



Alamogordo City Commission

NOTICE OF MEETING

Special Meeting Agenda

July 28, 2023 - 6:30 PM

Donald E. Carroll City Commission Chambers
City Hall, 1376 E. Ninth Street

Susan L. Payne Mayor
Dusty Wright Mayor Pro -Tem, District 6
Nick Paul District 1
Stephen Burnett District 2
Karl Melton District 3
Josh Rardin District 4
Sharon McDonald District 5

Stephanie Hernandez Acting City Manager
Ashley Smith City Attorney
Rachel Hughs City Clerk

MISSION STATEMENT as Adopted by the City Commission on March 24, 1995.

The City of Alamogordo is a Municipal Corporation that exists solely for the purpose of providing the best possible services to our customers, the citizens of Alamogordo. We are committed to providing these services with honesty, integrity, compassion, fairness, and a commitment to excellence.

We are committed to the long-term financial stability and responsible growth of the City and all decisions will be driven by our commitment to provide the best services possible in a financially sound and responsible manner given the economic realities facing the City.

In accordance with Section 10-15-1.D, NMSA 1978 (2010 Cumulative Supplement), this agenda has been posted on the bulletin board located in the east/west lobby of the City Hall and in the glass case located outside of the north entrance of the City Hall, distributed to the appropriate news media, and posted on the City website: <http://ci.alamogordo.nm.us> within the required time frame. As a courtesy, the entire Agenda Packet has also been posted on the City of Alamogordo website: <http://ci.alamogordo.nm.us>

The Mayor and City Commission request that all cell phones be turned off or set to vibrate. Members of the audience are requested to step outside the Commission Chambers to respond to or to conduct a phone conversation. The Alamogordo Commission Chambers is wheelchair accessible. Other special assistance for disabled attendees must be requested 48 hours in advance by contacting the City Clerk's Office at 575-439-4100.

CALL TO ORDER & ROLL CALL

Announce the presence of a Quorum.

INVOCATION & PLEDGE OF ALLEGIANCE

APPROVAL OF AGENDA

PUBLIC COMMENT

Residents must sign up with the City Clerk to address the City Commission. Comments are limited to 3 minutes, and there will be a maximum of 21 minutes allowed for Public Comment.

NEW BUSINESS

1. Consider, and act upon, approving tourism funding. (*Stephanie Hernandez, Acting City Manager*)
2. Consider, and act upon, Resolution 2023-35 approving the DFA Quarterly Report for the period ending June 30, 2023. (*Evelyn Huff, Finance Director*) **(Roll Call Vote Required)**
3. Consider, and act upon, the approval of Resolution No. 2023-34 amending the Preliminary FY 2023-2024 Budget with carry-over fund balances, and adopting the Final Budget for 2023-2024. (*Evelyn Huff, Finance Director*) **(Roll Call Vote required)**
4. Consider, and act upon, Resolution 2023-33 requesting state officials to review the bond rules implemented in 2017 in response to the amendment of the State of New Mexico Constitution regarding bail for criminal offenders passed in 2016. (*Stephanie Hernandez, Acting City Manager and Ashley Smith, City Attorney*) **(Roll Call Vote required)**

ADJOURNMENT

AGENDA REPORT

CITY OF ALAMOGORDO

CITY COMMISSION

Meeting Date: 7/28/2023

Report Date: 07/25/2023

Report No: 1.

Submitted By: Stephanie Hernandez

Subject: Consider, and act upon, approving tourism funding. *(Stephanie Hernandez, Acting City Manager)*

Fiscal Impact:

Amount Budgeted:

Fund:

Additional Fiscal Impact:

Recommendation:

Background:

WHITE SANDS ALAMOGORDO BALLOON INVITATIONAL TOURISM CONTRACT

THIS AGREEMENT is between WHITE SANDS BALLOON INVITATIONAL (“Tourism Partner”) and the **City of Alamogordo**, a New Mexico municipal corporation (“City”).

WHEREAS, the White Sands Balloon Invitational Event has been a long history within the city of Alamogordo.

WHEREAS the Commission of City of Alamogordo acknowledges White Sands Balloon Invitational brings in guests from all over the region.

WHEREAS THE CITY AND THE WHITE SAND BALLOON INVITATIONAL DO MUTUALLY AGREE TO THE FOLLOWING:

1. Provisions

- The city wishes to enter a 2-year contract and become a major partner with the White Sands Balloon Invitational.
- All promotional material will clearly state that “The City of Alamogordo” is the main sponsor and agree to use The City’s logo when possible.
- The city will provide the Ed Brabson Balloon Park at 700 Lavelle Rd, Alamogordo, New Mexico 88310, for Saturday, September 16th, 2023.
- The city will allow advertising on the Electronic Billboard Sign at 1321 N. White Sands Blvd, Alamogordo, New Mexico, 88310.

2. Compensation. The City shall pay the Tourism Partner for said services \$20,000 (inclusive of tax). The first installment up to \$15,000 will be provided upon receipt of the Invoice and budget. The second installment will be in Fiscal 2025 for any unspent funds not to exceed \$20,000 total. The tourism partner, upon final payment of the amounts due under this Agreement, releases the City, its officers, and employees, from all liabilities and obligations arising from or under this agreement, including but not limited to all damages, losses, costs, liability, and expenses, including but not limited to attorneys’ fees and costs of litigation that the Tourism Partner may incur.

3. Term. The term of this agreement shall be for one (2) year from the date entered below. Either Party may terminate the contract with thirty (30) days' written notice to the other of non-renewal.

4. Status of Tourism Partner. The Tourism Partner and its agents and employees are independent and are not employees of the City of Alamogordo. The Tourism Partner and its agents and employees shall not accrue leave, retirement, insurance, bonding, use of City vehicles, or any other benefits afforded to employees of the City as a result of this agreement. The Tourism Partner acknowledges that all sums received hereunder are reportable by the Tourism Partner for tax purposes, including, without limitation, self-employment and business

income tax. The Tourism Partner agrees not to purport to bind the City unless the Tourism Partner has express written authority to do so, and then only within the strict limits of that authority. The Tourism Partner will be responsible for compliance with all applicable laws, rules and regulations involving, but not limited to, employment, labor hours of work, working conditions, payment of wages, payment of taxes, such as unemployment, social security and other payroll taxes including other applicable contributions from such persons when required by law.

5. Indemnification. The Tourism Partner shall defend, indemnify and hold harmless the City from all actions, proceeding, claims, demands, costs, damages, attorneys' fees and all other liabilities and expenses of any kind from any source which may arise out of the performance of this agreement, caused by the negligent act or failure to act of the Tourism Partner, its officers, employees, servants, subcontractors or agents, resulting in injury or damage to persons or property during the time when the Tourism Partner or any officer, agent, employee, servant or subcontractor thereof has or is performing services pursuant to this agreement.

6. Immunity. The parties acknowledge and agree that nothing in the solicitation or this agreement shall be construed as a modification, compromise or waiver by the City of any rights or defenses of any immunities provided by Federal law or the laws of the State of New Mexico to the City or any of its officers and employees, which they may have had, now have or will have with respect to all matters arising out of this agreement. Any liability incurred in connection with this Agreement is subject to the immunities and limitation of the New Mexico Tort Claims Act.

7. Equal Opportunity Compliance. In accordance with all such laws of the State of New Mexico, the Tourism Partner assures that no person in the United States shall, on the grounds of race, religion, color, national origin, ancestry, sex, age, physical or mental handicap, or serious medical condition, spousal affiliation, sexual orientation or gender identity, be excluded from employment with or participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity performed under this agreement. If the Tourism Partner is found not to be in compliance with these requirements during the life of this agreement, Tourism Partner agrees to take appropriate steps to correct these deficiencies.

8. Confidentiality. Any confidential information provided to or developed by the Tourism Partner in the performance of this agreement shall be kept confidential and shall not be made available to any individual or organization by the Tourism Partner without the prior written approval of the City.

9. Conflict of Interest. The Tourism Partner warrants that it presently has no interest and shall not acquire any interest, direct or indirect, which would conflict in any manner or degree with the performance or services required under the Agreement. The Tourism Partner certifies that the requirements of the Governmental Conduct Act, Sections 10-16-1 through 10-16-18, NMSA 1978, regarding contracting with a public officer, state employee or former state employee have been followed.

10. Miscellaneous Provisions.

- a. This agreement shall be governed by the laws of the State of New Mexico as to interpretation and performance.
- b. This agreement may be amended only in writing signed by both parties.
- c. This agreement may not be assigned in whole or in part without written consent of the City.

IN WITNESS WHEREOF, the City and the Tourism Partner have executed this Agreement as of the dates indicated below.

TOURISM PARTNER

Date: _____

By: _____

NM Taxpayer Identification Number: _____

Federal Taxpayer Identification Number: _____

CITY OF ALAMOGORDO, NEW MEXICO
a New Mexico municipal corporation

Date: _____

By: _____
Stephanie Hernandez, Acting City Manager

ATTEST:

Rachel Hughs, City Clerk

APPROVED AS TO FORM:

Ashley Smith, City Attorney

AGENDA REPORT

CITY OF ALAMOGORDO

CITY COMMISSION

Meeting Date: 7/28/2023

Report Date: 07/25/2023

Report No: 2.

Submitted By: Evelyn Huff

Subject: Consider, and act upon, Resolution 2023-35 approving the DFA Quarterly Report for the period ending June 30, 2023. *(Evelyn Huff, Finance Director)* **(Roll Call Vote Required)**

Fiscal Impact:

Amount Budgeted:

Fund:

Additional Fiscal Impact:

Recommendation: Approve the Resolution

Background: The Quarterly DFA report must be uploaded to the Local Government Budget Management System (LGBMS) by July 31, 2023. The Quarter 4 report must be approved by resolution. Attached is Resolution 2023-35.

RESOLUTION NO. 2023-35

A RESOLUTION REQUESTING THE DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF NEW MEXICO, APPROVE THE QUARTERLY FINANCIAL REPORT FOR THE PERIOD ENDING JUNE 30, 2023.

WHEREAS, the City of Alamogordo, New Mexico has developed a budget for fiscal year 2023-2024; and

WHEREAS, the quarterly financial report for the fourth quarter ending June 30, 2023, has been reviewed and approved to ensure the accuracy of the beginning balances used for the FY2024 budget; and

WHEREAS, it has hereby certified that the contents in this report as true and correct to the best of our knowledge and that this report depicts all funds for the fourth quarter of fiscal year 2023.

NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF ALAMOGORDO, NEW MEXICO, that the quarterly financial report for the fourth quarter ending June 30, 2023, is hereby approved and respectfully requests approval from the Local Government Division of the Department of Finance and Administration.

PASSED, APPROVED AND ADOPTED by the Governing Body of the City of Alamogordo, New Mexico, at a regular meeting held this 28th. day of July 2023.

CITY OF ALAMOGORDO, NEW MEXICO,
A NEW MEXICO MUNICIPAL CORPORATION

By: _____
Susan L Payne, Mayor

ATTEST:

Rachel Hughs, City Clerk

APPROVED AS TO FORM:

Ashley N. Smith, City Attorney

AGENDA REPORT

CITY OF ALAMOGORDO

CITY COMMISSION

Meeting Date: 7/28/2023

Report Date: 07/25/2023

Report No: 3.

Submitted By: Evelyn Huff

Subject: Consider, and act upon, the approval of Resolution No. 2023-34 amending the Preliminary FY 2023-2024 Budget with carry-over fund balances, and adopting the Final Budget for 2023-2024. (*Evelyn Huff, Finance Director*) **(Roll Call Vote required)**

Fiscal Impact:

Amount Budgeted:

Fund:

Additional Fiscal Impact:

Recommendation: Approve the Resolution

Background: The City Commission held the Budget Hearing for the Preliminary Fiscal Year 2023-2024 Budget on May 1, 2023.

The Preliminary FY2023-2024 Budget was approved and adopted with Resolution 2023-16 by the City Commission on May 23, 2023, and preliminary approval was received from the State of New Mexico Department of Finance and Administration (DFA) on June 9, 2023.

Resolution 2023-34 adjusts the beginning cash balances to the unaudited cash balances as of June 30, 2023. It also carries over incomplete projects, grants and purchase orders for completion in FY2024.

RESOLUTION NO. 2023-34

A RESOLUTION REQUESTING THE DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF NEW MEXICO, APPROVE REVISED BUDGET FIGURES FOR CERTAIN LINE ITEMS IN THE CITY'S BUDGET FOR FISCAL YEAR 2023-2024.

WHEREAS, the City of Alamogordo, New Mexico wishes approval to change some of the budget line-item figures of various funds; and

WHEREAS, the Department of Finance and Administration, State of New Mexico, gave its written interim approval to the City of Alamogordo, New Mexico's annual budget on June 9, 2023, for fiscal year 2023-2024; and

WHEREAS, the City of Alamogordo, New Mexico, has tabulated on the following pages the additional resources and expenditures for fiscal year 2023-2024.

NOW, THEREFORE, BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF ALAMOGORDO, NEW MEXICO, that the City's annual budget for fiscal year 2023-2024 be and hereby is revised as of July 28, 2023, to reflect a more true and accurate projection of the actual revenues and expenditures for fiscal year 2023-2024 as shown on the following pages.

NOW, BE IT FURTHER RESOLVED BY THE GOVERNING BODY OF THE CITY OF ALAMOGORDO, NEW MEXICO, that the Department of Finance and Administration, State of New Mexico, be requested to give its written approval to the revised budget figures computed on July 28, 2023, as a more true and accurate projection of the actual revenues and expenditures for fiscal year 2023-2024.

PASSED, APPROVED AND ADOPTED by the Governing Body of the City of Alamogordo, New Mexico, at a Regular Meeting held this 28th day of July 2023.

CITY OF ALAMOGORDO, NEW MEXICO,
A NEW MEXICO MUNICIPAL CORPORATION

By: _____
Susan L. Payne, Mayor

ATTEST:

Rachel Hughs, City Clerk

APPROVED AS TO FORM:

Ashley N. Smith, City Attorney

AGENDA REPORT

CITY OF ALAMOGORDO

CITY COMMISSION

Meeting Date: 7/28/2023

Report Date: 07/25/2023

Report No: 4.

Submitted By:

Subject: Consider, and act upon, Resolution 2023-33 requesting state officials to review the bond rules implemented in 2017 in response to the amendment of the State of New Mexico Constitution regarding bail for criminal offenders passed in 2016. (*Stephanie Hernandez, Acting City Manager and Ashley Smith, City Attorney*) **(Roll Call Vote required)**

Fiscal Impact:

Amount Budgeted:

Fund:

Additional Fiscal Impact:

Recommendation:

Background:

RESOLUTION NO. 2023-33

A RESOLUTION REQUESTING STATE OFFICIALS TO REVIEW THE BOND RULES IMPLEMENTED IN 2017 IN RESPONSE TO THE AMENDMENT OF THE STATE OF NEW MEXICO CONSTITUTION REGARDING BAIL FOR CRIMINAL OFFENDERS.

