

TITLE 8 SOCIAL SERVICES
CHAPTER 11 ADULT PROTECTIVE SERVICES
PART 5 ADULT PROTECTIVE SERVICES LEGAL

8.11.5.1 ISSUING AGENCY: Aging and Long-Term Services Department - Adult Protective Services Division.
[8.11.5.1 NMAC - Rp, 8 NMAC 11.5.1, 10/30/08]

8.11.5.2 SCOPE: Protective services employees and general public.
[8.11.5.2 NMAC - Rp, 8 NMAC 11.5.2, 10/30/08]

8.11.5.3 STATUTORY AUTHORITY: Adult Protective Services Act, Section 27-7-14 et seq. NMSA 1978, as amended; Public Health Act, Section 24-1-5L, as amended; Probate Code, Section 45-5-301 et seq. NMSA 1978, as amended; Resident Abuse and Neglect Act, Section 30-47-1 et seq. NMSA 1978, as amended; Aging and Long-Term Services Act, Section 9-23-1 et seq. NMSA 1978, as amended.
[8.11.5.3 NMAC - Rp, 8 NMAC 11.5.3, 10/30/08]

8.11.5.4 DURATION: Permanent.
[8.11.5.4 NMAC - Rp, 8 NMAC 11.5.4, 10/30/08]

8.11.5.5 EFFECTIVE DATE: 10/30/08, unless a later date is cited at the end of a section.
[8.11.5.5 NMAC - Rp, 8 NMAC 11.5.5, 10/30/08]

8.11.5.6 OBJECTIVE: To establish guidelines for the provision of adult legal services by the department that are consistent with statutory authority and legal mandates.
[8.11.5.6 NMAC - Rp, 8 NMAC 11.5.6, 10/30/08]

8.11.5.7 DEFINITIONS:

A. “Ability to consent” means an adult’s ability to understand and appreciate the nature and consequences of proposed protective services or protective placement, including benefits, risks and alternatives to the proposed services or placement and to make or communicate an informed decision.

B. The “adult protective services (APS) attorney” is the attorney that represents the department in actions pursuant to the Adult Protective Services Act and federal and state constitutional, statutory and case law.

C. “Advance directives” include powers of attorney, living wills and written statements appointing surrogate health care decision makers under the Uniform Health Care Decisions Act (Section 24-7A-1 et seq. NMAC 1978 as amended) and the Mental Health Care Treatment Decisions Act (Section 24-7B-1 et seq. NMAC 1978 as amended).

D. An “affidavit” is a sworn statement of facts and accompanies the petition for an order. It is signed by any person who either has personal knowledge of the facts or has been informed of them and believes them to be true.

E. “Conservator” is a person or entity appointed by the court to manage the property or financial affairs, or both, of an incapacitated adult.

F. “Department” means the aging and long-term services department.

G. “Division” means the adult protective services division of the aging and long-term services department.

H. “Guardian” is a person or entity who has qualified to provide for the care, custody, or control of an incapacitated adult pursuant to court appointment. Examples of a guardian’s responsibilities may include making decisions about where the incapacitated person lives, making health care or treatment decisions for the incapacitated adult, and making decisions relating to the incapacitated adult’s personal safety or care.

I. “Guardianship or conservatorship” is the appointment, by a court, of a person or entity to assume decision making responsibility and to handle the affairs of an individual the court has found to be “incapacitated” as defined in the Probate Code. A guardian and conservator may be the same person or institution or they may be two different persons or entities.

J. An “incapacitated adult” is defined in the Adult Protective Services Act as any adult with a mental, physical or developmental condition that substantially impairs the adult’s ability to provide adequately for

the adult's own care or protection.

K. A “**surrogate**” is a person legally authorized to act on an adult's behalf.

L. A “**visitor**” is a court appointed person, who is not a department employee, with no personal interest in the proceedings who is trained or possesses the expertise to evaluate the person's needs in a guardianship or conservatorship case.

[8.11.5.7 NMAC - Rp, 8 NMAC 11.5.7, 10/30/08]

8.11.5.8 PURPOSE OF ADULT PROTECTIVE LEGAL SERVICES: The purpose of adult protective legal services is to protect incapacitated adults through legal intervention consistent with the adult's need for services and with the least possible restriction of the adult's liberty.

