

**PROPOSED REVISIONS TO THE RULES OF CRIMINAL PROCEDURE FOR THE
DISTRICT COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE
MAGISTRATE COURTS, THE RULES OF CRIMINAL PROCEDURE FOR THE
METROPOLITAN COURTS, AND THE RULES OF PROCEDURE FOR THE
MUNICIPAL COURTS**

PROPOSAL 2024-001

February 27, 2024

The New Mexico Supreme Court is considering amendments to Rules 5-401, 5-403, 5-409, 6-401, 6-403, 7-401, 7-403, 8-401, and 8-403 NMRA.

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 website at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
rules.supremecourt@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before March 22, 2024, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's website for public viewing.

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.

(3) **Local detention center; defined.** A “local detention center” is one that is commonly used by the district court in the normal course of business and not necessarily within the territorial jurisdiction of the court.

B. Right to pretrial release; recognizance or unsecured appearance bond. ~~[Pending trial, any]~~ 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 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. The court may order execution of a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required under Paragraphs E and F of this rule.

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 and the financial resources of the defendant. In addition, the court may take into account the available information 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 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 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;

~~[(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)]~~ (11) submit to a drug test or an alcohol test on request of a person designated by the court;

~~[(13)]~~ (12) return to custody for specified hours after release for employment, schooling, or other limited purposes; and

~~[(14)]~~ (13) 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 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 about secured bond.

(1) ***Contents of order setting conditions of release.*** The written order setting conditions of release shall be provided to the defendant at the conditions of release hearing, and;

(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 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 the 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; or

(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 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]~~ initial conditions of release hearing. 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 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 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; petition 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.*** 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 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 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 six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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 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, on notice to that court, any bond shall be transferred to the district court 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023; 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* Rule 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 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 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 on whether the defendant can afford to pay all or a part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant because of financial inability to post a secured bond. The 2024 amendment recompiled references to court-ordered available medical, psychological, or psychiatric treatment from Paragraph D of this rule to Rule 5-409(F)(6)(h) NMRA.

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) (1993) (authorizing the forfeiture of bond 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 of the New Mexico Constitution 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 ten percent (10%). No other percentage is permitted under the rule. If a cash deposit of ten percent (10%) is inadequate, the court then must consider a property bond involving property that 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 one hundred percent (100%) of the amount of the bond with the court or to purchase a bond from a paid surety. Under Subparagraph (E)(2)(c), the defendant alone has the choice to post the bond by a one hundred percent (100%) cash deposit or a surety. The court does not have the option to set a cash-only bond or a surety-only bond; it must give the defendant the choice of either. 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 any supplemental findings in a separate document within two (2) 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 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, 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 that motion 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 of the New Mexico Constitution 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 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 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 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

Under NMSA 1978, Section 31-3-1 (1972), 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 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 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 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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial release hearing 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* (1985). Paragraph R of this rule does not prevent a judge from filing a recusal 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

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~~] shall consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release on motion of the prosecutor, upon notice of non-technical violation of a condition of release by a court pretrial services agency, 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; temporary detention of certain defendants.**

(1) [~~If the court does not deny the motion on the pleadings,~~] Upon motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings as to why amended or revoked conditions of release are unnecessary, or 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.

(2) A defendant previously released by any court in this state pending any felony charge or pending a charge for an Enumerated Misdemeanor who is charged with a new felony or new Enumerated Misdemeanor alleged to have occurred during the period of initial

release, shall be held without bond and without conditions of release pending an initial hearing pursuant to Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant.

(3) For the purposes of this Paragraph, an “Enumerated Misdemeanor” means: battery against a household member contrary to Section 30-3-15 NMSA 1978, stalking contrary to Section 30-3A-3 NMSA 1978, violation of an order of protection contrary to Section 40-13-6 NMSA 1978, harassment contrary to Section 30-3A-2 NMSA 1978, driving under the influence of intoxicating liquor or drugs contrary to Section 66-8-102 NMSA 1978, or operating a motorboat while under the influence of intoxicating liquor or drugs contrary to Section 66-13-3 NMSA 1978.