WHEREAS on January 29th 2023, the city of Alamogordo Police Department was involved in an officer-involved shooting, in which the suspect went to jail and was held for violating conditions of release in a prior criminal case.

WHEREAS, on June 16, 2023, the alleged defendant was released on Conditions of Release set by the Court.

WHEREAS, on July 15, 2023, officers attempted to conduct a traffic stop on a vehicle. The Vehicle did not stop for Officers and attempted to flee. Officers did not pursue the vehicle. Soon after, Officers located the same vehicle involved in a crash. Officers observed a male subject fleeing the scene on foot. Officers gave chase, in which shots were fired. As a result of the gunfire, Officer Ferguson was injured and later succumbed to his injuries.

WHEREAS, in 2016, the State of New Mexico Constitution was amended concerning bail for Criminal Offenders.

WHEREAS, in 2017, new bond rules were implemented in response to the amendments to the Constitution.

WHEREAS, in 2020, the rules were amended to allow the court to schedule a detention hearing on their own under certain circumstances as listed.

WHEREAS, in 2022, amendments were created to fix grammatical errors in the rules.

BE IT RESOLVED, the Commission of the City of Alamogordo Requests the State Senators, State Representatives, Attorney General, and the New Mexico Governor to work together with local attorneys and judges to review and modify the bail bond reform laws in response to Officer Anthony Ferguson's ultimate sacrifice in the line of Duty.

PASSED, APPROVED, AND ADOPTED this _____ day of _____, 2023.

CITY OF ALAMOGORDO, NEW MEXICO
a New Mexico municipal corporation

By: _____
Susan L. Payne, Mayor

ATTEST:

Rachel Hughs, City Clerk

APPROVED AS TO FORM:

Ashley Smith, City Attorney

2022 NEW MEXICO COURT ORDER 0402 (C.O. 0402)

COURT RULES

NOTICE: Rules and related materials supplied by the courts are included in this database. Because all changes may not have been supplied, the court clerk should be consulted to determine current rules. Stricken material is indicated by ~~Text~~.

NM ORDER 0402

C.O. 0402

COURT RULES

Effective: to

STATE OF NEW MEXICO

RULES OF CRIMINAL PROCEDURE FOR THE DISTRICT COURTS

RULES OF CRIMINAL PROCEDURE FOR THE MAGISTRATE COURTS

RULES OF CRIMINAL PROCEDURE FOR THE METROPOLITAN COURTS

RULES OF PROCEDURE FOR THE MUNICIPAL COURTS

CRIMINAL FORMS

PROPOSED REVISIONS TO THE RULES OF APPELLATE PROCEDURE PROPOSAL 2022-002

January 3, 2022

The Rules of Criminal Procedure for New Mexico State Courts Committee has recommended amendments to Rules 5-106, 5-401, 5-403, 5-409, 6-401, 6-403, 6-409, 6-501, 7-401, 7-403, 7-409, 7-501, 8-401, and 8-403 NMRA and Form 9-303 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:

Jennifer L. Scott, 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 February 3, 2022, 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.

<< NM R DIST CT RCRP Rule 5-106 >>

5-106. PEREMPTORY CHALLENGE TO A DISTRICT JUDGE; RECUSAL; PROCEDURE FOR EXERCISING

A. Definition of Parties. “Party,” as used in this rule, shall mean a defendant, the state, or an attorney representing the defendant or the state. A party may not excuse a judge after the party has requested that judge to perform any discretionary act.

B. Extent of Excuse or Challenge. No judge may be excused from conducting an arraignment or first appearance, setting initial conditions of release, reviewing a lower court's order setting or revoking conditions of release, or presiding over a **pretrial detention hearing or a preliminary examination in a case where a pretrial detention motion has been filed**. No party shall excuse more than one judge.

C. Mass Reassignment. A mass reassignment occurs when one hundred (100) or more pending cases are reassigned contemporaneously.

D. Procedure for Excusing a District Judge. The statutory right to excuse the judge before whom the case is pending must be exercised by a party filing a peremptory election to excuse with the clerk of the district court within ten (10) days after the later of

- (1) arraignment or the filing of a waiver of arraignment;
- (2) service by the clerk of notice of assignment or reassignment of the case to a judge;
- (3) completion of publication of notice of reassignment in the case of a mass reassignment; or
- (4) filing of a notice of appeal from a lower court.

E. Notice of Reassignment. After the arraignment or the filing of a waiver of arraignment, if the case is reassigned to a different judge, the clerk shall give notice of reassignment to all parties. When a mass reassignment occurs, the clerk shall give notice of the reassignments to all parties by publishing notice for four (4) consecutive weeks on the State Bar ~~web-site~~ **website** and in two (2) consecutive New Mexico Bar Bulletins. Service of notice by publication is complete on the date printed on the second issue of the Bar Bulletin.

F. Service of Excusal. Any party electing to excuse a judge shall serve notice of that election on all parties.

G. Misuse of Peremptory Excusal Procedure. Peremptory excusals are not to be exercised to hinder, delay, or obstruct the administration of justice. If it appears that an attorney or group of attorneys may be using peremptory excusals for improper purposes or with such frequency as to impede the administration of justice, the Chief Judge of the district shall send a written notice to the Chief Justice of the Supreme Court and shall send a copy of the written notice to the attorney or group of attorneys believed to be improperly using peremptory excusals. The Chief Justice may take appropriate action to address any misuse, including issuance of an order providing that the attorney or attorneys or any party they represent may not file peremptory excusals for a specified period of time or until further order of the Chief Justice.

H. Recusal. No district judge shall sit in any action in which the judge's impartiality may reasonably be questioned under the provisions of the Constitution of New Mexico or the Code of Judicial Conduct, and the judge shall file a recusal in ~~any such~~ **that** action. ~~Upon~~ **On** receipt of notification of recusal from a district judge, the clerk of the court shall give written notice to each party.

I. Disability During Trial. If by reason of death, sickness, or other disability the judge before whom a jury trial has commenced is unable to proceed with the jury trial, any other judge regularly sitting in or assigned to the court, ~~upon~~ **on** certifying familiarity with the record of the jury trial, may proceed with and finish the jury trial or, if appropriate, may grant a mistrial. In a nonjury trial, ~~upon~~ **on** motion of the defendant, a mistrial shall be granted upon disability of the trial judge.

J. Disability After Verdict or Finding of Guilt. If by reason of death, sickness, or other disability the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other eligible judge may perform those duties on certifying familiarity with the record of the trial.

[As amended, effective August 1, 1989; September 1, 1990; June 1, 1994; as amended by Supreme Court Order No. 08–8300–039, effective December 15, 2008; as amended by Supreme Court Order No. 15–8300–019, effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 19–8300–008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20–8300–020, effective for all cases pending or filed on or after December 31, 2020; **as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.**]

Committee commentary

This rule governs the exercise of the statutory right to excuse the judge before whom the case is pending. *See* NMSA 1978, § 38–3–9. Paragraph B precludes a party from exercising this right in certain pretrial proceedings, including arraignment and pretrial release and detention hearings. Paragraph B does not prevent a judge from recusing under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or on motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21–211 NMRA.

Reassignment of a judge usually occurs in individual cases in which a party has excused the trial judge or the judge recuses himself or herself. When this happens, the clerk easily can and does provide individual notice of the reassignment to the parties by mail.

When a judge retires, dies, is disabled, or assumes responsibility for different types of cases (e.g., from a criminal to a civil docket), large numbers of cases are reassigned and parties who have not previously exercised a peremptory recusal may choose to recuse the successor judge. Providing individual notice by mail to every party in each ~~such case~~ **of those cases** is administratively difficult, expensive, and time consuming. Clerks sometimes provide notice of reassignment in an alternative manner—usually through publication in the Bar Bulletin, on the State Bar's ~~web site~~ **website**, or both.

The 2008 amendment formally incorporates into Rule 5–106 NMRA the use of notice by publication in such a situation—now identified as a “mass reassignment.” The amended rule requires that the specified notice be published on the State Bar's ~~web site~~ **website** for four (4) consecutive weeks and in two (2) consecutive issues of the New Mexico Bar Bulletin, and provides that a party who has not yet exercised a peremptory recusal may do so within ten (10) days after the date of the second Bar Bulletin. When a judge's entire caseload is reassigned, the publication notice need not contain the caption of each affected case, but must contain the names of the initially-assigned judge and the successor judge.

There may be occasions when many, but not all, of a judge's cases are reassigned; for example when an additional judge is appointed in a judicial district and a ~~portion~~ **part** of other judges' ~~eases~~ **caseloads** are assigned to the new judge. When this occurs, if the number of pending cases reassigned from any judge exceeds one hundred (100), the 2008 amendment authorizes notice by publication. To assure that the parties have notice of which cases were reassigned, the court should either make a list available containing the title of the action and file number of each case reassigned, or not reassigned, whichever is less. The court may publish ~~such a~~ **that** list in the Bar Bulletin, publish a notice in the Bar Bulletin that directs the reader to the court's ~~web site~~ **website** where such a list will be posted, or post notice on the State Bar's ~~web site~~ **website**.

Substituting publication for individual notice increases the chance that a party will not receive actual notice of a reassignment. ~~Where~~ **When** actual notice is not achieved through publication, the trial court has ample authority to accept a late recusal. *See* Rule 5–104(B) NMRA (providing that the court may permit ~~an~~ act to be done after a deadline has passed for cause shown).

[Adopted by Supreme Court Order No. 08–8300–039, effective December 15, 2008; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 19–8300–008, effective for all cases pending or filed on or after July 1, 2019; as amended by Supreme Court Order No. 20–8300–020, effective for all cases pending or filed on or after December 31, 2020; **as amended for stylistic compliance by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.**]

<< NM R DIST CT RCRP Rule 5–401 >>

5–401. PRETRIAL RELEASE**A. Hearing.**

(1) *Time.* If a case is initiated in the district court, and the conditions of release have not been set by the magistrate or metropolitan court, the district court shall conduct a hearing under this rule and issue an order setting the conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) *Right to Counsel.* If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to Pretrial Release; Recognizance or Unsecured Appearance Bond. Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or ~~upon~~ on the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be Considered in Determining Conditions of Release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information ~~concerning~~ about

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record ~~concerning~~ about appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. Non–Monetary Conditions of Release. In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

- (1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;
- (2) maintain employment, or, if unemployed, actively seek employment;
- (3) maintain or commence an educational program;
- (4) abide by specified restrictions on personal associations, place of abode, or travel;
- (5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify ~~concerning~~ **about** the offense;
- (6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
- (7) comply with a specified curfew;
- (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;
- (10) **refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner;**
- ~~(10)~~ (11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
- ~~(11)~~ (12) submit to a drug test or an alcohol test on request of a person designated by the court;
- ~~(12)~~ (13) return to custody for specified hours ~~following~~ **after** release for employment, schooling, or other limited purposes;
- ~~(13)~~ (14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. Secured Bond. If the court makes findings of the reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) Factors to be Considered in Setting Secured Bond.

- (a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) *Types of Secured Bond.* If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) Percentage bond. The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph M of this rule.

(b) Property bond. The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 5–401.1 NMRA.

(c) Cash or surety bond. The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph M of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 5–401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order Setting Conditions of Release; Findings regarding about Secured Bond.

(1) *Contents of Order Setting Conditions of Release.* The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice

(2) *Written Findings regarding about Secured Bond.* The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. Pretrial Detention.

(1) If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5–409 NMRA.

(2) The court may schedule a detention hearing within the time limits set forth in Rule 5–409(F)(1) NMRA and give notice to the prosecutor and defendant when

(a) The defendant is charged with a felony offense

(i) involving the use of a firearm;

(ii) involving the use of a deadly weapon resulting in great bodily harm or death,

(iii) which authorizes a sentence of life in prison without the possibility of parole, or

(b) A public safety assessment tool **approved by the Supreme Court for use in the jurisdiction** flags potential new violent criminal activity for the defendant.

(3) If the prosecutor does not file ~~an expedited~~ a motion for pretrial detention by the date scheduled for the detention hearing, the court shall treat the hearing as a pretrial release hearing under this rule and issue an order setting conditions of release.

H. Case Pending in District Court; Motion for Review of Conditions of Release.

(1) *Motion for Review.* If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) *Review Hearing.* The district court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~thereupon~~ then released, the court shall state in the record the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) *Work or School Release.* A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall state in the record the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the district court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) *Subsequent Motion for Review.* The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. Amendment of Conditions. The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the a condition of release, the court shall follow the procedures set forth in Rule 5–403 NMRA.

J. Record of Hearing. A record shall be made of any hearing held by the district court under this rule.

K. Cases Pending in Magistrate, Metropolitan, or Municipal Court; cPetition for Release or Review by District Court

(1) *Case Within Magistrate, Metropolitan, or Municipal Court Trial Jurisdiction.* A defendant charged with an offense that is within magistrate, metropolitan, or municipal court trial jurisdiction may file a petition in the district court for review of the magistrate, metropolitan, or municipal court's order setting conditions of release only after the magistrate, metropolitan, or municipal court has ruled on a motion to review the conditions of release under Rule 6–401(H) NMRA, Rule 7–401(H) NMRA, or Rule 8–401(G) NMRA. The defendant shall attach to the district court petition a copy of the magistrate, metropolitan, or municipal court order disposing of the defendant's motion for review.

(2) *Felony Case.* A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the defendant's arrest.

(3) *Petition; Requirements.* A petition under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;
- (b) serve a copy on the district attorney; and
- (c) provide a copy to the assigned district court judge.

(4) *Magistrate, Metropolitan, or Municipal Court's Jurisdiction Pending Determination of the Petition.* ~~Upon~~ **On** the filing of a petition under this paragraph, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court, **unless the case is dismissed or a finding of no probable cause is made.** The magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court while the district court petition is pending. The magistrate, metropolitan, or municipal court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) *District Court Review.* The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly ~~transmit~~ **send** a copy of the notice to the magistrate, metropolitan, or municipal court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(6) *District Court Order; Transmission to Magistrate, Metropolitan, or Municipal Court.* The district court shall promptly ~~transmit~~ **send** to the magistrate, metropolitan, or municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

L. Expedited Trial Scheduling for Defendant in Custody. The district court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. **The court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.**

M. Return of Cash Deposit. If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

N. Release from Custody by Designee. The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5–408 NMRA. A designee shall release a defendant from custody ~~prior to~~ before the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5–408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

O. Bind Over to District Court. For any case that is not within magistrate or metropolitan court trial jurisdiction, ~~upon~~ on notice to that court, any bond shall be transferred to the district court ~~upon~~ on the filing of an information or indictment in the district court.