[8.11.5.8 NMAC - Rp, 8 NMAC 11.5.8, 10/30/08]

8.11.5.9 ROLE OF THE ADULT PROTECTIVE SERVICES ATTORNEY:

A. The adult protective services attorney provides information, interpretation of law and general assistance to the department in the provision of adult protective services.

B. When the adult protective services attorney, supervisor, and regional manager cannot agree on the most appropriate course of action to protect an incapacitated adult through legal intervention, the issues shall be resolved between the general counsel and adult protective services division director. If they cannot agree, the department's cabinet secretary is the final arbiter.

[8.11.5.9 NMAC - Rp, 8 NMAC 11.5.9, 10/30/08]

8.11.5.10 GENERAL PROVISIONS:

A. The department complies with the provisions of the Adult Protective Services (APS) Act and the Rules of Civil Procedures and the Rules of Evidence for the district courts.

B. Attorney-client relationship: The primary decision-maker on the case of an incapacitated adult is the caseworker for the purpose of the attorney-client relationship. If a conflict of opinion arises between the caseworker and his supervisor or a manager within the chain-of-command, the decision-maker becomes the highest ranking person making a determination in the matter up to and including the department's cabinet secretary.

C. Attorney-client privileged communications: Written and verbal communications concerning department business between an APS attorney and a department employee in anticipation of litigation or concerning on-going litigation is privileged. Privileged communication may not be disclosed to a third party without appropriate permission or by order of the court.

D. Confidentiality/access to records: Protective services division records are confidential and can only be inspected pursuant to a valid court order except by those entities specifically entitled to access under the Adult Protective Services Act.

(1) When allowing access to an authorized entity, all attorney-client privileged information and, where protected by law, all identifying information on the referral source on referrals is stricken.

(2) Unless approved by a department attorney, division records are not released pursuant to a subpoena because subpoenas do not reflect a court determination of legitimate interest in the case or the work of the court.

E. Notice requirements: The APS attorney is responsible for sending proceeding notifications to the appropriate persons.

F. Due process: APS attorneys are to provide procedural safeguards for all parties in all adult protective services legal cases filed by the department.

[8.11.5.10 NMAC - Rp, 8 NMAC 11.5.10, 10/30/08]

8.11.5.11 CIVIL OR CRIMINAL COURT: The department may cooperate with parties and courts in criminal and other civil proceedings pursuant to applicable law.

[8.11.5.11 NMAC - Rp, 8 NMAC 11.5.11, 10/30/08]

8.11.5.12 CASES ON TRIBAL LANDS: The department may not provide legal services on Indian tribal land unless allowed under federal law after written authorization is received from tribal leadership (tribal governor or president.)

[8.11.5.12 NMAC - Rp, 8 NMAC 11.5.12, 10/30/08]

8.11.5.13 EMERGENCY PROTECTIVE SERVICES OR PLACEMENT:

A. If an incapacitated adult is in an emergency situation and lacks the ability to consent to receive protective services and no other authorized person is available or willing to consent to protective services, the department may seek an emergency order from the district court for such services.

B. The department files an ex parte order based upon a petition and affidavit.

C. Within 24 hours, excluding weekends and legal holidays, from the time the ex parte order is issued or, if the ex-parte order authorizes forcible entry, from the time the ex-parte order is served upon the incapacitated adult, the department mails or delivers written notice, including a copy of the petition, the ex parte order, and the affidavit for the ex parte order, to:

- (1) the adult;
- (2) his or her spouse;
- (3) adult children or next of kin;
- (4) surrogate or guardian, if any; and
- (5) the notice informs all parties that a hearing will be held no later than ten days after the date the

petition is filed to determine whether the conditions creating the emergency have been removed and whether the adult should be released from the court's order.

D. Limitations of an emergency ex parte order.

(1) The department cannot facilitate a change of residence or hospitalization unless the order requests it and identifies by name and location where the change of residence or hospitalization shall be.

(2) The adult loses no rights except those described in the emergency order.

