

NM Judiciary Comments on Proposed Amendments to Rules 1.21.2, 1.13.10.7, and 1.13.30.7 NMAC

Joey Moya <supjdm@nmcourts.gov>

Fri 6/29/2018 4:09 PM

To: CPR, RMD, SRCA <RMD.CPR@state.nm.us>;

Cc: Salazar, Melissa, SRCA <melissa.salazar@state.nm.us>; Lucero, Leo, SRCA <leo.lucero@state.nm.us>;

📎 1 attachment

NM Judiciary Comments on Proposed Amendments to 1.21.2, 1.13.10.7, and 1.13.30.7 NMAC (6-29-18).pdf;

Greetings:

On behalf of the New Mexico Judiciary, attached are comments to the proposed amendments to Rules 1.21.2, 1.13.10.7, and 1.13.30.7 NMAC. If you have any questions or trouble opening the attachment, please let me know. Thank you very much for the opportunity to submit comments.

--
Joey D. Moya
Clerk of Court & Chief Counsel
Supreme Court of New Mexico
P.O. Box 848 | Santa Fe, NM 87504
505.827.4862
www.supremecourt.nmcourts.gov



Supreme Court of New Mexico

CHIEF JUSTICE
JUDITH K. NAKAMURA
JUSTICES
PETRA JIMENEZ MAES
CHARLES W. DANIELS
BARBARA J. VIGIL
GARY L. CLINGMAN

P.O. BOX 848
SANTA FE, NEW MEXICO
87504-0848

CHIEF CLERK
JOEY D. MOYA, ESQ.
(505) 827-4860 FAX (505) 827-4837

June 29, 2018

Robert J. Torrez, Chair
NM Commission of Public Records
Santa Fe, New Mexico 87507

Melissa Salazar, State Records Administrator
State Records Center and Archives
Santa Fe, New Mexico 87507

Re: *Comments on Proposed Amendments to 1.21.2 NMAC, 1.13.10.7 NMAC, and 1.13.30.7 NMAC*

Dear Mr. Torrez and Ms. Salazar:

Thank you for the opportunity to comment on the amendments proposed for 1.21.2 NMAC, 1.13.10.7 NMAC, and 1.13.30.7 NMAC. The New Mexico Judiciary appreciates the extended comment period provided by the Commission of Public Records and State Records Administrator and offers the following comments as a consolidated response on behalf of the appellate, district, magistrate, and metropolitan courts in New Mexico.

PROPOSED AMENDMENTS TO 1.21.2

The proposed amendments for 1.21.2 NMAC include revisions to Sections 7, 9, 428, and 620. The Judiciary has no comments with regard to the proposed amendments to Section 428. The Judiciary submits the following with regard to Sections 7, 9, and 620.

Comments on Proposed Amendments to Subsections 1.21.2.7(D) and (I)

The Judiciary supports the effort to clarify and simplify the definitions that impact the date when the retention period for a public record begins. To that end, the Judiciary has no objection to deletion of the definition for “File closed” that is currently set forth in Subsection 1.21.2.7(D). The Judiciary does note, however, that the phrase “file closed” is used throughout the record retention rules and

appears to serve as a generic “trigger event” in most of those instances. As such, the Judiciary recognizes the importance of clearly defining the relevant “trigger event” for its public records since the proposed amendments to Subsection 1.21.2.7(I) make clear that the occurrence of the “trigger event” is what “begins the retention period.” Accordingly, the Judiciary recommends providing additional guidance regarding who is responsible for determining the relevant “trigger event” and how that determination should be made and documented.

As already noted, in many of the current record retention rules, the “trigger event” appears to be the date a file is closed. *See, e.g.*, 1.21.21.612; 1.21.21.613; 1.21.21.615; and 1.21.21.616 NMAC . But the specific conditions that need to be met before a file is considered closed can and will vary from one government activity or record type to the next. Presumably, then, the record retention rules implicitly leave the determination of when a file is considered to be “closed” to the individual governmental entity that created the public record. Or alternatively, perhaps the expectation is that each governmental entity should consult with, or defer to, the State Records Center and Archives to establish specific “trigger events” that would replace or bring clarity to the more general “file closed” trigger event that appear throughout the record retention rules. An example may demonstrate the questions and concerns the Judiciary has in this regard.