P. Evidence. Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

Q. Forms. Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

R. Judicial Discretion; Disqualification and Excusal. Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; September 1, 2005; as amended by Supreme Court Order No. 07–8300–029, effective December 10, 2007; by Supreme Court Order No. 10–8300–033, effective December 10, 2010; as amended by Supreme Court Order No. 14–8300–017, effective for all cases pending or filed on or after December 31, 2014; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20–8300–013, effective for all cases pending or filed on or after November 23, 2020; **as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.**]

Committee commentary

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014–NMSC–038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. *See* 18 U.S.C. § 3142. This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014–NMSC–038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, *see* Rules 6–401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7–401 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8–401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 5–104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5–409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such any release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014–NMSC–038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions prior to before a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination as to on whether the defendant can afford to pay all or a portion part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant due to because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant due to because of financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987–NMSC–108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court.”); *see also* NMSA 1978, § 31–3–2(B)(2) (authorizing the forfeiture of bond upon on the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014–NMSC–038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.”); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court “is ‘excessive’ under the Eighth Amendment”). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5–409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E.

The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond where the involving property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 5–401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9–303 NMRA (order setting conditions of release). Paragraph F also requires the court to make written findings justifying the imposition of a secured bond; if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such any supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district court must follow the procedures set forth in Rule 5–409 NMRA. Paragraph G was amended in 2020 to permit the court to automatically schedule a pretrial detention hearing in certain categories of cases. However, ~~prior to~~ **before** the hearing, the prosecutor retains the burden of filing an expedited motion for pretrial detention under Rule 5–409 NMRA. If the prosecutor does not file ~~such that~~ a motion ~~prior to~~ **before** the hearing, then the court is to set conditions of release rather than consider detention.

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release “in an expedited manner” and to release a defendant who is being held solely ~~due to~~ **because of** financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9–301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph L requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody ~~due to~~ **because of** inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part ~~due to~~ **because** “the stringent time limitations of the Speedy Trial Act, 18 U.S.C. § 3161”); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). **This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.**

Under NMSA 1978, Section 31–3–1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph N, a designee must be designated by the chief district court judge in a written court order. A person may not be appointed as a designee if ~~such~~ the person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph N and Rule 5–408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~prior to~~ **before** that defendant’s first appearance before a judge.

Paragraph O requires the magistrate or metropolitan court to transfer any bond to the district court ~~upon~~ **on** notice from the district attorney that an information or indictment has been filed. See Rules 6–202(E)–(F), 7–202(E)–(F) NMRA (requiring the district attorney to notify the magistrate or metropolitan court of the filing of an information or indictment in the district court). Paragraph P of this rule dovetails with Rule 11–1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in district court with respect to matters of pretrial release. ~~Like~~ **As with courts in** other types of proceedings where in which the Rules of Evidence do not apply, ~~at a court presiding over a pretrial release hearing the court is~~ responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir. 1983); *State v. Guthrie*, 2011–NMSC–014, ¶¶ 36–39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 5–106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 38–3–9. Paragraph R of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21–211 NMRA.

[As amended by Supreme Court Order No. 07–8300–029, effective December 10, 2007; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No.

20–8300–021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R DIST CT RCRP Rule 5–403 >>

5–403. REVOCATION OR MODIFICATION OF RELEASE ORDERS

A. Scope. In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

B. Motion for Revocation or Modification of Conditions of Release.

- (1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor or on the court's own motion.
- (2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. Issuance of Summons or Bench Warrant. If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. Initial Hearing.

- (1) The court shall hold an initial hearing as soon as practicable, but if the defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is detained if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center.
- (2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.
- (3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. Evidentiary Hearing.

- (1) *Time.* The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing.
- (2) *Defendant's Rights.* The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. Order at Completion of Evidentiary Hearing. At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 5–401 NMRA; or
- (3) revoke the defendant's release, if the court
 - (a) finds ~~that there is~~ either
 - (i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or
 - (ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and
 - (b) finds ~~that there is~~ clear and convincing evidence that either
 - (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
 - (ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation.

G. Evidence. The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. Review of Conditions. If the court enters an order setting new or additional conditions of release, the defendant may file a motion to review the conditions under Rule 5–401(H) NMRA. If, ~~upon~~ on disposition of the motion, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

I. Expedited Trial Scheduling for Defendant in Custody. The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. ~~On the written motion of the prosecutor or the defendant, or on the court's own motion, the~~ The court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.

J. Appeal. If the court revokes the defendant's release, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA. The appeal shall be heard in an expedited manner. The defendant shall be detained pending the disposition of the appeal.

K. Petition for Review of Revocation Order Issued by Magistrate, Metropolitan, or Municipal Court. If the magistrate, metropolitan, or municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph.

(1) *Petition; Requirements.* The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the magistrate, metropolitan, or municipal court;

- (b) serve a copy on the district attorney; and
- (c) provide a copy to the assigned district court judge.

(2) *Magistrate, Metropolitan, or Municipal Court's Jurisdiction Pending Determination of the Petition.* ~~Upon~~ On the filing of the petition, the magistrate, metropolitan, or municipal court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The case shall proceed in the magistrate, metropolitan, or municipal court while the petition is pending.

(3) *District Court Review.* The district court shall rule on the petition in an expedited manner.

- (a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:
 - (i) issue an order affirming the revocation order; or
 - (ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~transmit~~ send a copy of the notice to the magistrate, metropolitan, or municipal court.

(b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release in accordance with Rule 5–401 NMRA.

(4) *Transmission of District Court Order to Magistrate, Metropolitan, or Municipal Court.* The district court shall promptly ~~transmit~~ send the order to the magistrate, metropolitan, or municipal court, and jurisdiction over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

(5) *Appeal.* If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

L. Judicial Discretion; Disqualification and Excusal. Action by any court on any matter relating to pretrial release or detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from reviewing a lower court's order revoking conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 13–8300–046, effective for all cases pending or filed on or after December 31, 2013; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18–8300–024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order Nos. 20–8300–013 and 20–8300–019, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014–NMCA–037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968–NMSC–009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 (“If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts.”); *State v. Rivera*, 2003–NMCA–059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of

release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line.”), *rev'd on other grounds*, 2004–NMSC–001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11–1101(D)(3)(e) NMRA. ~~Like~~ **As with courts in** other types of proceedings where ~~in which~~ the Rules of Evidence do not apply, ~~at a court presiding over a pretrial detention hearing the court~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011–NMSC–014, ¶¶ 36–39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982–NMCA–058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

Consistent with Rule 5–106 NMRA, a party cannot exercise the statutory right to excuse a judge who is reviewing a lower court’s order setting or revoking conditions of release. *See NMSA 1978*, § 38–3–9. Paragraph L of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See N.M. Const. art. VI, § 18; Rule 21–211 NMRA.*

The 1975 amendment to Rule 5–402 NMRA makes it clear that this rule may be invoked while the defendant is appealing a conviction. *See Rule 5–402 NMRA and commentary.*

[As amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R DIST CT RCRP Rule 5–409 >>

5–409. PRETRIAL DETENTION

A. Scope. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 5–401 NMRA, under Article II, Section 13 and this rule, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a motion titled ~~“Expedited Motion for Pretrial Detention”~~ **for an expedited pretrial detention hearing** and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. Motion for Pretrial Detention. The prosecutor may file ~~an expedited~~ a motion for **an expedited pretrial detention hearing** at any time in ~~both the court where the case is pending and in the district court~~. The motion shall include the specific facts that warrant pretrial detention ~~and, in the event that probable cause has not yet been determined,~~ **shall specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.**

(1) The prosecutor shall immediately deliver a copy of the motion to

(a) the detention center holding the defendant, if any;

(b) the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender.

(2) The defendant may file a response to the motion for pretrial detention in the district court, but the filing of a response shall not delay the hearing under Paragraph F of this rule. If a response is filed, the defendant shall promptly provide a copy to the assigned district court judge and the prosecutor.

(3) ~~The~~ **Except where the court finds no probable cause, the** court may not grant or deny the motion for pretrial detention without a hearing.

C. Case pending initiated in Magistrate or Metropolitan Court. If a motion for pretrial detention is filed in the magistrate or metropolitan court and a probable cause determination has not been made, the magistrate or metropolitan court shall determine probable cause under Rule 6–203 NMRA or Rule 7–203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6–203 NMRA or Rule 7–203 NMRA and shall deny the motion for pretrial detention without prejudice. If probable cause has been found, the magistrate or metropolitan court clerk **shall proceed to conduct the defendant's first appearance under Rule 6–501 NMRA or Rule 7–501 NMRA and thereafter promptly transmit** send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The magistrate or metropolitan court's ~~court~~ **shall then close the case and its jurisdiction shall then be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph (I) of this rule.**

D. Case pending initiated in District Court. If a motion for pretrial detention is filed in the district court and ~~an initial finding of probable cause has not been found~~ **made under Article II, Section 14 of the New Mexico Constitution or Rule 5–208(D) NMRA, Rule 5–301 NMRA, Rule 6–203 NMRA, Rule 6–204(B) NMRA, or Rule 7–203 NMRA, or Rule 7–204(B) NMRA,** the district court shall determine probable cause in accordance with Rule 5–301 NMRA. If the ~~district~~ court finds no probable cause, the ~~district~~ court shall order the immediate personal recognizance release of the defendant under Rule 5–301 NMRA and shall deny the motion for pretrial detention without prejudice. **If probable cause is found, the court shall proceed to conduct the defendant's first appearance under Rule 5–301(D) NMRA and Rule 5–401(A) NMRA.**

E. Detention Pending Hearing; Warrant.

(1) *Defendant in Custody When Motion is Filed.* If a detention center receives a copy of a motion for pretrial detention, the detention center shall distribute the motion to any person designated by the district, magistrate, or metropolitan court to release defendants from custody under Rule 5–401(N) NMRA, Rule 5–408 NMRA, Rule 6–401(M) NMRA, Rule 6–408 NMRA, Rule 7–401(M) NMRA, or Rule 7–408 NMRA. All authority of any person to release a defendant pursuant to such designation is terminated upon receipt of a detention motion until further court order.

(2) *Defendant Not in Custody When Motion is Filed.* If the defendant is not in custody when the motion for pretrial detention is filed, the district court may issue a warrant for the defendant's arrest if the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution. If the motion does not allege sufficient facts, the court shall issue a summons and notice of hearing.

F. Pretrial Expedited Pretrial Detention Hearing. The district court shall hold a **an expedited** hearing on the motion for pretrial detention to determine whether any release condition or combination of conditions set forth in Rule 5–401 NMRA will reasonably protect the safety of any other person or the community. ~~Upon~~ **On the request of the prosecutor or on the court's**

own motion, the ~~district~~ court shall set the matter for a preliminary examination to be held concurrently with the motion for pretrial detention.

(1) Time.

(a) **Time limit.** The hearing shall be held promptly. Unless the court has issued a summons and notice of hearing under Subparagraph (E)(2) of this rule, the hearing shall commence no later than five (5) days after the later of the following events:

- (i) the filing of the motion for pretrial detention; or
- (ii) the date the defendant is arrested as a result of the motion for pretrial detention.

(b) **Time limit for concurrent hearings.** Notwithstanding the time limit specified in Subparagraph (F)(1)(a) of this rule, if the prosecutor requests or the court on its own motion orders the expedited pretrial detention hearing and preliminary examination to be held concurrently, the consolidated hearing shall be held no less than eight (8) days and no more than ten (10) days following the applicable triggering event identified in Subparagraph (F)(1)(a)(i) and (ii) of this rule.

~~(b)~~ (c) **Extensions.** The time enlargement provisions in Rule 5–104 NMRA do not apply to a pretrial detention hearing. The court ~~may~~ shall extend the time limit for holding the hearing as follows:

- (i) ~~for up to three (3) days~~ **to five (5) days** if in the motion for pretrial detention the prosecutor requests ~~or the district court on its own motion orders~~ a preliminary hearing to be held concurrently with the detention hearing;
- (ii) for up to three (3) days upon a showing that extraordinary circumstances exist and justice requires the extension;
- (iii) upon the defendant filing a waiver of the time limit; or
- (iv) upon stipulation of the parties.

~~(c)~~ (d) **Notice.** The court shall promptly schedule the hearing and notify the parties of the hearing setting within one (1) business day after the filing of the motion.

(2) Initial Disclosures.

(a) The prosecutor shall promptly disclose to the defendant prior to the hearing

- (i) all evidence that the prosecutor intends to rely on at the hearing, and
- (ii) all exculpatory evidence known to the prosecutor.

(b) Except in cases where the hearing is held within two (2) business days after the filing of the motion, the prosecutor shall disclose evidence under this subparagraph at least twenty-four (24) hours before the hearing. At the hearing the prosecutor may offer evidence or information that was discovered after the disclosure deadline, but the prosecutor must promptly disclose the evidence to the defendant.

(3) **Defendant's Rights.** The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

(4) *Prosecutor's Burden.* The prosecutor must prove by clear and convincing evidence that **the defendant is likely to pose a threat to the safety of others if released pending trial and that** no release conditions will reasonably protect the safety of any other person or the community.

(5) *Evidence.* The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at the hearing. The court may make its decision regarding pretrial detention based upon documentary evidence, court records, proffer, witness testimony, hearsay, argument of counsel, input from a victim, if any, and any other reliable proof presented at the hearing.

(6) *Factors to be Considered.* The court shall consider any fact relevant to the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release and any fact relevant to the issue of whether any conditions of release will reasonably protect the safety of any person or the community, including but not limited to the following:

- (a) the nature and circumstances of the offense charged, including whether the offense is a crime of violence;
- (b) the weight of the evidence against the defendant;
- (c) the history and characteristics of the defendant;
- (d) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;
- (e) any facts tending to indicate that the defendant may or may not commit new crimes if released;
- (f) whether the defendant has been ordered detained under Article II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in another pending case or was ordered detained based on a finding of dangerousness in any prior case; and
- (g) any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, provided that the court shall not defer to the recommendation in the instrument but shall make an independent determination of dangerousness and community safety based on all information available at the hearing.

G. Order for Pretrial Detention. The district court shall issue a written order for pretrial detention at the conclusion of the pretrial detention hearing if the court determines by clear and convincing evidence that **the defendant is likely to pose a threat to the safety of others if released pending trial and that** no release conditions will reasonably protect the safety of any other person or the community. The court shall file findings of the individualized facts justifying the detention as soon as possible, but no later than three (3) days after the conclusion of the hearing.

