a facsimile telephone number on a pleading or paper filed with the court in the action;
- (2) a letterhead with a facsimile telephone number; or
- (3) agreed to be served with a copy of the pleading or paper by facsimile transmission.

Service by facsimile is accomplished when the transmission of the pleading or paper is completed.

H. [~~Proof of service by facsimile.~~] **Proof of facsimile service** must include:

- (1) a statement that the pleading or paper was transmitted by facsimile transmission and that the transmission was reported as complete and without error;
- (2) the time, date and sending and receiving facsimile machine telephone numbers; and
- (3) the name of the person who made the facsimile transmission.

—[E.] **H. Demand for original.** A party shall have the right to inspect and copy any pleading or paper that has been filed or served by facsimile transmission if the pleading or paper has a statement signed under oath or affirmation or penalty of perjury.

I. Conformed copies. Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by facsimile transmission.

~~[10-105.2]~~ **10-106. Electronic service and filing of pleadings and other papers.**

A. **Definitions.** As used in these rules:

- (1) "electronic transmission" means the transfer of data from computer to computer other than by facsimile transmission; and
- (2) "document" includes the electronic representation of pleadings and other papers.

B. [~~Registration for electronic service.~~] The clerk of the Supreme Court shall maintain a register of attorneys who agree to accept documents by electronic transmission. The register shall include the attorney's name and preferred electronic mail address.:

Service by electronic transmission. Any document required to be served by Paragraph A of Rule 10-105 NMRA may be served on a party or attorney by electronic transmission of the document if the party or attorney has agreed to be served with pleadings or papers by electronic mail. Electronic service is accomplished when the transmission of the pleading or paper is completed. If within two (2) days after service by electronic mail, a party served by electronic mail notifies the sender of the electronic mail that the pleading or paper cannot be read, the pleading or paper shall be

served [by] any other method authorized by Rule 10-105 NMRA designated by the party to be served.

C. **Service by [E]electronic transmission by the court.** The court may [send] serve any document by electronic [transmission] service to an attorney [registered] or party pursuant to Paragraph B of this rule and to any other person who has agreed to receive documents by electronic transmission.

D. **Filing by electronic transmission.** Documents may be filed with the court by electronic transmission in accordance with this rule [~~and any technical specifications for electronic transmission~~], if:

(1) [~~in any court that has adopted technical specifications for electronic transmission;~~] the Supreme Court has adopted technical specifications for electronic transmission; and

(2) [~~if a fee is not required or if payment is made at the time of filing~~] the court in which documents are filed by electronic transmission has complied with the technical specifications for electronic transmission adopted by the Supreme Court.

E. **Single transmission.** Whenever a rule requires multiple copies of a document to be filed[;], only a single transmission is necessary.

F. [~~Service~~] **Time of filing.** For purposes of filing by electronic transmission, a "day" begins at 12:01 a.m. and ends at midnight. [~~Service pursuant to Rule 10-005 of these rules may be made by electronic transmission on any attorney who has registered pursuant to Paragraph B of this rule and on any other person who has agreed to service in this manner.~~]

—G. **Time of filing.** If electronic transmission of a document is received before [~~the close of the~~] midnight on the day preceding the next business day of the court [~~in which it is being filed~~], it will be considered filed on [~~that date. If electronic transmission is received after the close of business, the document will be considered filed on the next~~] the immediately preceding business day of the court. For any questions of timeliness, the time and date registered by the court's computer will be determinative.

[H.] **G. Demand for original.** A party shall have the right to inspect and copy any document that has been filed or served by electronic transmission if the document has a statement signed under oath or affirmation or penalty of perjury.

[I.] **Proof of service.** Proof of service by electronic transmission shall be made to the court by a certificate of an attorney or affidavit of a non-attorney and shall include:

- (1) the name of the person who sent the document;
- (2) the time, date and electronic address of the sender;
- (3) the electronic address of the recipient;
- (4) a statement that the document was served by electronic transmission and that the transmission was successful.:

H. Conformed copies. Upon request of a party, the clerk shall stamp additional copies provided by the party of any pleading filed by electronic transmission.

~~[10-106]~~ **10-107. Time.**

A. **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court or by the Children's Code, the day of the act, event or default from which the designated period of time begins to run shall not be included, unless otherwise provided by these rules. The last day of the period so computed shall be included, unless it is a Saturday, Sunday or legal holiday, or when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the clerk of the district court inaccessible, in which event the period runs until the end of the next day which is not one

of the aforementioned days. When the period of time prescribed or allowed is less than eleven (11) days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule, "legal holiday" includes New Year's day, Martin Luther King, Jr.'s birthday, Presidents day, Memorial day, Independence day, Labor day, Columbus day, Veterans' day, Thanksgiving day, Christmas day and any other day designated as a state or judicial holiday.

B. Enlargement. When, by these rules or by a notice given thereunder or by order of court, an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion:

(1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) upon motion made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules ~~[10-212,]~~ 10-211, ~~[10-226]~~ 10-241 or ~~[10-308]~~ 10-343 NMRA, except to the extent and under the conditions stated in those rules.

C. For motions. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

D. Additional time after service by mail. Whenever a party has the right or is required to do some act within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, three (3) days shall be added to the prescribed period.

[Committee commentary.]—No substantive changes were made in this rule in 1978. The rule substantially follows Rule 5-104 of the Rules of Criminal Procedure for the District Courts. Under Paragraph A, except as noted below, the time limits contained in these rules are computed in exactly the same manner as time is computed under either the Rules of Criminal Procedure for the District Courts or the Rules of Civil Procedure for the District Courts:

—The exceptions to the general method of time computation are the time limits for giving notice of detention, Rule 10-208, and notice of custody, Rule 10-302. These notices are required to be given within 24 hours from the time the child was placed in detention or taken into custody, including Saturdays, Sundays and legal holidays, even if the 24-hour period ends on one of these days.

—Paragraph B on enlargement of time limits is comparable to Paragraph B of the Rules of Criminal Procedure for the District Courts. The court may not extend the time for commencement of detention hearings or custody hearings unless the respondent's attorney agrees in writing to the extension. Under Rules 10-226 and 10-308, only the Supreme Court may extend the time for commencement of adjudicatory hearings.

—Paragraph C on additional time after service by mail follows Paragraph D of Rule 5-104 of the Rules of Criminal Procedure for the District Courts.

—Paragraph D on time for motions is patterned after Paragraph F of Rule 5-103 of the Rules of Criminal Procedure for the District Courts.]

~~[10-103-1]~~10-111. Motions; how and when presented.

A. Requirement of written motion; time for filing. All motions, except motions made during trial, or as may be permitted by the court, shall be in writing and shall state with particularity the grounds and the relief sought. All pre-adjudicatory motions shall be filed at least ten (10) days prior to any adjudicatory hearing except by leave of court.

B. Unopposed motions. The moving party shall determine whether or not a motion will be opposed. If the motion will not be opposed, an order ~~[initiated]~~ approved by opposing counsel shall accompany the motion.

C. Opposed motions. The motion shall recite that concurrence of opposing counsel was requested or shall specify why no such request was made. The movant shall not assume that the nature of the motion obviates the need for concurrence from opposing counsel unless the motion is a:

(1) motion to dismiss;

(2) motion for new trial;

(3) motion for judgment notwithstanding the verdict;

(4) motion for summary judgment in an abuse or neglect proceeding or in a termination of parental rights proceeding;

(5) motion for an ex parte custody order in an abuse or neglect proceeding; or

(6) motion for relief from a final judgment, order or proceeding in an abuse or neglect proceeding or a termination of parental rights proceeding pursuant to Paragraph B of Rule 1-060 of the Rules of Civil Procedure for the District Courts.

Notwithstanding the provisions of any other rule, counsel may file with any opposed motion a brief or supporting points with citations or authorities. If the motion requires consideration of facts not of record, the moving party shall file copies of all affidavits, depositions or other documentary evidence to be presented in support of the motion. Motions to amend pleadings shall have attached the proposed pleading. A motion for judgment on the pleadings presenting matters outside the pleading shall comply with Rule 1-056 of the Rules of Civil Procedure for the District Courts. A motion for new trial in a neglect or abuse, ~~[or]~~ termination of parental rights or delinquency proceeding shall comply with Rule 10-147 of these rules ~~[1-059 of the Rules of Civil Procedure for the District Courts].~~

D. Response. Unless otherwise specifically provided in these rules or by the Children's Code, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. A motion for new trial in a delinquency proceeding shall comply with Rule 5-604 of the Rules of Criminal Procedure for the District Courts.

E. Reply brief. Any reply brief shall be filed within fifteen (15) days after service of any written response.

~~[10-107]~~ 10-112. Pleadings and papers; captions.

A. Caption. Pleadings and papers filed in the children's court shall have a caption or heading which shall briefly include:

(1) the name of the court as follows:

"State of New Mexico

County of _____

_____ Judicial District"

In the Children's Court;

(2) the names of the parties; and

(3) a title which describes the cause of action or relief requested.

The title of a pleading or paper shall have no legal effect in the action.

B. Style. The petition and all other papers filed in the delin-

quency and abuse and neglect proceedings shall be entitled “In the Matter of _____, (*insert name of each child*)”.

[10-103.3] 10-113. Form of papers.

Except exhibits and papers filed by electronic transmission pursuant to Rule [10-105.2]10-106 of these rules, all pleadings and papers filed in the district court shall be clearly legible, shall be: on good quality white paper eight and one-half by eleven (8 1/2 x 11) inches in size, with a left margin of one (1) inch, a right margin of one (1) inch, and top and bottom margins of one and one-half (1 1/2) inches; with consecutive page numbers at the bottom; and stapled at the upper left hand corner; and, except for a cover page, shall be typed or printed using pica (10 pitch) type style or a twelve (12) point typeface. A space of at least two and one-half (2 1/2) by two and one-half (2 1/2) inches for the clerk’s recording stamp shall be left in the upper right-hand corner of the first page of each pleading. The contents, except quotations and footnotes, shall be double spaced. Exhibits which are copies of original documents may be reproduced from originals by any duplicating or copying process which produces a clear black image on white paper. The size of any exhibits shall be their original size or any smaller size not less than eight and one-half by eleven (8 1/2 x 11) inches.

[NEW MATERIAL]

10-114. Form of pleadings.

A. **Caption; names of parties.** Every pleading shall contain a caption setting forth the name of the court, the title of the action, the file number and a designation as to the type of pleading. In the petition the title of the action shall include the names of all parties.

B. **Paragraphs; separate statements.** All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters.

C. **Adoption by reference.** Statements made in one part of a pleading may be adopted by reference in another part of the same pleading or in another pleading or in any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

D. **Name of respondent.** In any pleading, the name of the respondent shall be stated, or, if the respondent’s name is not known, the respondent may be described by any name or description by which the respondent can be identified with reasonable certainty, together with a statement that respondent’s name is not known.

[NEW MATERIAL]

10-115. Signing of pleadings, motions and other papers; sanctions.

A. **Signing of papers.** Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party’s pleading, motion or other paper and state the party’s address and telephone number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The

signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer’s knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

B. **Sanctions.** If a pleading, motion or other paper is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading or other paper had not been served. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. For a willful violation of this rule an attorney or party may be subjected to appropriate disciplinary or other action. Similar action may be taken if scandalous or indecent matter is inserted.

C. **Definitions.** A “signature” means an original signature, a copy of an original signature, a computer generated signature or any other signature otherwise authorized by law.

[10-108]10-121. Parties [~~;~~intervention].

A. **Delinquency proceedings.** In proceedings on petitions alleging delinquency, the parties to the action are the child alleged to be delinquent, [and] the state and any person made a party by the court.

B. **Neglect or abuse and family in need of court ordered services proceedings; parties.** In proceedings on petitions alleging neglect or abuse or a family in need of court ordered services, the parties to the action are:

(1) the state;

(2) a parent, guardian or custodian who has allegedly neglected or abused a child or is in need of court-ordered services; [and]

(3) the child alleged to be neglected or abused or in need of court ordered services; and [~~The court shall appoint a guardian ad litem to represent the child alleged to be neglected or abused or in need of court ordered services upon the filing of a petition alleging neglect or abuse or a family in need of court ordered services.~~]

(4) any other person made a party by the court.

C. **Neglect or abuse and family in need of court ordered services proceedings; permissive joinder.** In proceedings on petitions alleging neglect or abuse or a family in need of court ordered services, the state may join as parties the non-custodial parent or parents, the guardian or custodian of the child or any other person permitted by law to intervene in the proceedings.

D. **Termination of parental rights [proceedings]; necessary parties.** [~~In termination of parental rights proceedings, the parties are the state, the parents of the child who have a constitutionally protected liberty interest in the child, the legal guardians of the child and any other person required by law to be made a party.~~] If a [supplemental petition] motion to terminate parental rights is filed in an abuse or neglect proceeding and a parent who has a constitutionally protected liberty interest in the child has not been joined as a party in the abuse or neglect proceeding, the department shall name the parent as a party in the termination of parental rights proceeding.

[E. Intervention:

(1) At any stage of abuse or neglect proceeding, a parent who has not been named as a party or, if the abused child is an Indian, the child’s Indian tribe may intervene.

(2) Upon timely application the following persons may be permitted to intervene in a children’s court proceeding under such

terms and conditions as the judge may prescribe:

_____ (a) in delinquency proceedings, the parents, guardian or custodian of the respondent;

_____ (b) in neglect, abuse or family in need of court ordered services proceedings, a guardian or custodian of the child alleged to have been abused or neglected or in need of court ordered services or any other person permitted by law;

_____ (c) in a delinquency, neglect, abuse or family in need of court ordered services proceeding any person with a statutory right to intervene in the proceedings; or

_____ (d) any person who has a constitutionally protected liberty interest in the proceedings if the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

— In exercising its discretion pursuant to subparagraph (2) of this paragraph the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.]

[**Committee commentary.** — Rule 10-108 is essentially a definitional section. It was changed in 1978 to reflect the enactment of Section 32-1-47 NMSA 1978 (formerly Section 13-14-44.1 NMSA 1953), allowing the parent of an alleged delinquent child to be named a party to the action.

— Under Paragraph A of Rule 10-108, the parties in delinquency and need of supervision proceedings are the respondent - the accused child - the state, a parent of a child alleged to be delinquent if named pursuant to Section 32-1-47 NMSA 1978, and, of course, anyone allowed to intervene under the rule. Depending on the stage of the proceeding, the state may be represented by either a juvenile probation officer or the children's court attorney. The children's court attorney must represent the state at adjudicatory hearings under Rules 10-227 and 10-308. Otherwise, his appearance at the various hearings is discretionary, although it would be unlikely that a probation officer would represent the state at release or transfer hearings.

— Paragraph B of Rule 10-108 defines the parties in neglect and abuse cases. In addition to the accused and the state, the alleged neglected or abused child, represented by a guardian ad litem, is a party. The guardian ad litem must be appointed upon the filing of the neglect or abuse petition (Rule 10-305), although nothing prohibits appointment prior to the filing. The role of the guardian ad litem has been well defined. His appointment:

... is a position of the highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved. *Bonds v. Joplin's Heirs*, 64 N.M. 342 at 345, 328 P.2d 597 (1958).

— In the 1978 revisions to the rules, the role of the guardian ad litem continues even after final disposition (Rule 10-309).

— The major difference between the role of the guardian ad litem in a neglect or abuse case and the role of the accused's attorney in a delinquency or need of supervision proceeding is that in the former, the guardian ad litem does what he considers to be in the best interests of the child, while in the latter the attorney, although he may advise differently, follows the instructions of his client, even though he may not consider those instructions to be in the client's best interests. The guardian ad litem has much greater freedom.

— Paragraph D of Rule 10-108 allows the parents, guardian or

custodian of the respondent in delinquency and need of supervision proceedings to become a party by moving the court for permission to intervene in the proceeding. In neglect or abuse proceedings, the parent, guardian or custodian who is not alleged to have neglected or abused the child may be permitted to intervene. The motion envisioned by the committee would be similar to an application for permissive intervention under Rule 1-024 of the Rules of Civil Procedure for the District Courts, with the court considering whether the intervention would unduly delay the proceedings or prejudice the rights of the respondent. For example, in delinquency and need of supervision proceedings, the risks of delay and confusion seem most acute in those situations in which the parents, guardian or custodian filed the original complaint against their child. In such circumstances, intervention by the parents, guardian or custodian may result in both the state and the parents, guardian or custodian prosecuting the child. Intervention would probably be most desirable in those situations where the accused child does not wish to contest the allegations of the petition, but his parents, guardian or custodian do.

— In the event that the court considers it necessary to have the parents, guardian or custodian appear before the court and intervention has not been sought and the parents have not been named as parties under Section 32-1-47 NMSA 1978, their appearance may be compelled by subpoena under Rule 10-109. Compare *In re Downs*, 82 N.M. 319, 481 P.2d 107 (1971).

— Rule 10-108 supersedes Subsections K and L of Section 32-1-27 NMSA 1978 relating to appointment of guardians ad litem to the extent that the rule is in conflict with these subsections. The court is left with the discretion to make such an appointment in other proceedings under the criteria set forth in the statute.]

[10-108] 10-122. [Parties; i] Intervention.

[A. **Delinquency proceedings.** In proceedings on petitions alleging delinquency, the parties to the action are the child alleged to be delinquent and the state.

— B. **Neglect or abuse and family in need of court ordered services proceedings; parties.** In proceedings on petitions alleging neglect or abuse or a family in need of court ordered services, the parties to the action are:

_____ (1) the state;

_____ (2) a parent who has allegedly neglected or abused a child or is in need of court ordered services; and

_____ (3) the child alleged to be neglected or abused or in need of court ordered services. The court shall appoint a guardian ad litem to represent the child alleged to be neglected or abused or in need of court ordered services upon the filing of a petition alleging neglect or abuse or a family in need of court ordered services.

— C. **Neglect or abuse and family in need of court ordered services proceedings; permissive joinder.** In proceedings on petitions alleging neglect or abuse or a family in need of court ordered services, the state may join as parties the non-custodial parent or parents, the guardian or custodian of the child or any other person permitted by law to intervene in the proceedings.

— D. **Termination of parental rights proceedings; necessary parties.** In termination of parental rights proceedings, the parties are the state, the parents of the child who have a constitutionally protected liberty interest in the child, the legal guardians of the child and any other person required by law to be made a party. If a supplemental petition to terminate parental rights is filed in an abuse or neglect proceeding and a parent has not been joined as a party in the abuse or neglect proceeding, the department shall name the parent as a party in the termination of parental rights

proceeding-]

[E]A. **Intervention of right.** [(H)]At any stage of an abuse or neglect proceeding, a parent who has not been named as a party or, if the abused or neglected child is an Indian child, the child's Indian tribe may intervene.

[(2)]B. **Permissive intervention.** Upon timely application the following persons may be permitted to intervene in a children's court proceeding under such terms and conditions as the judge may prescribe:

[(a)](1) in delinquency proceedings, the parents, guardian or custodian of the respondent;

[(b)](2) in neglect, abuse or famil[y]ies in need of court-ordered services proceedings, a guardian or custodian of the child alleged to have been abused or neglected or in need of court-ordered services[or any other person permitted by law];

[(c)](3) in a delinquency, neglect, abuse or family in need of court ordered services proceeding any person with a statutory [right to intervene] basis for intervention in the proceedings;[or]

[(d)](4) any person who has a constitutionally protected liberty interest in the proceedings if the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties[;]or

(5) any other person permitted by law to intervene.

In exercising its discretion pursuant to Subparagraph (2) of this paragraph, the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

C. Procedure. A person desiring to intervene pursuant to Paragraph A or B of this rule shall serve a motion to intervene upon the parties as provided in Rule 10-104. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene.

[Committee commentary.] — Rule 10-108 is essentially a definitional section. It was changed in 1978 to reflect the enactment of Section 32-1-47 NMSA 1978 (formerly Section 13-14-44.1 NMSA 1953), allowing the parent of an alleged delinquent child to be named a party to the action.

—Under Paragraph A of Rule 10-108, the parties in delinquency and need of supervision proceedings are the respondent - the accused child - the state, a parent of a child alleged to be delinquent if named pursuant to Section 32-1-47 NMSA 1978, and, of course, anyone allowed to intervene under the rule. Depending on the stage of the proceeding, the state may be represented by either a juvenile probation officer or the children's court attorney. The children's court attorney must represent the state at adjudicatory hearings under Rules 10-227 and 10-308. Otherwise, his appearance at the various hearings is discretionary, although it would be unlikely that a probation officer would represent the state at release or transfer hearings.

—Paragraph B of Rule 10-108 defines the parties in neglect and abuse cases. In addition to the accused and the state, the alleged neglected or abused child, represented by a guardian ad litem, is a party. The guardian ad litem must be appointed upon the filing of the neglect or abuse petition (Rule 10-305), although nothing prohibits appointment prior to the filing. The role of the guardian ad litem has been well defined. His appointment:

... is a position of the highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into

the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved. *Bonds v. Joplin's Heirs*, 64 N.M. 342 at 345, 328 P.2d 597 (1958).

—In the 1978 revisions to the rules, the role of the guardian ad litem continues even after final disposition (Rule 10-309).

—The major difference between the role of the guardian ad litem in a neglect or abuse case and the role of the accused's attorney in a delinquency or need of supervision proceeding is that in the former, the guardian ad litem does what he considers to be in the best interests of the child, while in the latter the attorney, although he may advise differently, follows the instructions of his client, even though he may not consider those instructions to be in the client's best interests. The guardian ad litem has much greater freedom.

—Paragraph D of Rule 10-108 allows the parents, guardian or custodian of the respondent in delinquency and need of supervision proceedings to become a party by moving the court for permission to intervene in the proceeding. In neglect or abuse proceedings, the parent, guardian or custodian who is not alleged to have neglected or abused the child may be permitted to intervene. The motion envisioned by the committee would be similar to an application for permissive intervention under Rule 1-024 of the Rules of Civil Procedure for the District Courts, with the court considering whether the intervention would unduly delay the proceedings or prejudice the rights of the respondent. For example, in delinquency and need of supervision proceedings, the risks of delay and confusion seem most acute in those situations in which the parents, guardian or custodian filed the original complaint against their child. In such circumstances, intervention by the parents, guardian or custodian may result in both the state and the parents, guardian or custodian prosecuting the child. Intervention would probably be most desirable in those situations where the accused child does not wish to contest the allegations of the petition, but his parents, guardian or custodian do.

—In the event that the court considers it necessary to have the parents, guardian or custodian appear before the court and intervention has not been sought and the parents have not been named as parties under Section 32-1-47 NMSA 1978, their appearance may be compelled by subpoena under Rule 10-109. Compare *In re Downs*, 82 N.M. 319, 481 P.2d 107 (1971).

Rule 10-108 supersedes Subsections K and L of Section 32-1-27 NMSA 1978 relating to appointment of guardians ad litem to the extent that the rule is in conflict with these subsections. The court is left with the discretion to make such an appointment in other proceedings under the criteria set forth in the statute.]

RULES 10-131, 10-132, 10-133, 10-134, 10-135, 10-136, AND 10-138 REMAIN UNCHANGED.

10-137. Continuing duty to disclose; failure to comply.

A. Duty to disclose. If, subsequent to compliance with Rule [10-213, 10-214, 10-308, 10-309 or 10-350] 10-221, 10-222, 10-331, 10-332, 10-333 or 10-334 NMRA [and prior to or during the adjudicatory hearing or termination of parental rights hearing], a party discovers additional material or witnesses which the party would have been under a duty to produce or disclose at the time of such previous compliance if it were then known to the party, the party shall promptly give written notice to the other party of the existence of the additional material or witnesses.

B. Failure to comply. If at any time during the course of the proceedings it is brought to the attention of the court that a

party has failed to comply with this rule or with an order issued pursuant to this rule, the court may order such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from calling a witness not disclosed, or from introducing in evidence the material not disclosed, or it may enter such other order as it deems appropriate under the circumstances, including, but not limited to, holding an attorney in contempt of court pursuant to Rule [10-113] 10-165 NMRA of these rules.

