

# Memorandum

**To:** Criminal Defense Attorneys Practicing in the Fourth Judicial District

**CC:** Hon. Abigail Aragon, Hon. Flora Gallegos, Hon. Melanie Rivera, Hon. Christian Montano, Hon. Christopher Baca, Hon. Cindy Garza, Robert Duran, John Guaderrama, Darlene Baca, Carol Muniz

**From:** Gerald E. Baca, Chief District Court Judge, Fourth Judicial District

**Date:** 7/27/2020

**Re:** Case Management in Jury Trials and In-person Hearings in Criminal Cases

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The Supreme Court has authorized the Fourth Judicial District to proceed with Jury Trials and in-person hearings. The Court approved the Resumption Plan for the Fourth Judicial District on July 15, 2020. A copy of the Resumption Plan for the Fourth Judicial District has previously been provided to you by the Court. A copy of the plan may also be found at [nmcourts.gov](http://nmcourts.gov). Please review the plan so that you are familiar with how the court will proceed in those hearings.

Despite the Supreme Court authorizing jury trials and in-person hearings, not every case will have in-person hearings. The majority of cases will still be held via remote access with video attendance expected of all parties, witnesses, and counsel unless there is some extenuating circumstance that prevents a party, witness or counsel from appearing by video link via Google Meet. Refer to Supreme Court Order No. 20-8500-025 to acquaint yourself with what procedure must be followed for a hearing to be held in-person.

In jury trials, bench trials and other in-person hearings, the following procedures shall be followed without exception:

A. The deadline for submission of a plea agreement for acceptance and approval by the court shall be not later than ten (10) calendar days before the start of the trial.

B. This deadline shall be strictly adhered to except upon the showing of exceptional circumstances that could not be anticipated. In that event, the party must file a motion seeking leave to submit an untimely plea agreement for the court's consideration stating specifically and in detail what constitutes the exceptional circumstances that prevented the plea agreement from being submitted to the court within the deadlines set forth above.

C. Any pretrial motions shall be filed by the parties in strict compliance with the time limits set forth in the Rules of Criminal Procedure for the court before which the case is pending. Any motion filed untimely will be summarily denied without a hearing unless the party filing such untimely motion files a motion seeking leave of the court and sets forth in that motion the exceptional circumstances that exist such that the untimely filing of the motion should be permitted.

D. Motions *in Limine* shall be filed not later than twenty (20) calendar days before the start of the trial. Responses thereto shall be filed seventeen (17) calendar days before the start of the trial. No replies shall be permitted. Any motion filed outside of the deadlines set forth in this paragraph will be summarily denied without a hearing.

E. Discovery in criminal cases shall strictly comply with the time limits set forth in the Rules of Criminal Procedure for the District Courts and Magistrate Courts, including the filing of a Certificate of Compliance as set forth in those rules. A violation of these rules by any party may result in the party being prohibited from presenting the information at trial and being subject to sanctions as permitted by the rules of procedure.

F. Final Witness Lists and Exhibit Lists in criminal cases shall be filed thirty (30) days before the first day that the trial is scheduled to begin.

G. Pre-trial Interviews in criminal cases shall be completed thirty (30) days before the first day that the trial is scheduled to begin.

H. Jury Instructions in criminal cases shall be provided to the court as follows:

1. The prosecutor and defense counsel shall meet 3 days before the start of the trial to reach stipulations as to jury instructions;

2. By 3:00 p.m. the day before the start of the trial, the parties shall submit three sets of jury instructions to the court as follows:

a. A set of stipulated instructions;

b. A set of requested (non-stipulated) instructions from the prosecution;

c. A set of requested (non-stipulated) instructions from the defense.

I. Docket Call/Final Pre-Trial Conference. A Docket Call/Final Pretrial Conference shall be held in all trials no later than ten (10) calendar days before the first day the trial is scheduled to begin. All parties and counsel shall attend the Docket Call/Pre-trial Conference and shall be ready to address any motions that have not been previously resolved in the matter. As well, the parties shall be prepared to present any settlements/plea agreements to the court at this time.

J. *Voir Dire*. The parties shall each have thirty (30) minutes to complete their *voir dire* of the jury. If additional time is needed, then the party requesting additional time shall file a motion requesting additional time stating with specificity good cause why additional time is warranted. This motion shall be filed no later than twenty (20) days before the first day that the trial is scheduled to begin.

K. Opening Statements. The parties shall each have ten (10) minutes to complete their opening statement. If additional time is needed, then the party requesting additional time shall file a motion requesting additional time stating with specificity good cause why additional time is warranted. This motion shall be filed no later than twenty (20) days before the first day that the trial is scheduled to begin.