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. If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) 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]~~, and 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 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 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 and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the evidentiary hearing.

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, 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. The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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.*** 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 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 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; 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, ¶¶ 1, 24-25, 321 P.3d 140, *overruled on other grounds by State v. Ameer*, 2018-NMSC-030, ¶ 69, 458 P.3d 390, 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.

As used in Paragraph D, a “local detention center” is “one that is commonly used by the district court in the normal course of business and not necessarily within the territorial jurisdiction of the court.” Rule 5-401(A)(3) NMRA.

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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial detention hearing 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 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

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 (1985). Paragraph L of this rule does not prevent a judge from filing a recusal 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 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023.]

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 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 motion for an expedited pretrial detention hearing at any time in the court where the case is pending. The motion shall include the specific facts that warrant pretrial detention and shall specify whether the state is requesting a preliminary examination to establish probable cause. If the state requests a preliminary examination, the motion shall also specify whether the state is requesting that an 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) 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 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 shall proceed to conduct the defendant's first appearance under Rule 6-501 NMRA or Rule 7-501 NMRA and thereafter promptly 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 shall then close the case and its jurisdiction shall be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph I of this rule.

D. **Case 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 made under Rule 5-301 NMRA, Rule 6-203 NMRA, or Rule 7-203 NMRA, the district court shall determine probable cause in accordance with Rule 5-301 NMRA. If the court finds no probable cause, the 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 under that designation is terminated on 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. **Expedited pretrial detention hearing.** The district court shall hold 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. On the request of the prosecutor or on the court's own motion, the 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.

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

(i) for three (3) days to five (5) days, as provided in Subparagraph (F)(1)(b) of this rule, if in the motion for pretrial detention the prosecutor requests or the court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing;

(ii) for up to three (3) days on a showing that extraordinary circumstances exist and justice requires the extension;

- (iii) on the defendant filing a waiver of the time limit; or
- (iv) on stipulation of the parties.

(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 on 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) the defendant's criminal history, including prior convictions and previous instances of failure to appear in court for a criminal matter in any jurisdiction; and

(h) the results of diagnostic screening demonstrating the defendant's need for, and the availability of medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency.

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. An order containing findings of the individualized facts justifying the detention must be filed 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.** 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 six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; 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.” *Id.* 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, ¶¶ 5-6, 70, 458 P.3d 390.

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), and 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 the 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 forty-eight (48) hours after arrest, in order to continue detention or other significant restraint of liberty. *Cnty. 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)(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 of the New Mexico Constitution. *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 is 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. This assessment “require[s] a detention court to engage in a delicate case-by-case balancing of all relevant factors, with the calculus limited only ‘by what evidence the litigants present.’” *State v. Mascareno-Haidle*, 2022-NMSC-015, ¶ 39, 514 P.3d 454 (citing *State v. Ferry*, 2018-NMSC-004, ¶ 7, 409 P.3d 918). Among other factors, the court may consider 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 *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. However, the detention court shall not “consider the nature and circumstances of the offense factor in isolation and to the exclusion of all other relevant factors, whether those factors are expressly identified in the rule or not.” *Masacreno-Haidle*, 2022-NMSC-015, ¶ 39 (internal quotation marks omitted). Furthermore, 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.” *Ferry*, 2018-NMSC-004, ¶ 6. “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 — 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and

witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

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 of the New Mexico Constitution, 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* (1985). Paragraph M does not prevent a judge from filing a recusal 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022.]

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.

(3) **Local detention center; defined.** A “local detention center” is one that is commonly used by the magistrate court in the normal course of business and not necessarily within the territorial jurisdiction of the court.

B. Right to pretrial release; recognizance or unsecured appearance bond. ~~[Pending trial, any]~~ 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 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. The court may order execution of a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required under Paragraphs E and F of this rule.