(3) The court may authorize only those interventions which it finds to be least restrictive of the adult's liberty and civil rights, consistent with his or her welfare and safety.

(4) Neither the department nor its employees can be named as guardian or conservator for the adult, except when the department employee is related by blood or marriage to the incapacitated adult.

E. If the department determines that conditions creating the need for emergency protective services or placement cannot or have not been resolved within the ten day period, renewal of the emergency order may be requested, or discussed at the ten day ex parte hearing.

(1) The department supports the request for renewal with a comprehensive physical, mental and social evaluation of the adult.

(2) The original order can be renewed by the court, once for a maximum period of twenty days.

(3) The adult can petition the court to set aside the emergency order at any time.

F. The adult is present at the hearing unless the court determines it is not possible or not in his best interest because of a threat to the adult's health and safety.

(1) The adult has the right to an attorney, whether or not he is present at the hearing. If the person is indigent, the court must appoint him an attorney no later than the date the petition is filed.

(2) The adult may secure an independent medical, psychological or psychiatric examination and present a report of the independent evaluation or the evaluator's testimony as evidence at the hearing.

[8.11.5.13 NMAC - Rp, 8 NMAC 11.5.13, 10/30/08]

8.11.5.14 CONTINUING NEED FOR PROTECTIVE SERVICES OR PLACEMENT:

A. If the adult continues to need protective services or placement after the renewal order expires, the department is responsible for seeking appointment of a guardian or conservator to assume responsibility for the adult's care or the department must petition for a non-emergency protective placement.

B. The department may file a petition for guardianship/conservatorship simultaneously with the application for renewal for continuity of services during the guardianship/conservatorship notice period of two weeks before the hearing on the merits can be held.

C. If a temporary guardian is appropriate, it may be possible to skip the renewal proceedings and immediately begin the guardianship.

[8.11.5.14 NMAC - Rp, 8 NMAC 11.5.14, 10/30/08]

8.11.5.15 EMERGENCY PLACEMENT BY A LAW ENFORCEMENT OFFICER:

A. The department may contact law enforcement to transport an incapacitated adult to an appropriate facility, without a court order, for an emergency placement.

- (1) Law enforcement makes the determination that the emergency placement is required based upon

law enforcement's personal observation and judgment in accordance with the Adult Protective Services Act.

- (2) The department need not be present for the emergency removal to occur.
- (3) The department is available upon request of law enforcement to accompany the officer to:
 - (a) help assess the adult's situation;
 - (b) assist in arranging suitable transporting; and
 - (c) help the officer locate and arrange an appropriate placement.

(4) Absent a court order allowing the caseworker to transport the adult, only a law enforcement officer is authorized to transport or delegate transport of an adult to an appropriate placement.

B. The APS attorney files a petition and affidavit in district court supporting the need for emergency placement within two working days following the emergency placement, and shall mail or deliver written notice to the person(s) specified in Subsection C of 8.11.5.13 NMAC, when the following conditions have been met:

- (1) the department is informed of and concurs with the officer's decision to place the adult; and
- (2) the department has determined the statutory requirements of the Adult Protective Services Act

regarding emergency protective placements by law enforcement officer have been met.

C. A court hearing is held within ten days from the date the petition is filed to review the emergency removal and placement and to consider any department request for an extension or renewal of the original emergency order.

[8.11.5.15 NMAC - Rp, 8 NMAC 11.5.15, 10/30/08]

8.11.5.16 NON-EMERGENCY PROTECTIVE SERVICES/PLACEMENT:

A. The department may petition the court for a non-emergency protective services/placement of an adult. The court may issue a non-emergency protective services/placement order based upon a petition and supporting medical, psychological and social evaluations of the adult.

B. The APS attorney prepares the non-emergency protective services/placement petition based on information provided by the caseworker.

C. The department provides notice that a petition for non-emergency protective services/placement has been filed as follows:

- (1) the adult receives written notice, in person, that a petition for non-emergency protective services/placement has been filed;
- (2) notice is given at least 14 days prior to the scheduled hearing date;
- (3) the adult's attorney and anyone who has physical custody of the adult is given notice; notice is also given to the adult's legal counsel, caretaker, guardian, conservator, surrogate, spouse, adult children or next of kin if such can be located with reasonable diligence.

