

# Administrative Office of the Courts

Supreme Court of New Mexico

Arthur W. Pepin, Director  
Karl W. Reifsteck, Director



202 E. Marcy Street  
Santa Fe, NM 87501  
(505) 827-4800  
(505) 827-4824 (fax)

## MEMORANDUM

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To: Members of the Bench and Bar  
From: Arthur W. Pepin & Karl W. Reifsteck  
RE: Amendments to Rules 5-208, 5-401, 5-403, 5-409, 6-204, 6-401, 6-403, 7-204, 7-401, 7-403, 8-401, 8-403 NMRA, amendments to Form 9-210A NMRA, and new Rule 5-403.1 NMRA  
Date: May 8, 2024

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The New Mexico Supreme Court has approved amendments to the rules of criminal procedure that involve revocation or amendment of a defendant's conditions of release, pretrial detention, arrest warrants, and pretrial conditions of release in criminal cases. These revisions have been under consideration by the Supreme Court since July 2023. The Court considered comments from the public, practitioners, and courts.

The revisions seek to improve public safety by clarifying existing rules and implementing new processes to automatically review conditions of release or consider revocation of conditions of release for defendants alleged to have committed new crimes while released before trial. This memorandum offers a brief overview of the approved amendments and adopted new rule.

### **Amendments to Rules 5-403, 6-403, and 7-403 NMRA** **Courts affected: District, Magistrate, and Metropolitan**

What has changed:

- Paragraph B requires judges to consider revocation or modification of a defendant's conditions of release on motion of the prosecutor or on notice of a non-technical violation of a condition of release by a pretrial services agency. Judges continue to have the authority to set hearings whenever they believe justice will be best served by considering revocation or modification of a defendant's conditions of release.
- Subparagraph (C)(1) requires judges to issue a summons and notice of hearing when a prosecutor files a motion to revoke or modify conditions of release, or when a court pretrial services agency notifies the court of a non-technical violation of a condition of release. Alternately, judges may file an order stating why a hearing on the alleged violation is not necessary under the circumstances. Judges continue to have the authority

to issue a bench warrant for the defendant's arrest under these circumstances. Prosecutors continue to have the authority to file a motion for revocation or modification of conditions of release whenever they believe this is in the best interest of justice.

- New subparagraph (C)(2) requires the automatic temporary detention of a defendant and a hearing when a defendant, who was released before trial on a felony or enumerated misdemeanor, is arrested and charged with a new felony or enumerated misdemeanor while released. An "enumerated misdemeanor" is defined in new Rule 5-403.1 NMRA. Judges continue to have the authority to set hearings and prosecutors continue to have the authority to file a motion for revocation or modification of conditions of release on *any* charge when the interest of justice requires.
- Subparagraph (C)(3) requires a hearing when a defendant, who was released before trial on a felony or enumerated misdemeanor, is charged but not arrested for a new felony or enumerated misdemeanor during the period of release. Judges have the option to issue a bench warrant for the defendant's arrest when arrest is necessary in the interest of justice. Judges continue to have the authority to set hearings and prosecutors continue to have the authority to file a motion for revocation or modification of conditions of release on *any* charge.
- Paragraph D provides time limits for setting initial hearings to continue, modify, or consider revocation of a defendant's conditions of release.
- Paragraph E has been amended to provide a deadline to hold the evidentiary hearing for revocation or amendment of conditions of release if the defendant is not in custody. The existing deadline for defendants held in custody remains unchanged.
- Paragraph F has been amended to clarify the deadlines for providing orders of revocation of conditions of release and orders continuing or amending conditions of release after an evidentiary hearing. Judges have three days after the hearing to file orders revoking conditions of release. If the court continues or amends the conditions of release, the order setting conditions of release must be provided to the defendant at the time of release or within three days of the hearing if the defendant is not in custody. The best practice remains to provide this order to the defendant at the time of the hearing. Under the judiciary's language access policies, the order setting conditions of release must be in a language that the defendant can read and understand.

## **Amendments to Rule 8-403 NMRA**

### **Courts affected: Municipal**

What has changed:

- Paragraph F has been amended to clarify the deadlines for providing orders of revocation of conditions of release and orders continuing or amending conditions of release following an evidentiary hearing. Judges have three days after the hearing to file orders revoking conditions of release. If the court continues or amends the conditions of release, the order setting conditions of release must be provided to the defendant at the time of release or within three days of the hearing if the defendant is not in custody. The best practice remains to provide this order to the defendant at the time of the hearing. Under

the judiciary’s language access policies, the order setting conditions of release must be in a language that the defendant can read and understand.