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 and the financial resources of the defendant. In addition, the court may take into account the available information 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 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 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;

~~[(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)]~~ (11) submit to a drug test or an alcohol test on request of a person designated by the court;

~~[(13)]~~ (12) return to custody for specified hours after release for employment, schooling, or other limited purposes; and

~~[(14)]~~ (13) 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 about secured bond.**

(1) ***Contents of order setting conditions of release.*** The written order setting conditions of release shall be provided to the defendant at the conditions of release hearing, and;

(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 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]~~ initial conditions of release hearing. 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 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.*** 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 send 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 send 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. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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 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, on notice to the magistrate court, any bond shall be transferred to the district court 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. 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023; 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 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* Rule 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 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 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 about whether the defendant can afford to pay all or a part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant 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) (1993) (authorizing the forfeiture of bond 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 of the New Mexico Constitution 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 ten percent (10%). No other percentage is permitted under the rule. If a cash deposit of ten percent (10%) is inadequate, the court then must consider a property bond involving property that 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 one hundred percent (100%) of the amount of the bond with the court or to purchase a bond from a paid surety. Under Subparagraph (E)(2)(c), the defendant alone has the choice to post the bond by a one hundred percent (100%) cash deposit or a surety. The court does not have the option to set a cash-only bond or a surety-only bond; it must give the defendant the choice of either. 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 the supplemental findings in a separate document within two (2) 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 of the New Mexico Constitution 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 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 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 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 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

Under NMSA 1978, Section 31-3-1 (1972), 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 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 before that defendant’s first appearance before a judge.

Paragraph N requires the magistrate court to transfer any bond to the district court 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. As with courts in other types of proceedings in which the Rules of

Evidence do not apply, a court presiding over a pretrial release hearing 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* (1983). Paragraph Q of this rule does not prevent a judge from filing a recusal 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

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~~ shall consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release on motion of the prosecutor, upon notice of non-technical violation of a condition of release by a court pretrial services agency, 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; temporary detention of certain defendants.**

(1) ~~[If the court does not deny the motion on the pleadings,]~~ Upon motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings as to why amended or revoked conditions of release are unnecessary, or 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.

(2) A defendant previously released by any court in this state pending any felony charge or pending a charge for an Enumerated Misdemeanor who is charged with a new felony or new Enumerated Misdemeanor alleged to have occurred during the period of initial release, shall be held without bond and without conditions of release pending an initial hearing

pursuant to Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant.

(3) For the purposes of this Paragraph, an “Enumerated Misdemeanor” means; battery against a household member contrary to Section 30-3-15 NMSA 1978, stalking contrary to Section 30-3A-3 NMSA 1978, violation of an order of protection contrary to Section 40-13-6 NMSA 1978, harassment contrary to Section 30-3A-2 NMSA 1978, driving under the influence of intoxicating liquor or drugs contrary to Section 66-8-102 NMSA 1978, or operating a motorboat while under the influence of intoxicating liquor or drugs contrary to Section 66-13-3 NMSA 1978.

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. If the defendant is not in custody, the hearing shall be held no later than ten (10) days after the motion or notice of alleged violation is filed.

(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. If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) 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~~], and 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 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 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 and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the evidentiary hearing.

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 on the issuance of the magistrate court order and shall not be required to first seek review or reconsideration by the magistrate court. If, 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. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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.*** 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 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 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; 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, ¶¶ 1, 24-25, 321 P.3d 140, *overruled on other grounds by State v. Ameer*, 2018-NMSC-030, ¶ 69, 458 P.3d 390, 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.

As used in Paragraph D, a “local detention center” is “one that is commonly used by the magistrate court in the normal course of business and not necessarily within the territorial jurisdiction of the court.” Rule 6-401(A)(3) NMRA.

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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial detention hearing 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 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

[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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023.]

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.

(3) **Local detention center; defined.** A “local detention center” is one that is commonly used by the metropolitan court in the normal course of business and not necessarily within the territorial jurisdiction of the court.

B. Right to pretrial release; recognizance or unsecured appearance bond. ~~[Pending trial, any]~~ 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 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. The court may order execution of a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required under Paragraphs E and F of this rule.

