IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

December 14, 2020

NO. 20-8500-042

IN THE MATTER OF THE AMENDMENT OF THE NEW MEXICO JUDICIARY PUBLIC HEALTH EMERGENCY PROTOCOLS FOR THE SAFE AND EFFECTIVE ADMINISTRATION OF THE NEW MEXICO JUDICIARY DURING THE COVID-19 PUBLIC HEALTH EMERGENCY

ORDER

WHEREAS, this matter having come before the Court upon recommendation to amend the New Mexico Judiciary's Emergency Court Protocols to permit the resumption of jury trials, lift the suspension of the exercise of peremptory excusals, and clarify the procedures for accessing and retaining public health screening question forms, and the Court having considered the recommendation and being sufficiently advised, Chief Justice Michael E. Vigil, Justice Barbara J. Vigil, Justice C. Shannon Bacon, and Justice David K. Thomson concurring;

NOW, THEREFORE, IT IS ORDERED that the recommendation is ADOPTED and the amendment of Emergency Court Protocols Nos. 1, 2, and 3 is APPROVED, effective immediately.

IT IS SO ORDERED.

WITNESS, the Honorable Michael E. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 14th day of December, 2020.

Joey D. Moya, Chief Clerk of the Supreme Court of the State of New Mexico

NEW MEXICO JUDICIARY
PUBLIC HEALTH EMERGENCY PROTOCOLS

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EMERGENCY COURT PROTOCOL NO. 1

Precautionary Measures For Operating Courthouses and Other Judicial Buildings

A. Continuity of Court Operations; Scope of Protocols.

1. All New Mexico state courts shall remain open and operating under regular business hours to ensure that the courts fulfill their constitutional and statutory responsibilities to all New Mexicans.

2. There shall be no blanket cancellation of cases or types of proceedings by New Mexico courts, unless authorized pursuant to an approved continuity of operations plan under Supreme Court Administrative Order No. 20-8500-016 or as otherwise ordered by the Supreme Court.

3. Probate courts and municipal courts in New Mexico may close if the building in which a court operates is closed by county or municipal authorities, or if the presiding judge in the court chooses to do so, provided that

(a) notice is posted at the closed courthouse with the locations and phone numbers of the nearest magistrate and district courts; and

(b) the public and the chief district judge in the judicial district is given advance notice of any such closure.

4. These Emergency Court Protocols shall apply to all appellate, district, metropolitan, magistrate, probate, and municipal courts in the State of New Mexico

and the Administrative Office of the Courts, and all references in the Emergency Court Protocols to the chief judge of the judicial district shall, when applicable, include the presiding judge of a probate or municipal court, the chief judge of the Bernalillo County Metropolitan Court, chief judge of the Court of Appeals for judges and employees of the New Mexico Court of Appeals, and the Chief Justice for Justices and employees of the Supreme Court or Administrative Office of the Courts.

B. Health Screening and Self-Isolation Procedures.

1. Any person wishing to enter a courthouse or other building operated or occupied by the New Mexico Judiciary shall comply with the screening requirements in this Protocol, which shall include all attorneys and employees of any other governmental entity housed within a building operated or occupied by the New Mexico Judiciary. In addition to the regular security screening that courts conduct, all courts shall screen any person wishing to enter a courthouse or other building operated or occupied by the New Mexico Judiciary and deny access to anyone, including any judicial officer, judicial employee, juror, witness, attorney, litigant, or other person, as appropriate, based on the answers to the screening questions required by the Supreme Court for entry to courthouses and other judicial buildings, which are posted on the New Mexico Judiciary website on the New Mexico Courts - Coronavirus (COVID-19) Information webpage at nmcourts.gov. All screening question forms submitted by judicial officers and judicial employees are

confidential, shall be retained for two (2) weeks for contact tracing purposes, and shall then be destroyed.

2. All courts shall conduct temperature checks using a thermometer on the forehead for all persons, including judicial officers and judicial employees, seeking to enter a courthouse or other judicial building operated or occupied by the New Mexico Judiciary and shall deny entry to anyone with a temperature of 100.4 degrees Fahrenheit or higher.

3. All courts shall maintain a daily log of all persons, including judicial officers and judicial employees, entering a courtroom. The daily log shall include the name, telephone number, and date of entry for each person on the log. The daily log shall be retained for four (4) weeks.

4. Any person, other than a judicial officer or judicial employees, who engages in or returns from out-of-state travel may enter a courthouse to appear pursuant to a court order, provided that the person successfully passes all other safety and public health screenings required by the court and otherwise complies with all other applicable directives from public health authorities.