H. Order Setting Conditions of Release. The district court shall deny the motion for pretrial detention if, on completion of the pretrial detention hearing, the court determines that the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order setting conditions of release under Rule 5–401 NMRA. The court shall file findings of the individualized facts justifying the denial of the detention motion as soon as possible, but no later than three (3) days after the conclusion of the hearing.

I. Further Proceedings in Cases Initiated in Magistrate or Metropolitan Court. ~~Upon completion of the hearing, if the case was pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court an order closing the magistrate or metropolitan court case.~~ **If, following a preliminary examination, the district court finds no probable cause to believe that the defendant has committed a felony offense, the court shall set conditions of release and may remand any remaining misdemeanor charges to the magistrate or metropolitan court for further proceedings.**

J. Expedited Trial Scheduling for Defendant in Custody. The district court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. **The court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year.**

K. Successive Motions for Pretrial Detention and Motions to Reconsider. On written motion of the prosecutor or the defendant, the district court may reopen the detention hearing at any time before trial if the court finds that

(1) information exists that was not known to the movant at the time of the hearing or circumstances have changed subsequent to the hearing, and

(2) the information or changed circumstance has a material bearing on whether the previous ruling should be reconsidered.

L. Appeal. Either party may appeal the district court order disposing of the motion for pretrial detention in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA. The district court order shall remain in effect pending disposition of the appeal.

M. Judicial Discretion; Disqualification and Excusal. Action by any court on any matter relating to pretrial detention shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from presiding over a detention hearing unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18–8300–024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order Nos. 20–8300–013 and 20–8300–021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

Paragraph A — In addition to the detention authority for dangerous defendants authorized by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court conceivably could be faced with a request to detain under the preexisting exception to the right to pretrial release in “capital offenses when the proof is evident or the presumption great.” As a result of the repeal of capital punishment for offenses committed after July 1, 2009, this provision will be applicable only to offenses alleged to have been committed prior to that date for which capital punishment may be imposed. *See State v. Ameer*, 2018–NMSC–030. Although this rule does not provide the district court with express sanction authority, the district court retains inherent authority to “impose a variety of sanctions on both litigants and attorneys in order to regulate docket, promote judicial efficiency, and deter frivolous filings.” *State ex rel. N.M. State Highway & Transp. Dep’t v. Baca*, 1995–NMSC–033, ¶ 11, 120 N.M. 1, 896 P.2d 1148 (internal quotation marks and citation omitted); *see also State v. Le Mier*, 2017–NMSC–017, ¶ 19, 394 P.3d 959 (“Where discovery violations inject needless delay into the proceedings, courts may impose meaningful sanctions to effectuate their inherent power and promote efficient judicial administration.”). “Extreme sanctions such as dismissal are to be used only in exceptional cases.” *State v. Harper*, 2011–NMSC–044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (internal quotation marks and citation omitted), *modified on other grounds by Le Mier*, 2017–NMSC–017. *Cf.* Rule 5–206 NMRA (providing that an attorney may be subject to appropriate disciplinary action for violating the rule); Rules 5–501(H), 5–502(G), 5–503.2(B), 5–505(B) NMRA (sanctions for discovery violations); Rule 5–511 NMRA (sanctions for burdening a person subject to a subpoena).

Paragraph B — Paragraph B permits the prosecutor to file a motion for pretrial detention at any time. The prosecutor may file the motion at the same time that the prosecution requests a warrant for the defendant's arrest under Rule 5–208(D) NMRA.

Under this Paragraph, the prosecutor retains discretion to “obtain[] a neutral determination of probable cause” by either presenting the case to a grand jury or proceeding with a preliminary examination. *See Herrera v. Sanchez*, 2014–NMSC–018, ¶ 14, 328 P.3d 1176. However, because the district court faces time constraints in setting a preliminary examination if requested, the prosecutor is required to advise the court of the need for such a setting by stating in

the motion for pretrial detention whether the prosecutor intends to proceed by grand jury indictment or instead by preliminary examination and the filing of a criminal information.

Paragraph C — Under Paragraph C, the filing of a motion for pretrial detention deprives the magistrate or metropolitan court of jurisdiction and confers exclusive jurisdiction on the district court, except as provided by Paragraph I. The district court's exclusive jurisdiction extends to cases that are refiled after dismissal.

Paragraphs C and D — Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause does not relieve the prosecutor from proving the grounds for pretrial detention by clear and convincing evidence.

Paragraph F — Paragraph F sets forth procedures for pretrial detention hearings. The court must “make three categories of determinations” at a pretrial detention hearing: “(1) which information in any form carries sufficient indicia of reliability to be worthy of consideration, (2) the extent to which that information would indicate that a defendant may be likely to pose a threat to the safety of others if released pending trial, and (3) whether any potential pretrial release conditions will reasonably protect the safety of others.” *State v. Groves*, 2018–NMSC–006, ¶ 29, 410 P.3d 193, 198 (internal quotation marks and citation omitted).

Subparagraph (F)(1)(b)(i) ~~(F)(1)(b)(i)~~ **(F)(1)(c)(i)** authorizes an extension of time if the prosecutor requests **or the court orders** a preliminary hearing to be held concurrently with the detention hearing.

Subparagraph (F)(3) describes the defendant's rights at the hearing. “[T]he Due Process Clause of the New Mexico Constitution requires that a defendant's protections at a pretrial detention hearing include ‘the right to counsel, notice, and an opportunity to be heard.’” *State ex rel. Torrez v. Whitaker*, 2018–NMSC–005, ¶ 88, 410 P.3d 201 (quoting *State v. Brown*, 2014–NMSC–038, ¶ 20, 338 P.3d 1276). “Due process requires a meaningful opportunity to cross-examine testifying witnesses or otherwise challenge the evidence presented by the state at a pretrial detention hearing.” *Id.* The defendant shall be entitled to appear and participate personally with counsel before the judge conducting the detention hearing, rather than by any means of remote electronic conferencing.

Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial detention hearing, consistent with Rule 11–1101(D)(3)(e) NMRA. In *Torrez*, the Supreme Court clarified that “neither the United States Constitution nor the New Mexico Constitution categorically requires live witness testimony at pretrial detention hearings.” 2018–NMSC–005, ¶ 110. The court may rely on “credible proffers and other summaries of evidence, law enforcement and court records, or other nontestimonial information” in determining whether the prosecutor has met its burden under Article II, Section 13. *Id.* ¶ 3. In doing so, the court should exercise “sound judicial discretion in assessing the reliability and accuracy of information presented in support of detention, whether by proffer or direct proof.” *Id.* ¶ 81. The “court necessarily retains the judicial discretion to find proffered or documentary information insufficient to meet the constitutional clear and convincing evidence requirement in the context of particular cases.” *Id.* ¶ 3. **Both the prosecutor and the defendant may proceed by proffer at the pretrial detention hearing.**

Subparagraph (F)(6) lists factors that the court may consider in assessing whether the prosecutor has met its burden of proving by clear and convincing evidence that the defendant may be likely to pose a threat to the safety of others if released pending trial and whether any potential pretrial release conditions will reasonably protect the safety of others. These factors include the nature and circumstances of the charged offense and the defendant's history and characteristics. *See State v. Groves*, 2018–NMSC–006, ¶¶ 32–33, 410 P.3d 193 (explaining that the defendant's past conduct can help the court assess whether the defendant poses a future threat of danger). In *State v. Ferry*, the Supreme Court explained that “the nature and circumstances of a defendant's conduct in the underlying charged offense(s) may be sufficient, despite other evidence, to sustain the [prosecutor's] burden of proving by clear and convincing evidence that the defendant poses a threat to others or the community.” 2018–NMSC–004, ¶ 6, 409 P.3d 918. **However, the type of offense charged, by itself and without more, will not suffice to meet the prosecutor's burden. See Groves, 2018–NMSC–006, ¶ 33 (discounting the relevance at a detention hearing of “the category or punishability of the charged crime,” and recognizing that “the court's focused concern is not to impose punishment for past conduct but instead to assess a defendant's likely future conduct”)** (citing *Torrez*, 2018–NMSC–005, ¶ 101. If the prosecutor meets this initial burden, the prosecutor must also demonstrate by clear and convincing evidence that “no release conditions will reasonably protect the safety of any other person or the community.” *Id.* “For example, the [prosecutor] may introduce evidence of a defendant's defiance of restraining orders; dangerous conduct in violation of a court order; intimidation tactics; threatening behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal to abide by conditions of release in other cases.” *Id.*

Paragraph I — ~~If the district court issues a detention order under Paragraph G of this rule, the magistrate or metropolitan court cannot release the defendant while the case is pending. The magistrate or metropolitan court should, however, issue a release order if the state files a voluntary dismissal or if the court dismisses the case under other rules, such as Rule 6-202(A)(3) or (D)(1) NMRA or Rule 7-202(A)(3) or (D)(1) NMRA.~~ On the transfer of a case to the district court, the magistrate or metropolitan court generally loses jurisdiction under Paragraph C of this rule. A single narrow exception is set out in Paragraph I, whose provisions allow a case to be remanded to the magistrate or metropolitan court only if, after a preliminary hearing, misdemeanor—not felony—charges alone remain, and then at the sole discretion of the district court. A case in which the prosecutor files and subsequently withdraws a motion for pretrial detention cannot be remanded to the magistrate or metropolitan court for further proceedings, unless the case otherwise meets the misdemeanor exception carved out under this paragraph.

Paragraph J — Paragraph J requires the district court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); *Am. Bar Ass’n, ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). **This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.**

Paragraph K — The district court may rule on a motion under Paragraph K with or without a hearing. The district court has inherent discretion to reconsider its ruling on a motion for pretrial detention. *See Sims v. Sims*, 1996–NMSC–078, ¶ 59, 122 N.M. 618, 930 P.2d 153 (“District courts have plenary power over their interlocutory orders and may revise them ... at any time prior to final judgment.” (internal citation omitted)); *see also State v. Brown*, 2014–NMSC–038, ¶ 13, 338 P.3d 1276 (recognizing that a pretrial release decision is interlocutory).

Paragraph L — Either party may appeal the district court’s ruling on the detention motion. Under Article II, Section 13, an “appeal from an order denying bail shall be given preference over all other matters.” *See also State v. Chavez*, 1982–NMSC–108, ¶ 6, 98 N.M. 682, 652 P.2d 232 (holding that the state may appeal a ruling where it is an aggrieved party under Article VI, Section 2 of the New Mexico Constitution).

Paragraph M — Consistent with Rule 5–106 NMRA, a party cannot exercise the statutory right to excuse a judge who is conducting a detention hearing. *See NMSA 1978*, § 38–3–9. Paragraph M does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See N.M. Const. art. VI, § 18; Rule 21–211 NMRA.*

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18–8300–024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. 20–8300–021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R MAG CT RCRP Rule 6–401 >>

6–401. PRETRIAL RELEASE

A. Hearing.

(1) *Time.* The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) first appearance or arraignment, if the defendant is not in custody.

(2) *Right to Counsel.* If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to Pretrial Release; Recognizance or Unsecured Appearance Bond. Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or ~~upon~~ on the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be Considered in Determining Conditions of Release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction; if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning about

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning about appearance at court proceedings; and

(b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;

(4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;

(5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and

(6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. Non-Monetary Conditions of Release. In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

(1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;

(2) maintain employment, or, if unemployed, actively seek employment;

- (3) maintain or commence an educational program;
- (4) abide by specified restrictions on personal associations, place of abode, or travel;
- (5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify ~~concerning~~ about the offense;
- (6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
- (7) comply with a specified curfew;
- (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;
- (10) **refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner.**
- ~~(10)~~ (11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
- ~~(11)~~ (12) submit to a drug test or an alcohol test on request of a person designated by the court;
- ~~(12)~~ (13) return to custody for specified hours ~~following~~ after release for employment, schooling, or other limited purposes;
- ~~[(13)]~~ (14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. Secured Bond. If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) Factors to be Considered in Setting Secured Bond.

- (a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.
- (b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.
- (c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.
- (d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) Types of Secured Bond. If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) **Percentage Bond.** The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph L of this rule.

(b) **Property Bond.** The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 6–401.1 NMRA.

(c) **Cash or surety bond.** The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph L of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 6–401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order Setting Conditions of Release; Findings ~~regarding~~ about Secured Bond.

(1) *Contents of Order Setting Conditions of Release.* The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) *Written Findings ~~regarding~~ about Secured Bond.* The court shall file written findings of the individualized facts justifying the secured bond, ~~if any~~, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. Pretrial Detention. If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 6–409 NMRA.

H. Motion for Review of Conditions of Release by the Magistrate Court.

(1) *Motion for Review.* If the magistrate court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) *Review Hearing.* The magistrate court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~thereupon~~ **then** released, the court shall file a

written order setting forth the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) *Work or School Release.* A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the magistrate court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) *Subsequent Motion for Review.* The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. Amendment of Conditions. The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 6–403 NMRA.

J. Petition to District Court.

(1) *Case within Magistrate Court Trial Jurisdiction.* A defendant charged with an offense that is within magistrate court trial jurisdiction may file a petition in the district court for review of the magistrate court's order setting conditions of release under this paragraph only after the magistrate court has ruled on a motion to review the conditions of release under Paragraph H of this rule. The defendant shall attach to the district court petition a copy of the magistrate court order disposing of the defendant's motion for review.

(2) *Felony Case.* A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under Rule 5–401(K) NMRA and this paragraph at any time after the defendant's arrest.

(3) *Petition; Requirements.* A petition to the district court under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the magistrate court,
- (b) serve a copy on the district attorney, and
- (c) provide a copy to the assigned district court judge.

(4) *Magistrate Court's Jurisdiction Pending Determination of the Petition.* ~~Upon~~ **On** the filing of a petition under this paragraph, the magistrate court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The magistrate court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate court while the district court petition is pending. The magistrate court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) *District Court Review.* The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly transmit a copy of the notice to the magistrate court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(6) *District Court Order; Transmission to Magistrate Court.* The district court shall promptly transmit to the magistrate court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the magistrate court.

K. Expedited Trial Scheduling for Defendant in Custody. The magistrate court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. **The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.**

L. Return of Cash Deposit. If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

M. Release from Custody by Designee. The presiding judge of the magistrate court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 6–408 NMRA. A designee shall release a defendant from custody ~~prior to~~ **before** the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 6–408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

N. Bind Over to District Court. For any case that is not within magistrate court trial jurisdiction, ~~upon~~ **on** notice to the magistrate court, any bond shall be transferred to the district court upon the filing of an information or indictment in the district court.