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 and the financial resources of the defendant. In addition, the court may take into account the available information 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 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 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)]~~ (11) submit to a drug test or an alcohol test on request of a person designated by the court;
- ~~[(13)]~~ (12) return to custody for specified hours after release for employment, schooling, or other limited purposes; and
- ~~[(14)]~~ (13) 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 about secured bond.

(1) *Contents of order setting conditions of release.* The written order setting conditions of release shall be provided to the defendant at the conditions of release hearing, and;

(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 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]~~ initial conditions of release hearing. 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 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.*** 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 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 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. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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 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, on notice to the metropolitan court, any bond shall be transferred to the district court 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023; 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 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* Rule 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 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 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 about whether the defendant can afford to pay all or a part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant 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) (1993) (authorizing the forfeiture of bond 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 of the New Mexico Constitution 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 ten percent (10%). No other percentage is permitted under the rule. If a cash deposit of ten percent (10%) is inadequate, the court then must consider a property bond involving property that 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 one hundred percent (100%) of the amount of the bond with the court or to purchase a bond from a paid surety. Under Subparagraph (E)(2)(c), the defendant alone has the choice to post the bond by a one hundred percent (100%) cash deposit or a surety. The court does not have the option to set a cash-only bond or a surety-only bond; it must give the defendant the choice of either. 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 any supplemental findings in a separate document within two (2) 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 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 of the New Mexico Constitution 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 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 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 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 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

Under NMSA 1978, Section 31-3-1 (1972), 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 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 before that defendant’s first appearance before a judge.

Paragraph N requires the metropolitan court to transfer any bond to the district court 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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial release hearing 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* (1983). Paragraph Q of this rule does not prevent a judge from filing a recusal 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

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~~ shall consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release on motion of the prosecutor, upon notice of non-technical violation of a condition of release by a court pretrial services agency, 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; temporary detention of certain defendants.**

(1) ~~[If the court does not deny the motion on the pleadings,]~~ Upon motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings as to why amended or revoked conditions of release are unnecessary, or 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.

(2) A defendant previously released by any court in this state pending any felony charge or pending a charge for an Enumerated Misdemeanor who is charged with a new felony or new Enumerated Misdemeanor alleged to have occurred during the period of initial release, shall be held without bond and without conditions of release pending an initial hearing pursuant to Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant.

(3) For the purposes of this Paragraph, an “Enumerated Misdemeanor” means: battery against a household member contrary to Section 30-3-15 NMSA 1978, stalking contrary to Section 30-3A-3 NMSA 1978, violation of an order of protection contrary to Section 40-13-6 NMSA 1978, harassment contrary to Section 30-3A-2 NMSA 1978, driving under the influence of intoxicating liquor or drugs contrary to Section 66-8-102 NMSA 1978, or operating a motorboat while under the influence of intoxicating liquor or drugs contrary to Section 66-13-3 NMSA 1978.

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. If the defendant is not in custody, the hearing shall be held no later than ten (10) days after the motion or notice of alleged violation is filed.

(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. If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) 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~~], and 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 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 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 and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the evidentiary hearing.

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 on the issuance of the metropolitan court order and shall not be required to first seek review or reconsideration by the metropolitan court. If, 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. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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 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 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; 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, ¶¶ 1, 24-25, 321 P.3d 140, *overruled on other grounds by State v. Ameer*, 2018-NMSC-030, ¶ 69, 458 P.3d 390, 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.

As used in Paragraph D, a “local detention center” is “one that is commonly used by the metropolitan court in the normal course of business and not necessarily within the territorial jurisdiction of the court.” Rule 7-401(A)(3) NMRA.

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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial detention

hearing 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 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

[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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023.]

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.

(3) **Local detention center; defined.** A “local detention center” is one that is commonly used by the municipal court in the normal course of business and not necessarily within the territorial jurisdiction of the court.

B. Right to pretrial release; recognizance or unsecured appearance bond. ~~[Pending trial, the]~~ Any defendant shall be ordered released pending trial on the defendant’s personal recognizance or 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. The court may order execution of a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required under Paragraphs E and F of this rule.