5. Upon receipt of notice that a judicial officer or employee has received a positive test results for COVID-19, the chief judge of the judicial district in which the judicial officer or employee works shall report the positive test result to the

Supreme Court Emergency Response Team at emergencyresponse@nmcourts.gov within two (2) hours of receiving notification of the positive test result.

6. For purposes of these Emergency Court Protocols, "self-isolation" refers to the voluntary physical separation of a judicial officer or employee in that person's residence or other place of lodging. Any judicial officer or employee who is self-isolating shall comply with all directives of the New Mexico Department of Health and shall not return to a courthouse or other building operated or occupied by the Judiciary until completing the required period of self-isolation.

C. Face Mask Requirements.

1. The use of a protective face covering that covers the nose and mouth shall be required by anyone, including judicial officers and judicial employees, entering and while in a courthouse, judicial building, or other physical space used, occupied, or operated by the New Mexico Judiciary, provided that this order shall not apply to the following individuals:

(a) young children who are unable to remove the face covering without assistance;

(b) any person who provides written proof that the person has been advised by a health care provider not to wear a face covering; or

(c) anyone who is unconscious, incapacitated, or otherwise unable to remove a face covering without assistance.

See also Emergency Court Protocol No. 2, Subsections A(2) and (3).

2. The use of a protective face covering is not required by a judicial officer or employee when in that person's private office with no one else present.

3. Protective face coverings required by these Emergency Court Protocols shall comply with all design requirements approved by the Supreme Court and posted to the New Mexico Judiciary's website.

D. On-Site Employees and Telework Procedures.

1. ***Telework.*** The chief judge or administrative authority in each judicial district may permit judicial employees to work from home if they can effectively perform their designated functions remotely, provided that adequate personnel continue to remain on site for court operations that must take place inside the courthouse.

2. ***On-Site Access Controls.*** Any judicial officer or employee who is denied access to a courthouse or other building operated or occupied by the New Mexico Judiciary because of the results of the screening or temperature check requirements in these Emergency Court Protocols or who is displaying symptoms associated with COVID-19 while working on site, working remotely, or during off-

duty hours shall be required to comply with Subsection (D)(3) or (D)(4) of this Protocol as applicable.

3. ***Requirements if On-Site Access Denied Because of Symptoms.*** If denied access to a courthouse or other building operated or occupied by the New Mexico Judiciary because of symptoms associated with COVID-19, the judicial officer or employee shall do the following:

(a) *Testing Required.* Obtain an immediate test for COVID-19 in accordance with New Mexico Department of Health protocols, if possible while still symptomatic, and disclose the results of the test to the chief judge of the judicial district or the chief judge's designee; and

(b) *Self-Isolation Required; Telework if Permitted.* Engage in a period of self-isolation as required under this Protocol and work from home during the period of self-isolation to the extent that work can be performed remotely with the permission of the chief judge or other administrative authority of the affected individual, with the duration of the required self-isolation determined as follows:

(i) *Positive Test.* If the test required under this Protocol is taken while symptomatic or asymptomatic and is positive for COVID-19, engage in a period of self-isolation of at least fourteen (14) days from symptom onset and as

further directed by the New Mexico Department of Health until the Department of Health clears the person to resume activities recommended for the general public;

(ii) *Negative Test **While Symptomatic***. If the test required under this Protocol is taken while symptomatic and is negative for COVID-19, engage in a period of self-isolation until asymptomatic for seventy-two (72) hours unless otherwise directed by the chief judge of the judicial district in accordance with guidance provided by the New Mexico Judicial Branch Coronavirus (COVID-19): Frequently Asked Questions and Resources for Judges, CEOs, and Employees; or

(iii) *Negative Test **While Asymptomatic***. If the test required under this Protocol is taken when not displaying symptoms, engage in a fourteen (14)-day period of self-isolation from display of initial symptoms.

4. ***Requirements if On-Site Access Denied for Non-Symptom Reasons.*** If denied access to a courthouse or other building operated or occupied by the New Mexico Judiciary because of answers to screening questions regarding circumstances other than symptoms associated with COVID-19, the judicial officer or employee shall do the following:

(a) *Self-Isolation Required.* Engage in a fourteen (14)-day period of

self-isolation unless otherwise directed by the chief judge of the judicial district in accordance with guidance provided by the New Mexico Judicial Branch Coronavirus (COVID-19): Frequently Asked Questions and Resources for Judges, CEOs, and Employees;

(b) *Testing Required.* Obtain a test for COVID-19 in accordance with New Mexico Department of Health protocols and disclose the results of the test to the chief judge of the judicial district or the chief judge's designee; and

(c) *Telework if Permitted.* Work from home to the extent that their work can be performed remotely with the permission of the chief judge or other administrative authority of the affected individual.