O. Evidence. Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

P. Forms. Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

Q. Judicial Discretion; Disqualification and Excusal. Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 07–8300, effective January 22, 2008; by Supreme Court Order No. 08–8300–044, effective December 31, 2008; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; **as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.**]

Committee commentary

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014–NMSC–038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely ~~due to~~ **because of** financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. See 18 U.S.C. § 3142. This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014–NMSC–038. Corresponding rules are located in the Rules of Criminal Procedure for the District Courts, see Rules 5–401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, see Rule 7–401 NMRA, and the Rules of Procedure for the Municipal Courts, see Rule 8–401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 6–104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5–409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such a release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. See *Brown*, 2014–NMSC–038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions ~~prior to~~ **before** a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination ~~as to~~ **about** whether the defendant can afford to pay all or a ~~portion~~ **part** of the cost, or whether the court has the authority to waive the cost, because detaining a defendant ~~due to~~ **because of** inability to pay the cost associated with a condition of release is comparable to detaining a defendant ~~due to~~ **because of** financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. See *State v. Ericksons*, 1987–NMSC–108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court.”); see also NMSA 1978, § 31–3–2(B)(2) (authorizing the forfeiture of bond ~~upon~~ **on** the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. See *Brown*, 2014–NMSC–038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.”); see also *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court “is ‘excessive’ under the Eighth Amendment”). A felony defendant who poses a danger that cannot be mitigated through

the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5–409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond ~~where the~~ **involving** property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 6–401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9–303 NMRA (order setting conditions of release). Although pretrial release hearings are not required to be a matter of record in the magistrate court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~such~~ **the** supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13 of the New Mexico Constitution. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the magistrate court must follow the procedures set forth in Rule 6–409 NMRA.

Paragraph H sets forth the procedure for the defendant to file a motion in the magistrate court for review of the conditions of release. Paragraph J sets forth the procedure for the defendant to petition the district court for release or for review of the conditions of release set by the magistrate court. Article II, Section 13 requires the court to rule on a motion or petition for pretrial release “in an expedited manner” and to release a defendant who is being held solely ~~due to~~ **because of** financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or a petition for pretrial release may present Form 9–301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph K requires the magistrate court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody ~~due to~~ **because of** inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part ~~due to~~ **because of** “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time ~~limitations~~ **limits** within which detained defendants should be tried consistent with the sound administration of justice.”). **This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.**

Under NMSA 1978, Section 31–3–1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph M, a designee must be designated by the presiding magistrate court judge in a written court order. A person may not be appointed as a designee if ~~such~~ **that** person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph M and Rule 6–408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~prior to~~ **before** that defendant's first appearance before a judge.

Paragraph N requires the magistrate court to transfer any bond to the district court ~~upon~~ **on** notice from the district attorney that an information or indictment has been filed. *See* Rule 6–202(E)–(F) NMRA (requiring the district attorney to notify the magistrate court of the filing of an information or indictment in the district court).

Paragraph O of this rule dovetails with Rule 11–1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the magistrate court with respect to matters of pretrial release. ~~Like~~ **As with courts in** other types of proceedings ~~where~~ **in which** the Rules of Evidence do not apply, ~~at~~ **a court presiding over** a pretrial release hearing the ~~court~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof”); *see also United*

States v. Marshall, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011–NMSC–014, ¶¶ 36–39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

Consistent with Rule 6–106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 35–3–7. Paragraph Q of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21–211 NMRA.

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R MAG CT RCRP Rule 6–403 >>

6–403. REVOCATION OR MODIFICATION OF RELEASE ORDERS

A. Scope. In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

B. Motion for Revocation or Modification of Conditions of Release.

- (1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor or on the court's own motion.
- (2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. Issuance of Summons or Bench Warrant. If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. Initial Hearing.

- (1) The court shall hold an initial hearing as soon as practicable, but if the defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is detained if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center.
- (2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.
- (3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. Evidentiary Hearing.

- (1) *Time.* The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing.

(2) *Defendant's Rights.* The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. Order at Completion of Evidentiary Hearing. At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 6–401 NMRA; or
- (3) revoke the defendant's release, if the court
 - (a) finds ~~that there is~~ either
 - (i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or
 - (ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and
 - (b) finds ~~that there is~~ clear and convincing evidence that either
 - (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
 - (ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation.

G. Evidence. The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. Review of Conditions. If the magistrate court enters an order setting new or additional conditions of release and the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may petition the district court for review in accordance with Rule 6–401(J) NMRA. The defendant may petition the district court immediately ~~upon~~ **on** the issuance of the magistrate court order and shall not be required to first seek review or reconsideration by the magistrate court. If, ~~upon~~ **on** disposition of the petition by the district court, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

I. Expedited Trial Scheduling for Defendant in Custody. The magistrate court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. **The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.**

J. Petition to District Court for Review of Revocation Order. If the magistrate court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5–403(K) NMRA.

(1) *Petition; Requirements.* The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the magistrate court;
- (b) serve a copy on the district attorney; and
- (c) provide a copy to the assigned district court judge.

(2) *Magistrate Court's Jurisdiction Pending Determination of the Petition.* ~~pen~~ On the filing of the petition, the magistrate court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The magistrate court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the magistrate court while the petition is pending.

(3) *District Court Review.* The district court shall rule on the petition in an expedited manner.

- (a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:
 - (i) issue an order affirming the revocation order; or
 - (ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~transmit~~ send a copy of the notice to the magistrate court.
- (b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release under Rule 5–401 NMRA.

(4) *District Court Order; Transmission to Magistrate Court.* The district court shall promptly ~~transmit~~ send the order to the magistrate court, and jurisdiction over the conditions of release shall revert to the magistrate court.

(5) *Appeal.* If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 08–8300–044, effective December 31, 2008; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18–8300–024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014–NMCA–037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968–NMSC–009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 (“If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts.”); *State v. Rivera*, 2003–NMCA–059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line.”), *rev'd on other grounds*, 2004–NMSC–001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11–1101(D)(3)(e) NMRA. ~~Like~~ **As with courts in other types of proceedings where in which** the Rules of Evidence do not apply, **at a court presiding over a pretrial detention hearing the court** is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011–NMSC–014, ¶¶ 36–39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982–NMCA–058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the magistrate court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R MAG CT RCRP Rule 6–409 >>

6–409. PRETRIAL DETENTION

A. Scope. This rule governs the procedure for the prosecutor to file a motion for pretrial detention in the magistrate and district court while a case is pending in the magistrate court. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 6–401 NMRA, under Article II, Section 13 and Rule 5–409 NMRA, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a ~~written~~ motion titled ~~“Expedited Motion for Pretrial Detention”~~ **for an expedited pretrial detention hearing** and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. Motion for Pretrial Detention. The prosecutor may file a ~~written-expedited~~ motion for an expedited pretrial detention hearing at any time in ~~both the magistrate court and in the district court~~. The motion shall include the specific facts that warrant pretrial detention ~~and, in the event that probable cause has not yet been determined,~~ **shall specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.**

C. Determination of Probable Cause. If a motion for pretrial detention is filed in the magistrate court and a probable cause determination has not been made, the magistrate court shall determine probable cause under Rule 6–203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 6–203 NMRA and shall deny the motion for pretrial detention without prejudice.

D. Determination of Motion by District Court. If probable cause has been found, the magistrate court clerk **shall proceed to conduct the defendant’s first appearance under Rule 6–501 NMRA and thereafter promptly transmit** ~~send~~ to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The

magistrate court's court shall then close the case and its jurisdiction shall then be terminated, and the district court shall acquire exclusive jurisdiction over the case, **except as provided in Rule 5-409(I) NMRA.**

~~E. Further Proceedings in Magistrate Court. Upon completion of the hearing, if the case is pending in the magistrate court, the district court shall promptly transmit to the magistrate court an order closing the magistrate court case.~~

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

Paragraph C — Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. *City of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

Paragraph D — ~~Upon~~ On the filing of a motion for pretrial detention, and a finding of probable cause, and the conducting of the defendant's first appearance, the magistrate court is deprived of jurisdiction, **except as provided in Rule 5-409(I) NMRA.**

[Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R MAG CT RCRP Rule 6-501 >>

6-501. ARRAIGNMENT; FIRST APPEARANCE

A. Explanation of Rights. Upon the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:

- (1) the offense charged;
- (2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;
- (3) the right to bail or the possibility of pretrial detention under Rule 5-401(G) NMRA;
- (4) the right, if any, to the assistance of counsel at every stage of the proceedings;
- (5) the right, if any, to representation by an attorney at state expense;
- (6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;
- (7) the right, if any, to a jury trial;
- (8) in those cases not within the court's trial jurisdiction the right to a preliminary examination;
- (9) that, if the defendant pleads guilty or no contest, it may have an effect upon the defendant's immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;

(10) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms, including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and

(11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act, NMSA 1978, Sections 29-11A-1 to -10.

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. Offense Within the Court's Trial Jurisdiction. If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint, under Rule 6-302 NMRA, and if the defendant refuses to answer, the court shall enter a plea of "not guilty" for the defendant. If, after entry of a plea of "not guilty," the defendant remains in custody, the action shall be set for trial as soon as possible.

C. Insanity or Incompetency. If the defendant raises the defense of "not guilty by reason of insanity at the time of commission of an offense," after setting conditions of release, the action shall be transferred to the district court. If a question is raised about the defendant's competency to stand trial, the court shall proceed under Rule 6-507.1 NMRA.

D. Waiver of Arraignment or First Appearance. With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea or waiver of first appearance shall be substantially in the form approved by the Supreme Court.

E. Felony Offenses; Preliminary Examination. If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district court. If the defendant does not waive preliminary examination, **and a motion for an expedited pretrial detention hearing has not been filed**, the court shall proceed to conduct such an examination in accordance with Rule 6-202 NMRA.

F. Bail. If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 6-401 NMRA. However, the court may delay entry of conditions of release for twenty-four (24) hours from the date of the initial appearance, not to exceed the time limits in Rule 6-401(A) NMRA, if

(1) The defendant is charged with a felony offense

- (a) involving the use of a firearm;
- (b) involving the use of a deadly weapon resulting in great bodily harm or death;
- (c) which authorizes a sentence of life in prison without the possibility of parole; or
- (d) a public safety assessment instrument approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant.

(2) The court shall immediately give notice to the prosecutor, the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender, of the circumstances in Subparagraph F(1) above that warrant delaying entry of conditions of release.

(3) If the prosecutor does not file an ~~expedited~~ a motion for an **expedited** pretrial detention **hearing** by the date scheduled for the conditions of release hearing, the court shall issue an order setting conditions of release pursuant to Rule 6–401 NMRA.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07–8300–030, effective December 15, 2007; as amended by Supreme Court Order No. 18–8300–023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. 20–8300–013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

If it is determined by the judge that the defendant is not represented by counsel, and it further appears that the defendant may be indigent, if the judge decides that no imprisonment will be imposed if the defendant is found guilty, then the court need not advise the defendant of his right to assistance of counsel at every stage of the proceedings and of the defendant's right to representation by an attorney at state expense. However, if the judge decides that imprisonment will be imposed or that this decision cannot be made at this stage of the proceedings, then the judge shall advise the defendant of the defendant's right to assistance of counsel at every stage of the proceedings and the defendant's right to be represented by an attorney at state expense if the defendant is indigent. *Argersinger v. Hamlin*, 407 U.S. 25 (1972). The defendant may waive counsel so long as the waiver is knowingly, voluntarily, and intelligently made and the defendant is aware of the possible disadvantages of proceeding without the assistance of counsel. *State v. Greene*, 1977–NMSC–111, 91 N.M. 207, 572 P.2d 935; *North Carolina v. Butler*, 441 U.S. 369 (1979). [Adopted by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R METRO CT RCRP Rule 7–401 >>

7–401. PRETRIAL RELEASE

A. Hearing.

(1) *Time*. The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

- (a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or
- (b) first appearance or arraignment, if the defendant is not in custody.

(2) *Right to Counsel*. If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to Pretrial Release; Recognizance or Unsecured Appearance Bond. Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the defendant's personal recognizance or ~~upon~~ on the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be Considered in Determining Conditions of Release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community,

the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information concerning about

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;
- (2) the weight of the evidence against the defendant;
- (3) the history and characteristics of the defendant, including
 - (a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning about appearance at court proceedings; and
 - (b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;
- (5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and
- (6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. Non-Monetary Conditions of Release. In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

- (1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;
- (2) maintain employment, or, if unemployed, actively seek employment;
- (3) maintain or commence an educational program;
- (4) abide by specified restrictions on personal associations, place of abode, or travel;
- (5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning about the offense;
- (6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
- (7) comply with a specified curfew;
- (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (9) from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

(10) refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner.

(11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

(12) submit to a drug test or an alcohol test on request of a person designated by the court;

(13) return to custody for specified hours following after release for employment, schooling, or other limited purposes;

(14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. Secured Bond. If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) Factors to be Considered in Setting Secured Bond.

(a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.

(b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.

(c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.

(d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) Types of Secured Bond. If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

(a) Percentage bond. The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph L of this rule.

(b) Property bond. The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 7-401.1 NMRA.

(c) Cash or surety bond. The court may give the defendant the option of either

(i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph L of this rule, or

(ii) a surety bond executed by licensed sureties in accordance with Rule 7-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order Setting Conditions of Release; Findings regarding about Secured Bond.

(1) *Contents of Order Setting Conditions of Release.* The order setting conditions of release shall

(a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct; and

(b) advise the defendant of

(i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

(ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) *Written Findings regarding about Secured Bond.* The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. Pretrial Detention. If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 7–409 NMRA.

H. Motion for Review of Conditions of Release by the Metropolitan Court.

(1) *Motion for Review.* If the metropolitan court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) *Review Hearing.* The metropolitan court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~thereupon~~ then released, the court shall file a written order setting forth the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) *Work or School Release.* A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the metropolitan court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) *Subsequent Motion for Review.* The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

I. Amendment of Conditions. The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 7–403 NMRA.

J. Petition to District Court.

(1) *Case within Metropolitan Court Trial Jurisdiction.* A defendant charged with an offense that is within metropolitan court trial jurisdiction may file a petition in the district court for review of the metropolitan court's order setting conditions of release under this paragraph only after the metropolitan court has ruled on a motion to review the conditions of release under Paragraph H of this rule. The defendant shall attach to the district court petition a copy of the metropolitan court order disposing of the defendant's motion for review.

(2) *Felony Case.* A defendant charged with a felony offense who has not been bound over to the district court may file a petition in the district court for release under Rule 5–401(K) NMRA and this paragraph at any time after the defendant's arrest.

(3) *Petition; Requirements.* A petition to the district court under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the metropolitan court,
- (b) serve a copy on the district attorney, and
- (c) provide a copy to the assigned district court judge.