Within the context of our magistrate courts, record retention rule 1.21.2.612 NMAC requires the retention of civil case files for “14 years from date file closed.” Because of uncertainty regarding when a civil case file in the magistrate courts should be considered closed, through an exchange of communications between the Administrative Office of the Courts Magistrate Court Division and State Records Center and Archives, an agreement was reached to interpret civil cases in which a judgment had been satisfied as a “dismissed case file” under 1.21.2.616 NMAC, rather than a “file closed” case under 1.21.2.612 NMAC. But because the term “file closed” is also used in 1.21.2.616 NMAC, the AOC Magistrate Court Division is concerned that the removal of the definition for “file closed” and amendment of the definition of “trigger event” could lead to a new interpretation of Sections 1.21.2.612 and 1.21.2.616 NMAC that would require magistrate courts to keep all civil files for 14 years, regardless of whether there is satisfaction of judgment within that time period in some or most civil cases of that nature. Although the Magistrate Court Division currently has an understanding with SRCA to treat such cases as dismissed cases under 1.21.2.616 NMAC that would be subject to a shorter retention period, because this understanding is not explicit under the rules, the AOC Magistrate Court Division is concerned that the current interpretation and application of those provisions could change or be forgotten over time as personnel changes and institutional memory is lost.

The foregoing situation involving certain civil cases in the magistrate courts is illustrative only, but it demonstrates the need to bring more specificity or clarity to how a specific trigger event should be established, interpreted, and documented when the term “file closed” is used in the rules as a trigger event applicable across different kinds of courts and different kinds of cases. To that end, it may be helpful to provide more instruction in the definition for “trigger event” or in the instructions contained in Rule 1.21.2.9 NMAC regarding how to bring more specificity to generic trigger events like “file closed” or to clarify that individual governmental entities have the primary

role in defining and interpreting a “trigger event” for the public records they create. And doing so seems especially important now that the functional records retention regulations are intended to apply across a broader array of public records.

As demonstrated with the magistrate courts example above within the relatively narrow area of defining trigger events for court case files within the Judiciary, the generic use of the term “file closed” as a “trigger event” may not always be adequate to ensure effective and consistent records retention practices. The Judiciary, therefore, encourages the Commission and State Records Administrator to provide more guidance or specificity regarding how to define and apply “trigger events”, particularly when “file closed” is used as the generic “trigger event” to begin the retention period for court case files created and maintained by the Judiciary.

Comments on Proposed Amendments to Subsection 1.21.2.9(I) NMAC

The Judiciary does not object to deletion of references to the Judiciary in Subsection 1.21.2.9(I) NMAC. In light of those proposed amendments and as a matter of consistency, however, the Judiciary requests conforming amendments to Subsections 1.13.2.20(B) and (D) NMAC to delete the phrase “the judicial branch” from each of those subsections.

Comments on Proposed New Section 1.21.2.620

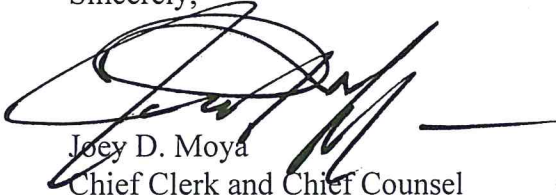
The Judiciary appreciates the willingness of the Commission and State Records Administrator to propose a new rule governing the retention of records related to court proceedings, such as tapes, transcripts, and court reporter notes. While the proposed new record retention rule exempts appellate case files from its application and does not permit the destruction of records related to court proceedings until the associated case is no longer eligible for appeal, the Judiciary is concerned that the proposed new rule may operate too broadly and allow for the destruction of some materials that still could be needed for post-conviction proceedings in state or federal court even though the underlying case is no longer eligible for direct appeal. To avoid an overly broad application or conflicting application with other records retention rules governing court case files, the Judiciary recommends revising Subsection C to only permit destruction when the “associated case is no longer eligible for appeal or post-conviction proceedings in state or federal court.” Alternatively, and perhaps preferably, the Judiciary would appreciate the opportunity to consider whether the content in this proposed new rule could be incorporated within existing records retention rules governing the associated case files, *see, e.g.*, 1.21.21.612 to -617 NMAC, since there is the potential for confusion and conflicting overlap among these provisions that would benefit from further consideration.

PROPOSED AMENDMENTS TO 1.13.10.7 and 1.13.30.7 NMAC

The comments set forth above with regard to the deletion of the definition of “File closed” and revision of the definition of “Trigger event” in Section 1.21.2.7 NMAC, apply equally to the proposed amendments to Sections 1.13.10.7 and 1.13.30.7 NMAC.

On behalf of the Judiciary, thank you for the opportunity and extended period of time to comment on the foregoing proposed amendments. Should you have any questions or need additional information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'Joey D. Moya', with a horizontal line extending to the right.

Joey D. Moya
Chief Clerk and Chief Counsel
Supreme Court of New Mexico