### **New Rule 5-403.1 NMRA**

#### **Courts affected: District, Magistrate, and Metropolitan**

- The Supreme Court adopted a new rule to provide definitions of an “enumerated misdemeanor” that now require temporary detention and an automatic hearing for revocation or modification of conditions of release under Rules 5-403, 6-403, and 7-403 NMRA. The rule also refers to existing policies for the definition of a “non-technical violation” of a condition of release. This definition is publicly available at: [pretrial.nmcourts.gov](http://pretrial.nmcourts.gov).

### **Amendments to Rules 5-401, 6-401, 7-401, and 8-401 NMRA**

#### **Courts affected: District, Magistrate, Metropolitan, and Municipal**

What has changed:

- Paragraph A has been amended to require that a defendant temporarily held in custody pending a hearing for revocation or modification of conditions of release, not have conditions of release set in their new case until after the initial hearing on revocation or modification occurs in the prior case.
- Paragraph B contains technical amendments that ensure the structure of the paragraph matches the overall structure of the rule.
- Paragraph D removes medical, psychological, or psychiatric treatment from the list of non-monetary conditions of release that a judge may order. New Mexico courts are dedicated to providing treatment options for defendants before trial. However, judges do not have the information necessary to order specific treatment at a first appearance or arraignment. In addition, it is a recommended practice to order treatment only “in limited circumstances” or “as supplemental support.”<sup>1</sup> Court programs will increase efforts to connect defendants with treatment and support services voluntarily while they await trial.
- Paragraph E in Rule 5-401 is updated to ensure the language is the same as Rules 6-401, 7-401, and 8-401 NMRA.
- Paragraph F implements a three-day deadline for providing a defendant with the order setting conditions of release. The best practice remains to provide this order to the defendant at the time of the hearing. Under the judiciary’s language access policies, the order must be in a language that the defendant can read and understand.
- Rule 5-401(G) NMRA removes a public safety assessment as a factor for setting a pretrial detention hearing. The Supreme Court approved public safety assessment

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<sup>1</sup> See, e.g., National Institute of Corrections, U.S. Dep’t. of Justice, Nat’l Inst. of Corr., *Incorporating Services and Support into Pretrial Supervision: Is There a Best Model?* (Sept. 2022), available online at: <https://s3.amazonaws.com/static.nicic.gov/Library/033627.pdf>

instrument is valid only for measuring risk and does not recommend for or against pretrial detention. A defendant's criminal history, risk, and other factors remain important considerations for judges, prosecutors, and defense attorneys to study regarding release conditions or a motion for pretrial detention.

- Paragraph H clarifies that defendants are automatically entitled to one review hearing if they remain in custody due to the initial conditions of release set in their case. Defense attorneys continue to have the ability to file a motion to reconsider conditions of release.
- Rules 5-401(K), 6-401(J), 7-401(J) and 8-401(I) NMRA have been amended to reflect the amendments to Rules 5-401(H), 6-401(H), 7-401(H), and 8-401(G).

### **Amendments to Rules 5-208, 6-204, and 7-204 NMRA** **Courts affected: District, Magistrate, and Metropolitan**

What has changed:

- The amended rules prohibit judges from setting conditions of release for defendants when issuing arrest warrants in most criminal cases. Judges may set conditions of release in warrants issued for minor traffic offenses. These minor traffic offenses *do not* include charges for driving a vehicle or operating a motorboat while intoxicated.

### **Amendments to Rule 5-409 NMRA** **Courts affected: District**

What has changed:

- The amendment removes a reference to a pretrial risk assessment instrument approved by the Supreme Court. The risk assessment instrument remains valid. However, this instrument only measures risk, and should not be used as a stand-alone factor to make a recommendation for or against pretrial detention. The risk assessment score may be considered as part of a defendant's history and characteristics.

### **Amendments to Form 9-210A NMRA** **Courts affected: District**

What has changed:

- The amendments limit when a judge can set conditions of release in an arrest warrant to be consistent with changes in Rules 5-208, 6-204, and 7-204 NMRA.

The rule amendments summarized in this memorandum can be viewed in their entirety on the New Mexico Supreme Court website at:

<https://supremecourt.nmcourts.gov/2024-approved-amendments-to-rules-and-forms/>