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 and the financial resources of the defendant. In addition, the court may take into account the available information 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 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 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;
- ~~[(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)] (11) submit to a drug test or an alcohol test on request of a person designated by the court;
- [(13)] (12) return to custody for specified hours after release for employment, schooling, or other limited purposes; and
- [(14)] (13) 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 written order setting conditions of release shall be provided to the defendant at the conditions of release hearing, and;

(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 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]~~ conditions of release hearing. 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 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.*** 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 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 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. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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 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. 22-8300-015, effective for all cases pending or filed on or after

December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023; 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 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* Rule 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 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 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 about whether the defendant can afford to pay all or a part of the cost, or whether the court has the authority to waive the cost, because detaining a defendant

because of inability to pay the cost associated with a condition of release is comparable to detaining a defendant 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) (1993) (authorizing the forfeiture of bond 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 ten percent (10%). No other percentage is permitted under the rule. If a cash deposit of ten percent (10%) is inadequate, the court then must consider a property bond involving property that 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 one hundred percent (100%) of the amount of the bond with the court or to purchase a bond from a paid surety. Under Subparagraph (E)(2)(c), the defendant alone has the choice to post the bond by a one hundred percent (100%) cash deposit or a surety. The court does not have the option to set a cash-only bond or a surety-only bond; it must give the defendant the choice of either. 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 any supplemental findings in a separate document within two (2) 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 of the New Mexico Constitution 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 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 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 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. A meaningful review of the progress of the case includes assessment of the parties’ compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

Under NMSA 1978, Section 31-3-1 (1972), 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 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 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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial release hearing 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 file a recusal 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

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] shall consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor, upon notice of non-technical violation of a condition of release by a court pretrial services agency, 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; temporary detention of certain defendants.**

(1) [If the court does not deny the motion on the pleadings,] Upon motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings as to why amended or revoked conditions of release are unnecessary, or 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.

(2) A defendant previously released by any court in this state pending any felony charge or pending a charge for an Enumerated Misdemeanor who is charged with a new felony or new Enumerated Misdemeanor alleged to have occurred during the period of initial release, shall be held without bond and without conditions of release pending an initial hearing pursuant to Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant.

(3) For the purposes of this Paragraph, an "Enumerated Misdemeanor" means: battery against a household member contrary to Section 30-3-15 NMSA 1978, stalking contrary to Section 30-3A-3 NMSA 1978, violation of an order of protection contrary to Section 40-13-6 NMSA 1978, harassment contrary to Section 30-3A-2 NMSA 1978, driving under the influence of intoxicating liquor or drugs contrary to Section 66-8-102 NMSA 1978, or operating a motorboat while under the influence of intoxicating liquor or drugs contrary to Section 66-13-3 NMSA 1978.

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. If the defendant is not in custody, the hearing shall be held no later than ten (10) days after the motion or notice of alleged violation is filed.

(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. If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) 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~~], and 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 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 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 and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the evidentiary hearing.

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 on the issuance of the municipal court order and shall not be required to first seek review or reconsideration by the municipal court. If, 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. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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.*** 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 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 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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; 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, ¶¶ 1, 24-25, 321 P.3d 140, *overruled on other grounds by State v. Ameer*, 2018-NMSC-030, ¶ 69, 458 P.3d 390, 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. These 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.

As used in Paragraph D, a “local detention center” is “one that is commonly used by the municipal court in the normal course of business and not necessarily within the territorial jurisdiction of the court.” Rule 8-401(A)(3) NMRA.

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. As with courts in other types of proceedings in which the Rules of Evidence do not apply, a court presiding over a pretrial detention hearing 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 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. A meaningful review of the progress of the case includes assessment of the parties' compliance with applicable deadlines, satisfaction of discovery obligations, and witness availability, among other matters. If the court determines that the parties have made insufficient progress on these measures, then it shall issue an appropriate scheduling order.