D. The department conducts or arranges for a comprehensive mental, psychological and social evaluation for the adult in a non-emergency petition.

E. Prior to the expiration of the non-emergency protective services/placement, the department reviews the need for continued protective services/placement, including the need for a guardian or conservator. The department submits a report and recommendations to all persons who were served notice of the original petition, as appropriate.

F. The department may petition the court for an extension of the protective services/placement order for a period not to exceed six months.

[8.11.5.16 NMAC - Rp, 8 NMAC 11.5.16, 10/30/08]

8.11.5.17 GUARDIANSHIP AND CONSERVATORSHIP:

A. The department explores other options such as representative payee, power of attorney, surrogate decision-makers, trusts and living wills, prior to initiating guardianship or conservatorship proceedings.

B. The department recommends limiting the powers of a guardianship or conservatorship to only those areas necessary to accommodate the adult's limitations.

C. The APS attorney completes the guardianship/conservatorship petition based on information provided by the department caseworker.

D. The department provides written notice that a petition has been filed. A copy of the petition and any interim order is served personally on the alleged incapacitated adult and given to all interested parties at least 14 days before the date the hearing is scheduled. Interested parties entitled to notice include:

- (1) the alleged incapacitated adult;
- (2) the adult's spouse, parents and adult children;

- (3) if there are no spouse, parents or adult children, at least one of his closest relatives;
 - (4) any person serving as the adult's guardian or conservator or who has primary responsibility for the person's care;
 - (5) any interested person who has filed a request for notice with the court; and
 - (6) any other person the court indicates.
 - E. Unless the adult has his own attorney, the court must appoint one to represent him.
 - F. The department recommends a qualified health care professional to examine the adult prior to the hearing.
 - G. The department provides the visitor a letter outlining the responsibilities of the visitor as per the Probate Code and the department and requests that the visitor sign a statement of confidentiality.
 - (1) The department caseworker negotiates a fee for the visitor not to exceed \$60.00 an hour with a limit of six hours per client to perform all the visitor's duties. A higher fee may be paid if approved by the APS attorney.
 - (2) The department reimburses the visitor's mileage at the DFA rate (see 2.42.2 NMAC).
 - (3) The visitor must submit an itemized statement for his services prior to payment.
 - H. Department employees cannot serve as visitors in cases filed by the APS attorney.
- [8.11.5.17 NMAC - Rp, 8 NMAC 11.5.17, 10/30/08]

8.11.5.18 TEMPORARY GUARDIANSHIP/CONSERVATORSHIP:

- A. In emergency situations the court may appoint a temporary guardian/conservator prior to a hearing on a petition.
 - B. The department may petition the court to appoint a temporary guardian/conservator.
 - C. The adult is served within 24 hours of the appointment of a temporary guardian/conservator.
 - D. If subsequently granted to the temporary guardian/conservator by the court, the authority of any previously court appointed permanent guardian or conservator is suspended.
- [8.11.5.18 NMAC - Rp, 8 NMAC 11.5.18, 10/30/08]

8.11.5.19 TERMINATION/REMOVAL OF A GUARDIAN OR CONSERVATOR: The adult, his personal representative, the conservator or guardian or any other interested persons, including the department, can petition the court for removal of the guardian/conservator and request the appointment of a successor, if in the adult's best interest. The court can remove a guardian or conservator, modify, or terminate a guardianship or conservatorship on the basis that the guardian/conservator:

- A. is incapacitated;
 - B. has abused, neglected or exploited the adult;
 - C. is unable or unwilling to carry out his statutory duties;
 - D. continued function as guardian/conservator is not in the adult's best interest; or
 - E. the adult is no longer incapacitated and is capable of managing his person or finances and property.
- [8.11.5.19 NMAC - Rp, 8 NMAC 11.5.19, 10/30/08]