L. Closing Statements. The parties shall each have thirty (30) minutes to complete their closing statement. The prosecution may divide this time between the first closing and rebuttal closing in any manner they choose. If additional time is needed, then the party requesting additional time shall file a motion requesting additional time stating with specificity good cause why additional time is warranted. This motion shall be filed no later than twenty (20) days before the first day that the trial is scheduled to begin.

M. Location of witnesses during the trial. The parties shall make arrangements for their witnesses to be located near the courthouse if they cannot be safely located within the courthouse due to safety protocols. For example, a witness who isn't able to remain in the courthouse until the witness is called, shall either wait at the sponsoring attorney's office provided the witness can be available and seated in the witness box within two (2) minutes or the witness can wait to be called in the witness' car that is parked in the courthouse parking lot.

N. Witnesses Located Outside of Courthouse. If the witness is located outside of the courthouse at the time the witness is called to testify, the party calling the witness shall notify the witness, by whatever method that party chooses, that the witness is to proceed to the courtroom where the trial is being held to testify. Court staff shall not be utilized to retrieve any witness that is not located inside of the courthouse at the time the witness is called to testify.

O. Compliance with Safety Protocols. All witnesses, attorney staff, and attorneys shall comply with all safety protocols currently in place to be able to gain entry into the courthouse where the trial is being held. This includes any witness who is traveling from out of state. If any party, witness, or attorney or a member of their staff does not pass the screening to gain entry into the courthouse, they shall not enter the courthouse. Witnesses, whether from within or without New Mexico, who do not pass the screening protocol, will be denied entry into the courthouse and either alternative arrangements will have to be made by the party calling that witness for that witness to testify via remote access at the trial or the witness may be excluded from the trial at the discretion of the trial court.

P. Pre-Screening of Witness by Party Calling the Witness. Not less than 24 hours before the start of the trial and again not less than 24 hours prior to the scheduled time for a witness to appear to testify at the trial, the party calling the witness shall pre-screen the witness by asking the witness the screening questions that are currently being asked of any person who is seeking entry into any courthouse in the State of New Mexico. These screening questions are posted on the internet at [nmcourts.gov](http://nmcourts.gov). If the witness fails this screening, the party calling the witness shall immediately inform the judge presiding over the trial and the manager of the court at which the trial is being held of this. The party calling the witness who has failed the screening shall upon completion of the screening, inform the witness that the witness is **not** to report to the courthouse at which the trial is being held and that the witness is to await further direction from the Court. The court shall hold a hearing at which the parties and their attorneys shall be present to determine how to proceed with respect to the presentation of the testimony of this witness.

Q. Trial Exhibits-Admission, Stipulation, Objections, Publication, and Use.

1. Meet and Confer. The parties shall meet and confer not less than twenty (20) days before the day the trial is scheduled to begin to discuss stipulations to exhibits. If the parties do stipulate to exhibits, the parties shall inform the court of those exhibits to which they have stipulated shall be admitted in evidence and they shall also inform the court of those exhibits to which they object and the basis for the objection. Within 24 hours of the meet and confer, the parties shall file a pleading indicating the exhibits to which they have stipulated admission and the exhibits to which they object and setting forth therein the basis for the objection. The parties shall then be prepared to discuss the objections at the Docket Call/Final Pre-trial Conference so that less time is taken up dealing with these issues during the trial.

2. Exhibit Binders.

a. Prosecution and Defense Binders. Each party shall have a three-ring binder in which each of their exhibits shall be kept. The binder for the prosecution shall be labeled "State's Exhibits" and each exhibit shall be pre-marked by number. The defense binder shall be labeled "Defendant's Exhibits" and each exhibit shall be pre-marked with letters. The individual exhibits shall be separated by tabs with the corresponding exhibit number or letter on the tab. On the morning of the first day of trial and before the presentation of evidence, each party shall furnish the Court and opposing party a binder containing their exhibits. These binders shall be labeled "State's Exhibits-Court's Copy," "Defendant's Exhibits-Court Copy," "State's Exhibits-Opposing Party Copy," and "Defendant's Exhibits-Opposing Party Copy." As well, each party shall furnish a second binder containing their exhibits to the Court for use by the witnesses as they testify. The binders shall be labeled "State's Exhibits-Witness Copy," and "Defendant's Exhibits-Witness Copy."

b. Jury Binders. Each party shall also prepare a binder for each member of the jury that contains their admitted exhibits. These binders shall be labeled “State’s Exhibits” or “Defense Exhibits” and numbered 1 through the number of jurors selected for the trial. These binders will be given to the jury at the start of the presentation of evidence.

