

Chapter 16



GOING TO COURT

Unfortunately, landlord-tenant disputes often end up in court. The most common landlord-tenant cases are evictions, which the law in New Mexico calls a *petition for writ of restitution*. In the case of evictions, landlords bring these actions to get court orders to remove tenants. Or, if the tenant has been illegally locked out of the apartment, the tenant can also file a petition for a writ of restitution restoring the apartment to the tenant (NMSA § 47-8-46).

Other common cases involve suits by tenants to recover damage deposits, where landlords have failed to follow the law or unreasonably withheld the deposits. Other cases involve landlords claiming past due rent or excessive damages caused by tenant after vacating the unit. A single case may involve all of these claims at the same time.

Most frequently the court dealing with these disputes will be the local Magistrate Court. In Albuquerque, it will be the Metropolitan (“Metro”) Court. The information in this guide is aimed at helping the landlord and tenant understand how those courts work in civil cases, the category to which landlord-tenant cases belong. This guide does not discuss criminal cases.

A. Legal counsel

Representation by a lawyer is usually not required in court. In some cases, landlords or tenants can represent themselves without a lawyer. It is a good idea, however, to at least talk to a lawyer before going to court on a landlord-tenant case. The tenant will want to know what defenses or counterclaims can be raised in the case. The landlord will want to make sure that he or she has followed all of the steps required by the law.

People with very low income can call their local legal aid office. People ineligible for free legal services can

consult their local lawyer referral service to find a lawyer. In hiring a lawyer, be sure to discuss all fee arrangements at the first meeting. Some lawyers do not charge a fee for the first consultation.

B. Some definitions

A person bringing suit against another person in court is called the *plaintiff*. The person being sued is called the *defendant*. A plaintiff or a defendant representing himself or herself is said to be a *pro se* party in the lawsuit.

A lawsuit starts with the filing of a *complaint* or *petition* in court. Magistrate and Metropolitan Courts have forms for complaints and petitions that the plaintiff can simply fill out (NMSA § 47-8-42). Lawsuits under the Uniform Owner-Resident Relations Act or the Mobile Home Park Act can also be filed in the local District Court (NMSA § 47-8-10). The procedures in the District Courts are more complicated than the Magistrate or Metropolitan Courts. This guide does not discuss procedures for District Court.

The next document in a lawsuit is the *summons* (NMSA § 47-8-43). This document is endorsed by the court clerk and tells the defendant a suit has been filed and that the defendant has a certain amount of time to answer the complaint or the petition. The summons will be attached to the complaint or the petition for *service of process*. Service of process means that the defendant must be notified of the lawsuit by having the complaint (or petition) and the summons delivered to him or her so that the defendant will know there is a lawsuit. Sometimes, the summons will include a *notice of hearing*, which tells the defendant the date, time, and place of a trial. In eviction actions, it is common that a notice of

hearing will be part of the summons (NMSA § 47-8-43).

The defendant has the right to tell his or her side of the story by filing a written *answer* to the complaint or petition (NMSA § 47-8-43). Magistrate and Metropolitan Courts have forms for answers, and the defendant can fill out the form and file it with the court. If the tenant receives a notice of hearing, the tenant should, but is not required to file a written answer explaining why the tenant disagrees with the complaint or petition. The tenant must appear in court on the date and time set out in the notice of hearing.

In cases involving damages or other issues, the court's final decision is called the *judgment* (NMSA § 47-8-46).

C. Court procedures

The first step in filing suit is to go to the courthouse in person. The court clerk will explain procedures and may assist a plaintiff in filing his or her complaint. But the court clerk *cannot* give any legal advice. There is a *filing fee*, which the plaintiff must pay at the time the complaint is filed with the court (NMSA § 34-6-40). If the tenant cannot afford the filing fee, the tenant can ask the court to waive the fee by filing a *Motion For Free Process*.



The summons and complaint cannot be served by the plaintiff directly. There may be a *service of process fee* if the plaintiff wants the sheriff to serve (deliver) the summons and the complaint. It is also possible for the plaintiff to hire a private process server or have a friend serve the court papers. If the plaintiff chooses to use that type of service, there will not be a service of process fee. However, if someone other than the sheriff will serve the papers, the plaintiff must get forms for a return of service and instructions on how to fill out the return from the court clerk.