[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. 22-8300-015, effective for all cases pending or filed on or after December 31, 2022; as amended by Supreme Court Order No. S-1-RCR-2023-00021, effective for all cases pending or filed on or after December 31, 2023; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]



[rules.supremecourt-grp] Rule Proposal Comment Form, 02/28/2024, 9:01 pm

web-admin@nmcourts.gov <nmcourtswbforms@nmcourts.gov>

Tue, Feb 27, 2024 at 9:01 PM

Reply-To: nmcourtswbforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your
Name: Israel Chávez

Phone
Number: 5056393900

Email: attorney@ichavezlaw.com

Proposal
Number: 2024-001

Comment: It appears the rule attempts to circumvent the constitutional amendment which disallows the imprisoning of people before trial. The dysfunction in districts attorneys offices across the state should be more of a concern instead of trying to continually stack the deck in favor of prosecutors. Please add more judges to non abq Santa Fe benches, please get more lawyers to rural New Mexico , please address the dysfunction in the DAs office. Address the criminal system corruption in Albuquerque.



[rules.supremecourt-grp] Rule Proposal Comment Form, 02/28/2024, 11:23 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Wed, Feb 28, 2024 at 11:23 AM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your
Name: Jeff Rein

Phone
Number: 5059170843

Email: jeffreinlaw@gmail.com

Proposal
Number: All.

Comment: I have been a criminal defense attorney for more than 30 years and the bonding system is as useless now as 30 years ago. Bonding companies do not supervise their clients and rarely arrest those clients if a warrant is issued for their failure to follow the conditions of release; the police make the arrest. More importantly, judges DO NOT follow through on the court's responsibility when a defendant violates their cor by forfeiting the surety bond. So the bonding company keeps it's down payment money from the defendant/client, then sues or garnishes the defendant's source of income because the defendant does not have the full amount of the court-ordered bond (or they would have paid it to the court and by passed the bonding company), and then the judges grant the bonding companies request to be released from the bond without ever paying any money to the courts.
Stop the scam.



[rules.supremecourt-grp] Rule Proposal Comment Form, 02/29/2024, 9:52 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Thu, Feb 29, 2024 at 9:52 AM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your
Name: Monica Galloway

Phone
Number: 505-577-8521

Email: 1967galloway@gmail.com

Proposal
Number: Proposal 2024-001 – Pretrial Release and Detention

Comment: My thoughts are that if certain repeat offenders are detained, then released, and offend again while released, they should remain detained until trial. If you look at the records on repeat offenders, the records will show that they mostly will reoffend when released pending trial. Then they will have a warrant for their arrest, they will take up the time of law enforcement, and or judicial system over and over. Time that could be utilized in other critical ways. My brother was the victim of a violent shooting here in Santa Fe, and because our judicial system kept his shooter behind bars pending trial, he was not able to shoot anyone else, and law enforcement didn't have to chase him down to appear in court for murder and attempted murder. Keep them behind bars, and there won't have to be so many warrants issued for their re-arrest. Give us more law enforcement officers so that they can find the harder criminals and drug dealers in Santa Fe, and spend less time chasing the repeat offenders that we let bond out of jail. Keep them locked up pending trial. Thank you for your time. I appreciate you allowing me to provide my opinion. Have a nice day.



[rules.supremecourt-grp] Rule Proposal Comment Form, 02/29/2024, 10:12 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Thu, Feb 29, 2024 at 10:12 AM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your Name: Jennifer Burrill

Phone
Number: 505-395-2880

Email: jennifer.burrill@lopdm.us

Proposal
Number: Proposal 2024-001 – Pretrial Release and Detention

Comment: Proposed Rule 5-403(C)(2) goes beyond the scope of SB271 that was passed by the legislature by including misdemeanor crimes and requiring a hearing by each judge with a pending case. The newly passed legislation only requires that the judge consider revocation not that a hearing be held and only requires such consideration in pending felony cases.

Below is the suggested change to the court's proposed language:

“The person shall remain in custody until each judge assigned to any of the person's pending felony cases or another judge assigned for that purpose considers modification or revocation of the person's conditions of release.”