(4) *Metropolitan Court's Jurisdiction Pending Determination of the Petition.* ~~Upon~~ **On** the filing of a petition under this paragraph, the metropolitan court's jurisdiction to set or amend the conditions of release shall be suspended pending determination of the petition by the district court. The metropolitan court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the metropolitan court while the district court petition is pending. The metropolitan court's order setting conditions of release, if any, shall remain in effect unless and until the district court issues an order amending the conditions of release.

(5) *District Court Review.* The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly ~~transmit~~ **send** a copy of the notice to the metropolitan court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(6) *District Court Order; Transmission to Metropolitan Court.* The district court shall promptly ~~transmit~~ **send** to the metropolitan court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the metropolitan court.

K. Expedited Trial Scheduling for Defendant in Custody. The metropolitan court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. **The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.**

L. Return of Cash Deposit. If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

M. Release from Custody by Designee. The chief judge of the metropolitan court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 7–408 NMRA. A designee shall release a defendant from custody ~~prior to~~ **before** the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 7–408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

N. Bind Over to District Court. For any case that is not within metropolitan court trial jurisdiction, ~~upon~~ **on** notice to the metropolitan court, any bond shall be transferred to the district court ~~upon~~ **on** the filing of an information or indictment in the district court.

O. Evidence. Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

P. Forms. Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

Q. Judicial Discretion; Disqualification and Excusal. Action by any court on any matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a judge. A judge may not be excused from setting initial conditions of release unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 08–8300–059, effective February 2, 2009; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; **as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.**]

Committee commentary

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014–NMSC–038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely ~~due to~~ **because of** financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. See 18 U.S.C. § 3142. This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court's holding in *Brown*, 2014–NMSC–038. Corresponding rules are located in the Rules of Criminal Procedure for the District Courts, see Rules 5–401 NMRA, the Rules of Criminal Procedure for the Magistrate Courts, see Rule 6–401 NMRA, and the Rules of Procedure for the Municipal Courts, see Rule 8–401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 7–104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5–409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (H)(2), and (H)(3) of this rule provide that assistance of counsel is

required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that ~~such~~ the release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. *See Brown*, 2014–NMSC–038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions ~~prior to~~ before a court appearance, the judge should review the conditions at the defendant's first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination ~~as to~~ about whether the defendant can afford to pay all or a ~~portion~~ part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant ~~due to~~ because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant ~~due to~~ because of financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. *See State v. Ericksons*, 1987–NMSC–108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the defendant's attendance to submit to the punishment to be imposed by the court.”); *see also* NMSA 1978, § 31–3–2(B)(2) (authorizing the forfeiture of bond ~~upon~~ on the defendant's failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014–NMSC–038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.”); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court “is ‘excessive’ under the Eighth Amendment”). A felony defendant who poses a danger that cannot be mitigated through the imposition of non-monetary conditions of release under Paragraph D of this rule should be detained under Article II, Section 13 and Rule 5–409 NMRA.

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond ~~where~~ when the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 7–401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9–303 NMRA (order setting conditions of release). Although pretrial release hearings are not required to be a matter of record in the metropolitan court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~such~~ any supplemental findings in a separate document within two days of the conclusion of the hearing.

Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section 13. If the defendant poses a danger to the safety of any other person or the community that cannot be addressed through the imposition of non-monetary conditions of release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the metropolitan court must follow the procedures set forth in Rule 7-409 NMRA.

Paragraph H sets forth the procedure for the defendant to file a motion in the metropolitan court for review of the conditions of release. Paragraph J sets forth the procedure for the defendant to petition the district court for release or for review of the conditions of release set by the metropolitan court. Article II, Section 13 requires the court to rule on a motion or petition for pretrial release "in an expedited manner" and to release a defendant who is being held solely ~~due to~~ **because of** financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or a petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph K requires the metropolitan court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody ~~due to~~ **because of** inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part ~~due to~~ **because of** "the stringent time limitations of the Speedy Trial Act," 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) ("Every jurisdiction should establish, by statute or court rule, accelerated time ~~limitations~~ **limits** within which detained defendants should be tried consistent with the sound administration of justice."). **This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.**

Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph M, a designee must be designated by the chief metropolitan court judge in a written court order. A person may not be appointed as a designee if ~~such~~ **that** person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph M and Rule 7-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~prior to~~ **before** that defendant's first appearance before a judge.

Paragraph N requires the metropolitan court to transfer any bond to the district court ~~upon~~ **on** notice from the district attorney that an information or indictment has been filed. *See* Rule 7-202(E)-(F) NMRA (requiring the district attorney to notify the metropolitan court of the filing of an information or indictment in the district court).

Paragraph O of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the metropolitan court with respect to matters of pretrial release. ~~Like~~ **As with courts in** other types of proceedings ~~where~~ **in which** the Rules of Evidence do not apply, at ~~a court presiding over~~ **a court presiding over** a pretrial release hearing ~~the court~~ is responsible "for assessing the reliability and accuracy" of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge "retains the responsibility for assessing the reliability and accuracy of the government's information, *whether presented by proffer or by direct proof*"); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) ("So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence."), *aff'd* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence). Consistent with Rule 7-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. *See* NMSA 1978, § 35-3-7. Paragraph Q of this rule does not prevent a judge from being recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

[Adopted by Supreme Court Order No. 08-8300-059, effective February 2, 2009; as amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R METRO CT RCRP Rule 7-403 >>

7-403. REVOCATION OR MODIFICATION OF RELEASE ORDERS

A. Scope. In accordance with this rule, the court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

B. Motion for Revocation or Modification of Conditions of Release.

- (1) The court may consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor or on the court's own motion.
- (2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. Issuance of Summons or Bench Warrant. If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. Initial Hearing.

- (1) The court shall hold an initial hearing as soon as practicable, but if the defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is detained if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center.
- (2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.
- (3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. Evidentiary Hearing.

- (1) *Time.* The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing.
- (2) *Defendant's Rights.* The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. Order at Completion of Evidentiary Hearing. At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 7–401 NMRA; or

(3) revoke the defendant's release, if the court

(a) finds ~~that there is~~ either

(i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or

(ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and

(b) finds ~~that there is~~ clear and convincing evidence that either

(i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or

(ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation.

G. Evidence. The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. Review of Conditions. If the metropolitan court enters an order setting new or additional conditions of release and the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may petition the district court for review in accordance with Rule 7–401(J) NMRA. The defendant may petition the district court immediately ~~upon~~ on the issuance of the metropolitan court order and shall not be required to first seek review or reconsideration by the metropolitan court. If, ~~upon~~ on disposition of the petition by the district court, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

I. Expedited Trial Scheduling for Defendant in Custody. The metropolitan court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial. **The court shall hold a status review hearing in any case in which the defendant has been held for more than sixty (60) days.**

J. Petition to District Court for Review of Revocation Order. If the metropolitan court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5–403(K) NMRA.

(1) *Petition; Requirements.* The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

(a) file a copy of the district court petition in the metropolitan court;

(b) serve a copy on the district attorney; and

(c) provide a copy to the assigned district court judge.

(2) *Metropolitan Court's Jurisdiction Pending Determination of the Petition.* On the filing of the petition, the metropolitan court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The metropolitan court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the metropolitan court while the petition is pending.

(3) *District Court Review.* The district court shall rule on the petition in an expedited manner.

(a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:

(i) issue an order affirming the revocation order; or

(ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~transmit~~ send a copy of the notice to the metropolitan court.

(b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release under Rule 5–401 NMRA.

(4) *District Court Order; Transmission to Metropolitan Court.* The district court shall promptly ~~transmit~~ send the order to the metropolitan court, and jurisdiction over the conditions of release shall revert to the metropolitan court.

(5) *Appeal.* If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

[As amended, effective September 1, 1990; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18–8300–024, effective for all cases pending or filed on or after February 1, 2019; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014–NMCA–037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968–NMSC–009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 (“If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts.”); *State v. Rivera*, 2003–NMCA–059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line.”), *rev'd on other grounds*, 2004–NMSC–001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11–1101(D)(3)(e) NMRA. Like **As with courts in other types of proceedings where in which** the Rules of Evidence do not apply, **at a court presiding over a pretrial detention hearing the court** is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff'd* 719 F.2d 887 (7th Cir. 1983); *State v. Guthrie*, 2011–NMSC–014, ¶¶ 36–39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982–NMCA–058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the metropolitan court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R METRO CT RCRP Rule 7–409 >>

7–409. PRETRIAL DETENTION

A. Scope. This rule governs the procedure for the prosecutor to file a motion for pretrial detention in the metropolitan and district court while a case is pending in the metropolitan court. Notwithstanding the right to pretrial release under Article II, Section 13 of the New Mexico Constitution and Rule 7–401 NMRA, under Article II, Section 13 and Rule 5–409 NMRA, the district court may order the detention pending trial of a defendant charged with a felony offense if the prosecutor files a written motion titled “~~Expedited Motion for Pretrial Detention~~” and proves by clear and convincing evidence that no release conditions will reasonably protect the safety of any other person or the community.

B. Motion for Pretrial Detention. The prosecutor may file a ~~written-expedited~~ motion for an expedited pretrial detention hearing at any time in both the metropolitan court and in the district court. The motion shall include the specific facts that warrant pretrial detention and, ~~in the event that probable cause has not yet been determined,~~ shall specify whether the state intends to establish probable cause by way of grand jury proceedings or through a preliminary examination and, if the latter, whether the state is requesting that the preliminary examination and the expedited pretrial detention hearing be held concurrently.

C. Determination of Probable Cause. If a motion for pretrial detention is filed in the metropolitan court and a probable cause determination has not been made, the metropolitan court shall determine probable cause under Rule 7–203 NMRA. If the court finds no probable cause, the court shall order the immediate personal recognizance release of the defendant under Rule 7–203 NMRA and shall deny the motion for pretrial detention without prejudice.

D. Determination of Motion by District Court. If probable cause has been found, the metropolitan court clerk shall proceed to conduct the defendant's first appearance under Rule 7–501 NMRA and thereafter promptly transmit send to the district court clerk a copy of the motion for pretrial detention, the criminal complaint, and all other papers filed in the case. The metropolitan court's court shall then close the case and its jurisdiction shall then be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided under Rule 5–409(I) NMRA.

~~**E. Further Proceedings in Metropolitan Court.** Upon completion of the hearing, if the case is pending in the metropolitan court, the district court shall promptly transmit to the metropolitan court an order closing the metropolitan court case.~~

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20–8300–013, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

Paragraph C — Federal constitutional law requires a “prompt judicial determination of probable cause” to believe the defendant committed a chargeable offense, before or within 48 hours after arrest, in order to continue detention or other significant restraint of liberty. ~~City~~ *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

Paragraph D — ~~Upon~~ **On the filing of a motion for pretrial detention, and a finding of probable cause, and the conducting of the defendant's first appearance,** the metropolitan court is deprived of jurisdiction, **except as provided in Rule 5–409(I) NMRA.**

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20–8300–021, effective for all cases pending or filed on or after November 23, 2020; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R METRO CT RCRP Rule 7–501 >>

7–501. ARRAIGNMENT; FIRST APPEARANCE

A. Explanation of Rights. ~~Upon~~ **On the first appearance of the defendant in response to a summons, warrant, or arrest, the court shall determine that the defendant has been informed of the following:**

- (1) the offense charged;
- (2) the maximum penalty and mandatory minimum penalty, if any, provided for the offense charged;
- (3) the right to bail or the possibility of pretrial detention under Rule ~~5–401(G)~~ **7–401(G)** NMRA;
- (4) the right, if any, to the assistance of counsel at every stage of the proceedings;
- (5) the right, if any, to representation by an attorney at state expense;
- (6) the right to remain silent, and that any statement made by the defendant may be used against the defendant;
- (7) the right, if any, to a jury trial;
- (8) in those cases not within the court's trial jurisdiction the right to a preliminary examination;
- (9) that, if the defendant pleads guilty or no contest, it may have an effect ~~upon~~ on the defendant's immigration or naturalization status, and if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea;
- (10) that, if the defendant is charged with a crime of domestic violence or a felony, a plea of guilty or no contest will affect the defendant's constitutional right to bear arms, including shipping, receiving, possessing, or owning any firearm or ammunition, all of which are crimes punishable under federal law for a person convicted of domestic violence or a felony; and
- (11) that, if the defendant pleads guilty or no contest to a crime for which registration as a sex offender is or may be required, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the registration requirement under the Sex Offender Registration and Notification Act [29–11A–1 NMSA 1978].

The court may allow the defendant reasonable time and opportunity to make telephone calls and consult with counsel.

B. Offense Within the Court's Trial Jurisdiction. If the offense charged is within the court's trial jurisdiction, the court shall require the defendant to plead to the complaint under Rule 7–302, and if the defendant refuses to answer, the court shall enter a plea of “not guilty” for the defendant. If, after entry of a plea of “not guilty,” the defendant remains in custody, the action shall be set for trial as soon as possible.

C. Defense of Insanity. If the defendant raises the defense of “not guilty by reason of insanity at the time of commission of an offense,” after setting conditions of release, the action shall be transferred to the district court.

D. Waiver of Arraignment or First Appearance. With prior approval of the court, an arraignment or first appearance may be waived by the defendant filing a written waiver. A waiver of arraignment and entry of a plea of not guilty or a waiver of first appearance shall be substantially in the form approved by the Supreme Court.

E. Felony Offenses; Preliminary Examination. If the offense is a felony and the defendant waives preliminary examination, the court shall bind the defendant over to the district court. If the defendant does not waive preliminary examination, **and a motion for an expedited pretrial detention hearing has not been filed**, the court shall proceed to conduct ~~such an~~ a preliminary examination in accordance with Rule 7–202 NMRA.

F. Bail. If the defendant has not been released by the court or the court's designee, and if the offense charged is a bailable offense, the court shall enter an order prescribing conditions of release in accordance with Rule 7–401 NMRA. However, the court may delay entry of conditions of release for twenty-four (24) hours from the date of the initial appearance, not to exceed the time limits in Rule 7–401(A) NMRA, if

(1) The defendant is charged with a felony offense

(a) involving the use of a firearm;

(b) involving the use of a deadly weapon resulting in great bodily harm or death;

(c) which authorizes a sentence of life in prison without the possibility of parole; or

(d) a public safety assessment instrument approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant.

(2) The court shall immediately give notice to the prosecutor, the defendant and defense counsel of record, or, if defense counsel has not entered an appearance, the local law office of the public defender or, if no local office exists, the director of the contract counsel office of the public defender, of the circumstances in Subparagraph F(1) above that warrant delaying entry of conditions of release.