Eviction actions are quick, and the trial date will be set at the time the landlord files the petition for a writ of restitution. The trial will be set between 7 to

10 days from the date the court papers are served on the defendant (NMSA § 47-8-43(A)(1)). Even if the defendant files a written answer, he or she must also appear at the time set for trial. If the defendant fails to appear, the court can issue a judgment granting everything requested by the plaintiff, including evicting the defendant from the rental unit.

If the tenant is filing for a writ of restitution to get back into the rental unit, the hearing date will be set three to five days after the service of the summons and petition on the landlord (NMSA § 47-8-43(A)(2)).

If the court orders the writ of restitution requiring the tenant to leave, the judge will give the tenant up to 7 days to move (NMSA § 47-8-43(B)).

D. Disqualifying a judge

If a party feels that he or she does not want the assigned judge to hear the case, it is possible to have the judge disqualified. The parties will know the name of the judge hearing the case because it will appear on the notice of hearing. In New Mexico, each party has the right to *bump* a judge without giving any particular reason, but the party must file a *notice of excusal* to do it (Rule 1-088.1, New Mexico Rules Annotated). The clerk's office has a form for this purpose. The notice of excusal must be filed not later than three days after service of the petition in an eviction action (Rule 2-106 & Rule 3-106(C)(3), NMRA). If the tenant asks the judge to do something (such as grant a continuance), the tenant loses the right to bump the judge without giving a reason. Any later statements of disqualification must be based on good cause (Rule 21-400, NMRA). For example, the tenant might want to disqualify the judge if the judge is a friend of the landlord or has had dealings with the tenant in the past and has demonstrated a bias against the tenant.

E. The trial

Trials in Magistrate and Metropolitan Courts are less formal than in District Court. There are several issues to consider about a trial in either court. Magistrate Courts do not have a *record* (a taped or written history of the trial), and any appeal from the Magistrate Court will involve a whole new trial (called a *de novo* appeal).

1. The record

In Metropolitan Court, appeals are *from the record* (Rule 3-706, NMRA). The Metropolitan Court will only make a formal record (a tape or CD recording) if one of the parties asks for it (Rule 3-708(A), NMRA). The clerk's office has a form for this purpose. You must file the form with the court before or at the start of the hearing. If a recording is not requested, it will be very difficult to show what errors were made at the trial if either party has to appeal. The court will not charge to have the trial recorded, but there is a charge for getting a copy of the recording if it is needed for an appeal (Rule 3-706(E), NMRA). The Metropolitan Court in Albuquerque currently provides recordings on CD. If your court case is in Metropolitan Court, it is very important to request a recording before the trial begins.

2. Jury trials

Another important issue to consider is whether to ask for a jury trial. Either the plaintiff or the defendant may ask for a jury to hear the case. The plaintiff makes the request for a jury trial at the time the complaint is filed. The defendant makes the request for a jury at the time the answer is filed. A defendant who wants a jury in an eviction case must file an answer before the trial date and include the request for jury in the answer. There is a fee for having a jury trial, and the fee is charged to the person making the request (Rule 1-038, NMRA; Rule 2-602, NMRA; and Rule 3-602, NMRA).

3. Interpreters

Courts are required to provide an interpreter free of charge to any party who requests one for the trial. The request should be made as soon as the party is aware that an interpreter will be needed, since it may take some time to locate or schedule one (NMSA § 38-9-3 and NMSA § 38-10-3).

4. Trial preparation

Anyone involved in a trial in a landlord-tenant case should be well organized and well prepared.

- Keep all *court papers* in order and bring them with you to court.
- Be prepared to *tell the judge* why you think you should win your case. Write an *outline* of the facts and points to be made, so that you

can relate the events in chronological order when you testify at the trial.