[Committee commentary.]—This rule was amended in 1982 to be consistent with Rule 5-505 NMRA of the Rules of Criminal Procedure for the District Courts.]

[10-115] 10-141. Rules of evidence.

[Except as otherwise provided by these rules,] The New Mexico Rules of Evidence shall govern all proceedings in the children's court, except as otherwise provided by law.

Committee Commentary

[Rule 10-115 was formerly Rule 14. It was renumbered in 1978.

—Rule 10-115 carries forth the provision of Rule of Evidence 11-1101 that the Rules of Evidence apply to all the courts of the state:

—Rule of Evidence 11-1101 makes the rules inapplicable to sentencing proceedings, issuance of arrest warrants and search warrants, granting or revoking probation and proceedings with respect to release on bail or otherwise. By analogy, these exceptions apply to the issuance of arrest and search warrants under Rule 10-206, to detention hearings under Rule 10-211 (a proceeding with respect to release on bail or otherwise), to dispositional hearings under Rules 10-229 and 10-309 (sentencing proceedings) and to reviews of dispositional judgments under Rule 10-311.

—Within specific children's court rules, the Rules of Evidence are specifically made inapplicable to the determination of a factual basis for an admission or consent decree, Rules 10-224 and 10-307; to ex parte custody proceedings, Rule 10-301; custody hearings, Rule 10-303; and the release hearing, Rule 10-212, under the general policy of Rule 11-1101 of the Rules of Evidence.

—The only other provisions of the Children's Court Rules which deal with evidentiary matters are Rules 10-224 and 10-307 relating to the inadmissibility of consent decree discussions in other proceedings:

—The Children's Code itself contains two evidentiary provisions which are apparently in conflict with one another and at least partially in conflict with the Rules of Evidence. The New Mexico Supreme Court applies the same constitutional standards for waiver of constitutional rights to children and adults. *State v. Henry*, 78 N.M. 573, 434 P.2d 692 (1967). See also Section 32-1-27 NMSA 1978. Children may waive their constitutional rights. See *Neller v. State*, 79 N.M. 528, 445 P.2d 949 (1968) and *Bouldin v. Cox*, 76 N.M. 93, 412 P.2d 392 (1966) (waivers of counsel); *Lopez v. United States*, 399 F.2d 865 (9th Cir. 1968) and *West v. United States*, 399 F.2d 467 (5th Cir. 1968) (waiver of Miranda rights).] Rule 11-1101(D)(2) NMRA states that the Rules of Evidence do not apply in the following situations:

Miscellaneous proceedings. Proceedings for extradition or rendition; sentencing by the court without a jury, or granting or revoking probation; issuance of warrants for arrest, criminal summonses and search warrants; proceedings with respect to release on bail or otherwise; dispositional hearings in children's court proceedings; and issuance of ex parte custody orders, custody hearings, permanency

hearings and judicial review proceedings in abuse and neglect proceedings.

However, the Rules of Evidence do apply to adjudicatory hearings on revocation of probation and consent decrees and to amenability hearings in children's court. See *State v. Erickson K*, 2002-NMCA-058, 132 N.M. 258, 46 P.3d 1258 (determining that the adjudicatory phase of juvenile proceedings are not exempt from the New Mexico Rules of Evidence); see also *In re Darcy S.*, 1997-NMCA-026, 123 N.M. 206, 936 P.2d 888 (stating that the Rules of Evidence apply to transfer hearings in children's court).

[NEW MATERIAL]

10-142. Judicial notice and determination of foreign law.

A. **Judicial notice.** The courts of New Mexico shall take judicial notice of the following facts:

(1) the true significance of all English words and phrases and of all legal expressions;

(2) whatever is established by law;

(3) public and private official acts of the legislative, executive and judicial departments of the United States, and the laws of the several states and territories of the United States, and the interpretation thereof by the highest courts of appellate jurisdiction of such states and territories;

(4) the seals of all the courts of this state, the United States and the courts of record of the various states of the United States and its territories;

(5) the accession to office, seals and the official signatures under seal of the officers of government in the legislative, executive and judicial departments of the United States and of the several states and territories thereof;

(6) the existing title, national flag and seal of every state or sovereign recognized by the executive power of the United States;

(7) the seals of notaries public; and

(8) the laws of nature, the result of time and the geographic divisions and political history of the world.

In all cases the court may resort for its aid to appropriate books or documents of reference.

This rule is not intended to be exclusive and nothing herein contained shall be construed to limit or restrict the courts from taking judicial notice under the New Mexico Rules of Evidence or existing practice.

B. **Determination of foreign law.** A party who intends to raise an issue concerning the law of a foreign country shall give notice in the party's pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the New Mexico Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

Committee Commentary

See Rule 1-044 NMRA of the Rules of Civil Procedure for District Court.

[10-109] 10-143. Subpoena.

A. **Form; issuance.**

(1) A subpoena shall not be issued pursuant to these rules unless a petition has been filed. Every subpoena shall:

(a) state the name of the court from which it is issued;

(b) state the title of the action and its children's court action number;

(c) command each person to whom it is directed to

attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person at a time and place therein specified; and

(d) be substantially in the form approved by the Supreme Court.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing, deposition or statement, or may be issued separately.

(2) All subpoenas shall issue from the court for the district in which the matter is pending.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney authorized to practice law in New Mexico and who represents a party, as an officer of the court, may also issue and sign a subpoena on behalf of the court.

B. Service; place of examination.

(1) A subpoena may be served any place within the state;

(2) A subpoena may be served by any person who is not a party and is not less than eighteen (18) years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if that person's attendance is commanded:

(a) if the witness is to be paid from funds appropriated by the legislature to the administrative office of the courts for payment of state witnesses or for the payment of witnesses in indigency cases, by processing for payment to such witness the fee and mileage prescribed by regulation of the administrative office of the courts;

(b) for all persons not described in Subparagraph (2)(a) of this paragraph, by tendering to that person the full fee for one day's expenses provided by Subsection A of Section 10-8-4 NMSA 1978 as per diem for nonsalaried public officers attending a board or committee meeting and the mileage provided by subsection D of Section 10-8-4 NMSA 1978. The fee for per diem expenses shall not be prorated. If attendance is required for more than one day, a full day's expenses shall be paid prior to commencement of each day attendance is required. When the subpoena is issued on behalf of the state or an officer or agency thereof, including the public defender department, fees and mileage need not be tendered. Prior to or at the same time as service of any subpoena commanding production of documents and things before trial, notice shall be served on each party in the manner prescribed by Rule ~~[10-105, 10-105.1 or 10-105.2]~~ 10-104, 10-105 or 10-106 NMRA;

(3) A person may be required to attend a deposition or statement within one hundred (100) miles of where that person resides, is employed or transacts business in person, or at such other place as is fixed by an order of the court.

(4) A person may be required to attend a hearing or trial at any place within the state.

(5) Proof of service when necessary shall be made by filing with the clerk of the court a return substantially in the form approved by the Supreme Court.

(6) A subpoena may be issued for taking of a deposition within this state in an action pending outside the state pursuant to Section 38-8-1 NMSA 1978 upon the filing of a miscellaneous proceeding in the judicial district in which the subpoena is to be served. Upon the docketing of the miscellaneous proceeding, the subpoena may be issued and shall be served as provided by this rule.

(7) A subpoena may be served in an action pending in this

state on a person in another state or country in the manner provided by law or rule of the other state or country.

C. Protection of persons subject to subpoenas.

(1) In general. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) Subpoena of materials.

(a) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things:

(i) need not appear in person at the place of production or inspection unless commanded to appear for deposition, statement, hearing or trial;

(ii) absent a court order, shall not respond to the subpoena prior to the expiration of fourteen (14) days after the date of service of the subpoena;

(iii) if a written objection is served or a motion to quash the subpoena is filed, shall not respond to the subpoena until ordered by the court; and

(iv) may condition the preparation of any copies upon payment in advance of the reasonable cost of inspection and copying.

(b) Subject to Subparagraph (2) of Paragraph D of this rule:

(i) a person commanded to produce and permit inspection and copying, or a person who has a legal interest in or the legal right to possession of the designated material may file a written objection or a motion to quash the subpoena;

(ii) any party may, within fourteen (14) days after service of the subpoena [or before the time specified for compliance if such time is less than fourteen (14) days after service,] serve upon all parties written objection to or a motion to quash inspection or copying of any or all of the designated materials;

(iii) if objection is [made,] served on the party serving the subpoena or a motion to quash is filed with the court and served on the parties, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an order of the court by which the subpoena was issued. [If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.] The court may award costs and attorney fees against a party or person for serving written objections or filing a motion to quash which lacks substantial merit.

(3) Modification or quashing of subpoena.

(a) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than one hundred (100) miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Subparagraph (3)(b)(iii) of this paragraph, such a person may in order to attend trial be commanded to travel from

any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
(iv) subjects a person to undue burden.

(b) [To protect a person subject to or affected by the subpoena, the court may quash or modify the subpoena if the] If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development or commercial information;

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party; or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than one hundred (100) miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

D. Duties in responding to subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

E. **Contempt.** Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided in Subparagraph (3)(a)(ii) of Paragraph C of this rule.

F. Duty to make copies available. A party receiving documents under subpoena shall make them available for copying by other parties.

Committee Commentary

See Rule 1-045 of the Rules of Civil Procedure for the District Courts. See the committee comments following Rule 1-045 NMRA for a discussion of the comparable civil rule governing subpoenas. [Prior to the adoption of this rule, Rule 1-044 NMRA governed subpoenas in criminal cases.] This rule is also similar to [substantively the same as] Rule 5-511 NMRA.

Grand jury subpoenas may be issued pursuant to Sections 31-6-12 and 31-6-13 NMSA 1978.

~~[10-117]~~ **10-144. Harmless error; failure to comply with time limits.**

Error or defect in any ruling, order, act or omission by the court or by any of the parties including failure to comply with time limits is not grounds for granting a new hearing or for setting aside a verdict, for vacating, modifying or otherwise disturbing a judgment or order, or for dismissing an action, unless refusal to take any such action appears to the court inconsistent with substantial

justice or unless these rules expressly provide otherwise.

[Committee commentary.]—Rule 10-117 was formerly Rule 18. It was renumbered in 1978.

—See Rule 1-061 of the Rules of Civil Procedure for the District Courts and Rule 5-113 of the Rules of Criminal Procedure for the District Courts. Rule 11-103 of the Rules of Evidence governs harmless error in the admission or exclusion of evidence.

—Rule 10-117 was amended in 1981 to clarify that failure to comply with time limits is not grounds for dismissal of an action unless expressly provided otherwise by the rules. Rules 10-226, 10-229 and 10-308 provide for dismissal with prejudice for failure to comply with the time limits for adjudicatory and dispositional hearings:

—In *State v. Doe*, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978), the New Mexico Court of Appeals dismissed a petition with prejudice which had not been filed within the time prescribed by Section 32-1-14 NMSA 1978. The court dismissed the petition with prejudice, basing its decision on the statute. Section 32-1-14 NMSA 1978 was amended in 1981 to delete both the time limit and dismissal with prejudice requirement provisions:

—Rules 10-226 and 10-308 provide time limits for adjudicatory hearings and Rule 10-229 provides time limits for dispositional hearings. These rules specifically require dismissal with prejudice if the time limit is not met. Since the decision in *State v. Doe*, supra, and apparently based on that holding, the court of appeals has dismissed petitions for failure to comply with time limits for dispositional and probation revocation hearings:

—*State v. Doe*, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979), held that a violation of the time requirements of Rule 10-229 requires dismissal. The delay of a child's arrival at the youth diagnostic center, followed by the withdrawal of the child's original attorney and a request for continuance of the hearing by a second attorney, resulting in the hearing being held more than seventy-five days following the completion of the adjudicatory hearing, does not affect the requirement of dismissal. *State v. Doe*, 94 N.M. 282, 609 P.2d 729 (Ct. App. 1980):

—*State v. Doe*, 93 N.M. 621, 603 P.2d 731 (Ct. App. 1979), held that failure of the court to commence the hearing to revoke probation within the time prescribed by the rules requires that the revocation petition be dismissed with prejudice:

—*State v. Doe*, 93 N.M. 748, 605 P.2d 256 (Ct. App. 1980), held that the hearing on a petition to extend custody pursuant to 32-1-38 NMSA 1978 must be held within 30 days after the date of termination of the prior custody or the date the respondent is arrested after his failure to appear, whichever shall last occur. The time limits of Rule 10-226 are applicable to petitions to extend custody. Failure to hold the hearing on the petition to extend custody within 30 days of the date of the applicable occurrence stated above requires dismissal with prejudice of the petition to extend custody.]

~~[10-103.2]~~ **10-146. Dismissal of actions.**

A. Voluntary dismissal; effect thereof.

(1) In any action except a delinquency proceeding, the action may be dismissed by the petitioner without order of the court:

(a) by filing a notice of dismissal at any time before commencement of the adjudicatory hearing; or

(b) by filing a stipulation of dismissal signed by all parties in the action.

(2) The children's court attorney may dismiss a delinquency petition or a petition to revoke probation, at any time prior to

commencement of the adjudicatory hearing, without order of the court.

B. Involuntary dismissal; effect thereof. For failure of the petitioner to comply with these rules or any order of court, a respondent may move for dismissal of an action or of any claim against the respondent. Unless the court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule ~~[10-007]~~ 10-121 NMRA, operates as an adjudication upon the merits.

C. Dismissal of requests for affirmative relief by parties other than the petitioner. The provisions of this rule apply to the dismissal of any request for affirmative relief by any party other than the petitioner. A voluntary dismissal without leave of the court by the party requesting such relief shall be made before a response is served, or if there is no response, before the introduction of evidence at the ~~[trial or]~~ adjudicatory hearing.

~~[10-120]~~ 10-147. New adjudicatory hearing or trial; relief from judgment or order.

A. Motion for new adjudicatory hearing or trial. A motion for a new adjudicatory hearing or trial may be filed by a party or upon the court's own initiative at any time not later than ten (10) days after the entry of a judgment pursuant to Rule 10-230 NMRA or Rule ~~[10-310]~~ 10-333 NMRA. A motion for a new adjudicatory hearing or trial based on the ground of newly discovered evidence may be made within thirty (30) days after entry of the judgment, but if an appeal is pending the court may grant the motion only on remand of the case.

(1) A new adjudicatory hearing or trial may be granted upon a finding by the court that the newly discovered evidence:

~~[(1)]~~ (a) will probably change the result if a new hearing is granted;

~~[(2)]~~ (b) was discovered since the adjudicatory hearing or trial and could not have been discovered before the adjudicatory hearing by the exercise of due diligence;

~~[(3)]~~ (c) is material to the issue;

~~[(4)]~~ (d) is not merely cumulative; and

~~[(5)]~~ (e) is not merely impeaching or contradictory.

(2) A motion for new adjudicatory hearing or trial is automatically denied:

~~[(1)]~~ (a) if not granted within ~~[ten (10)]~~ thirty (30) days from the date it is filed; or

~~[(2)]~~ (b) if the motion is filed while an appeal of the adjudication is pending, if not granted within thirty (30) days from the date of remand to the children's court.

B. Clerical mistakes. Clerical mistakes in judgments, orders or parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

C. Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons:

(1) mistake, inadvertence, surprise or excusable neglect;

(2) newly discovered evidence which by due diligence

could not have been discovered in time to move for a new trial under Paragraph A of this rule;

(3) fraud, misrepresentation or other misconduct of an adverse party;

(4) the judgment is void; or

(5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this paragraph does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court.

Committee Commentary

This rule retains the automatic denial provision because of the necessity of timely resolution of children's court proceedings.

~~[10-118]~~ 10-151. Stay pending appeal; application in the Court of Appeals.

A party appealing a judgment of the children's court may request that the judgment be stayed by filing and serving an application for stay in the manner provided by Rule 12-206 NMRA [the Rules of Appellate Procedure].

~~[Committee commentary. — This rule was revised in two ways in 1978: (1) the time in which an answer is to be filed in response to an application for stay was expanded from three days to seven days (see Rule 10-106 for computation of time limits), and (2) the role of the children's court judge in the appellate stay procedure was deleted. Requirements regarding reports of the evidence submitted in the children's court are now fulfilled by certificate of counsel.~~

~~— This rule sets forth the general procedure for staying a judgment of the children's court. Both the attorney general and the children's court attorney must be served with the application. Although the attorney general represents the state on appeal, the trial attorney may be involved in opposing the application. To give effect to 32-1-39B NMSA 1978, the rule requires the application to present alternatives for placement of the child pending the appeal.]~~

~~[10-119]~~ 10-152. Judgments or orders on mandate.

A. Party responsible. Within thirty (30) days after an appellate court has sent its mandate to the children's court, the prevailing party on appeal shall either:

(1) present to the court a proposed judgment or order on the mandate containing the specific directions of the appellate court; or

(2) if necessary, request a hearing.

B. Service. The proposed judgment or order on the mandate shall be served on all parties.

[NEW MATERIAL]

10-161. Designation of children's court judge.

A. Assignment of cases. The judge before whom the case is to be tried shall be designated at the time the petition is filed pursuant to local district court rule.

B. Procedure for replacing a children's court judge who has been excused or recused. In the event the designated children's court judge has been excused or recused, the clerk of the district court shall assign a district judge of the same judicial district at random, in the same fashion as cases are originally assigned or pursuant to local district court rule. If all district court judges in

the district have been excused or recused, the clerk of the district court shall immediately notify the chief justice of the Supreme Court of New Mexico, who shall designate a judge, justice or judge pro tempore to hear all further proceedings.

C. **Automatic recusal.** If a proceeding is filed in any county of a judicial district in which a judge or employee of the district is a party, no judge of the district may hear the matter without written agreement of the parties. If within ten (10) days after the proceeding is filed, the parties have not filed a stipulation agreeing to a judge within the district to preside over the matter, the clerk shall request the Supreme Court to designate a judge.

D. **Excusal of judge appointed by chief judge.** Any judge designated by the chief justice may not be excused pursuant to Article VI, Section 18 of the New Mexico Constitution.

~~[10-112]~~10-162. Peremptory challenge to a children's court judge; recusal; procedure for exercising; disability.

A. **Limit on excusals or challenges.** No party shall excuse more than one judge. A party may not excuse a judge after the party has requested that judge to perform any discretionary act. Action by the court in connection with a detention or custody hearing or the appointment of counsel shall not preclude the disqualification of a judge.

B. **Procedure for excusing a children's court judge.** A party may exercise the statutory right to excuse the judge before whom the proceeding is pending by filing with the clerk of the children's court a peremptory election. The peremptory election to excuse must be signed by the party or an attorney representing a party within ten (10) days after the latter of:

- (1) the first appearance of the party;
- (2) service of the petition on the party; or
- (3) mailing by the clerk of notice of assignment or reassignment of the case to a judge.

C. **Notice of reassignment; service of excusal.** After the filing of the petition, if the case is reassigned to a different judge, the clerk shall give notice of reassignment to all parties. Any party electing to excuse a judge shall serve notice of such election on all parties.

D. **Recusal.** No children's court judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in any such action. Upon receipt of notification of recusal from a children's court judge, the clerk of the court shall give written notice to each party.

E. **Disability.** If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed with it upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. The successor judge may recall any witness.

Committee Commentary

[In 1989, Rule 10-112 was amended to adopt the peremptory disqualification procedures approved by the Supreme Court for civil cases. See Rule 1-088.1.]

— Paragraph D of Rule 10-112 applies to disqualifications pursuant to Section 38-3-9 NMSA 1978. In *Frazier v. Stanley*, 83 N.M. 719, 497 P.2d 230 (1972), the New Mexico Supreme Court held that the right to disqualify a judge pursuant to Section 38-3-9 NMSA 1978 (formerly Section 21-5-8 NMSA 1953) was applicable to the Juvenile Code, predecessor statute to the Children's Code. The court held that Juvenile Code proceedings were "either civil or criminal (and) (i)n either case, petitioner was a party to the action

or proceeding and entitled to exercise the right of disqualification given her by Section 38-3-9, supra". 83 N.M. at 720.

— Under Section 38-3-9 NMSA 1978, the party himself, not his attorney, must sign the affidavit of disqualification, and this procedure is continued under Rule 10-112. Rule 10-112, although following the procedures outlined in Section 38-3-9 NMSA 1978, does not follow the time limits for disqualification set forth in Section 38-3-10 NMSA 1978.

— Paragraph B of Rule 10-112 is intended to make clear that the action of a judge at a detention or custody hearing or the action of the judge in appointing counsel is not considered an exercise of discretion in determining the validity of a later disqualification. See *Smith v. Martinez*, 96 N.M. 440, 631 P.2d 1308 (1968).

— Paragraph C of Rule 10-112 follows Rule 5-106 of the Rules of Criminal Procedure for the District Courts.]

Rule 10-162 [112] is not meant to restrict disqualifications pursuant to Art. VI, Sec. 18, of the New Mexico Constitution, nor to restrict disqualifications pursuant to Section[s] 32A-2-22(F) [32-1-29 or 32-1-36] NMSA 1978. Section 32A-2-22(F) [32-1-36 NMSA 1978] allows disqualification upon objection by the child in certain situations involving consent decrees[, and Section 32-1-29 NMSA 1978 permits disqualification upon objection of a party when the judge presides at a transfer hearing].

~~[10-111]~~ 10-163. Special masters.

A. **Appointment.** A special master may be appointed by a children's court judge pursuant to the provisions of this rule to assist in any children's court proceeding.

B. **Qualifications.** Any person appointed to serve as a special master pursuant to this rule shall:

- (1) have been licensed to practice law in the State of New Mexico for at least three (3) years; and
- (2) shall be familiar with children's court matters.

C. **Powers.** Unless the order otherwise specifies, the special master has the power to perform any of the functions of a children's court judge pursuant to the provisions of the Children's Court Rules except that the special master shall not preside at a preliminary hearing or examination, jury trial, bench trial, adjudicatory hearing or dispositional hearing without concurrence of the parties. All recommendations of the special master are contingent upon the approval of the children's court judge.

D. **Duties.** The special master shall prepare a report including proposed findings of fact and conclusions of law on the matters submitted to the special master by the order of appointment. The report shall be filed with the court and copies shall be served on all parties in accordance with the provisions of these rules.

E. **Exceptions to report.** Any party may file exceptions to the special master's proposed findings, conclusions, recommendations or proposed orders. Exceptions shall be in writing, filed with the clerk within five (5) days after service of the master's report and shall set forth:

- (1) those items to which exception is taken;
- (2) a short resume of all facts relevant to the issues presented for review with appropriate references to the pages of the record proper and pages or sequential time or counter numbers of the transcript. If reference is made to evidence the admissibility of which is in controversy, reference shall be to the place in the transcript of proceedings where the evidence was identified, offered and received or rejected;
- (3) a citation to any authority which may assist the children's court judge in reviewing the exceptions; and
- (4) a statement of the precise relief sought.

F. **[Review of the special master's report.** After the time for filing exceptions has expired the children's court may:

— (1) adopt the report or proposed order, modify it or reject it in whole or in part; or

— (2) receive evidence excluded by the special master to which exceptions have been taken.] **Children's court proceedings.** After receipt of the special master's report:

(1) Review of recommendations.

(a) The court shall review the recommendations of the special master and determine whether to adopt the recommendations.

(b) If the party files timely, specific objections to the recommendations, the court shall conduct a hearing appropriate and sufficient to resolve the objections. The hearing shall consist of a review of the record unless the court determines that additional evidence will aid in the resolution of the objections.

(c) The court shall make and independent determination of the objections.

(d) The court may adopt the recommendations, modify them, reject them in whole or in part, receive further evidence, or may recommit them to the special master with instructions.

(2) Findings and conclusions; entry of final order. After the hearing, the court shall enter a final order. When required by law, the court also shall enter findings and conclusions.