(3) If the prosecutor does not file ~~an expedited~~ a motion for **an expedited** pretrial detention **hearing** by the date scheduled for the conditions of release hearing, the court shall issue an order setting conditions of release pursuant to Rule 7–401 NMRA.

[As amended, effective March 1, 1987; October 1, 1987; September 1, 1990; October 1, 1996; November 1, 2000; as amended by Supreme Court Order No. 07–8300–030, effective December 15, 2007; as amended by Supreme Court Order No. 18–8300–023, effective for all cases filed on or after February 1, 2019; as amended by Supreme Court Order No. 20–8300–013, effective for all cases pending or filed on or after November 23, 2020; **as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.**]

Committee commentary

If it is determined by the judge that the defendant is not represented by counsel, and it further appears that the defendant may be indigent, if the judge decides that no imprisonment will be imposed if the defendant is found guilty, then the court need not advise the defendant of his right to assistance of counsel at every stage of the proceedings and of the defendant's right to representation by an attorney at state expense. However, if the judge decides that imprisonment will be imposed or that this decision cannot be made at this stage of the proceedings, then the judge shall advise the defendant of his **the defendant's** right

to assistance of counsel at every stage of the proceedings and his **the defendant's** right to be represented by an attorney at state expense if he **the defendant** is indigent. *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

The defendant may waive counsel so long as the waiver is knowingly, voluntarily, and intelligently made and the defendant is aware of the possible disadvantages of proceeding without the assistance of counsel. *State v. Greene*, 1977-NMSC-111, 91 N.M. 207, 572 P.2d 935; *North Carolina v. Butler*, 441 U.S. 369 (1979).

[As amended by Supreme Court Order No. 18-8300-023, effective for all cases filed on or after February 1, 2019; as amended for stylistic compliance by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R MUN CT P Rule 8-401 >>

8-401. PRETRIAL RELEASE

A. Hearing.

(1) *Time*. The court shall conduct a hearing under this rule and issue an order setting conditions of release as soon as practicable, but in no event later than

(a) if the defendant remains in custody, three (3) days after the date of arrest if the defendant is being held in the local detention center, or five (5) days after the date of arrest if the defendant is not being held in the local detention center; or

(b) arraignment, if the defendant is not in custody.

(2) *Right to Counsel*. If the defendant does not have counsel at the initial release conditions hearing and is not ordered released at the hearing, the matter shall be continued for no longer than three (3) additional days for a further hearing to review conditions of release, at which the defendant shall have the right to assistance of retained or appointed counsel.

B. Right to Pretrial Release; Recognizance or Unsecured Appearance Bond. Pending trial, the defendant shall be ordered released pending trial on the defendant's personal recognizance or ~~upon~~ **on** the execution of an unsecured appearance bond in an amount set by the court, unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

C. Factors to be Considered in Determining Conditions of Release. In determining the least restrictive conditions of release that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community, the court shall consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant. In addition, the court may take into account the available information ~~concerning~~ **about**

(1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence or involves alcohol or drugs;

(2) the weight of the evidence against the defendant;

(3) the history and characteristics of the defendant, including

(a) the defendant's character, physical and mental condition, family ties, employment, past and present residences, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record ~~concerning~~ **about** appearance at court proceedings; and

- (b) whether, at the time of the current offense or arrest, the defendant was on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law;
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the defendant's release;
- (5) any other facts tending to indicate the defendant may or may not be likely to appear as required; and
- (6) any other facts tending to indicate the defendant may or may not commit new crimes if released.

D. Non-Monetary Conditions of Release. In its order setting conditions of release, the court shall impose a standard condition that the defendant not commit a federal, state, or local crime during the period of release. The court may also impose the least restrictive particularized condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

- (1) remain in the custody of a designated person who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the court that the defendant will appear as required and will not pose a danger to the safety of any other person or the community;
- (2) maintain employment, or, if unemployed, actively seek employment;
- (3) maintain or commence an educational program;
- (4) abide by specified restrictions on personal associations, place of abode, or travel;
- (5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify ~~concerning~~ **about** the offense;
- (6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
- (7) comply with a specified curfew;
- (8) refrain from possessing a firearm, destructive device, or other dangerous weapon;
- (9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;
- (10) **refrain from any use of cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner.**
- ~~(10)~~ (11) undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;
- ~~(11)~~ (12) submit to a drug test or an alcohol test on request of a person designated by the court;
- ~~(12)~~ (13) return to custody for specified hours ~~following~~ **after** release for employment, schooling, or other limited purposes;
- ~~(13)~~ (14) satisfy any other condition that is reasonably necessary to ensure the appearance of the defendant as required and the safety of any other person and the community.

E. Secured Bond. If the court makes written findings of the particularized reasons why release on personal recognizance or unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ensure the appearance of the defendant as required, the court may require a secured bond for the defendant's release.

(1) Factors to be considered in setting secured bond.

- (a) In determining whether any secured bond is necessary, the court may consider any facts tending to indicate that the particular defendant may or may not be likely to appear as required.
- (b) The court shall set secured bond at the lowest amount necessary to reasonably ensure the defendant's appearance and with regard to the defendant's financial ability to secure a bond.
- (c) The court shall not set a secured bond that a defendant cannot afford for the purpose of detaining a defendant who is otherwise eligible for pretrial release.
- (d) Secured bond shall not be set by reference to a predetermined schedule of monetary amounts fixed according to the nature of the charge.

(2) Types of Secured Bond. If a secured bond is determined necessary in a particular case, the court shall impose the first of the following types of secured bond that will reasonably ensure the appearance of the defendant.

- (a) Percentage bond. The court may require a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of ten percent (10%) of the amount specified. The deposit may be returned as provided in Paragraph K of this rule.
- (b) Property bond. The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 8–401.1 NMRA.
- (c) Cash or surety bond. The court may give the defendant the option of either
 - (i) a secured appearance bond executed by the defendant in the full amount specified in the order setting conditions of release, secured by a deposit in cash of one hundred percent (100%) of the amount specified, which may be returned as provided in Paragraph K of this rule, or
 - (ii) a surety bond executed by licensed sureties in accordance with Rule 8–401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order Setting Conditions of Release; Contents.

(1) Contents of Order Setting Conditions of Release. The order setting conditions of release shall

- (a) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant's conduct;
- (b) advise the defendant of
 - (i) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;
 - (ii) the consequences for violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest, revocation of pretrial release, and forfeiture of bond; and

(iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice.

(2) *Written Findings regarding about Secured Bond.* The court shall file written findings of the individualized facts justifying the secured bond, if any, as soon as possible, but no later than two (2) days after the conclusion of the hearing.

G. Motion for Review of Conditions of Release by the Municipal Court.

(1) *Motion for Review.* If the municipal court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody twenty-four (24) hours after the issuance of the order setting conditions of release as a result of the defendant's inability to post the secured bond or meet the conditions of release in the present case, the defendant shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions of release.

(2) *Review Hearing.* The municipal court shall hold a hearing in an expedited manner, but in no event later than five (5) days after the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting conditions of release is amended and the defendant is ~~thereupon~~ then released, the court shall file a written order setting forth the reasons for declining to amend the order setting conditions of release. The court shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial release under Article II, Section 13 of the New Mexico Constitution shall be detained solely because of financial inability to post a secured bond unless the court determines by clear and convincing evidence and makes findings of the reasons why the amount of secured bond required by the court is reasonably necessary to ensure the appearance of the particular defendant as required. The court shall file written findings of the individualized facts justifying the secured bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

(3) *Work or School Release.* A defendant who is ordered released on a condition that requires that the defendant return to custody after specified hours, shall, on motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions imposed. Unless the requirement is removed and the defendant is released on another condition, the court shall file a written order setting forth the reason for the continuation of the requirement. A hearing to review conditions of release under this subparagraph shall be held by the municipal court within five (5) days of the filing of the motion. The defendant shall have the right to assistance of retained or appointed counsel at the hearing.

(4) *Subsequent Motion for Review.* The defendant may file subsequent motions for review of the order setting conditions of release, but the court may rule on subsequent motions with or without a hearing.

H. Amendment of Conditions. The court may amend its order setting conditions of release at any time. If the amendment of the order may result in the detention of the defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating a condition of release, the court shall follow the procedures set forth in Rule 8–403 NMRA.

I. Petition to District Court.

(1) *Defendant Must Seek Review by Municipal Court Before Filing Petition in District Court.* The defendant may file a petition in the district court for review of the municipal court's order setting conditions of release only after the municipal court has ruled on a motion to review the conditions of release under Paragraph G of this rule. The defendant shall attach to the district court petition a copy of the municipal court order disposing of the defendant's motion for review.

(2) *Petition; Requirements.* A petition to the district court under this paragraph shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the municipal court;
- (b) serve a copy on the prosecutor; and
- (c) provide a copy to the assigned district court judge.

(3) *Municipal Court's Jurisdiction Pending Determination of the Petition.* ~~Upon~~ **On** the filing of a petition under this paragraph, the municipal court's jurisdiction to amend the conditions of release shall be suspended pending determination of the petition by the district court. The municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the municipal court while the district court petition is pending. The municipal court's order setting conditions of release shall remain in effect unless and until the district court issues an order amending the conditions of release.

(4) *District Court Review.* The district court shall rule on the petition in an expedited manner. Within three (3) days after the petition is filed, the district court shall take one of the following actions:

- (a) set a hearing no later than ten (10) days after the filing of the petition and promptly ~~transmit~~ **send** a copy of the notice to the municipal court;
- (b) deny the petition summarily; or
- (c) amend the order setting conditions of release without a hearing.

(5) *District Court Order; Transmission to Municipal Court.* The district court shall promptly ~~transmit~~ **send** to the municipal court a copy of the district court order disposing of the petition, and jurisdiction over the conditions of release shall revert to the municipal court.

J. Expedited Trial Scheduling for Defendant in Custody. The municipal court shall provide expedited priority scheduling in a case in which the defendant is detained as a result of inability to post a secured bond or meet the conditions of release. **The court shall hold a status review hearing in any case in which the defendant has been held for more than forty-five (45) days.**

K. Return of Cash Deposit. If a defendant has been released by executing a secured appearance bond and depositing a cash deposit under Paragraph E of this rule, when the conditions of the appearance bond have been performed and the defendant's case has been adjudicated by the court, the clerk shall return the sum that has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.

L. Release from Custody by Designee. The presiding judge of the municipal court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 8–408 NMRA. A designee shall release a defendant from custody ~~prior to~~ **before** the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 8–408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if the person or the person's spouse is related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state.

M. Evidence. Information offered in connection with or stated in any proceeding held or order entered under this rule need not conform to the New Mexico Rules of Evidence.

N. Forms. Instruments required by this rule, including any order setting conditions of release, appearance bond, property bond, or surety bond, shall be substantially in the form approved by the Supreme Court.

O. Judicial Discretion; Disqualification. Action by any court on any matter relating to pretrial release shall not preclude the subsequent disqualification of a judge under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

[As amended, effective August 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990; as amended by Supreme Court Order No. 07–8300–034, effective January 22, 2008; by Supreme Court Order No. 08–8300–047, effective December 31, 2008; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014–NMSC–038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely ~~due to~~ **because of** financial inability to post a secured bond. This rule was derived from the federal statute governing the release or detention of a defendant pending trial. See 18 U.S.C. § 3142. This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court’s holding in *Brown*, 2014–NMSC–038. Corresponding rules are located in the Rules of Criminal Procedure for the District Courts, see Rules 5–401 NMRA, the Rules of Criminal Procedure for the Magistrate Courts, see Rule 6–401 NMRA, and the Rules of Criminal Procedure for the Metropolitan Courts, see Rule 7–401 NMRA.

Time periods specified in this rule are computed in accordance with Rule 8–104 NMRA.

Just as assistance of counsel is required at a detention hearing under Rule 5–409 NMRA that may result in a denial of pretrial release based on dangerousness, Subparagraphs (A)(2), (G)(2), and (G)(3) of this rule provide that assistance of counsel is required in a proceeding that may result in denial of pretrial release based on reasons that do not involve dangerousness, such as a simple inability to meet a financial condition.

As set forth in Paragraph B, a defendant is entitled to release on personal recognizance or unsecured bond unless the court determines that such release, in addition to any non-monetary conditions of release under Paragraph D, will not reasonably ensure the appearance of the defendant and the safety of any other person or the community.

Paragraph C lists the factors the court should consider when determining conditions of release. In all cases, the court is required to consider any available results of a pretrial risk assessment instrument approved by the Supreme Court for use in the jurisdiction, if any, and the financial resources of the defendant.

Paragraph D lists various non-monetary conditions of release. The court must impose the least restrictive condition, or combination of conditions, that will reasonably ensure the appearance of the defendant as required and the safety of any other person and the community. See *Brown*, 2014–NMSC–038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard conditions ~~prior to~~ **before** a court appearance, the judge should review the conditions at the defendant’s first appearance to determine whether any particularized conditions should be imposed under the circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions of release to ensure the orderly administration of justice. This provision was derived from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The court should make a determination ~~as to~~ **about** whether the defendant can afford to pay all or a ~~portion~~ **part** of the cost, or whether the court has the authority to waive the cost, because detaining a defendant ~~due to~~ **because of** inability to pay the cost associated with a condition of release is comparable to detaining a defendant ~~due to~~ **because of** financial inability to post a secured bond.

As set forth in Paragraph E, the only purpose for which the court may impose a secured bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which the defendant must be present. See *State v. Ericksons*, 1987–NMSC–108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the defendant’s attendance to submit to the punishment to be imposed by the court.”); see also NMSA 1978, § 31–3–2(B)(2) (authorizing the forfeiture of bond ~~upon~~ **on** the defendant’s failure to appear).

The 2017 amendments to this rule clarify that the amount of secured bond must not be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed according to the nature of the charge. Instead, the court must consider

the individual defendant's financial resources and must set secured bond at the lowest amount that will reasonably ensure the defendant's appearance in court after the defendant is released.

Secured bond cannot be used for the purpose of detaining a defendant who may pose a danger to the safety of any other person or the community. *See Brown*, 2014–NMSC–038, ¶ 53 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set high bail for the purpose of preventing a defendant's pretrial release.”); *see also Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated to ensure the defendant's appearance in court “is ‘excessive’ under the Eighth Amendment”).

The court should consider the authorized types of secured bonds in the order of priority set forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash deposit of 10%. If this is inadequate, the court then must consider a property bond ~~where the~~ **involving** property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the defendant has the option either to execute an appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond from a paid surety. A paid surety may execute a surety bond or a real or personal property bond only if the conditions of Rule 8–401.2 NMRA are met.