- Collect *evidence*—rent receipts, the lease, copies of notices and letters, housing code violation reports, photos, etc. In addition to the originals, make two copies of every piece of evidence, one for the court and one for the other party.
- Ask the court clerk for a *recording* of the hearing, if your case is in Metropolitan Court. (See “The record,” above in this chapter.)
- Arrange in advance for any *witnesses* to appear in support of your case, and practice answering the questions which will be asked in court.

A witness can be *subpoenaed* (given an official command to come to court), and it is always a good idea to have a subpoena issued by the court and served if you have any concern that the witness might not show up at the hearing. Witnesses who are subpoenaed are entitled to a \$75 fee for appearing in court.

5. Trial presentation

At the trial, the plaintiff tells his or her story first. This is because the plaintiff has the *burden of proof* to show why he or she should win. Then the defendant puts on his or her case. Each side will put on witnesses. Usually the plaintiff and the defendant are witnesses, together with other people who have knowledge of the facts of the case. The defendant gets to ask questions of the plaintiff's witnesses, and the plaintiff has the same opportunity to ask questions of the defendant's witnesses. This is called *cross-examination*. All witnesses will tell what they know after the court has made them swear to tell the truth.

In eviction cases, the landlord will usually be asking for a money judgment (back rent and/or damages) as well as a court-ordered eviction. Damage claims are often not heard at the time of the eviction trial, but they are left *open* to be heard at a later date, after the tenant has been forced to move. In some cases, the tenant may want a later trial on damages, too. However, if the issue of damages may affect the claims raised by the landlord for eviction, the tenant should

insist that the damage issues be part of the eviction trial.

When the housing is subsidized (Section 8, public housing, HUD, USDA or LIHTC), the tenant should always ask the judge for a payment plan for any unpaid rent. (See Chapter 14 of this guide for more information about subsidized housing.)

6. The judgment

After the trial, the judge will enter a decision about who won and who lost at the trial. This decision is called the *judgment* in the case, and it will be on a form prepared by the court. It will say what the loser must do. If the judge decides that the tenant must move out, the judgment will be for a writ of restitution specifying the date the tenant must be out of the rental unit. The tenant should explain to the judge whatever hardships this will involve. The judge can give the tenant three to seven days to leave the rental unit (NMSA § 47-8-46).

If the case involves a good-faith dispute over whether the tenant properly abated rent, and the landlord wins, the tenant may be given three days from the date of judgment to pay the back rent. If the tenant pays the rent within the three days, the writ of restitution will be dismissed (NMSA § 47-8-33(E)). This is called a *conditional writ*.

If the tenant wins, the judgment will note that the petition for a writ of restitution is denied. The judgment may also include an award of damages to the tenant for any claims the tenant made and won (NMSA § 47-8-48). As noted above, however, damage claims often are heard at a separate, later date than the eviction trial.

In addition to the relief awarded in the judgment, the winning party may be entitled to other money. The judge may award the winner court costs (such as filing and service fees) and in some cases, where the winning party has hired an attorney, the court may award attorneys' fees (NMSA § 47-8-48(A)).

F. Appeal

The losing party may appeal to the District Court if he or she disagrees with the judge's decision. An appeal from the lower court (Magistrate or Metropolitan Court) must be filed in District Court

within fifteen days by filing a *notice of appeal* with the District Court. The notice of appeal must also be served on the winning party (*appellee*) and filed in the lower court. The person appealing is called the *appellant*. There is a filing fee that must be paid to the District Court (Rule 1-072, NMRA, and Rule 1-073, NMRA). The appellant can ask the District Court to waive or reduce the filing fee if he or she cannot afford to pay it. You can get the forms to have the filing fee waived or reduced from the District Court clerk's office by asking for a "Motion for Free Process and Affidavit of Indigency."

When the tenant is evicted, an appeal can *stay* (meaning to stop temporarily) the eviction from taking place while the appeal is pending. To stay the eviction, the tenant must:

1. File the appeal in District Court and file a copy in the lower court (Metropolitan or Magistrate) before the eviction date written in lower court's judgment.
2. During the appeal, you must pay all rent that comes due after the eviction date. For example, if the eviction date in your appeal is June 15 and your rent is \$600 per month, you must pay \$300 rent to the landlord (the half month's rent for June 15 to June 30) within 5 days after filing the appeal, and then pay full rent for July, August and each month after that, when due, until your appeal is decided. The rent must be paid to the landlord or a private escrow company. Some landlords do not like to accept rent during the appeal. In that case, you can pay rent to a private escrow company, or ask the court to let you to pay the rent to the court clerk. If you do not pay rent during the appeal, the landlord can give you a three-day notice (see Chapter 6 of this guide on "When the tenant doesn't pay the rent"). If you do not comply, the landlord can file a motion in the court to evict you.