5. Any judicial employee engaged in a period of self-isolation required under these Emergency Court Protocols who is not able or permitted to work from home shall use annual and sick leave or, if eligible, leave under the Families First Coronavirus Response Act.

E. Travel Restrictions for Judicial Officers and Employees.

1. The suspension of all out-of-state travel on work-related business by judicial officers and judicial employees of the New Mexico Judiciary shall remain in effect until further order of the Court.

2. All judicial officers and judicial employees are strongly discouraged

from traveling out-of-state on personal business.

3. Any judicial officer or judicial employee who engages in out-of-state travel shall report the nature, extent, and details of the travel to the chief judge of the judicial district before traveling or, if advance notice of the out-of-state travel is not possible because of unforeseen, emergency circumstances, as soon as possible after the travel begins. The chief judge may deny any leave request for out-of-state travel.

4. Any judicial officer or judicial employee who arrives in New Mexico from an out-of-state or international location that would require a member of the general public to engage in a period of self-isolation under any applicable executive order shall engage in a fourteen (14)-day period of self-isolation upon return to New Mexico before returning to the workplace.

5. If a judicial officer or judicial employee has contact with any person, including a household member, while that person is required to engage in a period of self-isolation under any applicable executive order, the judicial officer or judicial employee shall engage in a fourteen (14)-day period of self-isolation from the date of contact with that person before returning to the workplace.

6. Exceptions to the self-isolation required under Subsections (E)(4) and (E)(5) of this Protocol are permitted under the following circumstances:

(a) Out-of-state travel for commuting to and from the personal residence of the judicial officer or employee shall not require self-isolation if telework is not available;

(b) Out-of-state travel for essential medical treatment for the judicial officer or employee or that person's immediate family member shall not require self-isolation, provided that the travel is not to an international destination; and

(c) Out-of-state travel by a judicial officer or employee who is outside the state for twenty-four (24) hours or less to attend to non-discretionary parenting responsibilities, such as travel for custody or visitation exchanges or to transport a child to or from school or college.

7. The exceptions to self-isolation in Subsections (E)(6)(a), (b), and (c) of this Protocol shall not apply to the following:

(a) Out-of-state travel for vacation purposes; and

(b) Out-of-state travel that included discretionary stops in addition to the intended destination, that included a mass gathering with other persons, or that did not otherwise comply with other social distancing requirements and recommendations from New Mexico public health authorities.

8. Any judicial officer or judicial employee who engages in voluntary out-

of-state travel that is not excepted under Subsection (E)(6) of this Protocol, or who has had contact with a person who has voluntarily traveled from out-of-state and is therefore subject to fourteen (14)-day self-isolation, shall be required to self-isolate for fourteen (14) days. Any judicial employee who voluntarily travels out-of-state or who has had contact with a person who travels out-of-state (other than a child returning from college) shall not be allowed to telework during the fourteen (14) day period of self-isolation. Judicial officers who voluntarily travel out of state shall seek approval from their chief judge to telework during the period of self-isolation. The prohibition against telework in this subsection shall not apply to travel plans approved before 4:00 p.m. on November 13, 2020.

F. Courthouse Cleaning Requirements.

All courthouses and other judicial buildings operated by the New Mexico Judiciary must be maintained in accordance with the guidelines issued by the New Mexico Department of Health for the cleaning and disinfection of public facilities during the current public health emergency. *See* Cleaning and Disinfection of Public Facilities in Response to Novel Coronavirus (COVID-19) (Issued March 22, 2020). [Approved by Supreme Court Order No. 20-8500-025, effective July 6, 2020; as amended by Supreme Court Order No. 20-8500-034, effective August 14, 2020; as amended by Supreme Court Order No. 20-8500-037, effective September 4, 2020;

as amended by Supreme Court Order No. 20-8500-038, effective October 16, 2020; as amended by Supreme Court Order No. 20-8500-039, effective November 13, 2020; as amended by Supreme Court Order No. 20-8500-040, effective November 20, 2020; as amended by Supreme Court Order No. 20-8500-042, effective December 14, 2020.]

