

**PROPOSED REVISIONS TO THE RULES OF CIVIL PROCEDURE
FOR THE DISTRICT COURTS
PROPOSAL 2019-006**

March 4, 2019

The Rules of Civil Procedure Committee has recommended amendments to Rule 1-007.1 NMRA for the Supreme Court's consideration.

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

Joey D. Moya, Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 3, 2019, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

1-007.1. Motions; how presented.

A. **Requirement of written motion.** 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.

B. **Unopposed motions.** The movant shall determine whether a motion will be opposed. If the motion will not be opposed, an order approved by all parties shall accompany the motion.

C. **Opposed motions.** The motion shall recite that the movant requested the concurrence of all parties 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 all parties unless the motion is a:

- (1) motion to dismiss;
- (2) motion for new trial;
- (3) motion for judgment as a matter of law;
- (4) motion for summary judgment;
- (5) motion for relief from a final judgment, order or proceeding pursuant to

Paragraph B of Rule 1-060 NMRA.

Notwithstanding the provisions of any other rule, the movant 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 movant 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 NMRA. A motion for new trial shall comply with Rule 1-059 NMRA.

D. **Response.** Unless otherwise specifically provided in these rules, 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. If a party fails to file a response within the prescribed time period the court may rule with or without a hearing.

E. **Separate counter-motions and cross-motions required.** Responses to motions shall be made separately from any counter-motions or cross-motions.

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

G. **Request for hearing.** A request for hearing shall be filed at the time an opposed motion is filed. The request for hearing shall be substantially in the form approved by the Supreme Court.

H. **Notice of completion of briefing.** At the expiration of all response times under this rule, the movant or any party shall file a notice of completion of briefing. The notice alerts the judge that the motion is ready for decision.

[As amended, effective December 4, 2000; March 15, 2005; as amended by Supreme Court Order No. 08-8300-32, effective November 17, 2008; as amended by Supreme Court Order No. _____, effective _____.]

Committee commentary. — If a party does not respond to a motion within fifteen days as required by Paragraph D of this rule, the moving party may submit a proposed order to the judge or the judge sua sponte may enter an appropriate order. Although the specific provisions of Rule 1-058(C) NMRA are not applicable, if a party submits a proposed order to the court, a copy of the proposed order must be served on all other parties. *See* Rule 1-005 NMRA of these rules, Rules 16-303 and 16-305 of the Rules of Professional Conduct and Rule 21-300 NMRA of the Code of Judicial Conduct. After assuring the non-responding party has received notice of the proposed order, the judge may enter an appropriate order.

The notice of completion of briefing required under Paragraph H of this rule shall be filed upon the expiration of the applicable deadline for filing responses and replies under Paragraphs D or F of the rule. The Judicial Districts may adopt local rules to incorporate additional filing requirements to coincide with the filing of the notice of completion of briefing. *See, e.g.,* LR13-404(A) NMRA (adopting motion package procedure). The district court may defer ruling on the request for hearing until the court receives the notice of completion of briefing. After the court announces its decision, the court shall comply with the requirements of Rule 1-058 NMRA.

[As amended by Supreme Court Order No. 08-8300-32, effective November 17, 2008.]

Google Groups

Attorney Comment Regarding Proposal 2019-006 (Rule 1-007.1, NMRA)

SUPREME COURT OF NEW MEXICO

Zane Swank <zaneswanklaw@gmail.com>

FILED

Apr 3, 2019 6:39 PM

Posted in group: nmsupremecourtclerk

APR - 3 2019

Dear Committee Chair:



Greetings. I have been practicing in the area of Domestic Relations for over ten years, for the past five years or so on a state-wide basis, and I have observed that Rule 1-007.1 is rarely complied with in Domestic Relations cases anywhere in the State. Further, non-compliance (or failing to file a Notice of Completion of Briefing) is never addressed by the Court (even when same is pled) (this includes judges and hearing officers), nor is there any adverse effect, such as entry of an order, suffered for a non-responsive party's failure to so comply. Thus, I am often faced with explaining to my clients that my filing of the Notice, though required by the Rules, is a tracking, drafting and filing expense which will likely not result in any meaningful result.