[rules.supremecourt-grp] Rule Proposal Comment Form, 02/29/2024, 10:33 am

1 message

web-admin@nmcourts.gov <nmcourtswebforms@nmcourts.gov>

Thu, Feb 29, 2024 at 10:33 AM

Reply-To: nmcourtswebforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your Name: Jennifer Burrill

Phone
Number: 505-395-2880

Email: jennifer.burrill@lopdm.us

Proposal
Number: Proposal 2024-001 – Pretrial Release and Detention

Comment: Rule 5-409 specifically addresses dangerousness as defined by the Constitutional change in 2016; flight risk was intentionally excluded. The proposed change in (F)(6)(g) removing the courts ability to consult the PSA and including failures to appear undermines the New Mexico Constitution. Flight risk is only a consideration when deciding when to issue a money bond not dangerousness.

The addition of (F)(6)(h) providing for the court's consideration results of "diagnostic screening demonstrating the defendant's need for, and the availability of medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency" is aspirational at best in that ten (10) days is an unrealistic deadline for prosecutors and defense attorneys to find prior evaluations or treatment records and precludes either party from having new evaluations conducted nor did the legislature appropriate to the courts the funding necessary to make this possible.

What is missing in this rule change there are no consequences for when the time rules are not followed and again there is no definition of expedited priority scheduling in section (J) that is necessary to comply with federal due process requirements.



New Mexico
Courts

Alyssa Segura <supams@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 03/12/2024, 9:45 am

web-admin@nmcourts.gov <nmcourtswbforms@nmcourts.gov>

Tue, Mar 12, 2024 at 9:45 AM

Reply-To: nmcourtswbforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your
Name: Jason Clack

Phone
Number: 3257620523

Email: jason.clack@yahoo.com

Proposal
Number: 2024-001 - Pretrial Release and Detention

Comment: I think that there will be a technical issue with the new language proposed in the last sentence of Rules 5/6/7/8-403(C)(2), "The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant." The problem is that the court that initially released the defendant may not be the court that has jurisdiction over the conditions of release at the time of the defendant's arrest on the new charges. For example, if the initial conditions of release were set by the magistrate court, but the defendant was indicted or the charges were bound over for trial and a criminal information was filed, then the magistrate court would no longer have jurisdiction over the conditions of release, per Rule 6-202(F) & (G). If the defendant is arrested on new charges while released on those conditions for which the magistrate court no longer has jurisdiction, then although the magistrate initially set those conditions, they would not be able to revoke or amend them. The district court would be the court with jurisdiction over those conditions of release. Therefore, I think that the language in the new paragraph for Rules 5/6/7/8-403(C)(2) should be, "The initial hearing required by Paragraph D shall be conducted by the court which has jurisdiction over the initial conditions of release." Please let me know if there are any questions about this comment. Thank you.



New Mexico
Courts

Alyssa Segura <supams@nmcourts.gov>

[rules.supremecourt-grp] Rule Proposal Comment Form, 03/13/2024, 12:30 pm

web-admin@nmcourts.gov <nmcourtswbforms@nmcourts.gov>

Wed, Mar 13, 2024 at 12:30 PM

Reply-To: nmcourtswbforms@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Your Name: Sam Ashman
Phone Number: 5052192836
Email: sam.ashman@lopdm.us
Proposal Number: 2024-001
Comment: comment attached
Upload: [2024-001-Comments.pdf](#)



2024-001-Comments.pdf
104K

It makes little sense to remove from 5-401 as an available condition of release that the defendant undergo behavioral health treatment, and it makes even less sense to make the availability of such treatment a factor that the court must consider under 5-409(F)(6).

- If behavioral health treatment is available to the defendant, why should the court not take that into account when fashioning, pursuant to 5-401(C), “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”?
- If courts are to be required under 5-409(F)(6) to consider the results of a diagnostic screening regarding the defendant’s need for behavioral health treatment, who is going to conduct such screenings in the short timeframe between the State’s motion for pretrial detention and the hearing on the motion? The public defender’s office, who represents the vast majority of defendants in these hearings, does not staff medical doctors and would not be able to furnish the court with the diagnostic information that the amendment calls for. While it is heartening to see the Committee treat the availability of treatment for behavioral health diagnoses as militating against the notion that no release conditions can reasonably protect others, there does not presently exist a means to screen defendants for behavioral health diagnoses within five business days of their arrest and the filing of a motion for pretrial detention. The effect if the proposed amendment would be to require courts to consider something that, in nearly every case, does not exist.