G. **Removal of special masters.** In any proceeding, upon motion of any party upon good cause shown, or upon the court's own motion, the children's court may at any time remove the special master from acting in that proceeding.

H. **Time limits.** No time limit set forth in these rules shall be tolled or enlarged because of the appointment of a special master. If a special master is assigned to make recommendations on a proposed admission or consent decree for a child who is in detention, the special master shall submit the special master's recommendations to the court within five (5) days after the admission or consent decree has been referred to the special master.

Committee Commentary

[Rule 10-111 was added in 1978 to provide assistance to the children's court judge in large judicial districts by allowing a special master to exercise all powers of the court, other than power to preside at jury trials, transfer hearings and dispositional hearings. The 1981 legislature specifically provided for the use of special masters in other judicial districts and provided less restrictive qualifications than provided in this rule. The committee believes that the use of special masters is an inherent power of the judiciary; however, consistent with legislative intent, the court deleted the geographical limitations in Rule 10-111. The committee did not recommend any change in the qualifications for special masters. See Section 32-1-38.1 NMSA 1978 and the definition of "court" found as Subsection C of Section 32-1-3 NMSA 1978.]

A major goal of the juvenile justice system is early and prompt judicial disposition of a case. Rule 10-111 is designed to allow supplementation of judicial resources. Paragraph F has been amended to conform with the changes in Rule 1-053.1 and 1-053.2 NMRA. [whenever the children's court judge "is unable to expeditiously dispose of pending children's court cases" or some other "exceptional condition" requires the appointment. The supreme court need not approve the appointment of a special master in each individual case.

— The power to appoint special masters is an inherent power of the judiciary. *McCann v. Maxwell*, 170 Ohio St. 282, 189 N.E.2d 143 (1963). See *North Carolina R.R. v. Swasey*, 90 U.S. 405, 23 L. Ed. 136 (1875). Typically, this power has been limited to

unusual or complex cases. Thus, Rule 1-053 of the Rules of Civil Procedure for the District Court provides:—

A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

—The committee believed that the court's inability to "expeditiously dispose of pending children's court cases" was the type of exceptional condition which warranted appointment of a special master. This conclusion was based on two considerations: (1) the goal of prompt disposition, previously discussed and (2) the very short time limits established in the rules and the Children's Code.

—The time limits in these rules are not to be tolled or enlarged if a special master is appointed.

—Once it was determined that a special master was a necessary addition to the system, the committee endeavored to draft a rule which would meet the requirements of both the state and federal constitutions.

—A special master in a juvenile case has been held to be a ministerial officer and not a judicial officer so long as the master's recommendations are not binding on the district judge. In *re Anderson*, 272 Md. 85, 321 A.2d 516 (Md. Ct. App. 1974). Under Rule 10-111F, the court is not bound by the findings and conclusions of the special master and may, in fact, receive evidence excluded by the special master if the claimed error is properly preserved. The court retains full power over the dispositional hearing pursuant to Paragraph C of Rule 10-111. The children's court judge always has responsibility for the final decision in the case.

—Under Rule 10-111 a child is subject to a "single proceeding which begins with a master's hearing and culminates with an adjudication by the children's court judge". Thus there is no violation of the double jeopardy clause of the United States Constitution. *Swisher v. Brady*, 438 U.S. 204, 98 S. Ct. 2699, 57 L. Ed. 705 (1978).

—This rule was amended in 1990 to authorize the appointment of special advocates to assist the children's court by investigating facts and making reports to the court. The 1991 amendments eliminated the authority of special advocates to enter into ex parte communications with the children's court judge.]

[10-121]10-164. Court appointed special advocates.

A. **Appointment.** A court appointed special advocate ("CASA") may be appointed by a children's court judge pursuant to the provisions of this rule to assist in any children's court proceeding.

B. **Qualifications.** Any volunteer appointed to serve as a CASA pursuant to this rule shall:

(1) be of the age of majority;

(2) have successfully passed screening requirements, including a written application, personal interview, reference checks and criminal records checks;

(3) have successfully completed initial and regular in-service training in accordance with the guidelines of the statewide CASA network; and

(4) remain under the supervision of the local CASA director.

C. **Powers.** The CASA may assist the court:

(1) in determining the best interests of the child by investigating the facts of the situation when directed by the court and

submitting reports to the parties; and

(2) by monitoring compliance with the treatment plan and submitting reports to the court and the parties subsequent to adjudication.

D. **Duties.** Any volunteer appointed to serve as a CASA pursuant to this rule shall be assigned duties consistent with the best interest of the child, which include but are not limited to:

(1) reviewing records other than those records to which access is limited by the court;

(2) interviewing appropriate parties;

(3) monitoring case progress;

(4) preparing reports based on the investigation conducted by the CASA, including recommendations to the court; and

(5) conducting business while maintaining confidentiality of information obtained.

E. **Ex parte communications.** A CASA volunteer shall not engage in any *ex parte* communications with the judge assigned to any case on which the CASA volunteer is working.

F. **Reports.** Any reports prepared by the CASA volunteer shall not be filed with or considered by the children's court judge prior to the conclusion of the adjudicatory proceeding. The report shall be served on the parties, but not the court, at least five (5) days prior to the hearing at which it will be considered.

G. **Time limits.** No time limit set forth in these rules shall be tolled or enlarged because of the appointment of a CASA.

[10-113]10-165. Attorney appearances; withdrawal and substitution of counsel; signing of pleadings.

A. **Entry of appearance.** Whenever an attorney undertakes to represent a party in any children's court action, the attorney shall file a written entry of appearance in the cause, unless the attorney was appointed by written order of the court. For the purpose of this rule, the filing of any pleading signed by an attorney constitutes an entry of appearance.

B. **Continued representation.** An attorney who has entered an appearance or who has been appointed by the court to represent a party in a children's court proceeding shall continue such representation until relieved by the court, unless a substitution of counsel is filed not less than fifteen (15) days prior to the adjudicatory hearing.

C. **Substitution of counsel.** Except as provided in Paragraph B of this rule, no attorney or firm who has entered an appearance in a children's court proceeding may withdraw as counsel without a written order of the court. The court may condition consent to withdraw upon substitution of other counsel or the filing by a party of proof of service on all other parties of an address at which service may be made upon the party. Following withdrawal by counsel, an unrepresented party shall have twenty (20) days within which to secure counsel or be deemed to have entered an appearance *pro se*. Notice of withdrawal and substitution of counsel shall be filed with the court and served on all parties either by withdrawing counsel or by substituted counsel.

D. **Failure to observe rules.** An attorney who willfully fails to observe the requirements of these rules, including prescribed time limitations, may be held in contempt of court and subject to disciplinary action.

E. **Signing of pleadings.** Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and telephone number shall be stated. A party who is not represented by an attorney shall sign the party's pleading and state the party's address and telephone number. Except when otherwise specifically

provided by rule, pleadings need not be verified or accompanied by affidavit. The signature of an attorney constitutes a certificate by the signer that the signer has read the pleading; that to the best of the signer's knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.

[Committee commentary.]—Rule 10-113 was formerly Rule 12. It was renumbered in 1978. See Rules 5-107 and 5-112 of the Rules of Criminal Procedure for the District Courts. See also discussion of attorney discipline in commentary to Rule 10-204.

—The requirement in Paragraph A of Rule 10-113 that counsel “immediately” file a written entry of appearance is designed to prevent the unnecessary appointment of an attorney for a respondent alleged to be delinquent or in need of supervision when that respondent already has retained private counsel. Under Rule 10-204, appointment of counsel occurs automatically within five days of the filing of a petition or at the conclusion of the detention hearing unless counsel has entered an appearance on behalf of the respondent.

—It should also be noted that the time limits for pretrial motions in Rule 10-114 and the time limit for a demand for jury trial in Rule 10-228 begin running from the time of appointment or entry of appearance.

—Paragraph D was derived from Rule 1-011 of the Rules of Civil Procedure for the District Courts. It eliminates any need for endorsements on petitions by the children's court attorney. See Section 32-1-17 NMSA 1978.]

[WITHDRAWN; RECOMPILED AS RULE 10-341]

[10-110. Witness immunity.]

A. **Issuance of order.** If a person has been or may be called to testify or to produce a record, document or other object in an abuse or neglect, termination of parental rights or guardianship proceeding in the children's court, the judge before whom the proceeding is pending may upon the written application for immunity by the children's court attorney, issue a written order requiring the person to testify or to produce the record, document or other object notwithstanding the person's privilege against self-incrimination. The department shall serve the district attorney with a copy of the application for immunity and notice of hearing on the application.

B. **Application.** The court may grant the application and issue a written order pursuant to this rule if it finds:

(1) the testimony, or the record, document or other object may be necessary to the public interest; and

(2) the person has refused or is likely to refuse to testify or to produce the record, document or other object on the basis of the person's privilege against self-incrimination.

C. **Extent of immunity.** Evidence compelled under an order granted pursuant to this rule or any information directly or indirectly derived from such evidence may not be used against the person in any criminal case except as provided by Rule 11-412 NMRA of the Rules of Evidence.]

[Committee commentary.]—Prior to the March 20, 2000 amendment of this rule, this rule was the same as Rule 5-116 NMRA of the Rules of Criminal Procedure for the District Courts. The March 20, 2000, amendments limit the applicability of this rule to abuse or neglect, termination of parental rights or guardianship proceedings in which the respondent may be accused of a criminal offense arising out of the proceedings.

—Paragraph C was added as part of the March 20, 2000 amendments.]

[NEW MATERIAL]

10-201. Delinquency proceedings; scope.

Article 2 of these rules governs procedure in delinquency proceedings.

~~10-204~~10-211. Preliminary inquiry; filing of petition.

A. **Preliminary inquiry.** Prior to the filing of a petition alleging delinquency, probation services shall complete a preliminary inquiry in accordance with the Children's Code.

B. **Petition[s]; form.** [Petitions] The petition shall be substantially in the form approved by the Supreme Court. The petition shall be signed by the children's court attorney or a staff attorney as permitted by the Children's Code.

C. **Time limit.** If the respondent child is in detention a petition shall be filed within two (2) days from the date of detention.

D. **Notice of filing of the petition[s] in delinquency proceedings.** If the parents, guardians or custodians of a respondent child alleged to be a delinquent child are not joined as parties in the delinquency proceeding, they shall be given notice of the filing of the petition in the manner provided by Rule 10-10[5]4 of these rules.

E. **Amendment of offense.** At any time prior to commencement of the adjudicatory hearing and subject to the provisions of Rule 10-212 NMRA, the court may allow the petition to be amended to charge the respondent child with an additional or different offense. Upon allowing such an amendment and upon the request of the respondent child, the court shall grant a continuance to allow further time for preparation.

[**Committee commentary.** — Rule 10-204 was formerly Rule 23. It was renumbered in 1978:

— The rule sets forth the procedure for initiating formal court action in a delinquency or need of supervision proceeding:

— Under Paragraph A of Rule 10-204 the filing of a petition is a two-step process: (1) probation services conducts a preliminary inquiry and either authorizes or refuses to authorize the filing of a petition; and (2) the children's court attorney reviews the matter to determine if there are legally sufficient grounds to proceed to court with the case. The children's court attorney makes the final determination whether or not to prosecute the child. He may do so even if probation services has not authorized a petition. He may refuse to do so even if probation services has authorized the filing of the petition. However, probation services must have completed a preliminary inquiry before the petition can be filed. The original committee believed that the children's court attorney is responsible for prosecuting the case, and he should make the ultimate decision whether or not to proceed:

— Paragraph B of Rule 10-204 sets forth the form and contents of the petition. Forms for petitions have been approved by the supreme court.

— Paragraph C of Rule 10-204 establishes time limits for filing of the petition. The time limit for filing of a petition when the child is in detention is also the time limit for completion of the preliminary inquiry. For computation of the time limits see Rule 10-106:

— Rule 10-204 covers the subject matter dealt with in Sections 32-1-14D, 32-1-17, 32-1-18, 32-1-19 and 32-1-26A(1) NMSA 1978. The most significant changes are in the procedure for filing a petition and in the time limits for filing a petition when the child is not in detention:

— Paragraph A of Rule 10-204 supersedes conflicting provisions contained in Sections 32-1-17 and 32-1-18 NMSA 1978. Initiating formal court action is a procedural matter.

— The requirement that the children's court attorney consult with

probation services is believed to be directory and not mandatory. See State ex rel. Attorney General v. Reese, 78 N.M. 241, 430 P.2d 399 (1967). Rule 10-113 of these rules makes the endorsement on each petition that the filing of the petition is in the best interest of the child and the public unnecessary. See also art. 20, § 1 of the New Mexico Constitution:

— In no case may anyone but the children's court attorney file a petition. (See Rule 10-305 for the filing of neglect petitions.) Probation officers are not allowed to sign any petitions, including petitions to revoke probation. (See Rule 10-232.) Of course, a parent, guardian, a representative of an agency licensed or authorized to provide care or supervision of children, etc., may make a complaint to probation services or the human services department.

— In State v. Doe, 91 N.M. 393, 574 P.2d 1021 (Ct. App. 1978), the court held that a petition not filed within the mandatory time period must be dismissed with prejudice pursuant to the language of former Section 32-1-14D NMSA 1978. Under Rule 10-117, the only jurisdictional time limits are those contained in Rules 10-226 and 10-308 regarding the commencement of adjudicatory hearings on delinquency, need of supervision and abuse and neglect petitions and Rule 10-229 regarding the commencement of dispositional hearings. This is consistent with the general policy followed in the Rules of Criminal Procedure for the District Courts. Enforcement of the other provisions of the rules, including time limits, is through Rule 10-113 which allows the court to impose sanctions on an attorney who willfully violates the rules. This is also consistent with the policy of the Rules of Criminal Procedure and similar provisions in other rules adopted by the supreme court. For example, in State v. Lucero, 87 N.M. 369, 533 P.2d 758 (1975), the supreme court directed the court of appeals to hear an appeal on its merits with leave to "impose such sanctions as it deems appropriate" on an attorney for violation of the appellate rules. See also Rule 5-702 and commentary thereto of the Rules of Criminal Procedure for the District Courts:

— Although Section 32-1-3P NMSA 1978 was amended to delete the requirement that a delinquent child be in need of care or rehabilitation, Section 32-1-31E NMSA 1978 requires the court to find that a delinquent child is in need of care and rehabilitation and if the court does not so find, the petition shall be dismissed and the child released. "Need of care and rehabilitation" is still a requirement for delinquency.]

~~10-204.1~~10-212. [Delinquency proceedings; j] Joinder of offenses and parties; severance.

A. **Joinder of offenses.** Two or more offenses may be joined in a single petition alleging delinquency, with each [such] allegation stated in a separate count if [such allegations, whether felonies or misdemeanors or both] the allegations:

(1) are of the same or similar character, even if not part of a single scheme or plan; or

(2) are based on the same conduct or on a series of acts either connected together or constituting parts of a single scheme or plan.

B. **Joinder of respondents.** A separate petition shall be filed for each respondent who is a child alleged to have committed a delinquent act. Two or more respondents may be joined on motion of a party, or by the filing of a statement of joinder by the state contemporaneously with the filing of the petitions charging such respondents:

(1) when each of the respondents is charged with account-

ability for each offense included;

(2) when all of the respondents are charged with conspiracy and some of the respondents are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) when, even if conspiracy is not charged and not all of the respondents are charged in each count, the several offenses charged:

(a) were part of a common scheme or plan; or

(b) were so closely connected in respect to time, place and occasion that it would be difficult to separate proof of one charge from proof of others.

C. Motion for severance. If it appears that a respondent or the state is prejudiced by the joinder of offenses or of parties by the filing of a statement of joinder for trial, the court may order separate trials of offenses, grant a severance of respondents or provide whatever other relief justice requires. In ruling on a motion by a respondent for severance, the court may order the state to deliver to the court for inspection in camera any statements or confessions made by the respondents which the state intends to introduce in evidence at the trial.

[Committee commentary.]—The rule sets forth the bases for joining offenses and respondents in children’s court proceedings and the basis and method of relief from prejudicial joinder.

—Paragraph A of Rule 10-107 on joinder of allegations of offenses follows Rule 5-203 of the Rules of Criminal Procedure for the District Courts. The issue of whether mandatory joinder is required by the supreme court order issued in December, 1979, was raised by the committee in December, 1981. It was the consensus of the supreme court that its earlier order did not extend to juvenile proceedings. See commentaries to Rule 5-203 of the Rules of Criminal Procedure for the District Courts. Paragraph B of Rule 10-107 relating to joinder of respondents is patterned after Paragraph B of Rule 5-203 of the Rules of Criminal Procedure for the District Courts. See also Section 32-1-47 NMSA 1978 for permissive joinder of parents in delinquency proceedings and Rule 10-108 of these rules.

—Paragraph C of Rule 10-107 governs joinder in neglect or abuse actions. A single petition may allege that a parent, guardian or custodian has neglected or abused more than one child or that both parents, guardians or custodians have neglected or abused one or more children. Of course, some connection between the alleged acts of neglect or abuse or the children involved is envisioned. Thus, Paragraph C of Rule 10-107 would permit joinder in a single petition of allegations that one parent neglected or abused only one of a couple’s children and that the other parent neglected or abused another of their children. It would allow in a single petition allegations of separate acts each amounting to neglect or abuse. —Under Paragraph D of Rule 10-107, relief from joinder is available only to the respondent. The relief may be granted only upon motion and hearing, and the moving respondent must show prejudice.

—Evidence against a joint respondent which violates the constitutional right of confrontation of the moving respondent is not admissible against the moving respondent. *Bruton v. United States*, 391 U.S. 123, 130-31, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). The *Bruton* holding has been held applicable to delinquency proceedings in at least one jurisdiction. *In re Appeal No. 977*, 22 Md. App. 511, 323 A.2d 663 (1974).]

[10-222]10-213. Youthful offender proceedings; filing of

notice.

A. Notice of intent. Within ten (10) days after the filing of a petition, the children’s court attorney may file with the children’s court a notice of intent to request the court to treat the respondent child as a “youthful offender”, as that term is defined in the Children’s Code. At any time prior to the commencement of the adjudicatory proceeding, upon good cause shown, the court may permit the filing of a notice of intent to invoke an adult sentence.

B. Probable cause determination. Within [~~ten (10)~~] fifteen (15) days after a notice of intent to invoke an adult sentence is filed, a preliminary [~~examination~~] hearing will be conducted by the court unless the case is presented to a grand jury or the respondent child waives the right to a preliminary hearing or grand jury. If the case is presented to a grand jury, the provisions of Section 31-6-1 et seq. shall apply, except as otherwise provided in these rules. [~~A preliminary hearing may be conducted by the children’s court judge or by a magistrate court or metropolitan court judge.~~

—**C. Transfer for preliminary examination.** If the children’s court judge determines that the preliminary hearing is to be conducted by a magistrate or metropolitan court judge, upon completion of the examination, the magistrate or metropolitan court shall transfer the proceedings to the children’s court with a finding that there is:

— (1) no probable cause to believe that the child has committed a youthful offender offense; or

— (2) probable cause to believe that the child committed a youthful offender offense.

—**D. Proceedings after transfer by magistrate or metropolitan court.** Upon transfer of a children’s case to the children’s court by a magistrate or metropolitan court judge pursuant to Paragraph B of this rule, the proceedings shall be reopened and the case assigned to the children’s court judge who transferred the proceedings to the magistrate or metropolitan court for a probable cause determination.

Committee Commentary

— Rule 10-222 was formerly Rule 30. It was renumbered in 1978:

— Rule 10-222 establishes procedures for the hearing to determine whether a child should be transferred to district court to be tried as an adult. Rule 10-223 prescribes time limits for holding a transfer hearing.

— Paragraph A of Rule 10-222 requires that the children’s court attorney initiate proceedings with a motion for transfer prior to the adjudicatory hearing on the petition. *See Breed v. Jones*, 421 U.S. 519, 99 S. Ct. 1779, 44 L. Ed. 2d 346 (1975) and *State v. Doe*, 96 N.M. 515, 632 P.2d 750 (Ct. App. 1981). The committee believes that the term “adjudicatory hearing” is synonymous to the use of the term “trial” for purposes of double jeopardy. *See State v. Rhodes*, 76 N.M. 177, 413 P.2d 214 (1966).

— A motion to transfer is not a preadjudicatory motion and therefore the time limits of Rule 10-114 for filing preadjudicatory motions do not apply to Rule 10-222. *State v. Doe*, supra.

— Paragraph B of Rule 10-222 again emphasizes that the child has a right to be represented by counsel. That question was left undecided in *Neller v. State*, 79 N.M. 528, 445 P.2d 949 (1968), but is guaranteed by Section 32-1-27H NMSA 1978. However, under *Neller*, the right may be waived if not timely raised. *See also State v. Salazar*, 79 N.M. 592, 446 P.2d 644 (1968) and *State v. Gallegos*, 82 N.M. 618, 485 P.2d 374 (Ct. App. 1971).

— Under Paragraph B of Rule 10-222, the hearing is both a probable cause determination and a determination of whether

the criteria for transfer set forth in Sections 32-1-29 and 32-1-30 NMSA 1978 exist.

—The specific provisions of Paragraph D of Rule 10-222 relating to the conduct of the hearing are taken from the preliminary examination procedures contained in Rule 5-302 of the Rules of Criminal Procedure for the District Courts.

—If transfer is ordered, the transfer hearing, although substantially similar to a preliminary examination under Rule 5-302 of the Rules of Criminal Procedure for the District Courts, is not a substitute for the defendant's constitutional right to a preliminary examination if transferred to the district courts. The committee specifically rejected a proposal to that effect as constitutionally impermissible and as unwise in view of the varying considerations present at the two hearings. A child transferred to district court to be tried as an adult is entitled to all the rights afforded an adult defendant. *Williams v. Sanders*, 80 N.M. 619, 459 P.2d 145 (1969); *Neller v. State*, *supra*.

—Paragraph E of Rule 10-222 is designed to allow immediate setting of conditions of release by the judge presiding at the transfer hearing if the child is transferred to the district court.

An order transferring the child is immediately appealable. In the *Matter of Doe II*, 86 N.M. 37, 519 P.2d 133 (Ct. App. 1974).

—The statutory bases for Rule 10-222 are Sections 32-1-29 and 32-1-30 NMSA 1978. The statutory provisions relating to the basis for transfer, age for transfer, etc., are substantive and therefore beyond the scope of the supreme court's rulemaking authority. The provisions relating to notice, specifically Sections 32-1-29A(3) and 32-1-30A(3), are procedural and thus are superseded by Rule 10-104 of these rules.]

Changing the time limit from ten to fifteen days in Paragraph A allows the ten-day requirement of notice of grand jury target to be met and eliminates the need to write special rules for grand jury proceedings. See Section 31-6-1 et seq.

[NEW MATERIAL]

10-214. General rules of pleading.

A. **Defects, errors, omissions and clerical mistakes.** No pleading shall be deemed invalid, nor shall the inquiry, hearing, judgment or other proceeding be stayed or in any manner affected because of any defect, error, omission, imperfection or inconsistency in the pleading, which does not prejudice the substantial rights of the respondent child on the merits. The court may at any time prior to an adjudication on the merits cause the pleadings to be amended to cure errors, defects, omissions, imperfections or variances if substantial rights of the respondent child are not prejudiced. Upon ordering such an amendment of a petition or other pleading, the court shall grant a continuance to any party whose ability to present the party's case has been affected by the amendment. Clerical mistakes in judgments, orders or other parts of the record and errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

B. **Surplusage.** Any unnecessary allegation contained in a petition may be disregarded as surplusage.

C. **Variations.** No variance between those allegations of a petition or any supplemental pleading which states the particulars of the delinquent act, whether amended or not, and the evidence offered in support thereof shall be grounds for the acquittal of the respondent child unless such variance prejudices substantial rights of the respondent child. The court may at any time allow the petition to be amended in respect to any variance to conform to the evidence. If the court finds that the respondent child has

been prejudiced by an amendment, the court may postpone the adjudicatory hearing or grant such other relief as may be proper under the circumstances.