8.11.5.20 EXPERT WITNESSES:

- A. The caseworker gives the APS attorney advance notice of all witnesses, expert or otherwise, to be called to allow sufficient time to secure subpoenas and service.
 - B. The department reimburses for expert testimony, time and travel.
 - (1) The APS attorney approves the expert witness services before they are rendered.
 - (2) The department has payment guidelines that are followed except in areas of the state where lower rates may be negotiated. APS attorneys may approve higher rates under exceptional circumstances, budget permitting.
- [8.11.5.20 NMAC - Rp, 8 NMAC 11.5.20, 10/30/08]

8.11.5.21 PENALTIES. The department may impose, after notice as described in Subsection A of 8.11.5.21 NMAC, civil penalties not to exceed \$10,000 against a facility, provider, or individual who fails to provide documents or certain identifying information, interferes with an investigation, interferes with the provision of voluntary or involuntary protective services, breaches confidentiality, or fails to report abuse, neglect, or

exploitation of an incapacitated adult.

A. Upon determination by the adult protective services division that there has been a violation of the particular statutory section of the APS Act that allows for a particular penalty, the department may deliver to the facility, provider, or individual charged with the violation a notice of civil penalty assessment. The notice shall be delivered in person or by certified mail, return receipt requested. The notice shall include:

- (1) the name and address of the person or entity to whom the penalty assessment is directed;
- (2) the date of the civil penalty assessment;
- (3) the basis for the civil penalty assessment;
- (4) the amount of the civil penalty assessment;
- (5) the date the civil penalty assessment is due for payment;
- (6) notice of the right to request an administrative hearing before the department to challenge the civil penalty assessment; and

(7) a statement that the request for administrative hearing must be made in writing to the department's adult protective services division director within ten days of the notification.

B. Unless a hearing is requested, the civil penalty assessment shall be paid to the department in the form of cash, cashier's check, or money order.

C. If a hearing is requested, the department secretary or his designee shall appoint a neutral hearing officer who shall schedule an administrative hearing to determine if the violation occurred and whether a penalty should be assessed. If a penalty shall be assessed, the hearing officer shall determine the amount of the penalty based on the following factors:

- (1) the severity of the violation;
- (2) the harm resulting from the violation;
- (3) the number of times the violation has occurred and whether civil penalties have been assessed previously;

(4) whether the violation is willful or intentional;

(5) whether the facility, provider, or individual charged with the violation was following

organizational policy or orders;

(6) whether there was threatened retaliation against a provider or employee for trying to comply with the requirements of the statutory sections of the adult protective services act allowing for penalties.

D. If the hearing officer determines that a facility, provider, or individual has committed the same violation more than once, a minimum of \$1,000 per occurrence shall be assessed.

[8.11.5.21 NMAC - N, 10/30/08]

8.11.5.22 REPRESENTATION:

A. A person or entity may appear as a party on his or their own behalf or by an attorney licensed to practice law in New Mexico.

B. The department may be represented by a duly authorized employee of the department or by an attorney licensed to practice law in New Mexico.

C. An attorney for a party must file an entry of appearance at least ten (10) working days before the commencement of any hearing. The attorney of record for a party shall be deemed to continue to be the attorney of record until written notice of withdrawal of representation is provided to the hearing officer and the parties.

[8.11.5.22 NMAC - N, 10/30/08]

8.11.5.23 REQUEST FOR HEARING: An assessed party may request a hearing before the department. The request for hearing shall be in writing and received by the adult protective services division director no later than ten (10) working days from the date that the assessed party receives the civil penalty assessment. The request for hearing shall include:

A. the name and address of the assessed party;

B. a copy of the civil penalty assessment;

C. a brief statement of the factual or legal bases upon which the assessed party challenges the civil penalty assessment; and

D. a statement of the relief requested.

[8.11.5.23 NMAC - N, 10/30/08]

8.11.5.24 APPOINTMENT OF HEARING OFFICER: Within five (5) working days of receipt of a timely request for hearing, the adult protective services division director shall appoint a hearing officer and shall send written notice of the appointment to the parties.
[8.11.5.24 NMAC - N, 10/30/08]

8.11.5.25 NOTICE OF HEARING AND TIME LIMITS FOR HOLDING HEARING:

A. Within ten (10) working days of appointment, the hearing officer shall establish the date, time and place of the hearing. The hearing shall be no more than one hundred twenty (120) calendar days from the date of the civil penalty assessment unless the parties agree otherwise.

