

D R A F T

**NEW MEXICO SUPREME COURT
AD HOC PRETRIAL RELEASE COMMITTEE
MEETING NOTES
March 1, 2018; 1:00 p.m. - 5:00 p.m.
State Bar Center, Albuquerque, NM, and by phone**

COMMITTEE MEMBERS PRESENT:

Professor Leo Romero, Chair
Jonathan Ibarra (designee of Ben Bauer)
Jason Clack (by phone)
Matthew Coyte
Hon. Sandra Engel
Hon. Buddy Hall (phone)
Jason Jaramillo
Hon. Elise Larsen
Anne Kelly
Gerald Madrid
Rep. Moe Maestas
Hon. Nan Nash
Diana Luce (designee of Rick Tedrow)
Hon. Alan Torgerson
Hon. Victor Valdez
Hon. Ann Yalman

COMMITTEE MEMBERS ABSENT:

Hon. Gerald Baca
Douglas Decker
Rep. Nate Gentry
Sen. Daniel Ivey-Soto
Judith Olean
Hon. Conrad Perea
Lisa Simpson

OTHERS PRESENT:

Jeff Rein
Michael Stout
Joy Willis
Sally A. Paez (staff)
Terri L. Saxon (staff)

Introductory Comments:

- Professor Leo Romero called the meeting to order at 1:06 p.m. and welcomed Sally A. Paez back to the Committee. He reviewed the Supreme Court order that allows the chief public defender to designate a representative to participate on the Committee. Next, Professor Romero directed the Committee to a portion of the letter from Justice Charles Daniels, which explains why the Court has reconvened the committee.
- 1. **Judge Nan Nash moved for approval of the meeting notes of the December 15, 2017 meeting. Anne Kelly seconded the motion, and it passed on a unanimous vote.**
- 2. **Discussion of previously-considered comments regarding Rule 5-409 NMRA.**
- The Committee discussed the comments it considered and approved or rejected at its previous meetings, as reflected in the Committee Approved Draft of Rule 5-409 that was submitted for the Court's consideration, first turning its attention to the changes approved

to Paragraph (F)(1)(b)(i), concerning preliminary examinations. After discussion, the Committee agreed that the changes recommended to the Court were the result of a compromise by the stakeholders on the Committee, and the members do not wish to revisit this recommendation.

- **Rep. Moe Maestas moved to amend Paragraph (F)(1)(b)(ii), to replace “delay” with “extension.” Judge Alan Torgerson seconded the motion, and it passed on a unanimous vote.**
- The Committee then discussed the various proposals to amend Paragraph (F)(5) and (6) and the Committee-approved revisions, particularly in light of the Supreme Court’s opinions in *State v. Ferry*, No. S-1-SC-36786; *State ex rel. Torrez v. Whitaker*, No. S-1-SC-36379; and *State v. Groves*, No. S-1-SC-36363. Judge Nash and Joy Willis suggested that the Committee-approved draft is consistent with those decisions and that no additional changes were needed. After further discussion, the Committee agreed that it does not want to recommend additional changes to these subparagraphs, but instead concluded that changes to the commentary would be appropriate. The Committee also agreed to incorporate the three-factor inquiry from *Groves* into the commentary. Professor Romero and Sally Paez will draft language for the Committee to review at its next meeting.
- Next, the Committee addressed Paragraph (F)(7) relating to permissive inference. In Justice Daniels’ letter, he expressed the Court’s concern that the position of the legislators and the NMDAA was not adequately articulated. Judge Nash pointed out that the NMDAA position was clearly set forth in its letter and that the NMDAA position, as well as all others, were considered by the Committee in its deliberations. In November and December 2017, a majority voted not to recommend the changes proposed by the NMDAA, and instead, by way of compromise, approved the language reflected in the Committee-approved draft. Professor Romero said that the Court specifically asked the NMDAA to articulate its position and objections, and suggested that the NMDAA prepare a minority recommendation for the Court. Joy suggested that in the interest of fairness, if a minority report is to be submitted the majority should have an opportunity to respond to it. Committee members expressed collective frustration with the Court, to wit: the Court reconvened the Committee in 2017 to consider the NMDAA proposal and responses, including input from legislators; the Committee reached a compromise and presented the compromise proposal to the Court; the Court then asked the Committee to reconsider its proposals but did not offer specific suggestions or direction regarding what it would like to see, except for a more developed minority position. Diana Luce will find out if the NMDAA wants to prepare a minority report.
- The Committee then discussed the NMDAA proposed changes to (F)(8), which a majority declined to recommend. Particularly in light of *Torrez* and *Groves*, the majority continues to believe that these changes are not necessary. If the NMDAA feels

differently, it is invited to prepare a minority report for the Court.