c. If an exhibit is not contained within the binders and has not been admitted into evidence and a party seeks to introduce it through the witness that is currently on the witness stand, the attorney seeking introduction of the exhibit shall hand a copy of the exhibit to the bailiff who shall hand it to the witness for use during this process. **NO ONE OTHER THAN THE BAILIFF SHALL APPROACH THE WITNESS STAND FOR ANY REASON.**

3. Publication of Exhibits. If a party wishes to publish an exhibit to the jury that is not contained in the jury binders, that party may do so by use of an ELMO or other projector. If the exhibit is such that it can be placed into the exhibit binders, the party shall make sufficient copies of the exhibit with exhibit label attached such that every member of the jury, the court, and opposing counsel can place the exhibit into the sponsoring parties’ exhibit binder. **NO EXHIBIT SHALL BE GIVEN TO THE JURY FOR THEM TO VIEW/INSPECT INDIVIDUALLY AND TO BE PASSED ON TO ALL THE JURORS FOR THEIR VIEW/INSPECTION.**

R. Location of Counsel During Examination of Witnesses. Counsel for the parties shall be seated at counsel table in the seat designated for them. **Counsel shall not move the chair from that location.** Counsel shall question the witnesses from counsel table and shall not move from the area immediately adjacent to their seat at counsel table for any reason without first obtaining the permission of the Court.

S. Location of Counsel During Opening Statement and Closing Arguments. Counsel for the parties shall make their opening statements and closing arguments from a podium/lectern that shall be positioned in the courtroom such that counsel can see the jury and they can see counsel and still be in compliance with physical distancing requirements. However, counsel shall not move from the area immediately behind the podium/lectern for any reason without first obtaining the permission of the Court.

T. Bench Conferences. **DUE TO DISTANCING REQUIREMENTS DURING THIS PUBLIC HEALTH EMERGENCY, NO ONE SHALL APPROACH THE JUDGE’S BENCH FOR ANY REASON.** Consequently, bench conferences or “sidebars” cannot occur as they usually did before the Public Health Emergency. If an attorney for a party believes that a bench conference is necessary, that attorney shall bring this to the attention of the court by standing at counsel table and requesting a bench conference or discussion of a matter outside the presence of the jury. The request should be done without alerting the jury of what issues will be discussed at the bench conference. A request for a bench conference shall be made sparingly and only when the issue cannot be resolved in any other manner. Once

the request is made, the Court will recess the proceedings to hold the bench conference outside of the presence of the jury. At that time, the Court, counsel, and the parties shall leave the courtroom where the trial is being held and reconvene on the record in another courtroom to take up the issues that necessitated the bench conference. During the bench conference in the second courtroom, the jury will remain in the courtroom where the trial is being held. The public and anyone else shall leave that courtroom so that there no one is present in that courtroom except for the jury. A bailiff will remain with the jury to assure that no one has any contact with the jury during this recess for the bench conference/sidebar.

U. Cleaning Protocols. Consistent with the protocols instituted by the New Mexico Supreme Court to protect the health and safety of all participants in the jury trial, the public and the media, the courtroom and any other high contact surfaces used during the trial shall be cleaned by court staff during any recess of the trial and in any event not less than every two (2) hours. This may necessitate that a recess in the trial be taken to have the courtroom and other adjacent areas cleaned. This recess should last no more than 15-30 minutes after which the trial can be resumed. During this recess, the jury will be escorted to a second courtroom where they will remain until the trial is resumed. Physical distancing requirements will be maintained during the move of the jury to and from the trial courtroom to the second courtroom and while the jury is in the second courtroom during this recess. During this recess, the attorneys, the parties, the public, and any media will be asked to leave the courtroom that is being cleaned and to wait in an area either inside of the courthouse that has been designated as a waiting area and that can accommodate this group of people and still maintain the physical distancing requirements. If this is not available or if the waiting area's capacity is exceeded, these people shall leave the courthouse and wait outside the courthouse in their car or other location so long as the physical distancing requirements are not violated. In any case, the attorneys, the parties, and any other trial participants shall be ready to resume the trial as soon as the courtroom has been sanitized.

V. Use of Electronic Equipment during the trial. If an attorney for any party intends to use electronic or other equipment for presenting evidence to the court, witness or jury, that attorney shall make arrangements with the Court to test the equipment that the attorney intends to use at the trial not later than 2 business days before the start of the trial. Failure to comply with this requirement may result in the attorney being prohibited from presenting that evidence to the court, jury, or witness by the use of that equipment. As well, the attorney(s) who intend to use any electronic or other equipment during the trial, shall set up such equipment during any recess of the trial before the use of the equipment. No unscheduled recess from the trial shall be taken to allow the attorney to set up the equipment. The purpose of this requirement is to eliminate delay in the trial due to any the equipment not working as anticipated during the trial or because the setting up of such equipment took longer than anticipated.