D. **Effect.** No appeal, or motion made after verdict, based on any such defect, error, omission, repugnancy, imperfection, variance or failure to prove surplusage shall be sustained unless the respondent child was, in fact, prejudiced in the respondent child's defense on the merits.

Committee Commentary

See Rule 5-204 NMRA of the Rules of Criminal Procedure of the District Courts for comparable rule.

[10-206]10-215. Warrants.

A. **Arrest warrants.** Warrants for the arrest of a respondent child alleged to have committed a delinquent act, or to have violated conditions of release, [or a criminal offense] may be issued by a children's court or district court judge. The issuance, execution and return of the warrant for arrest shall be in accordance with the Rules of Criminal Procedure for the District Courts. The warrant for arrest shall be substantially in the form approved by the Supreme Court.

B. **Bench warrants.** If any person who has agreed in writing to appear in court at a specified time and place or who is ordered by the court to appear at a specified time and place fails to appear at such specified time and place in person or by counsel when permitted by these rules, the court may issue a warrant for the person's arrest.

C. **Search warrants.** Search warrants may be issued by the court. The issuance, execution and return of the search warrant shall be in accordance with the Rules of Criminal Procedure for the District Courts. The search warrant shall be substantially in the form approved by the Supreme Court.

[Committee commentary.]—Rule 10-206 was formerly Rule 24. It was renumbered in 1978.

—The rule governs the use of arrest, search and bench warrants in delinquency and need of supervision proceedings.

—Under Paragraph A of Rule 10-206, arrest warrants are specifically authorized for both children alleged to be delinquent and those in need of supervision. The manner of obtaining, executing and returning the warrant does not differ materially from that used in adult criminal proceedings and is governed by Paragraph C of Rule 5-208 and by Rule 5-210 of the Rules of Criminal Procedure for the District Courts. However, in children's court proceedings, only the district court or children's court is authorized to issue the warrants:

—Paragraph B of Rule 10-206 on bench warrants applies not only to respondents but to any other person who has agreed in writing to appear in court at a specified time and place or who is ordered by the court to appear at a specified time and place. Thus a bench warrant may be issued for the arrest of a parent, guardian, custodian or witness who disobeys a subpoena.

—Paragraph C of Rule 10-206 technically allows the use of search warrants in both delinquency and need of supervision proceedings. The original committee felt that it would be an unusual case in which a search warrant would be justified in a need of supervision proceeding. Accordingly, the search warrant form approved by the supreme court is designed for use in cases involving allegations of delinquency. The issuance, execution and return of the search warrant is governed by Rule 5-211 of the Rules of Criminal Procedure for the District Courts.

—Rule 10-206 does not apply to neglect or abuse proceedings.

The original committee decided that neglect proceedings generally lack sufficient similarity to criminal cases for warrants to be appropriate.

—Rule 10-206 supersedes the provisions of Section 32-1-22A NMSA 1978 when such arrests would require warrants if the person to be arrested were an adult. Nothing in the rule is designed to limit the authority of a law enforcement officer to make a warrantless arrest in those situations when such an arrest would be valid if the person arrested were an adult.]

10-207. Place of detention.

[WITHDRAWN]

[A. **Delinquents.** An alleged or adjudicated delinquent may not be detained in an adult facility.

—B. **Youthful offender.** Notwithstanding the provisions of any other children's court rule, an alleged or adjudicated youthful offender may not be detained in an adult facility unless the court has determined to impose adult sanctions.

—C. **Serious youthful offender.** Notwithstanding the provisions of any other children's court rule, a child alleged to be a serious youthful offender shall not be detained in an adult facility unless the court makes findings that such detention is appropriate.

—**Committee commentary.**— Rule 10-207 was formerly Rule 25. It was renumbered in 1978.

—The provisions for release provided in Rule 10-207 are essentially those contained in Section 32-1-23 NMSA 1978. The only significant difference is that release may be made upon the written promise of the child to appear before the court when directed to do so, rather than the written promise of the parents, guardian or custodian that the child will appear before the court when directed to do so. The rule is not meant to allow the issuance of a bench warrant to the child or his parents, guardian or custodian for failure to appear before probation services as part of the preliminary inquiry. Under Section 32-1-14B NMSA 1978, participation in the preliminary inquiry is voluntary.

—Even if the child is released, the matter may be referred to probation services for further action. If the child is taken to a medical facility, the child also may be referred to probation services for determination of the appropriateness of detention prior to the detention hearing.

—Paragraph B of Rule 10-207 is directed to advisement of rights by law enforcement officers. Subparagraphs (1), (2) and (4) of Paragraph B essentially restate *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Subparagraph (3) is a right granted the child in Section 32-1-27 NMSA 1978. See the commentary to Rule 10-208 for a full discussion of the distinction between the use of the terms "in custody" and "detention".]

[10-208] 10-221. Placing child in detention.

A. **Referral to probation services.** Unless otherwise specifically ordered by the court, [U]pon delivery of a respondent child who may be held in custody to probation services or to a place of detention, a probation officer with the Children, Youth and Families Department shall interview the respondent child and, if possible, the respondent child's parents, guardian or custodian to determine if continued detention is necessary under the criteria set forth in the Children's Code.

B. **Notice of detention.** If [the probation officer] a designee of the Children, Youth and Families Department determines that continued detention is necessary, the person in charge of the place of detention shall advise the respondent child's parents, guardian or custodian as soon as practicable but no later than twenty-four

(24) hours from the time the respondent child was delivered to probation services or to a place of detention, including Saturdays, Sundays and legal holidays:

(1) the respondent child has been placed in detention;

(2) the reason the respondent child has been placed in detention;

(3) the place where the respondent child is detained and the visiting hours there;

(4) if no petition is filed, the respondent child will be released;

(5) if a petition is filed, a detention hearing will be held to determine whether continued detention is necessary; and

(6) the respondent child has a right to an attorney and, if they do not obtain an attorney for the child, the public defender will represent the child.

C. **Statement of probable cause.** In warrantless arrests, other than arrests for alleged parole violations, if the respondent child is to be detained, at the time of the detention the arresting officer shall prepare a statement of probable cause. The arresting officer or the arresting officer's designee shall inform the respondent child of the contents of the statement of probable cause. A copy of the statement of probable cause shall be provided to the respondent child [or] and the respondent child's attorney prior to the detention hearing. If a petition is filed, the statement and determination of probable cause shall be filed with the petition. A statement of probable cause shall be substantially in the form approved by the Supreme Court.

10-209. Criteria for detention.

[WITHDRAWN]

[A child shall not be placed in detention prior to the court's disposition unless probable cause exists to believe that:

—A. if not detained, the child will commit injury to the persons or property of others, cause self-inflicted injury or be subject to injury by others;

—B. the child has no parent, guardian, custodian or other person able to provide adequate supervision and care for the child;

—C. the child will run away or be taken away so as to be unavailable for proceedings of the court or its officers; or

—D. the custody or detention is otherwise authorized by the provisions of the Children's Code [32A-1-1 NMSA 1978].

—**Committee commentary.**— A child may be detained only when authorized by Sections 32-1-8 or 32-1-22 NMSA 1978 or by the provisions of these rules.

—Rule 10-209 sets forth three criteria for detention which are in addition to the statutory criteria. In addition to the other criteria set forth in Rule 10-209, the child may be detained if probable cause exists to believe that if not detained the child will "be subject to injury by others." This language is contained in Section 32-1-24A(1) NMSA 1978. The other criteria are also taken from Section 32-1-24 NMSA 1978.

—The criteria for placing children who are alleged to be neglected or abused in the custody of the Human Services Department is contained in Rule 10-303.]

[10-208A] 10-222. Probable cause determination.

A. **When required.** A probable cause determination shall be made in all cases in which the arrest has been made without a warrant and the respondent child has not been released. The probable cause determination shall be made promptly by a district judge, [metropolitan court judge], magistrate or special master, but in any event within forty-eight (48) hours after custody commences and

no later than the first appearance of the respondent child whichever occurs earlier.

B. **How conducted.** The determination that there is probable cause shall be nonadversarial and may be held in the absence of the respondent child and of counsel. No witnesses shall be required to appear unless the court determines that there is a basis for believing that the appearance of one or more witnesses might lead to a finding that there is no probable cause.

C. **Amended statement of probable cause.** If the statement of probable cause fails to make a written showing of probable cause, an amended statement of probable cause may be filed with sufficient facts to show probable cause for detaining the respondent child.

D. ~~[Dismissal for f]~~ **Failure to show probable cause.** If the court finds that there is no probable cause to believe that the respondent child has committed an offense, the court shall order the immediate release of the respondent child.

~~[10-205]~~ **10-223. Appointment of counsel; payment of fees.**

A. **Appointment.** Within five (5) days from the date the petition is filed, or at the ~~[conclusion]~~ commencement of the detention hearing, whichever occurs first, unless counsel has entered an appearance on behalf of the respondent child, the court shall ~~[advise]~~ appoint the public defender ~~[that the child is not represented by counsel and the public defender shall provide a defense for]~~ to represent the respondent child.

B. **Notice to parents.** ~~[If the public defender is asked to represent the respondent child, the public defender shall serve]~~ Any order of appointment shall be served on the parents, guardian or custodian by the court together with a written notice ~~[on a form approved by the Supreme Court]~~ that if they can afford an attorney to represent the respondent child, they will be ordered to reimburse the state for public defender representation. The notice shall be accompanied by a copy of the eligibility determination for indigent defense services form approved by the Supreme Court and shall advise the parents, guardian or custodian that if they do not complete the eligibility determination form return it to the public defender within the prescribed time, they may be charged for all legal representation of the respondent child. The notice shall also advise the parents, guardian or custodian of the duty of the public defender to assist the parents, guardian or custodian in any indigency determination proceeding.

C. **Hearing on indigency.** Within ~~[ten (10)]~~ five (5) days after receipt of the order and notice from the ~~[public defender]~~ court pursuant to Paragraph B of this rule, the parents, guardian or custodian shall complete and return to the public defender the eligibility determination form or shall make satisfactory arrangements for payment for legal services performed for the respondent child. Upon motion the children's court shall review the determination by the public defender that the parent, guardian or custodian is not indigent as provided ~~[by the procedures set forth in Children's Court Rule 10-408]~~ by the guidelines for eligibility determination for indigent defense services approved by the Supreme Court.

[Committee commentary.]—Prior to the 1982 amendments, the Children's Code provided for the appointment of counsel to represent any child who cannot afford counsel and for the reimbursement of the state if the parents, guardian or custodian can afford to pay the costs of representation. Subsection B of Section 32-1-27 NMSA 1978 requires the public defender to represent a child determined indigent.

—The 1981 session of the legislature did not amend several other sections of the Code which provide for the appointment of counsel

by the court. See Subsection H of Section 32-1-27 NMSA 1978 (appointment of counsel by the court in delinquency and need of supervision cases); Subsection J of Section 32-1-27 NMSA 1978 (appointment of counsel by the court in neglect and abuse cases); and Section 32-1-41 NMSA 1978 (appointment of counsel is a charge upon the funds of the court). Since counsel appointed by the court must be paid out of court funds, it is presumed that in most cases the public defender will be requested to represent the child. Rule 10-205 was drafted to implement the 1981 requirement that the public defender represent the child.

—The committee was of the opinion that the provisions of the Indigent Defense Act apply to a determination of who is a needy parent, guardian or custodian under the Children's Code. See Sections 31-16-1 through 31-16-10 NMSA 1978.

—The committee did not believe that it was necessary to advise the child at each stage of the proceedings of the child's right to counsel in that the public defender has a duty to represent the child under the Children's Code and presumably will be present at each stage of the proceedings.]

~~[10-208B]~~ **10-224. First appearance; explanation of rights.**

Upon the first appearance of a respondent child before a court in response to summons or warrant or following arrest, the court shall inform the respondent child of the following:

- A. the offense charged;
- B. the penalty provided by law for the offense charged;
- C. the right, if any, to bail;
- D. the right, if any, to trial by jury;
- E. the right to the assistance of counsel at every stage of the proceedings;
- F. the right, if any, to representation by an attorney at state expense;
- G. the right to remain silent, and that any statement made by the respondent child may be used against the respondent child; and
- H. the right, if any, to a preliminary examination.

~~[10-214]~~ **10-225. Detention hearing; conditions of release.**

A. **Detention hearing.** A detention hearing shall be held within ~~[twenty-four (24) hours, excluding Saturdays, Sundays and legal holidays;]~~ one (1) day from the time:

(1) the petition is filed if the respondent child is in detention at the time the petition is filed; ~~[or]~~

(2) the respondent child is placed in detention if the respondent child is placed in detention after the petition is filed[-];

(3) the respondent child is placed in detention without a warrant for failure to comply with the conditions of release; or

(4) within one (1) day from the time a respondent child moves the court for release after being placed in detention pursuant to a warrant for failure to comply with conditions of release.

B. **Notice of detention.** If the respondent child is taken into custody and detained, the court shall give oral or written notice of the detention hearing to the children's court attorney, public defender and probation services. Probation services shall make a reasonable effort to give oral or written notice of the time and place of the detention hearing to the respondent child and, if they can be found, to the parents, guardian or custodian of the respondent child.

C. **Conditions of release.** The court shall review the need for detention pursuant to ~~[Rule 10-209]~~ the Children's Code. If none of the criteria for detention exist, the court shall release the respondent child on the respondent child's written promise to

appear before the court at a stated time and place or impose the first of the following conditions of release which will reasonably assure the appearance of the respondent child at the adjudicatory hearing or, if no single condition gives that assurance, any combination of the following conditions:

(1) place the respondent child in the custody of a designated person or organization agreeing to supervise the respondent child;

(2) place restrictions on the travel, association or place of abode of the respondent child during the period of release;

(3) impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the respondent child return to detention as required.

D. **Review.** A denial of release may be reviewed at any time.

E. **[Failure to appear] Violation of conditions of release.** If the respondent child fails to appear or violates a condition of release, the children's court may order the respondent child taken into custody.

F. **Special master.** The provisions of Paragraphs A through D of this rule may be carried out by [a metropolitan court judge,] a magistrate or [by a] special master [appointed by a district judge].

[Committee commentary.] — The rule governs the procedure at the first formal court appearance for a child in detention who is alleged to be delinquent or in need of supervision:

— Paragraph A requires that the detention hearing be held within one day after a petition is filed or within one day of the date the respondent was placed in detention if a petition had previously been filed. The latter requirement is designed to cover those situations in which the petition has already been filed and a later determination is made to arrest the child. To compute the time limits see Rule 10-106.

— Paragraph B specifies that the purpose of the detention hearing is to review the necessity for detention under the criteria established in Rule 10-209 and that it is not to determine probable cause. The rule does not provide for release on bail. Bail does not appear to be constitutionally required in juvenile cases if adequate substitutes for bail are provided. See *Williams v. Sanders*, 80 N.M. 619, 459 P.2d 145 (1969).

— Paragraph C requires that reasonable notice of the hearing be given the parents, guardian or custodian of the child. The person giving the notice is expected to use good faith in providing notice to the parents, guardian or custodian of the child as soon as it appears that a petition will be filed and a date and time for the detention hearing is ascertained. The notice may be written or oral; although, because of the time restrictions, it would normally be oral or left in writing at the residence of the parents, guardian or custodian. Only one parent need be notified.]

[10-224.1] 10-226. Plea agreements.

A. **In general.** The court shall not participate in any plea discussions. A plea and disposition agreement entered into between the respondent child and the children's court attorney shall be submitted to the court substantially in the form approved by the Supreme Court.

B. **Hearing.** Prior to accepting a plea and disposition agreement, the court shall require the disclosure of the agreement in open court [at the time the admission is offered. The court may accept or reject the agreement, or may defer its decision until there has been an opportunity to consider a report from the probation department].

C. **Rejection of plea.** If the court rejects the plea agreement,

the court shall inform the parties of this fact, advise the respondent child personally in open court that the court is not bound by the plea agreement, and advise the respondent child that if the respondent child persists in admitting the allegations or pleading no contest, the disposition of the case may be less favorable to the respondent child than that contemplated by the plea agreement.

[10-224] 10-227. Admissions; no contest pleas.

A. **Admission[s] or no contest plea.** The respondent child may [make an admission by]:

(1) admit[ing] sufficient facts to permit a finding that the allegations of the petition are true; or

(2) enter[ing] a plea of no contest to the allegations in the petition.

B. **Inquiry of child.** The court shall not accept an admission or a no contest plea without addressing the respondent child in open court and determining that the respondent child understands:

(1) [understands] the charges;

(2) [understands] the possible dispositions authorized by the Children's Code for the offense;

(3) [understands] the right to deny the allegations in the petition and have a trial on the allegations;

(4) [understands] that an admission or no contest plea waives the right to a trial; [and]

(5) [understands] that, if the respondent child admits or pleads no contest to the allegations of the petition, it may have an effect upon the respondent child's immigration and naturalization status.

C. **Ensuring that the [admission] plea is voluntary.** The court shall not accept an admission or plea of no contest without addressing the respondent child in open court and determining that the admission or no contest plea is voluntary and not the result of force or threats except promises made as part of the plea agreement.

D. **Factual basis [for admission].** The court shall not enter a disposition without making such inquiry as shall satisfy it that there is a factual basis for the [admission] allegations in the petition.

E. **Applicability.** This rule applies to admissions or no contest pleas in delinquency and probation revocation proceedings.

Committee Commentary

This rule was amended in 2007 to reflect the changes to Section 32A-2-21(G) of the Children's Code that were enacted in 2005. [Rule 10-224 was substantially revised in 1978 to clarify the admission and consent decree procedure:

— The rule now defines two types of admissions: the traditional "guilty" plea and a nolo contendere plea. The child must enter one of these two pleas in order to utilize the consent decree procedure. However, the making of an admission in itself does not entitle a child to enter a consent decree:

— Consent decrees are still negotiated settlements, approved by the court, under which the child is placed on probation for a period of up to six months, with the possibility of extension for another six months or revocation of the consent decree. See commentary to Rule 10-225 for a discussion of the extension and revocation provisions:

— In the event a consent decree has not been negotiated, a child who makes an admission is subject to the discretion of the court in terms of disposition, limited only by the provisions of Section 32-1-38 NMSA 1978. (See Paragraph E of Rule 10-224.) The court is not bound to accept an admission. *State v. Doe*, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978):

—Prior to the 1978 revision, a consent decree required that the child “admit sufficient facts to invoke the jurisdiction of the court.” In practice, this requirement proved too vague to be workable. Section 32-1-36 NMSA 1978, which deals with consent decrees, does not govern consent decrees in abuse or neglect cases. Consent decrees, like stipulated judgments in civil cases, are procedural matters, governed by court rules.

—The statute does provide for reinstatement of the original petition if the child does not fulfill the terms of the consent decree or if a new delinquency or need of supervision petition is filed against the child during the period the consent decree is in effect. See Section 32-1-36D NMSA 1978.

—Before entry of the consent decree, the child is fully advised that he will have no rights to an adjudicatory hearing if he enters the consent decree, Paragraph C of Rule 10-224. The original petition is not “reinstated”; rather, the consent decree is revoked. See Rule 10-225.

—Prior to approval of a consent decree or acceptance of a formal admission of the allegations of a petition by the court, a petition must have been filed. (See definition of “respondent” in Rule 10-102.) This requirement does not prohibit probation services and the child from agreeing to an informal supervision or informal probation prior to the filing of a petition. However, once the jurisdiction of the court is invoked, only a court order may resolve the case.

—Paragraph F of Rule 10-224 defines the dispositional limits of a consent decree. A consent decree cannot be used to place the respondent in an institution or a department of corrections facility, unless the decree is revoked and such placement is appropriate for the original offense. (See Rule 10-225.) The initial term of the consent decree is six months. While probation services may actually negotiate the terms of the decree, the rule requires that the children’s court attorney agree to the terms of the consent decree. The original committee believed that once the jurisdiction of the court had been invoked by filing of a petition, the children’s court attorney was charged with responsibility for the case and his agreement was essential. To provide otherwise would allow probation services to remove cases from the authority of the children’s court attorney.]

—Paragraph C of Rule 10-224 follows the determination required in Rule 5-303 of the Rules of Criminal Procedure for the District Courts and Rule 11 of the Federal Rules of Criminal Procedure. The determination is required in cases involving either a consent decree or an admission. The original committee believed that such an inquiry is constitutionally mandated. In re Appeal No. 544, 25 Md. App. 26, 332 A.2d 680 (1975); Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

—Paragraph D of Rule 10-224 requires that there be a factual basis for the admission or consent decree agreement.

—Paragraph F of Rule 10-224 prohibits the court from accepting the admissions contained in a consent decree, and then imposing a more stringent disposition than that negotiated. If the court accepts the consent decree, it must do so on the terms negotiated or on terms more favorable to the respondent. It is entirely within the discretion of the court whether or not to accept a consent decree agreement. Nothing prohibits the court from rejecting the offered decree prior to conducting the hearing required by Paragraph F of Rule 10-224. However, the decree cannot be accepted until after the determination required by Paragraph C is made.

—Paragraph G of Rule 10-224 follows the general policy in civil cases and adult criminal cases in the district courts that negotia-

tions leading toward settlements should be encouraged and thus negotiation discussions should not be admissible if the negotiation efforts fail.

—Paragraph H of Rule 10-224 is designed to assure a prompt final disposition for detained children when an admission is made or agreement reached on a consent decree. For computation of the time limit, see Rule 10-106.

—Paragraph I of Rule 10-224 was added in 1978:

—Rules 10-224 and 10-225 are procedural rules and supersede any conflicting provisions of Section 32-1-36 NMSA 1978. They are designed to clarify the procedure to be used when the respondent in a delinquency or need of supervision proceeding admits the factual allegations of the petition. The rule does not envision the use of any “notice of intent to admit the allegations of the petition” (Section 32-1-32 NMSA 1978) and to the extent this “notice” is called for in the Children’s Code, it is superseded by the provisions of Rule 10-224.

—In addition to the changes made in the “reinstatement” procedure previously discussed, consent decree procedure also varies from the statute in that supervision may be in the home of another person and the children’s court attorney must approve the consent decree.

—Subsection F of Section 32-1-36 NMSA 1978, establishing a basis for disqualification of a judge in consent decree situations, is not affected by Rule 10-224 since it deals with a substantive right.

Rule 10-224 was substantially revised in 1978 to clarify the admission and consent decree procedure. It was revised again in 2000 to add Paragraph C and make other changes consistent with Rule 5-303 NMRA.

—The rule defines two types of admissions: the traditional “guilty” plea and a nolo contendere plea. The child must enter one of these two pleas in order to utilize the consent decree procedure. However, the making of an admission in itself does not entitle a child to enter a consent decree.

—Consent decrees are still negotiated settlements, approved by the court, under which the child is placed on probation for a period of up to six months, with the possibility of extension for another six months or revocation of the consent decree. See commentary to Rule 10-225 NMRA for a discussion of the extension and revocation provisions.

—In the event a consent decree has not been negotiated, a child who makes an admission is subject to the discretion of the court in terms of disposition. The court is not bound to accept an admission. State v. Doe, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

—Paragraph C of Rule 10-224 NMRA follows the determination required in Rule 5-303 NMRA of the Rules of Criminal Procedure for the District Courts and Rule 11 of the Federal Rules of Criminal Procedure. The determination is required in cases involving either a consent decree or an admission. The original committee believed that such an inquiry is constitutionally mandated. In re Appeal No. 544, 25 Md. App. 26, 332 A.2d 680 (1975); Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

—Rules 10-224, 10-224.1 and 10-225 NMRA are procedural rules and supersede any conflicting provisions of the Children’s Code. They are designed to clarify the procedure to be used when the respondent in a delinquency proceeding admits the factual allegations of the petition.

—Rule 10-224 was substantially revised in 1978 to clarify the

admission and consent decree procedure. It was revised again in 2000 to add Paragraph C and make other changes consistent with Rule 5-303 NMRA.