EMEREGENCY COURT PROTOCOL NO. 2

Precautionary Measures for Conducting Judicial Proceedings

A. Social Distancing and Face Mask Requirements.

1. All hearings, including trials, and all other court-organized gatherings of any type and at any location shall be held in a manner that limits the number of individuals in a single room or connected space — which includes judges, court personnel, jurors, attorneys, litigants, the press, and the general public — to allow for appropriate social distancing, as recommended by public health authorities. In any such gathering, a minimum of six (6) feet in each direction must be maintained between every individual while entering, inside, and exiting the courthouse.

2. Judicial officers and other court personnel shall wear a protective face covering at all times while participating in a judicial proceeding. *See also* Emergency Court Protocol No. 1, Section C.

3. During trials and other hearings all witnesses and jurors shall wear a protective face covering at all times, including while testifying or deliberating, except that a face covering may be removed for a very brief moment to allow for the identification of a party or witness provided that the party or witness does not speak while the face covering is removed. *See also* Emergency Court Protocol No. 1, Section C.

4. Any party may request that a witness be allowed to testify without a

face covering, which may be granted in the discretion of the judge subject to the following requirements:

(a) the witness shall be required to appear by two-way audio-visual connection outside of the courtroom;

(b) the audio-visual connection must enable simultaneous audio-visual communication between the witness and the judge and attorneys in the courtroom for direct examination, cross-examination, and other necessary communications during the testimony of the witness;

(c) no other person shall be present in the room with the witness while the witness is unmasked;

(d) the judge, court monitor or court reporter, the litigants and their counsel who are present in the courtroom, and all jurors shall be able to see, hear, and observe the demeanor of the witness while testifying;

(e) if the witness is a party to the case, the ability for confidential communication between the testifying party and the party's attorney shall be made available; and

(f) the judge shall make a factual finding on the record of the necessity for allowing audio-visual testimony to further an important public policy, which may include finding that the witness is unavailable for testimony in the courtroom because of the need to protect public health during the current public

health emergency.

B. Format of Court Proceedings.

1. All hearings, except for jury trials, shall use telephonic or audio-video connection for court appearances by all attorneys, litigants, and witnesses, unless the judge presiding over the bench trial or other hearing makes oral or written findings of fact and conclusions of law supporting a compelling need for an in-person appearance that are specific to the particular circumstances in an individual case.

2. A judge shall obtain the approval of the chief judge of the judicial district before proceeding with an in-person appearance that is requested upon motion of a party or upon the judge's own motion.

3. A judge may continue to take other protective measures, including the granting of continuances upon motion of any party or the judge's own motion, in appropriate cases when remote appearances are not feasible but a compelling need for an in-person appearance does not exist.

4. Telephonic or audio-video hearings shall be held in a manner that allows the press and members of the public to observe the proceeding.

5. Any criminal procedure rules requiring the presence of the defendant may be accomplished through remote, audio-visual appearance in the discretion of the judge, provided that confidential communication between the defendant and defense counsel is made available.

C. Conduct of Jury Trials and Other In-Person Proceedings.

1. Civil and criminal jury trials scheduled to commence on or after November 16, 2020, are suspended until January 1, 2021, and civil and criminal jury trials shall resume by February 1, 2021. The resumption of civil and criminal jury trials shall occur in each judicial district pursuant to individualized plans submitted by the chief judge in each judicial district for approval by the Supreme Court.

2. Jury trials and other in-person proceedings shall be held in a manner that allows the press and members of the public to attend in person or, if necessary to comply with the social distancing requirements in these Emergency Court Protocols, by audio or audio-video connection.

3. Each judicial district's plan for conducting jury trials and other in-person proceedings shall incorporate all of the precautionary measures in these Emergency Court Protocols, which shall include maintaining a minimum distance of six (6) feet in each direction between every individual participating in the trial proceedings. Approved plans for conducting jury trials and other in-person proceedings shall not be revised without approval of the Supreme Court.

[Approved by Supreme Court Order No. 20-8500-025, effective July 6, 2020; as amended by Supreme Court Order No. 20-8500-039, effective November 13, 2020; as amended by Supreme Court Order No. 20-8500-042, effective December 14, 2020.]

EMEREGENCY COURT PROTOCOL NO. 3

Temporary Procedural Requirements for Judicial Proceedings

A. Filing by Email and Fax.

1. All courts shall maintain local procedures for accepting filings by email or by fax from self-represented litigants to minimize the need for self-represented litigants to enter a courthouse to file a document.

2. Filing by email or fax also shall be permitted by attorneys in those case-types that are not eligible for electronic filing through the New Mexico Judiciary's File and Serve system.