When I see that opposing party has failed to file a timely response, or any response at all, I then file a Notice of Completion of Briefing per the Rule. In my Notice, I allege, *inter alia*, the following:

1. "All response times under the Rule (*Id.*) have expired and [opposing party] has failed to file any Response to the **Motion**."

2. "Rule 1-007.1(D), NMRA (2017) provides:

'Response. Unless otherwise specifically provided in these rules, 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. If a party fails to file a response within the prescribed time period the court may rule with or without a hearing.' (bold and underscore added)."

3. Rule 1-008(D), NMRA (2017) states: "D. **Effect of failure to deny.** Averments in a pleading to which a responsive pleading is required [Rule 1-007.1(D)] . . . are admitted when not denied in the responsive pleading."

4. Averments in the **Motion** should be deemed procedurally admitted by [opposing party].

5. The **Motion** is ripe for a decision granting all relief requested in the Motion, in [movant's] favor, without a hearing.

Never once in my career have I ever received a Notice of Completion of Briefing from an opposing counsel, nor have I ever seen such a Notice filed in a DM case in which I later entered.

Never once has a Family Court or hearing officer entered any Order solely based on the Notice of Completion of Briefing in my cases. Never once has the Court entered any ruling at hearing solely as a result of my bringing the non-compliance with said Rules to the Court's attention.

Never once has the Court ever attempted to rule that averments not denied are deemed admitted per 8, when read with Rule 1-007.1

THE RULE HAS NO TEETH AND IS LARGELY DISREGARDED IN FAMILY LAW COURTS

I believe the disregard of the Rule by attorneys and the Courts in Domestic Relations Cases is simply because 1) Rule 1-007.1 has no enforcement teeth, 2) effectuation of Rule 1-007.1 is akin to a default judgment, which is disfavored in New Mexico and 3) Courts believe it would be inherently unfair to a party to enter an Order without a hearing, even when there is provable, proper service upon counsel of record. These conclusions in my opinion, while being fair, are on balance expressly contradictory to the underlying purposes of the Rule(s).

Such has led to DM cases taking longer to get pushed through the Courts, unnecessary expense and delay resulting in virtually every motion requiring a hearing. This naturally clogs the Courts docket, strains resources and further stretches out the timeline of cases, which often results in real harm to children, substantial financial loss to parties and increases legal expense to litigants.

Therefore, I urge the Committee to consider adding some teeth, or binding language, to the Rule to provide that Courts actually do something meaningful as a result of a Notice of Completion of Briefing being filed and service being proved. Otherwise, the Rule is a waste of time and an unnecessary expense in DM cases.

PROPOSED CONSIDERATION

Perhaps the Rule should include a requirement of 1) proof of service of the Motion with the Notice and 2) a proposed Order be tendered once the Notice is accepted as filed (say within 5 days). Then, so long as the proposed Order stays within the four corners of the relief requested in the predicate Motion, with sufficient proof of service and with judicial review that no harm would come to any child as a result of entry of the Order, the Court should enter the Order. The Order should require the movant to file a Certificate of Service within ten (10) days proving service of the Order (now conformed) upon opposing party. Then, the Order should include an objections provision similar to that allowed when a Hearing Officer enters her Recommendations. Same would be subject to Judicial Review and due process would be addressed by 1) the service of the predicate Motion, 2) service of the Notice and 3) service of the Order with an objections window notice.

I believe such would streamline DM cases and would allow the Courts to have more time to devote to hearings on the merits. Further, the cost of DM litigation would be substantially lowered as more issues would be resolved, as intended, through the pleadings process, rather than setting every issue in every motion for a hearing.

Very Respectfully Submitted,

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