B. The hearing officer shall issue a notice of hearing at least thirty (30) calendar days before the hearing date, unless the parties agree to a shorter timeframe. The notice shall be served on the parties by certified mail, return receipt requested. At the discretion of the hearing officer, the notice may be served by regular mail or other appropriate means on any other persons or entities that may have an interest in the proceedings.

C. The notice of hearing shall include:

- (1) the name of the assessed party;
- (2) the name and address of the adult protective services division director;
- (3) the time, date, place, and nature of the hearing; and
- (4) a statement of the legal authority under which the hearing is to be held.

8.11.5.25 NMAC - N, 10/30/08]

8.11.5.26 VENUE: Unless the parties agree otherwise, the hearing shall be held in the county where the events allegedly occurred that gave rise to the civil penalty assessment.
[8.11.5.26 NMAC - N, 10/30/08]

8.11.5.27 POWERS AND DUTIES OF THE HEARING OFFICER: The hearing officer shall have the authority to:

- A.** preside over hearings;
- B.** assure that hearings are properly recorded;
- C.** administer oaths and affirmations to the witnesses;
- D.** issue subpoenas and subpoenas *duces tecum*;
- E.** establish procedural schedules;
- F.** rule on motions and procedural requests;
- G.** require parties to attend hearings, pre-hearing conferences and settlement conferences;
- H.** require parties to produce for examination information or witnesses under their control;
- I.** require parties to express their positions on any issues in the proceedings;
- J.** require parties to submit legal briefs on any issues in the proceedings;
- K.** examine witnesses, and permit parties to examine witnesses;
- L.** determine the admissibility of evidence;
- M.** take official notice of any matter that is among the traditional matters of official or administrative notice in accordance with the terms of this rule;
- N.** recess any hearing from time to time;
- O.** regulate the course of the proceedings and the conduct of any participants;
- P.** take any action reasonably necessary to compel discovery or control the conduct of parties or witnesses;
- Q.** issue a recommended decision on the merits of a case, including findings of fact and conclusions of law;
- R.** approve settlements or other pre-hearing or post-hearing dispositions of cases by the parties, subject to final approval by the secretary; and
- S.** take any other action reasonably necessary to conclude the proceedings in a timely and fair manner.

[8.11.5.27 NMAC - N, 10/30/08]

8.11.5.28 APPLICABILITY OF RULES OF CIVIL PROCEDURE AND RULES OF EVIDENCE: Although formal rules of civil procedure and evidence do not apply, the hearing officer may look to the New

Mexico rules of civil procedure and the New Mexico rules of evidence for guidance during the course of the proceedings. In addition, the hearing officer's recommended decision and the secretary's final decision must be supported by a residuum of legally competent evidence as would support a verdict in a court of law.
[8.11.5.28 NMAC - N, 10/30/08]

8.11.5.29 COMMUNICATIONS WITH DEPARTMENT AND HEARING OFFICER:

A. No party, representative of a party, or other person shall communicate off the record about the merits of a case with the department or the hearing officer unless the communication is in writing and a copy is provided to all parties to the proceedings.

B. The department's employees and the hearing officer shall not communicate off the record about the merits of a case with any party, representative of a party, or other person unless the communication is in writing and a copy is sent to all parties to the proceedings.

[8.11.5.29 NMAC - N, 10/30/08]

8.11.5.30 PRE-HEARING DISCLOSURES AND DISCOVERY:

A. Upon written request of any party, the hearing officer may require parties to comply with reasonable discovery requests. Oral and written depositions are prohibited except to preserve the testimony of persons who are sick or elderly, or persons who shall not be able to attend the hearing.

B. At least fifteen (15) calendar days before the hearing, each party shall file the following information with the hearing officer and send copies to the other parties:

(1) the name of each witness that the party shall or may call at the hearing;

(2) a summary of the anticipated direct testimony of each witness and, if the testimony includes expert opinions, a list of documents or other information that provides the bases for those opinions;

(3) an estimate of the length of time for the direct testimony of each witness; and

(4) a list of exhibits that shall or may be offered into evidence at the hearing; in addition, each party shall provide the other parties, but not the hearing officer, with copies of all exhibits that are identified on the exhibit list but have not been provided previously.