3. **Comments remaining for the Committee to consider.** The next item on the agenda was the comments to Rule 5-409 and other rules that the Committee was not able to consider prior to making its December 2017 recommendation to the Court.

- First, the Committee considered the four different proposals to revise Paragraph (F)(1)(a), time limit. Judge Nash and Jonathan Ibarra expressed a desire to leave the time limit at five days. Anne Kelly said that the Victims of Crime Act is an important consideration, and Professor Romero added that there is a provision for an extension under certain circumstances. Diana Luce described problems in the 5th District with notice and timing of hearings. After discussion, the Committee agreed not to recommend any proposed changes to Paragraph (F)(1)(a).

- Next, the Committee considered the NMDAA's proposed new Paragraph (F)(1)(c) regarding notice. The proposed language is intended to facilitate notification under the Victims of Crime Act. Judge Nash expressed concern that courts do not have sufficient information to identify the victim. Others clarified that notification is the district attorney's responsibility. Diana Luce described the issues in the 5th District with insufficient notice, including, in some instances, prosecution and defense receiving notice of a hearing just three hours before the hearing is scheduled to convene. The Committee heard from representatives of all stakeholders in this discussion.

- **Judge Torgerson moved to adopt the following language: "The court shall promptly schedule a hearing and give notice of the hearing within one business day of the filing of the motion. Judge Valdez seconded the motion. Jonathan Ibarra and Matthew Coyte opposed, and the motion passed on a majority vote.**

- The Committee then considered the various proposed amendments to Paragraph (F)(2) regarding discovery. Judge Nash reminded the Committee that although the Committee did not reach these proposals in its November and December meetings, this idea had been thoroughly discussed before the Committee recommended the changes that were adopted effective July 1, 2017. Professor Romero acknowledged this, but suggested that the Committee needs to consider all of the pending suggestions, including each proposal in the NMDAA's September 2017 letter. Some Committee members suggested that the remedy for a failure to disclose evidence relevant to a detention hearing is release on recognizance, which is within a judge's discretion and does not need to be explicitly included in a rule; others disagreed.

- **Matthew Coyte moved to recommend adoption of an explicit remedy for violation of the discovery provision in Rule 5-409, with the precise language to be determined. Judge Nash seconded the motion. Six members voted in**

favor of the motion, and eight voted in opposition. The motion failed on a majority vote.

- After further discussion following the Committee's vote on this proposal, the Committee agreed to reconsider if a Committee member proposed specific language. Jonathan Ibarra will draft proposed language for the Committee to consider. The Committee proceeded to discuss what types of information are available for discovery at this preliminary stage, and the scope of what a judge or defendant may need to see.
- **Judge Valdez moved to reject the NMDAA proposed language for Paragraph (F)(2). Judge Torgerson seconded the motion. With two members opposing, the motion carried on a majority vote. Judge Valdez next moved to reject the LOPD's proposed amendments to the text and corresponding commentary. Judge Torgerson seconded the motion. Three members opposed the motion, and it carried on a majority vote. Jonathan suggested that the LOPD recommendation can serve as the minority position on this issue.**
- The Committee then considered the LOPD's proposal to amend the commentary regarding Paragraph (F)(3), defendant's rights to clarify that an accused has more liberty than a probationer. After discussion, the Committee agreed to this proposal.
- **Jonathan Ibarra moved to amend the commentary to reflect that the liberty interest at stake in a pre-trial detention hearing is higher than that at a probation violation hearing, and further stated that he or Sally will find appropriate supporting authority. Matthew Coyte seconded the motion, and it passed on a unanimous vote, subject to review at the next meeting.**
- The next agenda item considered by the Committee was the NMDAA's proposed amendment to Paragraph (A), scope. The general consensus of the Committee was that the proposed amendment is not necessary.
- **Judge Nash moved to make no change to Paragraph (A) and Jonathan Ibarra seconded the motion. Diana Luce opposed, and the motion passed on a majority vote.**
- Judge Buddy Hall asked to next consider the three proposals for revisions to Paragraph (I), further proceedings in magistrate or metropolitan court. The concern that some members had was that in some instances, after a district court has set conditions of release a defendant asks the magistrate or metropolitan court to alter those conditions. This raises practical and jurisdictional concerns. After a thorough discussion, the Committee agreed that Professor Romero and Sally would propose some language to address this issue for the Committee to consider at its next meeting. Professor Romero also invited Judge Hall to propose language as well.

Professor Romero adjourned the meeting at 5:00 p.m.