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## FISCAL IMPACT REPORT

**ORIGINAL DATE** 02/05/18  
**LAST UPDATED** 02/07/18      **HJR** 6

**SPONSOR** Rehm

**SHORT TITLE** Court Practices Determined by Legislature, CA      **SB** \_\_\_\_\_

**ANALYST** Daly

### ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY18	FY19	FY20	3 Year Total Cost	Recurring or Nonrecurring	Fund Affected
<b>Total</b>		See Fiscal Implications			Nonrecurring	Election Fund
		See Fiscal Implications	See Fiscal Implications	See Fiscal Implications	Recurring	General Fund

(Parenthesis ( ) Indicate Expenditure Decreases)

Relates to HJR 7

### SOURCES OF INFORMATION

LFC Files

#### Responses Received From

Administrative Office of the Courts (AOC)

New Mexico Attorney General (NMAG)

### SUMMARY

#### Synopsis of Bill

House Joint Resolution 6 amends Article 4 of the New Mexico Constitution to remove rulemaking authority from the courts by adding a new section requiring all rules of practice and procedure for the courts be established by law. It also amends Article 6 of the Constitution to provide that the Supreme court's power of superintending control over all inferior courts be subject to the new limitation in Article 4. The resolution is to be submitted for approval by the people of the state in the next general election (November 2018) or any special election called for that purpose.

### FISCAL IMPLICATIONS

Section 1-16-13 NMSA 1978 requires the SOS to print the full text of each proposed constitutional amendment, in both Spanish and English, in an amount equal to 10 percent of the registered voters of the state. The SOS is constitutionally required to public the full text of each proposed constitutional amendment once a week for four weeks preceding the election in newspapers in every county in the state. According to the SOS, the most recent cost to print a constitutional amendment is \$47.60 per word.

Fiscal implications on the courts are indeterminate, depending on future legislative changes to rules of practice and procedure. As discussed in Significant Issues, additional litigation may arise.

## **SIGNIFICANT ISSUES**

AOC explains:

Under the current constitutional structure, the Legislature and Supreme Court share concurrent authority to adopt rules of practice and procedure for New Mexico's courts. The proposed amendments to the New Mexico Constitution may raise separation of powers questions under Article III, Section 1, of the New Mexico Constitution to the extent that legislative rulemaking for the courts would affect the essential functions of the Judiciary. Given that constitutional uncertainty, the scope and application of the proposed constitutional amendments, if approved by the voters, may increase litigation in the courts.

NMAG points to what may be an unintended consequence of HJR 6: the involvement of the Executive Branch in judicial practices and procedures through the Governor's exercise of the power to veto. In addition, NMAG notes existing statutes authorizing the state Supreme Court to regulate pleading, practice and procedure in judicial proceedings by promulgation of rules, as long as those rules do not abridge, enlarge or modify the substantive rights of any litigant. See NMSA 1978, Sections 38-1-1 and 2.

NMAG offers this additional analysis:

The New Mexico Supreme Court regularly asserts that the State Constitution, Art. III, §1, (separating the power of government into the legislative, executive and judicial branches) and Art. VI, §3 (giving it superintending control over inferior courts) vests within it the exclusive right to regulate all pleadings, practices and procedures affecting the judicial branch. It has used this assertion to hold statutes invalid because the subject matter is procedural, not substantive; a recent example being when it specified to what public official service of process should be directed, superseding NMSA §38-1-17 with Rule 1-004(H) NMRA.

NMAG also advises that, as noted by New Mexico Justice Seth Montgomery in his dissent to *Maples v. New Mexico*, 1990-NMSC-042, most states and federal government allow for statutes relating to court rules. It goes on to report:

Citing *State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 162 (1957), Justice Montgomery noted there are good arguments for limiting judicial nullification of statutes affecting the judicial branch to those which: (1) undercut its ability to perform essential functions, and (2) which interfere with the effective and efficient operation of the courts.

Both AOC and NMAG express concern as to the use of the legislative process as the exclusive means for regulating rules of practice and procedure for the courts. First noting that this restriction will raise questions about the extent to which that process can react quickly enough to

provide timely changes to the rules of practice and procedure that are responsive to unexpected and ever-changing demands on New Mexico's court system, AOC explains the current process for rulemaking:

The Supreme Court's current rulemaking structure is supported by a robust rules committee process that provides informed recommendations to the Supreme Court on a regular basis for needed changes to the rules of practice and procedure for the Judiciary. Those recommendations come from Supreme Court committees comprised of individuals with direct experience and expertise using and working in the court system, including judges, lawyers, legislators, executive agency representatives, law enforcement and corrections representatives, and members of the general public. Using the legislative process as the exclusive method for adopting rules of practice and procedure for the Judiciary would forgo the expertise and advice that New Mexico currently enjoys through the Supreme Court rules committee process.

While the Supreme Court generally adopts rule changes at the end of each calendar year, the Court's rulemaking procedures also enable to the Court to adopt and implement rule changes outside the normal annual cycle to quickly address changes in the law and respond to changing circumstances that would otherwise impede the efficient administration of justice. If rulemaking were limited to the legislative process, rule changes could only be passed annually while the Legislature is in sessions. And given the restrictions on legislation that may be considered during a 30 day session, many needed amendments to the rules of practice and procedure may not be eligible for adoption or amendments except once every two years during 60 day sessions, which would call into question New Mexico's ability to meet the constantly changing needs of the court system.

Similarly, NMAG notes:

There are at least 23 separate sets of Supreme Court rules presently in effect, ranging from civil procedure to the Judicial Performance Evaluation Commission. Given the extent and varying nature of the procedures involved, transferring authority for rule making from the judiciary to the legislature would invite gridlock and ossification. Additionally, while rules and statutes need to remain reasonably constant to allow New Mexicans time to both comprehend and to adapt their practices accordingly, circumstances do change, technological advances do occur, and user experiences do provide direct feedback to the courts. With all the Legislature has to accomplish during a session, the committee rooms and the wells of the House and Senate are unlikely to be efficient forums for determining what court practices and procedures are best suited for dealing with courtroom situations developing in real time, or implementing new technologies.

## **PERFORMANCE IMPLICATIONS**

AOC notes that removing rulemaking responsibility from the Judiciary would reduce the resources devoted to the rulemaking process and may increase litigation in the courts concerning the scope and application of legislatively adopted rules of practice and procedure. Further, it comments that eliminating the flexibility the Judiciary currently maintains over the rulemaking process and limiting rulemaking regarding practice and procedure to legislative action once a

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year or once every two years will impact the Judiciary's ability to effectively meet the needs of the court system and provide for the efficient administration of justice.

### **RELATIONSHIP**

HJR 6 is related to HJR 7, which makes changes to the existing provision of the Constitution regarding bail, including language allowing conditions for denial of bail to be set by the legislature through enactment of statutes.

### **OTHER SUBSTANTIVE ISSUES**

NMAG warns that if passed by the voters, HJR 6 would alter the balance of power between three co-equal branches of government; if abused, it could effectively terminate the ability of the judiciary to operate.

### **ALTERNATIVES**

NMAG suggests these possible alternatives:

1. Revise HJR 6 to provide an opportunity for legislative review, whereby unless affirmatively rejected by the end of the next legislative session, proposed rule changes go into effect;
2. Revise HJR 6 to allow for statutes implementing legislative policy external to the functioning of the courts; or
3. Revise HJR 6 to delete the grant of power to the legislature in article 4 and revise Article VI, §3 to provide that the Supreme Court's rule making power is limited to the conduct of court proceedings and the internal functioning of the inferior courts and court adjuncts.

MD/jle