The law also allows the appellant to post an appeal bond to *stay execution* of a money judgment during the appeal. This kind of stay temporarily prevents the appellee from garnishing the appellee's wages or bank accounts or from executing on (seizing) the appellee's personal property, until the appeal is over. NMSA § 47-8-47(B). This kind of stay is not as

important to low-income tenants because (1) their wages are too low to garnish, (2) their public benefits are exempt from garnishment, and (3) most low-income people do not have sufficient personal property for execution. Therefore, before posting an appeal bond, you should first get legal advice to see if it is really necessary. It is important to realize that staying the eviction (as described in above) and staying collection of the money judgment (as described in this paragraph) are two separate procedures, and you can choose to do one or the other or both. For example, if you cannot afford an appeal bond but you can afford to pay the ongoing rent, you can choose only to stay the eviction, and thereby remain in your unit while the appeal is taking place. The fact that you do not also post an appeal bond does not prevent you from doing this.

An appellant must comply with the court rules, or the appeal may be dismissed. This guide does not cover all of the rules for an appeal. You should consult a lawyer immediately upon filing a Notice of Appeal.

G. After court

If an eviction has been ordered and not appealed, a writ of restitution empowers the sheriff to carry out the eviction (NMSA § 47-8-46). The sheriff will order the tenant out of the unit and may either order the tenant to remove personal property immediately or lock up the unit and advise the tenant to arrange for removal of the property, giving the tenant only a few minutes to gather important documents or other personal effects. There are strict time limits for making arrangements to remove all personal property. After those time limits, the landlord may be able to dispose of the property as he or she wishes. (See Chapter 10 of this guide on “The Tenant’s Property.”)

For any final judgment which includes an award of money, a *writ of execution* may be issued by the court, instructing the sheriff to carry out the judgment. If the losing side does not comply

voluntarily with the terms of the judgment, the sheriff may be able to seize money or property to satisfy the judgment (Rule 1-065.1, New Mexico Rules Annotated; Rule 2-801, NMRA; Rule 3-801, NMRA).

Certain things are exempt from judgment collections, such as:

- Personal property up to the value of \$500
- Tools of the trade up to the amount of \$1,500
- One motor vehicle up to the value of \$4,000
- Jewelry up to the value of \$2,500
- Clothing, furniture and books
- Medical equipment being used for the health of the person (NMSA § 42-10-1; NMSA § 42-10-2)
- Up to sixty thousand dollars (\$60,000) in equity in the person’s own home (NMSA § 42-10-9)
- Life insurance and health insurance plans (NMSA § 42-10-3)

Anyone seeking to exempt their eligible property from seizure must file a *claim of exemptions* with the court, listing what property is being protected. The clerk can provide the form (NMSA § 42-10-13). This should be done immediately after the judgment has been entered. It must be done before any sale of the property takes place.

A judgment may also be satisfied by garnishment (NMSA § 35-12-1) against wages or bank accounts. If a judgment debtor earns wages which exceed a certain amount, the debtor’s employer may be served with a *writ of garnishment*, and the debt is withheld from the debtor’s wages (NMSA § 35-12-3). Income from public benefits such as welfare, Social Security, and veteran’s benefits cannot be garnished, even if deposited in a bank account (NMSA § 35-12-7). If these types of income are being garnished, contact an attorney immediately.

Information about the court system is available at www.nmcourts.gov. This website includes general information about the courts in New Mexico, links to legal research information and links to websites for New Mexico courts, including the District Courts and the Bernalillo County Metropolitan Court. The Magistrate Courts’ website includes a very useful manual explaining the Magistrate Court Rules and Procedures.