3. Applicable provisions in the rules of procedure addressing the filing of documents in the appellate, district, metropolitan, and magistrate courts by email or fax shall remain temporarily suspended to the extent necessary to accommodate local procedures used by courts for expanded filing by email or fax during the current public health emergency.

B. Exhibits in Remote Proceedings.

1. No later than forty-eight (48) hours before the start of any hearing held by telephonic or audio-video connection at which a party plans to offer documentary exhibits for admission, unless otherwise directed by the court, the offering party shall submit the following to the court with a copy to the opposing parties:

(a) the proffered exhibits; and

(b) an exhibit list that indicates whether the parties stipulate or object to the admission of each proffered exhibit and, if opposed, the grounds for any objections.

2. If it appears that one or more proffered exhibits will be opposed, the presiding judge may hold an evidentiary hearing prior to the hearing at which the exhibits are sought to be admitted in order to resolve objections to the admission of exhibits.

3. The admission of exhibits opposed on foundational or authentication grounds may be conditionally admitted pending witness testimony, but purely legal objections to the admission of an exhibit may be resolved before the hearing for which the exhibits are sought to be admitted.

C. Identification Issues in Remote Criminal Proceedings.

If a party anticipates challenging the identification of a defendant at a hearing to be held by telephonic or audio-video connection, that party shall notify the court and opposing counsel at least forty-eight (48) hours before the hearing so that the court and opposing counsel have adequate time to prepare and make arrangements for conducting the hearing in a manner conducive to addressing and resolving a challenge to the identity of the defendant.

D. Temporary Stays.

No court shall order a blanket temporary stay of any type of court proceeding

except pursuant to written order of the Supreme Court. *See, e.g.*, Order No. 20-8500-007 (Staying Execution of Writs of Restitution in Eviction Proceedings); Order No. 20-8500-008 (Staying Writs of Restitution under Mobile Home Park Act); Order No. 20-8500-021(Staying Issuance of Writs of Garnishment and Writs of Execution in Consumer Debt Collection Cases).

E. Peremptory Excusal of Judges.

To facilitate case management processes in the district, metropolitan and magistrate courts during the current public health emergency, the suspension of the exercise of peremptory excusals under Rules 1-088.1, 2-106, 3-106, 5-106, 6-106, 7-106, 10-162, and LR2-308(E) NMRA shall remain in place for cases filed on before December 31, 2020, and shall be lifted for all cases filed on or after January 1, 2021.

F. Deadlines for Trials in Criminal Cases.

The calculation of any deadlines in Rules 5-604, 6-506, 7-506, 8-506, and LR2-308 NMRA for all cases pending or filed on or after March 17, 2020, shall not include any period of time-delay caused by the current public health emergency. But to exclude a period of time from the calculation of deadlines under the terms of this Emergency Court Protocol, a judge must enter specific findings of fact demonstrating that the period of delay was caused by the current public health emergency.

G. Plea and Settlement Deadlines.

1. In criminal and civil proceedings in which a jury or bench trial has been scheduled by a district, magistrate, or metropolitan court, a plea agreement or a settlement agreement between the parties that would eliminate the need for a trial shall be submitted for the court's consideration by a deadline set in the court's discretion that will allow the court sufficient time to take action on the plea agreement or settlement agreement no later than five (5) business days before the scheduled date for jury selection or commencement of a bench trial.

2. A request for the court to approve an untimely plea agreement or settlement agreement shall not be granted except upon a written finding by the judge of extraordinary circumstances that excuse the untimely submission of the agreement. If the court denies a request to accept an untimely plea agreement or settlement agreement, the case shall proceed to trial on the scheduled date.

3. Notwithstanding the denial of a request to accept an untimely plea agreement in a criminal case, a defendant may elect to plead guilty to all charges leaving full sentencing discretion with the court or the state may elect to dismiss all charges with prejudice any time before or during trial.

4. The provisions of this Emergency Court Protocol shall not apply to the plea deadline provisions in local Rule LR2-308 NMRA or to non-attorney prosecutions in the metropolitan and magistrate courts.

5. This Emergency Court Protocol shall be effective for all cases in which a jury selection or bench trial is scheduled to commence on or after July 1, 2020.

H. Motions to Reduce Sentences.

The deadline for filing a motion to reduce a sentence under Rule 5-801(A) NMRA may be waived by the court upon a showing of an extraordinary change in circumstances caused by the current public health emergency.

[Approved by Supreme Court Order No. 20-8500-025, effective July 6, 2020; as amended by Supreme Court Order No. 20-8500-039, effective November 13, 2020; as amended by Supreme Court Order No. 20-8500-042, effective Decmeber 14, 2020.]