—The rule defines two types of admissions: the traditional “guilty” plea and a nolo contendere plea. The child must enter one of these two pleas in order to utilize the consent decree procedure. However, the making of an admission in itself does not entitle a child to enter a consent decree.

—Consent decrees are still negotiated settlements, approved by the court, under which the child is placed on probation for a period of up to six months, with the possibility of extension for another six months or revocation of the consent decree. See commentary to Rule 10-225 NMRA for a discussion of the extension and revocation provisions.

—In the event a consent decree has not been negotiated, a child who makes an admission is subject to the discretion of the court in terms of disposition. The court is not bound to accept an admission. *State v. Doe*, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

—Paragraph C of Rule 10-224 NMRA follows the determination required in Rule 5-303 NMRA of the Rules of Criminal Procedure for the District Courts and Rule 11 of the Federal Rules of Criminal Procedure. The determination is required in cases involving either a consent decree or an admission. The original committee believed that such an inquiry is constitutionally mandated. In re Appeal No. 544, 25 Md. App. 26, 332 A.2d 680 (1975); *Santobello v. New York*, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); *Boykin v. Alabama*, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969).

—Rules 10-224, 10-224.1 and 10-225 NMRA are procedural rules and supersede any conflicting provisions of the Children’s Code. They are designed to clarify the procedure to be used when the respondent in a delinquency proceeding admits the factual allegations of the petition.]

[10-225] 10-228. Consent decrees; extension, revocation or termination of consent decree.

A. Consent decrees. [After entry of an admission pursuant to Rule 10-224 NMRA or after a child has been adjudicated as a delinquent] Upon a finding that a factual basis exists for the allegations in the petition, the court may enter a consent decree that places the respondent child under supervision for a period not to exceed six (6) months under conditions established by the court. As part of a consent decree, the parties may agree to an extension of the consent decree not to exceed an additional six (6) months. [A consent decree and any extension may not exceed one (1) year from the date of the entry of the original consent decree.]

B. Extension. The children’s court attorney may move the court for an order extending the original consent decree for a period not to exceed six (6) months from the expiration of the original decree. The motion for extension shall be filed prior to the expiration of the original decree. If the respondent child objects to the extension, the court shall hold a hearing to determine if the extension is in the best interests of the respondent child and the public.

C. One year limit. A consent decree and any extension may not exceed one (1) year from the date of the entry of the original consent decree.

[E]D. Revocation of consent decree. If, prior to discharge by probation services or the expiration of the consent decree, whichever occurs earlier, the respondent child allegedly fails to fulfill the terms of the decree, the children’s court attorney may file a petition to revoke the consent decree. Proceedings on the

petition shall be conducted in the same manner as proceedings on petitions to revoke probation.

[Committee commentary.]—Rule 10-225 was formerly Rule 33. It was renumbered in 1978. The rule governs three situations: extension of a consent decree, termination of a consent decree and violation of a consent decree.

—Paragraphs A and B of Rule 10-225 allow extension of a consent decree for a period not to exceed six months if the children’s court attorney moves the court for an extension of the decree prior to expiration of the original decree. The child must be given notice of the motion under Rule 10-104 NMRA. A hearing must be held if the child objects to the motion. The original committee envisioned that such a hearing would be in the nature of a dispositional hearing. However, because the possible reasons for seeking the extension are varied (i.e. the child may have allegedly committed another delinquent act which did not warrant revoking the consent decree), the actual format of the hearing has been left open. It is not an ex parte hearing.

—Paragraph C of Rule 10-225 governs revocation of the consent decree. Since a consent decree is essentially a negotiated probationary period, the original committee felt that the proceedings to revoke the consent decree should follow the procedure to revoke probation contained in Rule 10-232 NMRA of these rules. The petition is to be filed by the children’s court attorney. (See commentary to Rule 10-224 NMRA for a discussion of the jurisdictional basis for the court’s authority to order disposition appropriate in the original proceeding.)

[10-213] 10-231. Disclosure by the state.

A. Information subject to disclosure. Unless a shorter period of time is ordered by the court, within ten (10) days after the date of filing of a petition alleging delinquency, subject to Paragraph E of this rule, the state shall disclose or make available to the respondent:

(1) any statement made by the respondent child, or a co-respondent, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the children’s court attorney;

(2) the respondent child’s prior record of delinquent acts and probation records, if any, as is then available to the state;

(3) any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the state, and which are material to the preparation of the defense or are intended for use by the state as evidence at the adjudicatory hearing, or were obtained from or belong to the respondent child;

(4) any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known to the children’s court attorney;

(5) a written list of the names and addresses of all witnesses which the children’s court attorney intends to call at the adjudicatory hearing, together with any recorded or written statement, made by the witness and any record of prior convictions of any such witness which is within the knowledge of the children’s court attorney; and

(6) any material evidence favorable to the respondent which the state is required to produce under the [due process clause of the United States Constitution] United States or New Mexico

Constitutions.

B. Examining, photographing or copying evidence. The respondent child may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. Certificate. The children's court attorney shall file with the clerk of the court at least ten (10) days prior to the adjudicatory hearing a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the children's court attorney to the respondent after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the respondent.

D. Information not subject to disclosure. Unless otherwise ordered, the children's court attorney shall not be required to disclose any material required to be disclosed by this rule if:

(1) the disclosure will expose a confidential informer; or
(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure to defense counsel.

E. Failure to comply. If the state fails to comply with any of the provisions of this rule, the court may enter an order pursuant to pursuant to Rule [10-113] 10-165 NMRA and Rule 10-137 NMRA.

[Committee commentary. — Rule 10-213 NMRA was revised in 1982 to be consistent with the revised discovery rule for criminal cases in the district courts. The information discoverable under Rule 10-213 NMRA is the same that the state must disclose in adult cases pursuant to Rule 5-501 NMRA of the Rules of Criminal Procedure for the District Courts. Appropriate language changes have been made in this rule to reflect the children's court terminology.]

[10-214] 10-232. Disclosure [of evidence and witnesses] by the respondent child.

A. Information subject to disclosure. Unless a shorter period of time is ordered by the court, within thirty (30) days after the date of the filing of a petition or not less than ten (10) days before the adjudicatory hearing, whichever date occurs earlier, the respondent child in a delinquency proceeding shall disclose or make available to the state:

(1) any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody or control of the respondent child, and which the respondent child intends to introduce in evidence at the adjudicatory hearing which were prepared by a witness whom the respondent child intends to call at the adjudicatory hearing;

(2) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the respondent child, which the respondent child intends to introduce in evidence at the adjudicatory hearing or which were prepared by a witness whom the respondent child intends to call at the adjudicatory hearing; and

(3) a list of the names and addresses of the witnesses the respondent child intends to call at the adjudicatory hearing, together with any recorded or written statement made by any identified witness.

B. Examining, photographing or copying evidence. The state may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. Information not subject to disclosure. Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of:

(1) reports, memoranda or other internal defense documents made by the respondent child, or the respondent child's attorneys in connection with the investigation or defense of the case;

(2) statements made by the respondent child to the respondent child's agents or attorneys.

D. Certificate. The respondent shall file with the clerk of the court at least ten (10) days prior to the adjudicatory hearing a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the respondent child after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the state.

E. Failure to comply. If the respondent child fails to comply with any of the provisions of this rule, the court may enter an order pursuant to pursuant to Rule [10-113] 10-165 NMRA and Rule 10-137 NMRA.

[Committee commentary. — This rule was formerly Rule 10-214. It was amended in 1982 to be consistent with Rule 5-502 NMRA of the Rules of Criminal Procedure for the District Courts. See commentary to Rule 5-502 NMRA of the Rules of Criminal Procedure for the District Courts for the derivation of this rule. It governs discovery by the state in delinquency proceedings.]

[10-219] 10-233. Notice of alibi; [delinquency proceedings] entrapment defense.

A. Notice. [In delinquency proceedings, u]Upon the written request of the children's court attorney, specifying as particularly as is known to the children's court attorney, the place, date and time of the commission of the delinquent act charged, a respondent child who intends to offer evidence of an alibi or entrapment as a defense [in the respondent's defense] shall, not less than ten (10) days before the adjudicatory hearing or such other time as the children's court may direct, serve upon such children's court attorney a notice in writing of the respondent child's intention to introduce evidence [claim such] of an alibi or evidence of entrapment.

B. Content of notice. [Such] A notice of alibi or entrapment shall contain specific information as to the place at which the respondent child claims to have been at the time of the alleged offense and, as particularly as known to the respondent child or the respondent child's attorney, the names and addresses of the witnesses by whom the respondent child proposes to establish such alibi or raise an issue of entrapment. Not less than five (5) days after receipt of the respondent child's alibi witness list or at such other time as the children's court may direct, the children's court attorney shall serve upon the respondent child the names and addresses, as particularly as known to the children's court attorney, of the witnesses the state proposes to offer in rebuttal to discredit the respondent child's alibi or claim of entrapment at the adjudicatory hearing.

[B]C. **Continuing duty to give notice.** Both the respondent child and the children's court attorney shall be under a continuing

duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this rule.

[C]D. **Failure to give notice.** If a respondent child fails to serve a copy of [~~the notice of alibi~~] such notice as herein required, the children's court may exclude evidence offered by the respondent child for the purpose of proving an alibi, except the testimony of the respondent child. If such notice is given by a respondent child, the children's court may exclude the testimony of any witness offered by the respondent child for the purpose of proving an alibi or entrapment if the name and address of such witness was known to respondent child or the respondent child's attorney but was not stated in such notice. If the children's court attorney fails to file a list of witnesses and serve a copy [~~thereof~~] on the respondent child as provided in this rule, the children's court may exclude evidence offered by the state to contradict the respondent child's alibi or entrapment evidence. If [~~such~~] notice is given by the children's court attorney, the children's court may exclude the testimony of any witnesses offered by the children's court attorney for the purpose of contradicting the defense of alibi or entrapment if the name and address of such witness is known to the children's court attorney but was not stated in such notice. For good cause shown the children's court may waive the requirements of this rule.

[D]E. **Notice inadmissible.** The fact that a notice of alibi was given or anything contained in such notice shall not be admissible as evidence in the adjudicatory hearing.

Committee Commentary

See Rule 5-508 of the Rules of Criminal Procedure for the District Courts. [Rule 10-213 NMRA was revised in 1982 to be consistent with the revised discovery rule for criminal cases in the district courts. The information discoverable under Rule 10-213 NMRA is the same that the state must disclose in adult cases pursuant to Rule 5-501 NMRA of the Rules of Criminal Procedure for the District Courts. Appropriate language changes have been made in this rule to reflect the children's court terminology.]

[10-217] 10-234. Videotaped depositions; testimony of certain minors who are victims of sexual offenses[; ~~delinquency proceedings~~].

A. **Videotaped depositions.** Upon motion, and after notice to opposing counsel, at any time after the filing of a petition in children's court delinquency proceeding alleging criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, the children's court may order the taking of a videotaped deposition of the victim, upon a showing that the child may be unable to testify without suffering unreasonable and unnecessary mental or emotional harm. The children's court judge must attend any deposition taken pursuant to this paragraph and shall provide such protection of the child as the judge deems necessary.

B. **Use of videotaped depositions.** At the adjudicatory hearing of a child charged with criminal sexual penetration or criminal sexual contact on a child under sixteen (16) years of age, any part or all of the videotaped deposition of a child under sixteen (16) years of age taken pursuant to Paragraph A of this rule, may be shown to the children's court judge or the jury and admitted as evidence as an additional exception to the hearsay rule of the Rules of Evidence if:

(1) the child is unable to testify before the court without suffering unreasonable and unnecessary mental or emotional harm;

(2) the deposition was presided over by a children's court judge and the child was present and was represented by counsel or waived counsel; and

(3) the child was given an adequate opportunity to cross-examine the child, subject to such protection of the child as the judge deems necessary.

C. **Other uses.** In addition to the use of a videotaped deposition as permitted by Paragraph B of this rule, a videotaped deposition may be used [~~for any of the reasons set forth in Paragraph N of Rule 10-216 NMRA~~] in a delinquency proceeding if permitted by the Rules of Evidence.

Committee Commentary

Rule [10-217] 10-234 is almost identical to Rule 5-504 of the Rules of Criminal Procedure for the District Courts. See the commentary to that rule for a discussion of the history of that rule.

[10-220] 10-241. Insanity at time of commission of delinquent act; notice of incapacity to form specific intent.

A. **Defense of insanity.** [~~In delinquency proceedings:~~]

[(1) ~~n~~] Notice of the defense of insanity of the respondent child at the time of the commission of the delinquent act must be given within ten (10) days after service of the petition or within ten (10) days after an attorney is appointed or enters an appearance on behalf of the respondent child, whichever is later, unless upon good cause shown the court waives the time requirement of this rule.

[(2) ~~when the defense of insanity at the time of the commission of the delinquent act is raised, the issue shall be determined in nonjury trials by the court and in jury trials by a special verdict of the jury. When the determination is made and the respondent child is discharged on the ground of insanity, a judgment dismissing the petition with prejudice shall be entered, and any proceedings for commitment of the respondent child because of any mental disorder or developmental disability shall be pursuant to law.~~]

B. **Mental examination.** Upon motion and upon good cause shown the children's court judge shall order a mental examination of the respondent child.

C. **Determination of issue of insanity.** When the defense of insanity at the time of the commission of the delinquent act is raised, the issue shall be determined in nonjury trials by the court and in jury trials by a special verdict of the jury. When the determination is made and the respondent child is discharged on the ground of insanity, a judgment dismissing the petition with prejudice shall be entered, and any proceedings for commitment of the respondent child because of any mental disorder or developmental disability shall be pursuant to law.

D. **Statement made during [psychiatric] mental examination or treatment.** A statement made by the child during a [psychiatric] mental examination or treatment subsequent to the commission of the alleged delinquent act shall not be admissible in evidence in any criminal or delinquency proceeding on any issue other than that of the child's sanity, ability to form specific intent or competency to participate in the proceedings.

E. **Notice of incapacity to form specific intent.** If the respondent child intends to call an expert witness on the issue of whether the respondent child was incapable of forming the specific intent required as an element of an alleged delinquent act, notice of such intention shall be given in the same manner and time as notice of insanity as a defense.

[Committee commentary.— This rule, which was added in 1978, sets forth the procedure to be used in delinquency proceedings if either the defense of insanity or incapacity to form specific

intent is raised. The procedure is similar to that in Rule 5-602 of the Rules of Criminal Procedure for the District Courts. However, the time for filing the notice of insanity or incapacity to form specific intent is tied to service of the petition on the respondent or entry of appearance by counsel, rather than arraignment as provided in Rule 5-602.

— Paragraph B is similar to Paragraph C of Rule 5-602 of the Rules of Criminal Procedure for the District Courts. Reference to court payment in cases of indigency is deleted. Pursuant to 32-1-32B NMSA 1978, the court may order examination by a psychiatrist or psychologist of any child before the court prior to the adjudicatory hearing if there are indications that the child is mentally ill or mentally retarded. The statutory provision is not limited to the issue of competency. Section 32-1-35 NMSA 1978 further allows the court at any stage of the proceeding to transfer legal custody of the child for a period of up to 30 days for evaluation if the child appears to be mentally ill or mentally retarded. If at any time in the proceedings, the evidence indicates that the child is mentally retarded or mentally ill, the court may proceed pursuant to 32-1-35 NMSA 1978. Initiation of commitment proceedings is discretionary with the court. *State v. John Doe*, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).

— Paragraph C follows Subparagraph (2) of Paragraph A of Rule 5-602 and Paragraph D of Rule 5-602; and Paragraph D follows Paragraph E of Rule 5-602.

— Section 32-1-35 NMSA 1978 deals generally with the alternatives available when any child appears before the court and shows signs of mental illness or mental retardation. This rule does not modify the general provisions of 32-1-35 NMSA 1978; rather, this rule provides a structure in delinquency proceedings in which the issue of insanity or incapacity to form specific intent can be raised as a legal defense to a specific charge. If the issue of mental illness or mental retardation arises in need of supervision cases, reference should be made to 32-1-35 NMSA 1978 and to Rule 10-221. In neglect cases, 32-1-35 NMSA 1978 governs.]

[10-221] 10-242. Determination of competency to stand trial; lack of capacity].

A. **How raised.** The issue of respondent child's competency to stand trial [in delinquency or child in need of supervision proceedings] may be raised by motion, or upon the court's own motion, at any stage of the proceedings.

B. **Mental examination.** Upon motion and upon good cause shown the children's court judge shall order a mental examination of the respondent child before making any determination of competency.

C. **Determination.** The issue of competency shall be determined by the children's court judge, unless the judge finds there is evidence which raises a reasonable doubt as to the respondent child's competency to stand trial.

(1) If a reasonable doubt is raised prior to the adjudicatory hearing, the children's court, without a jury, may determine the issue of competency; or, in its discretion, may submit the issue to a jury, other than the jury sitting at the adjudicatory hearing.

(2) If the issue of competency is raised during the adjudicatory hearing, the children's court judge in nonjury cases shall determine the issue; in jury cases, the jury shall be instructed upon the issue. If, however, the respondent child has been previously found to be competent to stand trial in the proceedings, the issue of competency shall be redetermined in accordance with this rule only if the children's court judge finds that there is evidence not previously submitted which raises a reasonable doubt as to

the respondent child's competency to participate in the proceedings.

D. **Proceedings on finding of incompetency.** If a respondent child is found incompetent to stand trial in a case in which the respondent child is accused of an act that would be a misdemeanor if the respondent child were an adult, the court shall dismiss the petition with prejudice and may recommend that the children's court attorney initiate proceedings under the Children's Mental Health and Developmental Disabilities Act, Sections 32A-6-1 to 32A-6-22 NMSA 1978. In all other cases in which the respondent child is found incompetent to stand trial:

(1) further proceedings on the petition shall be stayed until the respondent child becomes competent to participate in the proceedings, provided that a petition shall not be stayed for more than one (1) year;

(2) where appropriate, the [children's] court [judge] may order treatment to enable the respondent child to attain competency to stand trial; [and]

(3) the [children's] court [judge] may review and amend the conditions of release pursuant to Rule[s] 10-209 and 10-211] 10-225 of these rules[-]; and

(4) the court shall review the respondent child's competency every ninety (90) days for up to one year.

E. If, at any time during the year described in Paragraph D, the court finds that the respondent child cannot be treated to competency or if the court finds after one year that the respondent child is still incompetent to stand trial, then the case shall be dismissed with prejudice. The court may recommend proceedings under the Children's Mental Health and Developmental Disabilities Act, Sections 32A-6-1 to 32A-6-22 NMSA 1978.

F. **Mistrial.** If the finding of incompetency is made during the adjudicatory hearing, the children's court judge shall declare a mistrial.]

Committee Commentary

[See Paragraph B of Rule 5-602 of the Rules of Criminal Procedure for the District Courts. This rule applies to both delinquency and need of supervision proceedings. See commentary to Rule 10-220 for a discussion of the interrelationship of Rule 10-220 and this rule and the provisions of 32-1-35 NMSA 1978 relating generally to the mental illness or mental retardation of children appearing before the court.

— Paragraph B is similar to Paragraph C of Rule 5-602 of the Rules of Criminal Procedure for the District Courts. Reference to court payment in cases of indigency is deleted. Pursuant to 32-1-32B NMSA 1978, the court may order examination by a psychiatrist or psychologist of any child before the court prior to the adjudicatory hearing if there are indications that the child is mentally ill or mentally retarded. The statutory provision is not limited to the issue of competency. Section 32-1-35 NMSA 1978 further allows the court at any stage of the proceeding to transfer legal custody of the child for a period of up to 30 days for evaluation if the child appears to be mentally ill or mentally retarded. If at any time in the proceedings, the evidence indicates that the child is mentally retarded or mentally ill, the court may proceed pursuant to 32-1-35 NMSA 1978. Initiation of commitment proceedings is discretionary with the court. *State v. John Doe*, 91 N.M. 506, 576 P.2d 1137 (Ct. App. 1978).]

This rule was changed in 2007 to reflect the changes to Section 32A-2-21(G) of the Children's Code that were enacted in 2005.

[10-226] 10-243. Adjudicatory hearing; time limits.

A. Child in detention. If the child is in detention, the adjudicatory hearing shall be commenced within thirty (30) days from whichever of the following events occurs latest:

(1) the date the petition is served on the child;

(2) the date the child is placed in detention;

(3) if an issue is raised concerning the child's competency to participate at the adjudicatory hearing, the date an order is entered finding the child is competent to participate at the adjudicatory hearing. The court may order periodic judicial reviews pending completion of the competency evaluation. At each judicial review the child's attorney shall advise the court of the status of the evaluation;

(4) if the proceedings have been stayed pursuant to Rule [10-221] 10-242 NMRA on a finding of incompetency to stand trial, the date an order is filed finding the child competent to participate in an adjudicatory hearing;

(5) if a mistrial is declared or a new adjudicatory hearing is ordered by the children's court, the date such order is filed;

(6) in the event of an appeal, the date the mandate or order is filed in the children's court disposing of the appeal;

(7) if the child fails to appear at any time set by the court, the date the child is taken into custody after the failure to appear or the date an order is entered quashing the warrant for failure to appear;

(8) the date the court allows the withdrawal of a plea or rejects a plea; or

(9) if a notice of intent has been filed alleging the child is a "youthful offender", as that term is defined in the Children's Code [Chapter 32A NMSA 1978], the return of an indictment or the filing of a bind over order that does not include a "youthful offender" offense.

B. **Child not in detention.** If the child is not in detention, or has been released from detention prior to the expiration of the time limits set forth in this rule for a child in detention, the adjudicatory hearing shall be commenced within one-hundred twenty (120) days from whichever of the following events occurs latest:

(1) the date the petition is served on the child;

(2) if an issue is raised concerning the child's competency to participate at the adjudicatory hearing, the date an order is entered finding the child is competent to participate at the adjudicatory hearing;

(3) if the proceedings have been stayed on a finding of incompetency to participate in the adjudicatory hearing, the date an order is filed finding the child competent to participate in an adjudicatory hearing;

(4) if a mistrial is declared or a new adjudicatory hearing is ordered by the children's court, the date such order is filed;

(5) in the event of an appeal, the date the mandate or order is filed in the children's court disposing of the appeal;

(6) if the child fails to appear at any time set by the court, the date the child is taken into custody after the failure to appear or the date an order is entered quashing the warrant for failure to appear;

(7) the date the court allows the withdrawal of a plea or rejects a plea; or

(8) if a notice of intent has been filed alleging the child is a "youthful offender", as that term is defined in the Children's Code, the return of an indictment or the filing of a bind over order that does not include a "youthful offender" offense.

C. **Multiple petitions.** If more than one petition is pending, the time limits applicable to each petition shall be determined independently.

D. **Extension of time by children's court.** For good cause

shown, the time for commencement of an adjudicatory hearing may be extended by the children's court judge provided that the aggregate of all extensions granted by the children's court judge may not exceed sixty (60) days.

E. **Extension of time by Supreme Court.** For good cause shown, the time for commencement of an adjudicatory hearing may be extended by the Supreme Court, a justice thereof, or a judge designated by the Supreme Court. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the adjudicatory hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the motion, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the adjudicatory hearing must be commenced.

F. **Effect of noncompliance with time limits.** If the adjudicatory hearing on any petition is not begun within the times specified in Paragraph A or B of this rule or within the period of any extension granted as provided in this rule, the petition shall be dismissed with prejudice.

Committee Commentary

The adjudicatory hearing is sometimes described in the Children's Code as the "hearing on the petition" and is the equivalent to a trial in the adult criminal system. The time limits in this rule for commencing an adjudicatory hearing are jurisdictional. [Rule 10-226 was revised in 1978.

—The time limits for the commencement of the adjudicatory hearing depend upon whether or not the respondent is in detention. Prior to the 1978 revisions to this rule, the time limits were measured only by the date of service of the petition on the respondent. In conformity with similar changes in the Rules of Criminal Procedure for the District Courts, five other events were added from which the time limits are computed. The events are the same whether or not the respondent is in detention and are substantively similar to those added to Rule 5-604 of the Rules of Criminal Procedure for the District Courts.