C. Parties are encouraged to enter into stipulations of fact to expedite the hearing process. Any stipulations must be filed jointly with the hearing officer at least ten (10) working days before the hearing.

[8.11.5.30 NMAC - N, 10/30/08]

8.11.5.31 SUBPOENAS:

A. Pursuant to Section 28-17-19(C) NMSA 1978, upon the written request of a party, the hearing officer may issue subpoenas to compel attendance of witnesses or production of records in connection with proceedings before the department.

B. In order to subpoena a person who is not a party to the proceedings, or an agent or representative of a party, the party requesting the subpoena shall tender witness fees and mileage to the person subpoenaed in accordance with the terms of Rule 1-045 NMRA.

C. The hearing officer may condition a subpoena to permit the inspection and copying of records upon the party requesting the subpoena paying the person subpoenaed the reasonable cost of inspection and copying in advance.

[8.11.5.31 NMAC - N, 10/30/08]

8.11.5.32 EVIDENCE AND CONDUCT OF HEARING:

A. Hearings shall be conducted as follows:

(1) all hearings shall be open to the public, unless closing a hearing is necessary to protect the privacy of any person who is entitled to privacy protection under federal or state law;

(2) only relevant and material evidence is admissible at hearings; evidence shall be allowed if it is of a type commonly relied upon by reasonably prudent persons in the conduct of serious affairs;

(3) redundant evidence shall be excluded;

(4) witnesses shall be examined orally, under oath or affirmation; the parties and the hearing officer shall have the right to cross-examine witnesses; and

(5) the hearing officer may take official notice of any matter that is among the traditional matters of official or administrative notice, and may take official notice of any matter that is within the department's specialized knowledge; the hearing officer shall inform the parties of any matters officially noticed, and shall afford

the parties an opportunity to contest any such matters.

B. The burden of persuasion at the hearing shall be on the adult protective services division, which must prove its case by a preponderance of the evidence unless the case involves allegations of fraud.

C. At the hearing, the adult protective services division shall present its evidence first. If the assessed party wishes to present evidence, it shall proceed second. Thereafter, only the adult protective services division may present rebuttal evidence. Rebuttal evidence shall be confined to the issues raised in the assessed party's presentation of evidence. Each party shall be given an opportunity to offer a final oral or written argument without additional presentation of evidence.

[8.11.5.32 NMAC - N, 10/30/08]

8.11.5.33 RECORD OF HEARING:

A. Unless a hearing is stenographically recorded and the hearing officer orders otherwise, all hearings shall be recorded electronically by audio or audio-video. Any party desiring a copy of the audio or audio-video shall make a written request to the hearing officer and shall pay the cost of preparing a copy.

B. No later than five working days before a hearing, a party may request that the hearing be stenographically recorded at the cost of the requesting party. The request shall be in writing to the hearing officer and shall certify that the party has hired a certified court reporter and made all necessary arrangements for the court reporter to perform his or her job. In addition, the requesting party shall arrange for the court reporter to deliver two copies of the completed hearing transcript to the hearing officer. A court reporter's transcription becomes official when certified by the hearing officer. The requesting party shall pay the court reporter's fees, including any costs associated with providing the copies of the completed hearing transcript to the hearing officer.

C. Record. The record in a hearing shall consist of the following:

- (1) the civil penalty assessment;
- (2) the assessed party's request for hearing;
- (3) the notice of appointment of the hearing officer;
- (4) the notice of hearing;
- (5) all pleadings and orders;
- (6) any written information requested by the hearing officer and provided to him or her by the parties before the hearing;
- (7) all exhibits;
- (8) all stipulations;
- (9) all statement of matters officially noticed by the hearing officer;
- (10) the electronic audio or audio-video recording, or the court reporter's written transcription of the hearing prepared in accordance with this rule;
- (11) the hearing officer's recommended decision;
- (12) any motions for reconsideration and rulings thereon; and
- (13) the secretary's final decision.