W. Moving of Furniture. Moving of furniture in the Courtroom from where it has been placed by the Fourth Judicial District Court's Emergency Response Team is strictly

prohibited by anyone, including judicial officers, attorneys, court managers or other persons without first obtaining permission from the Court Executive Officer of the Fourth Judicial District and the Chief Judge of the Fourth Judicial District Court. The furniture is located at that specific location to maintain distancing requirements and the placement of the furniture in those locations is included in the Resumption Plan for the Fourth Judicial District Court which has been reviewed and approved by the Supreme Court's Emergency Response Team. Moving any furniture or changing the seating will violate distancing requirements, will be contrary to the Resumption Plan submitted to the Supreme Court and has not been approved by the ERT.

W. Streaming of the Trial. Video or audio streaming of the trial will occur only if the seating capacity in the courtroom where the trial is being held is exceeded. In that case, a video or audio stream will be sent to a second location within the courthouse where the public, the media, or any other person may sit while maintaining physical distancing requirements to watch or listen to the trial. Video or audio streaming to any individual, organization, or the public other than as provided in this paragraph is prohibited without the prior approval of the Court Executive Officer of the Fourth Judicial District and the Chief Judge of the Fourth Judicial District Court.

X. Bench Trials & In-Person Hearings. These procedures apply to bench trials and in-person hearings except for those procedures specifically dealing with the jury. However, the deadlines for in-person hearings or evidentiary hearings that are held with the prior permission of the Chief Judge of the Fourth Judicial District shall comply with any deadlines established by Supreme Court Order, Rule of Criminal Procedure applicable to the Court in which the hearing is being held, or any Statute. As well, the judge presiding over the in-person hearing, may, in the judge's discretion, establish any other deadlines or procedures to be followed in those hearings that are not inconsistent with the procedures outlined in this memorandum, Supreme Court Order, Rule of Criminal Procedure applicable to the Court in which the hearing is being held, or any Statute.

Y. Number of Jurors Summoned for *Voir Dire*.

1. Magistrate Court Trials. In all criminal cases to be tried to a jury in the magistrate court a maximum of twenty (20) jurors shall be summoned for jury service. That is, that the jury clerk and court staff shall contact as many jurors as necessary so that after a pre-screening of these potential jurors is done, twenty (20) jurors are available and have said that they intend to appear for the trial.

2. District Court-Simple and Intermediate Complexity Cases. In criminal cases to be tried to a jury in the district court that have been classified as simple or intermediate cases for speedy trial purposes, a maximum of thirty (30) jurors shall be summoned for jury service. That is, that the jury clerk and court staff shall contact as many jurors as necessary so that after a pre-screening of these potential jurors is done, thirty (30) jurors are available and have said that they intend to appear for the trial.

3. District Court-Complex Cases. In criminal cases to be tried to a jury in the district court that have been classified as complex cases for speedy trial purposes, a maximum of forty (40) jurors shall be summoned for jury service. That is, that the jury clerk and court staff shall contact as many jurors as necessary so that after a pre-screening of these potential jurors is done, forty (40) jurors are available and have said that they intend to appear for the trial.

4. Motions for Additional Jurors. If counsel for a party believes that additional jurors are needed, then counsel requesting the additional jurors shall file a motion requesting additional jurors stating with specificity good cause why additional jurors are needed. This motion shall be filed no later than twenty (20) days before the first day that the trial is scheduled to begin.

5. Pre-Screening of Potential Jurors by the Court. Not less than seven (7) calendar days before the start of the trial, the jury clerk shall contact potential jurors to administer a pre-screening to those jurors so that no juror who fails the pre-screening will report to the court on the day of trial. The pre-screening of the jurors shall consist of the clerk asking the screening questions that are currently being asked of any person who is seeking entry into any courthouse in the State of New Mexico. These screening questions are posted on the internet at [nmcourts.gov](http://nmcourts.gov). If the juror fails this screening, the juror shall not be summoned for jury service for the trial.

I know that this memo is lengthy, but I have tried to cover as many issues as I thought should be dealt with so that jury trials and in-person hearings can be conducted in a manner whereby all participants know, in advance, the procedures that will be followed, so that the due process rights of the parties are preserved, and, most importantly, so that everyone participating in the jury trials and in-person hearings will be safe.

Bear in mind that as the circumstances with Covid-19 change and new Executive Orders are issued by the Governor and new orders are issued by the Supreme Court, these procedures may change.

Thank you for your continued cooperation in these uncertain and trying times. Keep yourselves safe and well.