—Paragraph C relating to failure to appear was added in 1978 and Paragraphs D and E concerning time extensions and failure to comply with the time limits were modified in accord with changes in Rule 5-604 of the Rules of Criminal Procedure for the District Courts.

—See commentary to Rule 5-604 of the Rules of Criminal Procedure for the District Courts for a discussion of these changes.

The time limits in Rule 10-226 are jurisdictional. See commentary to Rule 10-204.

Rules 10-226 and 10-227 use the term "adjudicatory hearing" rather than the statutory "hearing on the petition" to describe what is the equivalent of a trial in the adult criminal system

The statutory time limit runs from the date of filing of the petition. Obviously, the time limits do not apply if no adjudicatory hearing is required because an admission has been accepted or because a consent decree agreement has been approved.

Paragraph B of Rule [10-226] 10-241 was amended in 1982 to clarify when adjudicatory hearings may be held when a child is released prior to the expiration of the time limits for commencement of hearings for children in detention.]

[10-227] 10-244. [Delinquency proceedings; a] Adjudicatory hearing; general procedure.

A. **Conduct.** Except as otherwise provided, adjudicatory hearings in delinquency cases shall be conducted in the same manner as trials are conducted under the Rules of Criminal Procedure for the District Courts.

B. **Children's court attorney.** In delinquency cases, the children's court attorney shall represent the state at all adjudicatory hearings.

Committee Commentary

[Rule 10-227 was formerly Rule 35. It was renumbered in 1978.]

The rule establishes general procedures for both jury and non-jury adjudicatory hearings and, by reference, adopts the specific provisions of Rules 5-606 through 5-611 of the Rules of Criminal Procedure for the District Courts. However, the procedure for demanding a jury trial and certain other aspects of jury trials established by the Rules of Criminal Procedure for the District Courts are not applicable to jury trials in the children's court under Rule [10-227] 10-244. See commentary to Rule [10-228] 10-245 of these rules.

[Paragraph A of Rule 10-227, by requiring that adjudicatory hearings be conducted in the same manner as adult criminal trials, follows the recommendation of the national advisory commission on criminal justice standards and goals. The original committee agreed with the NAC commentary that when "the juvenile contests the facts upon which court jurisdiction is sought, the procedure for resolving the dispute should not differ substantially from that used in adult cases." The adoption of the provisions of the Rules of Criminal Procedure for the District Courts also brings the rules into compliance with the due process and fair hearing requirements of *In re Gault*, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967), and *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).]

—Paragraph B of Rule 10-227 requiring the children's court attorney to represent the state in adjudicatory hearings specifically follows NAC Standard 14.4 that: "In all delinquency cases, a legal officer representing the State should be present in court to present evidence supporting the allegation of delinquency." The original committee decided that: (1) a juvenile probation officer is not an attorney and should not be serving in the role of an attorney; (2) that if the juvenile probation officer were allowed to be the "chief prosecutor," his ability to counsel and deal with the respondent on a more informal basis would be compromised; and (3) it is part of the duties of the children's court attorney to represent the state as prosecutor. See Rule 10-102 for the definition of "children's court attorney."

Subsection B of Section [32-1-31] 32A-2-16 NMSA 1978 provides that all hearings on petitions alleging delinquency shall be open to the public unless the court makes a finding of exceptional circumstances. Hearings on petitions alleging need of supervision are closed to the public.

[10-228] 10-245. Jury trial[; delinquency proceedings].

A. **[Demand] Waiver.** [A demand for trial by jury in delinquency proceedings shall be made in writing to the court within ten (10) days from the date the petition is filed or within ten (10)

days from the appointment of an attorney for the respondent or entry of appearance by counsel for the respondent, whichever is later. If demand is not made as provided in this paragraph, trial by jury is deemed waived.] Unless the respondent child knowingly and voluntarily waives the right to a jury trial, trial shall be by jury on all delinquency petitions when the offense(s) alleged would be triable by jury if committed by an adult.

B. **Peremptory challenges.** In all trials by jury in delinquency proceedings, the state shall be entitled to two (2) peremptory challenges and the defense, three (3). When two (2) or more respondents are jointly tried, two (2) additional challenges shall be allowed to the defense and one (1) to the state for each additional respondent.

[**Committee commentary.**—Rule 10-228 was formerly Rule 36. It was renumbered in 1978. This rule was readopted after the decision in *State v. Doe*, 94 N.M. 637, 614 P.2d 1086 (Ct. App. 1980) to make it clear that the provisions of this rule and Section 32-1-31 NMSA 1978 govern the procedure for demanding a jury trial.

—The rule contains special provisions relating to jury trials in the children's court.

—Paragraph A of Rule 10-228 requires that the demand for jury trial be in writing and that it be filed within certain time limits.

—Paragraph B of Rule 10-228 is patterned after Subparagraph (1)(b) of Paragraph D of Rule 5-606 of the Rules of Criminal Procedure for the District Courts.

—Except as provided in Rule 10-228, jury trials are conducted in the same manner as trials are conducted under the Rules of Criminal Procedure for the District Courts. See Rule 10-227.

—See also, Section 32-1-31A NMSA 1978 and *Peyton v. Nord*, 78 N.M. 717, 437 P.2d 716 (1968).]

[10-229] 10-246. Dispositional proceedings.

A. **Access to reports.** At least five (5) days before a hearing, copies of any social, diagnostic or other predisposition reports ordered by or submitted to the court shall be provided to the parties.

B. **Time limits.** When the respondent child is in detention, dispositional proceedings shall begin within thirty (30) days from the date the court concludes the adjudicatory hearing in a delinquency proceeding or trial in a youthful offender proceeding or accepts an admission of the factual allegations of the petition. The dispositional proceedings shall be concluded as soon as practical. If the hearing is not begun within the time specified in this paragraph, unless the respondent child has agreed to the delay or has been responsible for the failure to comply with the time limits, the respondent child shall be released from detention on such conditions as appropriate until the dispositional hearing can be commenced.

C. **Commitment for diagnosis.** The court may order a respondent child adjudicated as a delinquent child or convicted in a youthful offender proceeding to be committed to a facility for purposes of diagnosis and recommendations to the court as to what disposition is in the best interests of the child and the public. If the court enters an order transferring the child for a diagnostic commitment pursuant to the Children's Code, the dispositional proceedings shall be recommenced within forty-five (45) days after the filing of the court's order. If the hearing is not recommenced within the time specified in this paragraph, unless the respondent child has agreed to the delay or has been responsible for the failure to comply with the time limits, the respondent child shall be released from detention on such conditions as appropriate

until the dispositional hearing can be commenced.

D. Extension of time. For good cause shown the time for commencing a disposition hearing may be extended by the Supreme Court, a justice thereof, or a judge designated by the Supreme Court. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts petitioner deems to constitute good cause for an extension of time to commence the dispositional hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the motion, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the dispositional hearing must be commenced.

[Committee commentary.]—Rule 10-229 was formerly Rule 37. It was renumbered in 1978.

The rule establishes dispositional procedures for use after entry of a judgment that the respondent is a delinquent child or a child in need of supervision.

—Paragraph A of Rule 10-229 reflects the original committee's concern that the dispositional hearing is often the crucial stage in children's court proceedings, particularly those involving children in need of supervision in which the facts have been stipulated. As noted in the report by the president's commission on law enforcement and administration of justice, *The Challenge of Crime in a Free Society* 86-87 (1967):

... children need advocates to speak for them and guard their interests, particularly when disposition decisions are made. It is the disposition stage at which the opportunity arises to offer individualized treatment plans and in which the danger adheres that the court's coercive power will be applied without adequate knowledge of the circumstances.

—The purpose of Paragraph A of Rule 10-229 is to assure that if the accuracy of social, medical, psychological and psychiatric reports which form the basis for disposition is questioned, the respondent has a means to test that accuracy. The original committee was concerned with those instances in which the dispositional reports are conclusionary in nature or substantially based on hearsay. In such cases, the reports are admissible, but defense counsel is allowed an opportunity to show that the conclusion is erroneous or the hearsay unreliable, and the state is allowed the same means to challenge the respondent's evidence under Subparagraph (2) of Paragraph A of Rule 10-229.

—Subparagraph (1) of Paragraph A of Rule 10-229 sets a time limit for providing copies of the reports to the parties.

—Paragraph B of Rule 10-229 establishes time limits for beginning the dispositional hearing if the respondent is in detention or if the respondent is transferred to a corrections division facility for diagnosis. The statutory maximum period for a diagnostic confinement is ninety days for a child adjudicated as a delinquent and sixty days for a child adjudicated a child in need of supervision. See Section 32-1-32 NMSA 1978. If the respondent is not undergoing diagnosis at a corrections division facility, but is in detention, the dispositional hearing must begin within twenty

days from the date the adjudicatory hearing was concluded or an admission accepted by the court. This time limit is to prevent continued detention without prompt final disposition.

—The dispositional hearing must begin twenty days after the court receives the diagnostic report of the department. The additional twenty-day leeway is allowed to provide adequate time for receipt and examination of diagnostic reports and to schedule the hearing. This rule supersedes Section 32-1-32 NMSA 1978 in this respect.

—There is no time limit for the dispositional hearing of children who are not in detention or undergoing diagnosis.

—The time periods of this rule are mandatory. See Rule 10-117. The court must dismiss any case in which the dispositional hearing has not been held within time limits prescribed by this rule. See *State v. Doe*, 93 N.M. 31, 595 P.2d 1221 (Ct. App. 1979), for a decision issued prior to the amendment of Rules 10-117 and 10-229, clarifying when a proceeding must be dismissed. For decisions discussing "prejudice" in criminal cases where prejudice to the defendant was found, see *State v. Orona*, 92 N.M. 450, 589 P.2d 1041 (1979); *State v. Vigil*, 87 N.M. 345, 533 P.2d 578 (1975); *State v. Caputo*, 94 N.M. 190, 608 P.2d 166 (Ct. App. 1980); *Chacon v. State*, 88 N.M. 198, 539 P.2d 218 (Ct. App. 1975); *State v. Johnson*, 84 N.M. 29, 498 P.2d 1372 (Ct. App. 1972) and *Barker v. Wingo*, 407 U.S. 514 (1972). For decisions where no prejudice to the defendant was found, see *State v. Smith*, 92 N.M. 533, 591 P.2d 664 (1979); *State v. Gallegos*, 92 N.M. 370, 588 P.2d 1045 (Ct. App. 1978) and *State v. Gutierrez*, 91 N.M. 542, 577 P.2d 440 (Ct. App. 1978).]

[10-230] 10-251. Judgments and appeals.

A. Entry of judgment. If the child is found to have committed a delinquent act, a judgment to that effect shall be entered. If the child is found not to be a delinquent child, a judgment to that effect shall be entered. The judgment and disposition shall be rendered in open court and thereafter a written judgment and disposition shall be signed by the judge and filed. The clerk shall give notice of entry of judgment and disposition.

B. Advisement of right to an appeal. At the time of disposition in a case which has gone to an adjudicatory hearing on a denial of the allegations of the petition, the court shall advise the child of the right to appeal and of the right of a person who is unable to pay the cost of an appeal to proceed at state expense. Failure of the court to so advise the child shall toll the time for taking an appeal.

C. Appeals. Appeals from judgments and dispositions on petitions alleging delinquency shall be governed by the Rules of Appellate Procedure.

[Committee commentary.]—This rule (formerly Rule 38) was not substantially changed in 1978.

—The rule deals with the conclusion of the adjudicatory hearing and the onset of the time for appeal.

—Under 32-1-3N and P and 32-1-31 NMSA 1978, a determination of guilt in a delinquency or need of supervision proceeding requires a two-pronged inquiry: (1) did the child commit a delinquent act or commit an offense defined as need of supervision, and, if so, (2) is the child also in need of care or rehabilitation? If the answer to both inquiries is in the affirmative, then the respondent is either a delinquent child or a child in need of supervision. Such a conclusion is equivalent to a finding of guilty in an adult criminal case.

—Accordingly, Paragraph A reflects this two-faceted inquiry. The first entry of judgment goes only to whether or not it has

been proven that the acts alleged were committed by the child. This determination, standing alone, does not make the child a “delinquent child” and is therefore not a sufficient basis for the court to proceed to disposition. The court also must determine whether the respondent is in need of care or rehabilitation. If it so determines, the judgment that the respondent is a delinquent child or a child in need of supervision is then entered and has the equivalent effect of a determination of guilty in adult criminal cases. Failure to hold a hearing to determine whether or not the child is in need of care or rehabilitation is reversible error. *State v. John Doe*, 91 N.M. 356, 573 P.2d 1211 (Ct. App. 1977).

— If the answer to either of the two inquiries is in the negative, the judgment to be entered is that the respondent is not guilty.

— Paragraph B provides that the time for appeal begins to run from disposition, not from the conclusion of the adjudicatory hearing. *See In re John Doe III*, 87 N.M. 170, 531 P.2d 218 (Ct. App. 1975).

— Section 32-1-39A NMSA 1978 simply allows “a party” to appeal from a judgment of the children’s court to the court of appeals “in the manner provided by law.” Paragraph C specifies that the appeal will be governed by the New Mexico Rules of Appellate Procedure.]

[10-230.1] 10-252. Modification of judgment.

A. **Correction of judgment.** The court may correct an unlawful disposition [in a delinquency proceeding] at any time and may correct a commitment imposed in an unlawful manner within the time provided by this rule for the reduction of the term of commitment.

B. **Reduction of term of commitment.** A motion to modify or reconsider the disposition may be filed [by the respondent in a delinquency proceeding] by any party or raised by the court on its own motion:

(1) [in which] if the initial commitment period is two (2) years or less, within thirty (30) days after the judgment is filed;

(2) [in which] if the initial commitment period is longer than two (2) years, within ninety (90) days after [:(a)] the judgment is filed;

[(b)](3) [receipt by the] within thirty (30) days after filing in the children’s court of a mandate affirming the judgment or dismissal of an appeal; or

[(3) within thirty (30) days after filing in the children’s court of any order or judgment of the appellate court denying review of, or having the effect of upholding the disposition.]

(4) upon revocation of probation as provided by law.

C. **Form of order.** A form of order setting a hearing [on] and providing for transportation shall be submitted with the motion to modify or reconsider disposition [shall be submitted with the motion].

D. **Disposition.** The court shall enter an order either denying or granting a motion to modify or reconsider disposition within [ninety (90)] sixty (60) days after the date it is filed or the motion is deemed denied. If the court grants the motion, the court may change the disposition from incarceration to probation or enter such other order as deemed appropriate.

[10-232] 10-261. Probation.

A. **Probation.** At the conclusion of the dispositional hearing, the court may enter an order placing the child on probation under terms and conditions as the court may prescribe.

B. **Revocation of probation.** If the child fails to fulfill the terms or conditions of probation, the children’s court attorney

may file a petition to revoke probation.

C. **Revocation procedure.** Proceedings to revoke probation shall be conducted in the same manner as proceedings on petitions alleging delinquency. The child whose probation is sought to be revoked shall be entitled to all rights that a child alleged to be delinquent is entitled to under law and these rules, except that:

(1) no preliminary inquiry shall be conducted;

(2) the hearing on the petition shall be to the court without a jury;

(3) the petition shall be styled as a “Petition to Revoke Probation” and shall state the terms of probation alleged to have been violated and the factual basis for these allegations; and

(4) the petition may be filed any time prior to expiration of the period of probation.

[**Committee commentary.**— Rule 10-232 was formerly Rule 39. It was renumbered in 1978.—

— The children’s court attorney must sign the petition. See also Section 32-1-43 NMSA 1978.—

— There is no provision in the Children’s Code similar to Section 31-21-15B NMSA 1978 regarding credit for probation for adults. *See State v. Sublett*, 78 N.M. 655, 436 P.2d 515 (Ct. App. 1968). Section 32-1-38G NMSA 1978 of the Children’s Code provides that any time “prior to the expiration of a judgment of probation,” a court may extend the judgment for one year. Section 32-1-38G NMSA 1978 seems to require less than Rule 10-232 does for initiating a petition to revoke probation. However, Section 32-1-43 NMSA 1978, regarding probation revocation, provides that the court not only may extend the judgment, but it may “make any other judgment or disposition that would have been appropriate in the original disposition of the case.” Rule 10-232 was amended in 1982 to require the filing of the petition for revocation prior to expiration of the probation period. By requiring that the petition to revoke probation be filed prior to the expiration of the probation period, this rule would be consistent with Rule 10-225 regarding the extension of consent decrees.

— Rule 11-509 of the Rules of Evidence establishing a privilege between probation officers and the respondent is inapplicable to probation revocation proceedings since it applies only to statements made during a preliminary inquiry, and none is conducted under Subparagraph (1) of Paragraph A of Rule 10-232. *See State v. Doe*, 91 N.M. 364, 574 P.2d 288 (Ct. App. 1978).

— The 1982 amendments deleting “parole” from this rule were made to be consistent with the amendment of Section 32-1-43 NMSA 1978 by the 1981 legislature. Section 32-1-43.1 NMSA 1978 now requires the field community services division of the corrections department to establish procedures for parole revocations.]

[10-233] 10-262. Automatic sealing of records.

A. **No adjudication of delinquency.** When a petition for delinquency has been filed that does not result in an adjudication of delinquency, the children’s court attorney shall present the court with an order sealing the files and records in the case, in a form prescribed by the Supreme Court, which the court shall enter upon conclusion of the case.

B. **Release from legal custody and supervision.** When a person has been released from the court-ordered supervision of the Children, Youth, and Families Department (CYFD or department), and the department has not received any new allegations of delinquency regarding that person for two (2) years since the release, the department shall notify the court that two (2) years have elapsed since the release and shall present the court with an

order sealing the files and records in the case, in a form prescribed by the Supreme Court, which the court shall enter.

C. Copies of order. The clerk of the court shall deliver or mail copies of any sealing order to:

- (1) the children's court attorney;
- (2) CYFD and any other authority granting the release;
- (3) the law enforcement officer, department and central depository having custody of the law enforcement files and records;
- (4) any other agency having custody of records or files subject to the sealing order;
- (5) counsel of record at the time of disposition; and
- (6) the person who is the subject of the sealing order, at that person's last known mailing address.

Committee Commentary

This rule is based on the 2003 statutory amendments to Section 32A-2-26 NMSA 1978, subsections G and H. These subsections provide for automatic sealing of court records for a person who is not the subject of a delinquency petition; for a person who is determined by the court not to be a delinquent offender; or for a person who has been released from legal custody and supervision and for whom no new allegations of delinquency have been received in the past two years. This rule is intended to specify the mechanism for automatic sealing, as the statute does not state how it is to be accomplished, and to provide guidance to the Children, Youth and Families Department (department) and the courts in its implementation. The rule is not intended to govern or comment on sealing by motion under subsection A of Section 32A-2-26 NMSA 1978.

Note that the rule does not address the first part of subsection G of Section 32A-2-26 NMSA 1978, which provides that a person who is not the subject of a delinquency petition shall have his or her files automatically sealed. The fact that a delinquency petition was not filed means that the matter was handled informally by probation services. The committee believes this is a matter best left to the department, which administers probation services. The committee strongly encourages the department to develop a mechanism for sealing under these circumstances, as these children's records otherwise will remain unsealed while children for whom a petition has been filed are protected by the rule.

With regard to Paragraph A of the rule, there are a variety of circumstances under which a petition for delinquency is filed but does not result in an adjudication of delinquency. Such circumstances may include, but are not limited to, dismissal by the state, a satisfaction of time waiver, completion of the terms of a consent decree, an acquittal or other form of dismissal, or a ruling on appeal that concludes the case without an adjudication of delinquency. Not all courts enter formal orders of dismissal or make formal determinations that the child is not delinquent; the rule is broadly stated to accommodate different practices around the state. This approach is consistent with Rule ~~[10-103.2(B)]~~ 10-146 NMRA, which provides, with limited exceptions, that a dismissal "operates as an adjudication upon the merits."

With regard to Paragraph B of the rule, the committee recommended use of the phrase "court-ordered supervision of the department" instead of the statutory phrase "custody and supervision of the department" to make it clear that a child given probation alone is as entitled to sealing as a child placed in the department's custody. Comments received during the public comment period suggested that this required clarification.

It is the committee's intent that the term "files and records"

include all forms of such documents, including but not limited to electronic and paper versions. Finally, the committee encourages all recipients of any sealing order under this rule to ensure that the order is given to the proper person responsible for sealing within the recipient's agency. The rule attempts to delineate the responsible persons to the degree possible, but ultimately implementation of this rule and its underlying statute rests with the recipient individuals and agencies.

Because this rule does not change current law, which has been in effect since July 1, 2003, this rule applies to all cases either pending or filed on or after the effective date of the statute and to those cases that were closed but not yet eligible for sealing before that date. Those persons who were eligible to move for sealing of their records before the amended statute became effective are not covered by this rule, but they may still file a motion to have their records sealed.

10-231. Commitment information.

[WITHDRAWN]

[Whenever a child is committed to either the girls' school, the boys' school or the youth diagnostic and development center, the committing court shall provide the following information to that facility if available:

- A. medical information. A complete medical report including any psychological and drug involvement information, if applicable;
- B. family information. This shall include information relating to number of siblings, family income, and religious background;
- C. educational information;
- D. employment information;
- E. delinquent history; and
- F. any other information which is relevant to the background of the child.]

[NEW MATERIAL]

10-301. Abuse and neglect proceedings; families in need of court-ordered services; scope.

Article 3 of these rules governs the procedure in abuse and neglect proceedings in the children's court. Unless addressed separately, these rules govern the families in need of court-ordered services proceedings in the children's court.

Committee Commentary

Rule 10-101A(1)(c) of the Children's Court Rules provides that "the Children's Court Rules govern procedure in the children's courts of New Mexico in all matters involving children alleged by the state . . . to be abused or neglected, as defined in the Abuse and Neglect Act, including proceedings to terminate parental rights which are filed pursuant to the Abuse and Neglect Act." Rule 10-101A(5) provides in part that "the Children's Code and the Rules of Civil Procedure for the District Courts govern the procedure in all other proceedings under the Children's Code." Thus, the Rules of Civil Procedure do not automatically apply to abuse and neglect proceedings. The committee has attempted to ensure that comprehensive procedures exist for abuse and neglect proceedings. Where gaps exist, the Rules of Civil Procedure may be used as guidance for those procedural matters under Article 3 not otherwise addressed in the Children's Court Rules.

~~[10-301]~~ 10-311. Ex parte custody orders.

A. Issuance. If the department wishes to seek or retain custody, at the time the petition is filed or [W]within two (2) days after a child is taken into custody, the department shall file a motion

for an *ex parte* custody order with a sworn written statement of facts showing probable cause to believe (1) that the child has been abused or neglected and (2) that custody under the criteria set forth in Section 32A-4-18 NMSA 1978 is necessary. The motion and affidavit for the *ex parte* custody order shall be substantially in the form approved by the Supreme Court.

B. **Service.** The order shall be served with the petition.

Committee Commentary

The rule establishes a procedure similar to an arrest warrant to cover situations in which a child alleged to be abused or neglected may be taken into custody. Sections 32A-4-6 to 32A-4-8 NMSA 1978 provide for temporary custody prior to the filing of a petition. Rule 10-~~303~~ 315 NMRA requires a custody hearing to be held within ten (10) days after the petition has been filed.

~~10-305~~ 10-312. Filing of petition; amendment of petition; appointment of guardian *ad litem* or attorney.

A. **Form and contents.** Petitions or amended petitions alleging abuse or neglect shall be in a form approved by the Supreme Court.

B. **Time limits.** If a child is taken into custody, a petition alleging abuse or neglect shall be filed by the department within two (2) days from the date that the child is taken into emergency custody by the department. If a petition is not filed within the time set forth in this paragraph, the child shall be released to the child's parents, guardian or custodian.