[8.11.5.33 NMAC - N, 10/30/08]

8.11.5.34 HEARING OFFICER'S RECOMMENDED DECISION:

A. The hearing officer shall present a written recommended decision to the secretary after the close of the hearing, and shall send copies to the parties. The recommended decision shall be based solely on the record and shall include proposed findings of fact and conclusions of law.

B. Any motions for reconsideration shall be submitted to the hearing officer within five working days from the date of service of the hearing officer's recommended decision. Such motions shall be decided without a hearing unless the hearing officer orders otherwise.

[8.11.5.34 NMAC - N, 10/30/08]

8.11.5.35 SECRETARY'S FINAL DECISION:

A. The secretary shall issue a final written decision within 10 working days of the receipt of the hearing officer's recommended decision or ruling on a motion for reconsideration. Based upon the evidence in the record, the secretary may affirm, reverse or modify the hearing officer's recommended decision as modified by any subsequent rulings of the hearing officer. The secretary's final decision shall inform the parties of their right to seek judicial review.

B. The secretary shall send copies of the final decision to the parties by certified mail, return receipt

requested.

C. When the secretary's final decision affirms a civil penalty assessment by the adult protective services division, the assessed party shall pay the civil penalty to the department within thirty (30) calendar days from the date of the decision. Payment shall be in the form of cash, cashier's check or money order.
[8.11.5.35 NMAC - N, 10/30/08]

8.11.5.36 APPEAL: A person who is aggrieved by the secretary's final decision may appeal to the district court in accordance with the provisions of Section 39-3-1.1 NMSA 1978 and Rule 1-074 NMRA. The date of filing of the secretary's final decision starts the time limit for appeal.
[8.11.5.36 NMAC - N, 10/30/08]

8.11.5.37 NO AUTOMATIC STAY PENDING JUDICIAL REVIEW: The filing of a notice of appeal shall not stay the enforcement of the secretary's final decision. Upon a showing of substantial hardship and irreparable harm, the secretary may grant a stay of the final decision pending appeal. The district court may also grant a stay in accordance with the provisions of Rule 1-074 NMRA.
[8.11.5.37 NMAC - N, 10/30/08]

8.11.5.38 ENFORCEMENT OF ORDERS AND PAYMENT IN DEFAULT: Whenever an assessed party is in default of a civil penalty assessment, the adult protective services division may file an action in district court solely for the purpose of entry of judgment and enforcement of the civil penalty. The district court shall accept the civil penalty assessment without reviewing the basis for it and shall enter an appropriate judgment or order to enforce the civil penalty assessment.
[8.11.5.38 NMAC - N, 10/30/08]

HISTORY OF 8.11.5 NMAC:

Pre-NMAC History: The material in this part was derived from that previously filed with the state records center and archives under:

SSD 10.0.0, Social Services - Definition and Goal Statement, filed 8/22/86.
SSD 10.0.0, Social Services - Definition and Goal Statement, filed 6/18/87.
SSD 10.0.0, Social Services - Definition and Goal Statement, filed 9/18/90.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 8/22/86.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 1/29/87.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 6/18/87.
SSD 10.1.0, Social Services for Adults - General Provisions, filed 9/18/90.
SSD 10.2.0, Social Services for Adults - General Guidelines, filed 8/22/86.
SSD 10.2.0, Social Services for Adults - General Guidelines, filed 9/18/90.

History of Repealed Material: 8 NMAC 11.5, Adult Protective Services-Adult Protective Services Legal (filed 6/16/1997) repealed 10/30/08.

Other History:

SSD 10.0.0, Social Services - Definition and Goal Statement (filed 9/18/90); SSD 10.1.0, Social Services for Adults - General Provisions (filed 9/18/90); and SSD 10.2.0, Social Services for Adults - General Guidelines (filed 9/18/90) were renumbered, reformatted, and replaced by 8 NMAC 11.5, Adult Protective Services-Adult Protective Services Legal, effective 07/01/1997.

8 NMAC 11.5, Adult Protective Services - Adult Protective Services Legal (filed 06/16/1997) was replaced by 8.11.5 NMAC, Adult Protective Services Legal, effective 10/30/08.