Paragraph F governs the contents of an order setting conditions of release. *See* Form 9–303 NMRA (order setting conditions of release). Although pretrial release hearings are not required to be a matter of record in the municipal court, Paragraph F requires the court to make written findings justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~such~~ **any** supplemental findings in a separate document within two days of the conclusion of the hearing. Paragraph G sets forth the procedure for the defendant to file a motion in the municipal court for review of the conditions of release. Paragraph I sets forth the procedure for the defendant to petition the district court for review of the conditions of release set by the municipal court. Article II, Section 13 requires the court to rule on a motion or petition for pretrial release “in an expedited manner” and to release a defendant who is being held solely ~~due to~~ **because of** financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or a petition for pretrial release may present Form 9–301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

Paragraph J requires the municipal court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody ~~due to~~ **because of** inability to post bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part ~~due to~~ **because of** “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass'n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). **This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.**

Under NMSA 1978, Section 31–3–1, the court may appoint a designee to carry out the provisions of this rule. As set forth in Paragraph L, a designee must be designated by the presiding municipal court judge in a written court order. A person may not be appointed as a designee if ~~such~~ **that** person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph L and Rule 8–408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~prior to~~ **before** that defendant's first appearance before a judge.

Paragraph M of this rule dovetails with Rule 11–1101(D)(3)(e) NMRA. Both provide that the Rules of Evidence are not applicable to proceedings in the municipal court with respect to matters of pretrial release. ~~Like~~ **As with courts in** other types of proceedings ~~where~~ **in which** the Rules of Evidence do not apply, ~~at a court presiding over a pretrial release hearing the court~~ is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government's information, whether presented by proffer or by direct proof”); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account

in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011–NMSC–014, ¶¶ 36–39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence).

As set forth in Rule 8–106 NMRA, no right to peremptory disqualification exists in the municipal court, but a judge may be recused under the provisions of the New Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21–211 NMRA.

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court No. _____, effective for all cases pending or filed on or after _____.]

<< NM R MUN CT P Rule 8–403 >>

8–403. REVOCATION OR MODIFICATION OF RELEASE ORDERS

A. Scope. In accordance with this rule, the court may consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release

- (1) if the defendant is alleged to have violated a condition of release; or
- (2) to prevent interference with witnesses or the proper administration of justice.

B. Motion for Revocation or Modification of Conditions of Release.

(1) The court may consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release on motion of the prosecutor or on the court’s own motion.

(2) The defendant may file a response to the motion, but the filing of a response shall not delay any hearing under Paragraph D or E of this rule.

C. Issuance of Summons or Bench Warrant. If the court does not deny the motion on the pleadings, the court shall issue a summons and notice of hearing, unless the court finds that the interests of justice may be better served by the issuance of a bench warrant. The summons or bench warrant shall include notice of the reasons for the review of the pretrial release decision.

D. Initial Hearing.

(1) The court shall hold an initial hearing as soon as practicable, but if the defendant is in custody, the hearing shall be held no later than three (3) days after the defendant is detained if the defendant is being held in the local detention center, or no later than five (5) days after the defendant is detained if the defendant is not being held in the local detention center.

(2) At the initial hearing, the court may continue the existing conditions of release, set different conditions of release, or propose revocation of release.

(3) If the court proposes revocation of release, the court shall schedule an evidentiary hearing under Paragraph E of this rule, unless waived by the defendant.

E. Evidentiary Hearing.

(1) *Time.* The evidentiary hearing shall be held as soon as practicable. If the defendant is in custody, the evidentiary hearing shall be held no later than seven (7) days after the initial hearing.

(2) *Defendant’s Rights.* The defendant has the right to be present and to be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed. The defendant shall be afforded an opportunity to testify, to present witnesses, to compel the attendance of witnesses, to cross-examine witnesses who appear at the hearing, and to present information by

proffer or otherwise. If the defendant testifies at the hearing, the defendant's testimony shall not be used against the defendant at trial except for impeachment purposes or in a subsequent prosecution for perjury.

F. Order at Completion of Evidentiary Hearing. At the completion of an evidentiary hearing, the court shall determine whether the defendant has violated a condition of release or whether revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice. The court may

- (1) continue the existing conditions of release;
- (2) set new or additional conditions of release in accordance with Rule 8–401 NMRA; or
- (3) revoke the defendant's release, if the court
 - (a) finds ~~that there is~~ either
 - (i) probable cause to believe that the defendant committed a federal, state, or local crime while on release; or
 - (ii) clear and convincing evidence that the defendant has willfully violated any other condition of release; and
 - (b) finds ~~that there is~~ clear and convincing evidence that either
 - (i) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or
 - (ii) revocation of the defendant's release is necessary to prevent interference with witnesses or the proper administration of justice.

An order revoking release shall include written findings of the individualized facts justifying revocation.

G. Evidence. The New Mexico Rules of Evidence shall not apply to the presentation and consideration of information at any hearing under this rule.

H. Review of Conditions. If the municipal court enters an order setting new or additional conditions of release and the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may petition the district court for review in accordance with Rule 8–401(I) NMRA. The defendant may petition the district court immediately ~~upon~~ on the issuance of the municipal court order and shall not be required to first seek review or reconsideration by the municipal court. If, ~~upon~~ on disposition of the petition by the district court, the defendant is detained or continues to be detained because of a failure to meet a condition imposed, or is subject to a requirement to return to custody after specified hours, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

I. Expedited Trial Scheduling for Defendant in Custody. The municipal court shall provide expedited priority scheduling in a case in which the defendant is detained pending trial.

The court shall hold a status review hearing in any case in which the defendant has been held for more than forty-five (45) days.

J. Petition to District Court for Review of Revocation Order. If the municipal court issues an order revoking the defendant's release, the defendant may petition the district court for review under this paragraph and Rule 5–403(K) NMRA.

(1) *Petition; Requirements.* The petition shall include the specific facts that warrant review by the district court and may include a request for a hearing. The petitioner shall promptly

- (a) file a copy of the district court petition in the municipal court;
- (b) serve a copy on the prosecutor; and
- (c) provide a copy to the assigned district court judge.

(2) *Municipal Court's Jurisdiction Pending Determination of the Petition.* ~~Upon~~ **On** the filing of the petition, the municipal court's jurisdiction to set or amend conditions of release shall be suspended pending determination of the petition by the district court. The municipal court shall retain jurisdiction over all other aspects of the case, and the case shall proceed in the municipal court while the petition is pending.

(3) *District Court Review.* The district court shall rule on the petition in an expedited manner.

- (a) Within three (3) days after the petition is filed, the district court shall take one of the following actions:
 - (i) issue an order affirming the revocation order; or
 - (ii) set a hearing to be held within ten (10) days after the filing of the petition and promptly ~~transmit~~ **send** a copy of the notice to the municipal court.
- (b) If the district court holds a hearing on the petition, at the conclusion of the hearing the court shall issue either an order affirming the revocation order or an order setting conditions of release under Rule 5–401 NMRA.

(4) *District Court Order; Transmission to Municipal Court.* The district court shall promptly [transmit] **send** the order to the municipal court, and jurisdiction over the conditions of release shall revert to the municipal court.

(5) *Appeal.* If the district court affirms the revocation order, the defendant may appeal in accordance with Rule 5–405 NMRA and Rule 12–204 NMRA.

[Approved, effective July 1, 1988; as amended, effective September 1, 1990; as amended by Supreme Court Order No. 08–8300–047, effective December 31, 2008; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 18–8300–024, effective for all cases pending or filed on or after February 1, 2019; **as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.**]

Committee commentary

The 2017 amendments to this rule clarify the procedure for the court to follow when considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the conditions of release. In *State v. Segura*, 2014–NMCA–037, 321 P.3d 140, the Court of Appeals held that due process requires courts to afford the defendant notice and an opportunity to be heard before the court may revoke the defendant's bail and remand the defendant into custody. *See also Tijerina v. Baker*, 1968–NMSC–009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the right to bail is not absolute); *id.* ¶ 10 (“If the court has inherent power to revoke bail of a defendant during trial and pending final disposition of the criminal case in order to prevent interference with witnesses or the proper administration of justice, the right to do so before trial seems to be equally apparent under a proper set of facts.”); *State v. Rivera*, 2003–NMCA–059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are separate, coercive powers of a court, apart from the bond itself. They are enforceable by immediate arrest, revocation, or modification if violated. Such conditions of release are intended to protect the public and keep the defendant in line.”), *rev'd on other grounds*, 2004–NMSC–001, 134 N.M. 768, 82 P.3d 939.

Paragraph G provides that the New Mexico Rules of Evidence do not apply at a revocation hearing, consistent with Rule 11–1101(D)(3)(e) NMRA. ~~Like~~ **As with courts in other types of proceedings where in which** the Rules of Evidence do not apply, **at a court presiding over a pretrial detention hearing the court** is responsible “for assessing the reliability and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the responsibility for assessing the reliability and accuracy of the government’s information, whether presented by proffer or by direct proof”); *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the discretion of the detention hearing court to determine whether a pretrial detention order may be supported in an individual case by documentary evidence, proffer, one or more live witnesses, or other forms of information the court deems sufficient); *see also United States v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge considers has sufficient indicia of reliability to support its probable accuracy, the information may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011–NMSC–014, ¶¶ 36–39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on the reliability of the evidence); *State v. Vigil*, 1982–NMCA–058, ¶ 24, 97 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for accuracy or reliability lacked probative value).

Paragraph I requires the municipal court to prioritize the scheduling of trial and other proceedings for cases in which the defendant is held in custody. *See generally United States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10–5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice.”). This rule does not preclude earlier or more regular status review hearings. The purpose of the hearing is to determine how best to expedite a trial in the case.

[Adopted by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

<< NM R CR Form 9–303 >>

9–303. ORDER SETTING CONDITIONS OF RELEASE

[For use with District Court Rule 5–401 NMRA,
Magistrate Court Rule 6–401 NMRA,
Metropolitan Court Rule 7–401 NMRA and
Municipal Court Rule 8–401 NMRA]

STATE OF NEW MEXICO

[COUNTY OF]

[CITY OF]

_____ COURT

STATE OF NEW MEXICO

[COUNTY OF]

[CITY OF]

v.

..... No.

..... Defendant.

ORDER SETTING CONDITIONS OF RELEASE

Release on recognizance or unsecured bond:

It is ordered that the defendant be released from custody ~~upon~~ **on**:

(check and complete applicable alternatives)

☐ Personal recognizance.

☐ Unsecured appearance bond of \$_____.

☐ Third-party custody release to: _____(individual or organization).

I/We agree to supervise the defendant; to use every effort to assure the defendant's appearance at all scheduled hearings; and to notify the court immediately ~~in the event~~ **if** that the defendant violates any conditions of release.

Signature of Custodian

Address (city/zip)

Area Code/Telephone #

Defendant's conditions of release:

The court **FINDS** that the following conditions of release are the least restrictive conditions necessary to reasonably assure the appearance of the defendant as required and the safety of any other person and the community. The defendant shall not violate any federal, state, or local criminal law and shall:

(complete and check only applicable conditions ~~prior to~~ before signature by defendant)

☐ not possess firearms or dangerous weapons;

☐ not return to the location of the alleged incident;

☐ not consume alcohol;

☐ **not consume cannabis, cannabis products, or synthetic cannabinoids without a certification from a licensed medical practitioner;**

☐ not buy, sell, consume, or possess illegal drugs;

☐ notify the court of any change of address;

☐ not leave the (county of _____) (State of _____) without prior permission of the court;

☐ maintain contact with the defendant's attorney/seek and consult with an attorney;

☐ avoid all contact with the alleged victim or anyone who may testify in this case;

☐ have an ignition interlock device installed on any vehicle the defendant may drive; (☐ camera capable ignition interlock device);

☐ be on pretrial supervision and abide by all conditions set by the court and by pretrial services;

☐ reside at _____(address) unless otherwise agreed to by the court;

☐ submit to drug or alcohol testing ~~upon~~ on the request of _____;

☐ not leave the defendant's residence between the hours of _____ p.m. and _____ a.m. without prior permission of the court;

☐ maintain employment, or, if unemployed, actively seek employment;

☐ maintain or commence an educational program;

☐ (other conditions) _____

Release on secured bond:

☐ The court **FINDS** that release on non-monetary conditions will not reasonably assure the appearance of the defendant. In making this determination, the court finds the following particularized factors require imposition of a secured bond in the amount set forth below:

.....

Secured bond of \$ _____, secured by:

☐ cash at 10 % of total bond.

☐ real property bond executed on Form 9-304 NMRA.

☐ either 100% cash or a surety bond executed on Form 9-304 NMRA.

Defendant's acceptance of conditions and promise to appear:

I understand the above conditions of release and agree to them.

I understand that the court may have me arrested at any time, without notice, to review and reconsider these conditions.

I understand that my conditions of release may be revoked and I may be charged with a separate criminal offense if I intimidate or threaten a witness, the victim, or an informant, or if I otherwise obstruct justice.

I further understand that my conditions of release may be revoked if I violate a federal, state, or local criminal law.

I agree to appear before the court on _____, at _____ (a.m.) (p.m.) located at _____ and there after at ~~such~~ any times and places required in this case by any court.

I understand, that if I fail to appear as required, my bond, if any, may be forfeited, and I may be prosecuted and sent to [jail] [the penitentiary] for the separate offense of failure to appear. I agree to comply fully with each of the conditions imposed on my release and to notify the court promptly ~~in-the-event~~ if I change the address indicated below.

.....

Date of signature

Defendant's signature

.....
Date of release

Time of release

.....
Cell phone number

Alternate phone number

.....
Email address

.....
Mailing address (include city, state, and zip code)

.....
Physical address (include city, state, and zip code)

Judicial approval of conditions:

Judge's signature

USE NOTES

(Do not print use notes on pre-printed forms)

This form was revised in 2017 in conjunction with amendments to Rules 5–401, 6–401, 7–401, and 8–401 NMRA. These rules require the court to file written findings of the individualized facts justifying any secured bond as soon as possible, but no later than two (2) days after the conclusion of the pretrial release hearing. Judges are encouraged to enter their written findings on this order at the conclusion of the hearing. If more detailed findings are necessary, the judge should make ~~such~~ any supplemental findings in a separate document within two days of the conclusion of the hearing.

If a surety provides bond for the defendant, Form 9–304 NMRA must also be completed. If a third party custodian is named, the third-party custodian agreement must also be completed and signed.

[Approved, effective September 1, 1990; as amended by Supreme Court Order 07–8300–29, effective December 10, 2007; as amended by Supreme Court Order No. 17–8300–005, effective for all cases pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

NM ORDER 22-0402

End of Document

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