C. **Service.** A petition alleging abuse or neglect shall be served as provided by Rule 10-104 of these rules. A copy of the petition shall also be served on a parent who has not been made a party with a notice that the parent may intervene and request custody of the child.

D. **Appointment of guardian *ad litem* or attorney.** Upon the filing of a petition in an abuse or neglect proceeding, a guardian *ad litem* shall be appointed by the court to represent the best interest of any child under the age of fourteen (14). The court shall appoint an attorney to represent any child who is fourteen (14) years of age or older.

E. **Notice to Indian tribes.** If the alleged abused or neglected child is enrolled or eligible for enrollment in an Indian tribe, the Children, Youth and Families Department shall give notice of the filing of the petition to the child's Indian tribe. The form and manner of the notice shall comply with the provisions of the federal Indian Child Welfare Act of 1978.

F. **Amended petitions.** The department may file an amended petition alleging abuse or neglect:

- (1) once as a matter of course at any time within twenty (20) days after it is served; or
- (2) upon leave of court.

Committee Commentary

Rule 10-~~305~~ 315 NMRA sets the general procedure and time limits for filing of petitions alleging abuse or neglect.

The Supreme Court approved form of petition in abuse or neglect actions provides notice that the respondent's parental rights may be terminated. See Rule 10-108 NMRA and Section 32A-4-27 NMSA 1978 for rights of non-custodial parents to intervene. See also Section 32A-4-29 NMSA 1978. The committee views the right to intervene as procedural.

~~10-305.2~~ 10-313. Appointment of attorney for child turning fourteen.

A. **Duty of guardian *ad litem*.** If a child in an abuse or neglect proceeding is represented by a guardian *ad litem* at the time the

child reaches the age of fourteen (14) years of age, the guardian *ad litem* shall either:

(1) file a notice of continued representation as attorney for the child; or

(2) file a motion to request the court appoint an attorney for the child.

B. **Advice of rights.** At the first appearance of a child in an abuse or neglect proceeding after the child's fourteenth (14th) birthday, the court shall inquire as to whether the child is represented by an attorney. If the child is not represented by an attorney, the court shall appoint an attorney.

Committee Commentary

Section 32A-4-29 NMSA 1978 provides termination procedures as part of the disposition. To implement this section the Supreme Court approved form of summons and petition has been amended to advise the respondents that the court may terminate the parental rights of a parent who is a party to the proceeding. See Children's Court Form 10-403 NMRA, summons, and Form 10-454 NMRA for petition.

~~10-304~~ 10-314. Explanation of respondent's rights at first appearance; appointed counsel.

A. **Explanation of rights at first appearance.** At the first appearance of the respondent [im] on an abuse or neglect petition or a termination of parental rights motion [proceeding], if the respondent is not represented by an attorney, the respondent shall be informed by the court of:

[A:] (1) the allegations of the petition or the motion;

[B:] (2) the right to an adjudicatory hearing on the allegations in the petition or the right to a trial on the allegations in the motion;

[C:] (3) the right to an attorney and that if the respondent cannot afford an attorney, one will be appointed to represent the respondent free of charge; and

[D:] (4) the possible consequences if the allegations of the petition or the motion are found to be true.

B. **Appointed counsel.** In any proceeding or case that may result in the termination of parental rights, an attorney may not be appointed to represent more than one respondent.

Committee Commentary

See Sections 32A-4-10(B) and 32A-4-29(F) NMSA 1978 for the right to counsel of a parent, guardian or custodian in an abuse or neglect or termination of parental rights proceeding. The right to counsel does not appear to be limited to parents who are respondents in the proceeding.

Historically, noncriminal proceedings against parents based on their treatment of their children were equitable in nature and were based on the doctrine of *parens patriae*. See, *In re Santillanes*, 47 N.M. 140, 138 P.2d 503 (1943). Modern abuse and neglect and termination of parental rights proceedings are typically statutory proceedings. Absent statutory authorization for a right to a jury trial, it has been held that the parents have no such right. *Matter of T.J.*, 1997-NMCA-021, 123 N.M. 99, 934 P.2d 293 (mother not entitled to jury trial under New Mexico constitution or by statute.)

~~10-303~~ 10-315. Custody hearing; abuse and neglect.

A. **Time limits.** A custody hearing shall be held within ten (10) days from the date a petition is filed alleging abuse or neglect. At the custody hearing the court shall determine if the child should remain or be placed in the custody of the department pending adjudication. Upon written request of the respondent, the hearing

may be held sooner, but in no event shall the hearing be held less than two (2) days after the date the petition was filed.

B. Notice. The department shall give reasonable notice of the time and place of the custody hearing to the parents, guardian or custodian of the child alleged to be abused or neglected.

[**C. Conduct.** At the custody hearing, the court shall release the child to the child's parents, guardian or custodian unless probable cause exists to believe that:

— (1) the child is suffering from an illness or injury, and no parent, guardian, custodian or other person is providing adequate care for the child;

— (2) the child is in immediate danger from the child's surroundings, and removal from those surroundings is necessary for the child's safety or well-being;

— (3) the child will be subject to injury by others if not placed in the custody of the department;

— (4) the child has been abandoned by the child's parent, guardian or custodian;

— (5) no parent, guardian, custodian or other person is able or willing to provide adequate supervision and care for the child.

— **D. Conclusion.** At the conclusion of the hearing, if the court determines that custody pending adjudication is appropriate, the court may:

— (1) award custody of the child to the department with or without rights of visitation for the parents, guardian or custodian of the child; or

— (2) return the child to the child's parents, guardian or custodian upon such conditions as will reasonably assure the safety and well-being of the child.

— **E. Special masters.** A custody hearing may be held by a special master appointed by the court. All custody orders must be signed by the children's court judge prior to taking effect.]

Committee Commentary

The custody hearing required by Rule 10-[303] 315 NMRA is the equivalent of the detention hearing in delinquency [and need of supervision] cases. It also covers those situations in which the children, youth and families department does not have custody, but desires to take custody of the child pending the adjudicatory hearing.

Paragraph A of Rule 10-[303] 315 NMRA requires that the hearing be held within ten (10) days from the date the petition is filed, and it may be held sooner upon written request of the respondent. [If the child is in custody, the hearing must be held within two days after the petition is filed.]

Paragraph B of Rule 10-[303] 315 NMRA requires that reasonable notice be served on the parents, guardian or custodian of the child. The timeliness of the notice must be interpreted in view of the fact that a longer time limit for the custody hearing is allowed than for a detention hearing in a delinquency [or need of supervision] proceeding. [The notice need be given only to one parent.]

[Paragraph C of Rule 10-303 NMRA provides for the continued pre-adjudicatory custody of a child if there is probable cause to believe the child is an abused or neglected child. See Section 32A-4-2 NMSA 1978 for the definitions of "neglected" and "abused" children. See also Section 32A-4-6 NMSA 1978 (grounds for taking into custody) and Section 32A-4-8 NMSA 1978 (place of temporary custody):

— Paragraph D of Rule 10-303 NMRA provides guidelines for the court to use if the child is placed in the custody of the department pending the adjudicatory hearing:]

The Rules of Evidence, other than those with respect to

privileges, do not apply to custody hearings. See Rule 11-1101 NMRA of the Rules of Evidence [for exclusions from the Rules of Evidence. See also *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978)].

[10-305.1] 10-321. Joinder of parties; severance[; abuse and neglect proceedings].

A. Joinder of parties. Two or more respondents may be named in the same pleadings:

(1) alleging abuse or neglect of a child; or

(2) requesting a termination of parental rights.

B. Misjoinder and nonjoinder. Parties may be dismissed or added by order of the court on motion of any party or of its own initiative at any stage of the proceeding. Any claim against a party may be severed and proceeded with separately.

Committee Commentary

Section 32A-4-29 NMSA 1978 provides termination procedures as part of the disposition. To implement this section the Supreme Court approved form of summons and petition has been amended to advise the respondents that the court may terminate the parental rights of a parent who is a party to the proceeding. See Children's Court Form 10-403 NMRA, summons, and Form 10-454 NMRA for petition.

[NEW MATERIAL]

10-322. Defenses and objections; when and how presented; by pleading or motion.

A. When presented. A respondent in a proceeding may serve a response within thirty (30) days after the service of the summons and petition. Unless a different time is fixed by the court, after service of a motion under Paragraph B of this rule, any responsive pleading shall be filed within ten (10) days after the denial of the motion.

B. How presented. Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading if one is filed, except that the following defenses may, at the option of the respondent, be made by motion:

(1) lack of jurisdiction over the subject matter;

(2) lack of jurisdiction over the person;

(3) improper venue;

(4) insufficiency of process;

(5) insufficiency of service of process;

(6) failure to state a claim upon which relief can be granted;

(7) failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the party may assert at the adjudicatory hearing any defense in law or fact to that claim for relief.

[10-308] 10-331. Disclosure by the department[; abuse, neglect and termination of parental rights proceedings].

A. Information subject to disclosure. Unless a shorter period of time is ordered by the court, no less than fifteen (15) days prior to any adjudicatory hearing or termination of parental rights hearing, the department shall disclose and make available to the parties [the respondent and the guardian ad litem]:

(1) any statement made by the respondent[;] or a co-respondent, or copies thereof, which is [with]in the possession, custody or control of the department and the existence of which is known, or by the exercise of due diligence may become known, to the children's court attorney;

(2) any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are [with]in the possession, custody or control of the department, and which are intended for use by the department as evidence at the adjudicatory hearing or termination of parental rights hearing, or were obtained from or belong to the respondent;

(3) any results or reports of physical or mental examinations, and of scientific tests or experiments, made in connection with the particular case, or copies thereof, which are [with]in the possession, custody or control of the department and the existence of which is known, or by the exercise of due diligence, may become known to the children's court attorney; and

(4) a written list of the names and addresses of all witnesses which the children's court attorney intends to call at the adjudicatory hearing or termination of parental rights hearing, together with any recorded or written statement made by the witness.

~~[B.] **Court order relating to discovery.** The court may order any other discovery permitted by the Rules of Civil Procedure for the District Courts. The court may order production of or may limit the production of any books, papers, documents, photographs, tangible objects, reports or other information as may be necessary to ensure a fair consideration of the allegations while considering the best interests of the child.]~~

~~[C.] **B. Examining, photographing or copying evidence.** [The respondent] The parties may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.~~

~~[D.] **C. Certificate.** [The children's court attorney shall file with the clerk of the court, a] At least ten (10) days prior to the adjudicatory hearing or termination of parental rights hearing, the children's court attorney shall file with the clerk of the court a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information prior to the adjudicatory hearing or termination of parental rights hearing. If information specifically excepted from the certificate is furnished by the children's court attorney to [the respondent] the parties after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the parties [the respondent].~~

~~[E.] **D. Information not subject to disclosure.** Unless otherwise ordered, the children's court attorney shall not be required to disclose any material required to be disclosed by this rule if:~~

~~(1) the disclosure will expose a confidential informer; or~~

~~(2) there is substantial risk to some person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment resulting from such disclosure, which outweighs any usefulness of the disclosure [to defense counsel].~~

~~When material is withheld under this rule, the children's court attorney shall disclose to the parties that material has been withheld, together with a description of the nature of the documents, communications or things not disclosed that is sufficient to enable a party to contest the failure to disclose.~~

~~[F.] **E. Failure to comply.** If the department fails to comply with~~

any of the provisions of this rule, the court may enter an order pursuant to Rule 10-113 NMRA and Rule 10-137 NMRA.

~~[10-309] **10-332. Disclosure of evidence and witnesses by the respondent[; abuse, neglect and termination of parental rights proceedings].**~~

~~A. **Information subject to disclosure.** Unless a shorter period of time is ordered by the court, not less than fifteen (15) days prior to any adjudicatory hearing or termination of parental rights hearing, the respondent shall disclose and make available to the [department and the guardian ad litem] parties:~~

~~(1) any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are [with]in the possession, custody or control of the respondent, and which the respondent intends to introduce in evidence at the adjudicatory hearing or termination of parental rights hearing or which were prepared by a witness whom the respondent intends to call at the adjudicatory hearing or termination of parental rights hearing;~~

~~(2) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, [with]in the possession or control of the respondent, which the respondent intends to introduce in evidence at the adjudicatory hearing or termination of parental rights hearing or which were prepared by a witness whom the respondent intends to call at the adjudicatory hearing or termination of parental rights hearing; and~~

~~(3) a list of the names and addresses of the witnesses the respondent intends to call at the adjudicatory hearing or termination of parental rights hearing, together with any recorded or written statement made by any identified witness.~~

~~B. **Examining, photographing or copying evidence.** The [department and the guardian ad litem] parties may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.~~

~~C. **Information not subject to disclosure.** Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of:~~

~~(1) reports, memoranda or other internal defense documents made by the respondent, or the respondent's attorneys in connection with the investigation or defense of the case; or~~

~~(2) statements made by the respondent to the respondent's agents or attorneys.~~

~~D. **Certificate.** The respondent shall file with the clerk of the court at least ten (10) days prior to the adjudicatory hearing or termination of parental rights hearing a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the respondent after the filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the [department and the guardian ad litem] parties.~~

~~E. **Failure to comply.** If the respondent fails to comply with any of the provisions of this rule, the court may enter an order pursuant to Rule 10-113 NMRA or Rule 10-137 NMRA.~~

~~[10-310] **10-333. Disclosure of evidence and witnesses by the**~~

child's guardian [ad litem] ad litem or attorney]; abuse, neglect and termination of parental rights proceedings].

A. Information subject to disclosure. Unless a shorter period of time is ordered by the court, not less than fifteen (15) days prior to any adjudicatory hearing or termination of parental rights hearing, the child's guardian [ad litem] ad litem or attorney shall disclose and make available to the parties [department and the respondent]:

(1) a statement of the child's declared position appertaining to the adjudication, disposition or termination of parental rights;

(2) a statement of the guardian [ad litem] ad litem's position appertaining to the adjudication, disposition or termination of parental rights;

(3) any books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are [with]in the possession, custody or control of the child's guardian ad litem or attorney, and which the child's guardian [ad litem] ad litem or attorney intends to introduce in evidence at the adjudicatory hearing or termination of parental rights hearing or which were prepared by a witness whom the child's guardian [ad litem] ad litem or attorney intends to call at the adjudicatory hearing or termination of parental rights hearing;

(4) any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, [with]in the possession or control of the child's guardian [ad litem] ad litem or attorney, which the child's guardian [ad litem] ad litem or attorney intends to introduce in evidence at the adjudicatory hearing or termination of parental rights hearing or which were prepared by a witness whom the child's guardian [ad litem] ad litem or attorney intends to call at the adjudicatory hearing or termination of parental rights hearing; and

(5) a list of the names and addresses of the witnesses the child's guardian [ad litem] ad litem or attorney intends to call at the adjudicatory hearing or termination of parental rights hearing, together with any recorded or written statement made by any identified witness.

B. Examining, photographing or copying evidence. The parties [department and the respondent] may examine, photograph or copy any material disclosed pursuant to Paragraph A of this rule.

C. Information not subject to disclosure. Except as to scientific or medical reports, this rule does not authorize the discovery or inspection of:

(1) reports, memoranda or other internal defense documents made by the child's guardian [ad litem] ad litem or attorney in connection with the investigation or defense of the case;

(2) statements made by the child to the child's guardian [ad litem] ad litem unless such statements contradict prior statements made by the child in connection with any allegation of abuse or neglect; or

(3) statements made by the child to the child's attorney.

D. Certificate. The child's guardian [ad litem] ad litem or attorney shall file with the clerk of the court at least ten (10) days prior to the adjudicatory hearing or termination of parental rights hearing a certificate stating that all information required to be produced pursuant to Paragraph A of this rule has been produced, except as specified. The certificate shall contain an acknowledgment of the continuing duty to disclose additional information. If information specifically excepted from the certificate is furnished by the child's guardian [ad litem] ad litem or attorney after the

filing of the certificate, a supplemental certificate shall be filed with the court setting forth the material furnished. A copy of the certificate and any supplemental certificate shall be served on the parties [department and the respondent].

E. Failure to comply. If the child's guardian [ad litem] ad litem or attorney fails to comply with any of the provisions of this rule, the court may enter any order pursuant to Rule 10-113 NMRA or Rule 10-137 NMRA.

[NEW MATERIAL]

10-334. Court-ordered discovery.

The court may order any discovery permitted by the Children's Court Rules or by Rules of Civil Procedure for the District Court. The court may order or limit production of any books, papers, documents, photographs, tangible objects, reports or other information as may be necessary to ensure a fair consideration of the issues while considering the best interests of the child.

~~10-306.1~~ 10-335. Court ordered diagnostic examinations and evaluations.

At any time after the commencement of an abuse and neglect proceeding, upon motion of a party or upon the court's own motion, the court may order a respondent or any child alleged to be neglected or abused to undergo a diagnostic examination or evaluation. Copies of any diagnostic examination or evaluation report shall be provided to the parties. If the examination is ordered prior to the adjudicatory hearing, copies of the diagnostic or evaluation report shall be provided to the parties at least five (5) days prior to the adjudicatory hearing. Diagnostic or evaluation reports shall not be provided to the court prior to the adjudicatory hearing.

~~10-110~~ 10-341. Witness immunity.

A. Issuance of order. If a person has been or may be called to testify or to produce a record, document or other object in an abuse or neglect, termination of parental rights or guardianship proceeding in the children's court, the judge before whom the proceeding is pending may upon the written application for immunity by the children's court attorney, issue a written order requiring the person to testify or to produce the record, document or other object notwithstanding the person's privilege against self-incrimination. The department shall serve the district attorney with a copy of the application for immunity and notice of hearing on the application.

B. Application. The court may grant the application and issue a written order pursuant to this rule if it finds:

(1) the testimony, or the record, document or other object may be necessary to the public interest; and

(2) the person has refused or is likely to refuse to testify or to produce the record, document or other object on the basis of the person's privilege against self-incrimination.

C. Extent of immunity. Evidence compelled under an order granted pursuant to this rule or any information directly or indirectly derived from such evidence may not be used against the person in any criminal case except as provided by Rule 11-412 NMRA of the Rules of Evidence.

Committee Commentary

Prior to the March 20, 2000 amendment of this rule, this rule was the same as Rule 5-116 NMRA of the Rules of Criminal Procedure for the District Courts. The March 20, 2000, amendments limit the applicability of this rule to abuse or neglect, termination of parental rights or guardianship proceedings in which the

respondent may be accused of a criminal offense arising out of the proceedings.

Paragraph C was added as part of the March 20, 2000 amendments.

[10-307] 10-342. Admissions and consent decrees.

A. **Admissions.** The respondent may make an admission by:

(1) admitting sufficient facts to permit a finding that the allegations of the petition are true; or

(2) declaring [his] the respondent's intention not to contest the allegations in the petition.

B. **Consent decrees.** A consent decree in an abuse or neglect proceeding is an order of the court, after an admission has been made, that suspends the proceedings on the petition and in which, under terms and conditions negotiated and agreed to by the respondent and the children's court attorney:

(1) the legal custody of the child is transferred to the department for a period not to exceed six (6) months from the date of the consent decree; and

(2) the child is allowed to remain with the respondent or other person and the respondent will be under supervision of the department for a period not to exceed six (6) months.

C. **Inquiry of respondent.** The court shall not accept an admission or approve a consent decree without first, by addressing the respondent personally in open court, determining that:

(1) [he] the respondent understands the allegations of the petition;

(2) [he] the respondent understands the dispositions that the court may make if the allegations of the petition are found to be true;

(3) [he] the respondent understands [that he has a] the right to deny the allegations in the petition and to have a trial on the allegations;

(4) [he] the respondent understands that [if he makes and admission or agrees] by admitting or agreeing to the entry of the consent decree[; he] the respondent is waiving the right to a trial [is waived]; and

(5) the admission or provisions of the consent decree are voluntary and not the result of force or threats or of promises other than any consent decree agreement reached.

D. **Basis for admission or consent decree.** The court shall not enter judgment upon an admission or approve a consent decree without making such inquiry as shall satisfy the court that there is a factual basis for the admission or consent decree.

E. **Disposition.** After acceptance of an admission, unless made for the purpose of a consent decree, the court shall proceed to make any disposition permitted by law as it deems appropriate under the circumstances.

F. **Acceptance of consent decree.** If the court accepts a consent decree, the court shall approve the disposition provided for in the consent decree or another disposition more favorable to the respondent than that provided for in the consent decree. If the court rejects the consent decree, the decree shall be null and void.

G. **Inadmissibility of discussions.** Evidence of an admission or agreement to a consent decree, later withdrawn, or of conduct or statements made [in connection therewith is not admissible in any proceeding against the respondent] during negotiations shall be considered to be "compromise negotiations" under Rule 11-408 NMRA and is not admissible to prove abuse or neglect. This rule does not require the exclusion of any evidence otherwise discoverable merely because it was presented in the course of

settlement negotiations.

H. **Time limits.** If the child is in the custody of the department, the court shall accept or reject the admission or consent decree within five (5) days after the admission is made or within five (5) days after a consent decree has been submitted to the court for its approval.

~~[I. **Rules of Evidence.** The Rules of Evidence do not apply to inquiries made to determine whether there is a factual basis for an admission or a consent decree.]~~

~~[J.] I. **Extension[- termination].** [Consent decrees in abuse and neglect proceedings may be extended by the department and terminated in accordance with Rule 10-225.] The department may move the court for an order extending the original consent decree for a period not to exceed six (6) months from the expiration of the original decree. The motion for extension shall be filed prior to the expiration of the original decree. If the respondent objects to the extension, the court shall hold a hearing to determine if the extension is in the best interests of the child.~~

~~[K.] J. **Revocation.** If, prior to the expiration of the consent decree, the respondent allegedly fails to fulfill the terms of the decree, the [children's court attorney department] may file a petition to revoke the consent decree. If the respondent is found to have violated the terms of the consent decree, the court may:~~

~~(1) extend the period of the consent decree; or~~

~~(2) make any other disposition which would have been appropriate in the original proceedings.~~

Committee Commentary

~~[Rule 10-307 was expanded in 1978.]~~ The rule institutes consent decree and admissions procedures for abuse and neglect cases. The consent decree in an abuse or neglect case differs from that in a delinquency ~~[or need of supervision]~~ proceeding in that the parties may agree that the department have legal custody of the child for a period of up to six months or the child may be placed under supervision in his own home or the home of another for the six-month period.

See generally Rules 10-~~[224]~~ 231 and 10-~~[225]~~ 233 and the commentaries thereto.

[10-320] 10-343. Adjudicatory hearing; time limits; continuances.

A. **Time for hearing.** The adjudicatory hearing shall be commenced within sixty (60) days after whichever of the following events occurs latest:

(1) the date that the petition is served on the respondent;

(2) the termination of any diversion agreement;

(3) if a mistrial is declared or a new trial is ordered by the trial court, the date that such order is filed; or

(4) in the event of an appeal, the date that the mandate or order is filed in the district court disposing of the appeal.

B. **Children's court attorney.** The children's court attorney shall represent the state at the adjudicatory hearing.

C. **Extension of time.** The time for commencement of an adjudicatory hearing may be extended by the:

(1) children's court judge for good cause shown, provided that the aggregate of all extensions granted by the children's court judge may not exceed thirty (30) days. The party seeking an extension of time shall file with the court a verified petition for extension concisely stating the facts that petitioner deems to constitute good cause for an extension of time to commence the adjudicatory hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable

time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit; or

(2) Supreme Court, a justice thereof, or a judge designated by the Supreme Court, for good cause shown. The party seeking an extension of time shall file with the clerk of the Supreme Court a verified petition for extension concisely stating the facts that petitioner deems to constitute good cause for an extension of time to commence the adjudicatory hearing. The petition shall be filed within the applicable time limits prescribed by this rule, except that it may be filed within ten (10) days after the expiration of the applicable time limits if it is based on exceptional circumstances beyond the control of the state or children's court which justify the failure to file the petition within the applicable time limit. A party seeking an extension of time shall forthwith serve a copy thereof on opposing counsel. Within five (5) days after service of the motion, opposing counsel may file an objection to the extension setting forth the reasons for such objection. No hearing shall be held except upon order of the Supreme Court. If the Supreme Court finds that there is good cause for the granting of an extension beyond the applicable time limit, it shall fix the time limit within which the adjudicatory hearing must be commenced.

D. Effect of noncompliance with time limits. If the adjudicatory hearing on any petition is not begun within the time specified in Paragraph A of this rule or within the period of any extension granted as provided in this rule, the petition shall be dismissed with prejudice.

Committee Commentary

[This rule was amended in 1998 to add a new Subparagraph (2) to Paragraph A to accommodate other pre-adjudication dispositions and to permit the children's court judge to extend the time for adjudicatory hearings for not more than 30 days. See also Rule 10-226.

—This rule is former Rule 10-308. It was revised in 1978 to expand the time limit for commencement of the adjudicatory hearing when the alleged abused or neglected child is in the custody of the Human Services Department and to expand the "events" which start the time limit running:

—Whether or not the alleged abused or neglected child is in the custody of the department, the time limits for commencement of the adjudicatory hearing begin to run from the latest of the four "events" set forth in Paragraphs A and B of Rule 10-320. Before the 1978 revisions, the time limits were keyed to service of the petition on the respondent. In 1978, the "event" approach was adopted for commencement of the time limits in neglect, delinquency and need of supervision proceedings. See Rule 10-226 and the commentary thereto.]

Like the time limits in Rule 10-[226], the time limits in [Rule 10-320] this rule are jurisdictional.

~~[10-321]~~ **10-344. Disposition hearing; time limits.**

A. Predisposition report. If the court finds that the respondent has abused or neglected the child, the court shall hold a dispositional hearing. If the dispositional hearing is not held at the same time as the adjudicatory hearing, the department shall prepare a predisposition report. Unless the dispositional hearing is held in conjunction with the adjudicatory hearing, at least five (5) days prior to the dispositional hearing, the department shall file with the court and serve on each party [~~and the guardian ad litem~~] a predisposition report.

B. Access to reports. At the time of serving the department's dispositional plan on the parties [~~and guardian ad litem~~], the

department shall serve each party [~~and the guardian ad litem~~] with:

(1) copies of any social, diagnostic or other predisposition reports ordered by or submitted to the court; and

(2) a proposed disposition order.

C. Time. If, at the conclusion of an adjudicatory hearing, the child is found to be abused or neglected, the court may proceed immediately to make disposition of the case. If the dispositional hearing is not held in conjunction with the adjudicatory hearing, it shall commence within thirty (30) days after conclusion of the adjudicatory hearing.

Committee Commentary

[See Rule 10-230 and commentary thereto.

—Three changes were made in Rule 10-309 in 1978. First, the guardian ad litem was added to the list of those to receive predisposition reports. As the attorney for the child, who is a party to the action, the guardian ad litem must receive all pleadings, reports, etc. (See Rule 10-103.) The rule has not always been followed, and the 1978 committee wished to emphasize that the guardian ad litem is entitled to the reports.

—The second change made in 1978 was the addition of the requirement that status reports be filed at least every six months, rather than once a year, if legal custody of the child is granted to the human services department. The last change made was the addition of the requirement that the status report be filed and copies sent to the court, the attorneys and the guardian ad litem. (See the commentary to Rule 10-108 for a discussion of the duties of a guardian ad litem.) These changes were made to provide a better monitoring system of children in the custody of the department.

—Section 32-1-32A NMSA 1978 requires that the court direct the preparation of a predisposition study and report. [As to the predisposition study and report, see Section 32A-4-21 NMSA 1978.

~~[10-325]~~ **10-345. [Judicial review and p]Permanency and permanency review hearings.**

A. [First] Initial permanency hearing. Within six (6) months after the conclusion of the initial judicial review of a child's dispositional order or within twelve (12) months of a child entering foster care, as defined in Section 32A-4-25.1(E) NMSA 1978 (as amended, 2005), whichever occurs first, the court shall conduct a permanency hearing to determine what permanency plan is in the child's best interest.

B. Notice. The department shall be responsible for obtaining a setting for the [first] initial and any subsequent permanency or permanency review hearings and shall give notice of the hearing to all other parties and such other persons as required by law.

C. Pre-permanency hearing report; conference. Not less than five (5) days prior to a permanency hearing, the department shall prepare and serve on each party a pre-permanency hearing report. The report shall include the department's proposed permanency plan. The pre-permanency hearing report shall also set forth any changes to the disposition plan.

D. Pre-hearing [settlement conference] mandatory meeting. Not less than five (5) days prior to [each] the initial permanency hearing, the parties shall participate in a pre-hearing [settlement conference] mandatory meeting. The department shall give notice of the time and place of the [hearing] meeting to each party [~~and to the child's guardian ad litem~~].

E. Initial permanency order. At the conclusion of the permanency hearing, the court shall enter an order[-] establishing one of the permanency plans set forth in Section 32A-4-25.1(B) NMSA

1978 (as amended, 2005) for the child.

— (1) returning custody of the child to the parents and dismissing the case;

— (2) returning the child to the child's parent, guardian or custodian, subject to those conditions and limitations as the court may prescribe, including protective supervision of the child by the department and continuation of the treatment plan for not more than six (6) months; or

— (3) continuing the child in the legal custody of the department with such other disposition as may be in the child's best interest.

F. [Subsequent] [p] Permanency review hearing; when required. [Within three (3) months after the initial permanency hearing order, the Court shall hold a subsequent permanency hearing if:

— (1) a motion to terminate parental rights has not been filed;

— (2) a petition to appoint a permanent guardian has not been filed; or

— (3) the child's permanency plan has not been formally changed to provide for emancipation of the child.]

(1) If the court adopts a permanency plan of reunification under Paragraph E of this rule at the conclusion of the initial permanency hearing, the court shall schedule a permanency hearing within three (3) months, which may be vacated if the child is reunified.

(2) At the conclusion of any permanency review hearing, the court shall enter an order changing the plan, dismissing the case, or returning the child to his parent, guardian or custodian as set forth in Section 32A-4-25.1(D) NMSA 1978 (as amended, 2005).

G. Subsequent permanency hearings [~~disposition~~] The court shall hold permanency hearings at least every twelve (12) months when a child is in the legal custody of the department. At each hearing, the court shall review the permanency plan in effect, determine that the department has made reasonable efforts to finalize the plan in effect, and determine whether changes to the plan are appropriate.

[At the conclusion of the subsequent permanency hearing, the court shall enter an order:

— (1) requiring the department to change the child's permanency plan to provide for adoption, emancipation, permanent guardianship or long-term foster care for the child and that additional efforts to reunite the child and parent will not be attempted;

— (2) dismissing the case and returning the child to the parent, guardian or custodian; or

— (3) returning the child to the parent, guardian or custodian, subject to those conditions the court may prescribe, including protective supervision of the child by the department and continuation of the treatment plan for not more than six (6) months.

H. Judicial reviews. If a judgment has been filed finding the child to be neglected or abused, within sixty (60) days after the date the judgment was filed, the court shall review the treatment plan approved by the court. At least once every six (6) months thereafter, the court shall review the department's progress in implementing the court's orders. The department shall request a date for each judicial review and give notice as required by law.]

[Committee commentary.]—This rule requires the court to conduct a permanency hearing. This hearing was created by the 1997 amendments to the Abuse and Neglect Act. See Section

32A-4-25.1 NMSA 1978. Unlike Section 32A-4-25.1 NMSA 1978 this rule does not include evidentiary matters. The Rules of Evidence committee reviewed Subsection I of Section 32A-4-2 NMSA 1978, but decided not to recommend proposed amendments to Rule 11-1101 NMRA that would exclude permanency hearings from the Rules of Evidence. The Rules of Evidence are therefore applicable to permanency hearings. See *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978).

—Section 32A-25.1 provides that at the first permanency hearing there is a presumption that the child is to be returned to the parents. In the second and subsequent permanency hearings, there is a presumption that the child should not be returned to the parents. Rule 11-301 of the Rules of Evidence eliminated the "bursting bubble" theory of presumptions. A presumption now

—retains evidentiary effect throughout the trial, so as to permit the fact finder to draw an inference of the presumed fact from proof of the basic or predicate fact.

Considering the language of 32A-4-25.1 in light of the Rules of Evidence, it appears that in the first permanency hearing the department would have the burden of persuasion to prove by a preponderance of the evidence that the child should not be returned to the parents. See *Nichols v. Nichols*, 98 N.M. 322, 648 P.2d 780 (1982). In the second permanency hearing the parents would have the burden of persuasion that the child should be returned to them

—Under our Rules of Evidence, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but it does not shift to that party the burden of proof in the sense of the risk of nonpersuasion, which remains upon the party on whom it was originally cast.

Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991).

—In *Jaramillo v. Jaramillo*, the New Mexico Supreme Court rejected the use of presumptions in a child relocation case in favor of the court determining what is in the best interest of the child. The opinion in *Jaramillo* is instructive here. In *Jaramillo*, the New Mexico Supreme Court quoted from a United States Supreme Court opinion as follows:

—Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

See *Stanley v. Illinois*, 405 U.S. 645, 656-57, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

—The committee fully endorses the concept of a periodical review by the court to assure that the best interests of the child are not forgotten in an abuse and neglect proceeding. This laudable goal is best implemented by the children's court reviewing the case each time with the best interest of the child in mind.

—The Rules of Evidence and Children's Court rules control procedural and evidentiary matters, including the procedures and evidence in permanency hearings. See *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978).

—Section 32A-4-25.1 NMSA 1978 provides that at the first permanency hearing there is a presumption that the child is to be returned to the parents and that in any second or subsequent permanency hearing, there is a presumption that the child should

not be returned to the parents.

Under our Rules of Evidence, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but it does not shift to that party the burden of proof in the sense of the risk of nonpersuasion, which remains upon the party on whom it was originally cast.

Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991).

—In *Jaramillo v. Jaramillo*, the New Mexico Supreme Court rejected the use of presumptions in a child relocation case in favor of the court determining what is in the best interest of the child. The opinion in *Jaramillo* is instructive here. In *Jaramillo*, the New Mexico Supreme Court quoted from a United States Supreme Court opinion as follows:

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

See Stanley v. Illinois, 405 U.S. 645, 656-57, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). The committee fully endorses the concept of a periodical review by the court to assure that the best interests of the child are not forgotten in an abuse and neglect proceeding. This goal is best implemented by the children's court reviewing the case in each permanency hearing with the best interest of the child in mind.

—Considering the language of 32A-4-25.1 in light of the Rules of Evidence, in the first permanency hearing the department has the burden of persuasion to prove by a preponderance of the evidence that the child should not be returned to the child's parents. Any party who opposes returning the child to the child's parents has the burden of persuasion that it is not in the child's best interest for the court to order the return of custody to the parents.

—In a second or any subsequent permanency hearing the burden of persuasion that it is not in the child's best interest for the court to enter an order requiring the department to implement a plan providing for the adoption, emancipation, permanent guardianship or long-term foster care of the child and prohibiting any further efforts by the department to reunite the child and the child's parents is on any party opposing the entry of the order.]

[10-325]10-346. Judicial reviews, [and permanency hearings:]

[A. **First permanency hearing.** Within six (6) months after the conclusion of the initial judicial review, the court shall conduct a permanency hearing to determine what permanency plan is in the child's best interest.

—B. **Notice.** The department shall be responsible for obtaining a setting for the first and any subsequent permanency hearing and shall give notice of the hearing to all other parties and such other persons as required by law.

—C. **Pre-permanency hearing report; conference.** Not less than five (5) days prior to a permanency hearing, the department shall prepare and serve on each party a pre-permanency hearing report. The report shall include the department's proposed permanency plan. The pre-permanency hearing report shall also set forth any changes to the disposition plan.

—D. **Pre-hearing settlement conference.** Not less than five (5) days prior to each permanency hearing, the parties shall participate in a pre-hearing settlement conference. The department shall give

notice of the time and place of the hearing to each party and to the child's guardian ad litem.

—E. **Initial permanency order.** At the conclusion of the permanency hearing, the court shall enter an order:

— (1) returning custody of the child to the parents and dismissing the case;

— (2) returning the child to the child's parent, guardian or custodian, subject to those conditions and limitations as the court may prescribe, including protective supervision of the child by the department and continuation of the treatment plan for not more than six (6) months; or

— (3) continuing the child in the legal custody of the department with such other disposition as may be in the child's best interest.

—F. **Subsequent permanency hearing; when required.** Within three (3) months after the initial permanency hearing order, the court shall hold a subsequent permanency hearing if:

— (1) a motion to terminate parental rights has not been filed;

— (2) a petition to appoint a permanent guardian has not been filed; or

— (3) the child's permanency plan has not been formally changed to provide for emancipation of the child.

—G. **Subsequent permanency hearing; disposition.** At the conclusion of the subsequent permanency hearing, the court shall enter an order:

— (1) requiring the department to change the child's permanency plan to provide for adoption, emancipation, permanent guardianship or long-term foster care for the child and that additional efforts to reunite the child and parent will not be attempted;

— (2) dismissing the case and returning the child to the parent, guardian or custodian; or

— (3) returning the child to the parent, guardian or custodian, subject to those conditions the court may prescribe, including protective supervision of the child by the department and continuation of the treatment plan for not more than six (6) months.

—H. **Judicial reviews.** [If a judgment has been filed finding a child to be neglected or abused, within sixty (60) days after the date the judgment was filed, the court shall review the treatment plan approved by the court. At least once every six (6) months thereafter, the court shall review the department's progress in implementing the court's orders. The department shall request a date for each judicial review and give notice as required by law.

[**Committee commentary.**—This rule requires the court to conduct a permanency hearing. This hearing was created by the 1997 amendments to the Abuse and Neglect Act. See Section 32A-4-25.1 NMSA 1978. Unlike Section 32A-4-25.1 NMSA 1978 this rule does not include evidentiary matters. The Rules of Evidence committee reviewed Subsection I of Section 32A-4-2 NMSA 1978, but decided not to recommend proposed amendments to Rule 11-1101 NMRA that would exclude permanency hearings from the Rules of Evidence. The Rules of Evidence are therefore applicable to permanency hearings. See *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976); *cert. denied*, 436 U.S. 906 (1978).

—Section 32A-25.1 provides that at the first permanency hearing there is a presumption that the child is to be returned to the parents. In the second and subsequent permanency hearings, there is a presumption that the child should not be returned to the parents. Rule 11-301 of the Rules of Evidence eliminated the "bursting bubble" theory of presumptions. A presumption now

retains evidentiary effect throughout the trial, so as to permit the fact finder to draw an inference of the presumed fact from proof of the basic or predicate fact.

Considering the language of 32A-4-25.1 in light of the Rules of Evidence, it appears that in the first permanency hearing the department would have the burden of persuasion to prove by a preponderance of the evidence that the child should not be returned to the parents. See *Nichols v. Nichols*, 98 N.M. 322, 648 P.2d 780 (1982). In the second permanency hearing the parents would have the burden of persuasion that the child should be returned to them

—Under our Rules of Evidence, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but it does not shift to that party the burden of proof in the sense of the risk of nonpersuasion, which remains upon the party on whom it was originally cast.

Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991).

—In *Jaramillo v. Jaramillo*, the New Mexico Supreme Court rejected the use of presumptions in a child relocation case in favor of the court determining what is in the best interest of the child. The opinion in *Jaramillo* is instructive here. In *Jaramillo*, the New Mexico Supreme Court quoted from a United States Supreme Court opinion as follows:

—Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

See *Stanley v. Illinois*, 405 U.S. 645, 656-57, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972).

—The committee fully endorses the concept of a periodical review by the court to assure that the best interests of the child are not forgotten in an abuse and neglect proceeding. This laudable goal is best implemented by the children's court reviewing the case each time with the best interest of the child in mind.

—The Rules of Evidence and Children's Court rules control procedural and evidentiary matters, including the procedures and evidence in permanency hearings. See *Ammerman v. Hubbard Broadcasting, Inc.*, 89 N.M. 307, 551 P.2d 1354 (1976), cert. denied, 436 U.S. 906 (1978).

—Section 32A-4-25.1 NMSA 1978 provides that at the first permanency hearing there is a presumption that the child is to be returned to the parents and that in any second or subsequent permanency hearing, there is a presumption that the child should not be returned to the parents.

—Under our Rules of Evidence, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but it does not shift to that party the burden of proof in the sense of the risk of nonpersuasion, which remains upon the party on whom it was originally cast.

Jaramillo v. Jaramillo, 113 N.M. 57, 823 P.2d 299 (1991).

—In *Jaramillo v. Jaramillo*, the New Mexico Supreme Court rejected the use of presumptions in a child relocation case in favor of the court determining what is in the best interest of the child. The opinion in *Jaramillo* is instructive here. In *Jaramillo*, the New Mexico Supreme Court quoted from a United States Supreme Court opinion as follows:

—Procedure by presumption is always cheaper and easier

than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

See *Stanley v. Illinois*, 405 U.S. 645, 656-57, 31 L. Ed. 2d 551, 92 S. Ct. 1208 (1972). The committee fully endorses the concept of a periodical review by the court to assure that the best interests of the child are not forgotten in an abuse and neglect proceeding. This goal is best implemented by the children's court reviewing the case in each permanency hearing with the best interest of the child in mind.

—Considering the language of 32A-4-25.1 in light of the Rules of Evidence, in the first permanency hearing the department has the burden of persuasion to prove by a preponderance of the evidence that the child should not be returned to the child's parents. Any party who opposes returning the child to the child's parents has the burden of persuasion that it is not in the child's best interest for the court to order the return of custody to the parents.

—In a second or any subsequent permanency hearing the burden of persuasion that it is not in the child's best interest for the court to enter an order requiring the department to implement a plan providing for the adoption, emancipation, permanent guardianship or long-term foster care of the child and prohibiting any further efforts by the department to reunite the child and the child's parents is on any party opposing the entry of the order.]

[10-330] 10-347 Termination of parental rights; form of motion [commencement of proceedings].

[A. **Commencement.** A termination of parental rights proceeding may be commenced by filing a motion to terminate parental rights:

— (1) at any stage of the abuse or neglect proceeding by the department; or

— (2) at any time after the disposition hearing, by any party authorized by law to file a motion to terminate parental rights.

—B. **Joinder.** A termination of parental rights proceeding may be commenced by filing a motion to terminate parental rights. If a parent has not previously been made a party to the proceeding, that parent shall be joined as a party to the proceeding. The parent shall be served with a summons and a copy of the motion in the manner provided by Rule 10-104 NMRA.]

[C. **Contents of motion or petition.** The] A motion for the termination of parental rights [or petition] shall be substantially in the form approved by the Supreme Court.

Committee Commentary

For termination of parental rights, see Sections 32A-4-28 to -30 NMSA 1978.

[**Committee commentary.** The child's guardian ad litem is a party to an abuse or neglect proceeding. See Rule 10-108 NMRA.

—Although Section 32A-4-29 NMSA 1978 could be read to permit a motion to be filed at any stage of the proceedings by any person who has a statutory right to intervene, including a person with a constitutionally protected liberty interest, this rule makes it clear that only parties may file a motion to terminate parental rights. Paragraph E of Rule 10-108 NMRA provides for intervention in abuse and neglect proceedings only if the judge finds it will not unduly delay or prejudice the adjudication of rights of the original parties. This eliminates last minute delays in disposition hearings which could adversely affect the rights of the original

parties:

— If the judge does not permit intervention in the abuse or neglect proceeding, termination procedures may be filed pursuant to Section 32A-5-16 NMSA 1978. The Rules of Civil Procedure for the District Courts govern terminations under Section 32A-5-16 NMSA 1978. See Rule 10-101 NMRA.

— See *State v. Joe R.*, 1997-NMSC-038, 123 N.M. 711, 945 P.2d 76 for termination of parental rights of parent incarcerated in penitentiary.

— Section 32A-4-29 NMSA 1978 permits a motion to terminate to be filed by any person having a legitimate interest, including a relative or foster parent. Rule 10-108 provides for numerous parties. These parties must be joined and served personally. More than the filing of a simple motion may be necessary.]

[NEW MATERIAL]

10-351. Findings of fact and conclusions of law.

A. **Findings of fact and conclusions of law.** At the conclusion of an adjudicatory hearing or termination of parental rights proceeding, upon request of any party the court shall allow counsel a reasonable opportunity to file requested findings of fact and conclusions of law, which shall be served upon the parties and provided to the judge. The court shall enter its decision, which shall consist of findings of fact and conclusions of law. Each finding of fact and conclusion of law shall be separately numbered.

B. **Waiver.** A party waives findings of fact and conclusions of law if the party fails to file requested findings of fact and conclusions of law within the time specified by the court.

C. **Motion to amend or make additional findings and conclusions.** Upon motion of a party made not later than ten (10) days after entry of judgment, the court may amend its findings or make additional findings and may amend the judgment accordingly. If a motion made under this paragraph is not granted within thirty (30) days from the date it is filed, the motion is automatically denied.

Committee Commentary

[This rule is similar to Rule 1-052 NMRA of the Rules of Civil Procedure for the District Courts and Federal Rule 58.]

See Rule 1-052 NMRA for the Rule of Civil Procedure on findings and conclusions.

[10-103.2] 10-352. Dismissal of actions.

A. **Voluntary dismissal; effect thereof.** [(1)] [In any action except a delinquency proceeding, the] Any action may be dismissed by the petitioner without order of the court:

[~~(a)~~](1) by filing a notice of dismissal at any time before commencement of the adjudicatory hearing; or

[~~(b)~~](2) by filing a stipulation of dismissal signed by all parties in the action.

[(2)] The children's court attorney may dismiss a delinquency petition or a petition to revoke probation, at any time prior

to commencement of the adjudicatory hearing, without order of the court.]

B. **Involuntary dismissal; effect thereof.** For failure of the petitioner to comply with these rules or any order of court, a respondent may move for dismissal of an action or of any claim against the respondent. Unless the court in its order for dismissal otherwise specifies, a dismissal under this paragraph and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule [10-007] 10-117 NMRA, operates as an adjudication upon the merits.

C. **Dismissal of requests for affirmative relief by parties other than the petitioner.** The provisions of this rule apply to the dismissal of any request for affirmative relief by any party other than the petitioner. A voluntary dismissal without leave of the court by the party requesting such relief shall be made before a response is served, or if there is no response, before the introduction of evidence at the [trial or] adjudicatory hearing.

[10-350] 10-353. Judgments and appeal[; proceedings].

A. **Entry of judgment.** The judge shall [sign] enter a written judgment on petitions alleging abuse or neglect and a written judgment on motions to terminate parental rights [and disposition in abuse and neglect proceedings. The judgment and disposition shall be filed]. The clerk shall give notice of entry of the judgment and disposition and any judgment on a motion to terminate parental rights.

B. **Appeals.** Appeals from judgments and dispositions on petitions alleging abuse or neglect and appeals from judgments on motions to terminate parental rights shall be governed by the Rules of Appellate Procedure.

[WITHDRAWN; SEE RULE 10-314]

[10-331. Explanation of *pro se* respondent's rights at first appearance; termination of parental rights proceeding.

— A. **Explanation of rights.** If the first appearance of a respondent is at a termination of parental rights proceeding, if the respondent is not represented by an attorney, the respondent shall be informed by the court of:

— (1) the allegations of the motion to terminate parental rights;

— (2) the right to a trial on the allegations in the motion;

— (3) the right to an attorney and that if the respondent cannot afford an attorney, one will be appointed to represent the respondent free of charge; and

— (4) the consequences if the allegations of the motion are found to be true.

— B. **Appointment of counsel.** In any proceeding or case that may result in the termination of parental rights, an attorney may not represent more than one parent.]

A new marketing option...

Inserts are Now Available in the *Bar Bulletin*



- Four pages
- Full color
- Only one per issue
- Profile your firm or company
- Highlight your products or services

for more information contact:

Marcia C. Ulibarri • 505.797.6058 • mulibarri@nmbar.org