Courts should continue to be required under 5-409(F)(6) to consider pretrial risk assessments.

- Courts use pretrial supervision as a condition of release with great frequency, and it is only reasonable for the pretrial supervision office to supply the court with its assessment of a defendant’s criminal history and risk of committing new crimes for the court to consider in deciding whether to detain the defendant. Where the result of the assessment is that less than the maximum available conditions would suffice to “reasonably ensure the appearance of the defendant as required and the safety of any other person and the community,” 5-401(C), that datum bears directly on the question of whether there are release conditions that can reasonably protect others. 5-409 should continue to instruct courts to consider PSAs without deferring to them outright.

Proposed 5-409(F)(6)(g) is duplicative of subsections(c)-(e).

The proposed amendments to 5-403 are problematic.

- What is the definition of “non-technical violation”?
- Article II, Section 13 of the New Mexico Constitution guarantees release pending trial unless the prosecution proves by clear and convincing evidence that no release conditions will reasonably protect others. The presumption is on release. By requiring courts to consider revocation in certain circumstances and to make written findings when the court decides not to revoke, the proposed amendments reverse that constitutionally-protected presumption.
- It seems impractical, at least in Bernalillo County where the Metropolitan Court makes initial release orders in most cases, to require the court that initially released the

defendant to conduct hearings pursuant to 5-403(D). The Metropolitan Court and the District Court have different pretrial supervision offices. The District Court is in a much better position than the Metropolitan Court to assess whether there has or has not been compliance with District Court Pretrial Services Supervision and what special conditions of release the office is able to enforce for cases pending in the District Court.



New Mexico
Courts

Alyssa Segura <supams@nmcourts.gov>

[rules.supremecourt-grp] Comments on proposed pretrial detention Rule changes

Gerald Byers <GByers@da.state.nm.us>

Wed, Mar 20, 2024 at 2:21 PM

Reply-To: gbyers@da.state.nm.us

To: "rules.supremecourt@nmcourts.gov" <rules.supremecourt@nmcourts.gov>

Chief Clerk Garcia,

Below please find my comments on the proposed rule changes for consideration by the committee.

Thank you.

1. 5-401(D) The proposed strikeout is: “[(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;]”
 - a. There is insufficient mental health infrastructure within New Mexico. The problem is particularly acute in Dona Ana County. To remove the ability for a court to order substance abuse and mental health treatment (“stay on your meds”) while under the court’s jurisdiction as a reliable asset to ensuring the defendant appears at court - and is not in a depreciated mental status - so as to keep themselves and others relatively safe while on conditions of release is directly exacerbating the problem, not minimizing it. Rule 5-409(F)(6)(h) does not replace what is being eliminated in Rule 5-401(D).
2. 5-401(G)(2)(b) The proposed strikeout is “ a public safety assessment tool approved by the Supreme Court for use in the jurisdiction flags potential new violent criminal activity for the defendant.”
 - a. The gist of paragraph G is to outline circumstances when the court may hold a pretrial detention hearing on its own motion. Removal of the language proposed to be stricken eliminates the ability of the court to hold a pretrial detention hearing when its own pretrial services division identifies a new violent criminal offense for which the defendant has been accused and would otherwise alert the court of this situation directly impacting public safety. The court cannot act if it does not know. The pretrial services division may more easily learn of a defendant’s recent arrest in Albuquerque when that defendant has an open pending case in Las Cruces. The local District Attorney may not necessarily know of the defendant’s recent Albuquerque arrest.

Gerald M. Byers

District Attorney

3rd Judicial District Attorney's Office

845 N. Motel Blvd., Suite D

Las Cruces, NM 88007

Office Phone: 575-524-6370

Cell Phone: 575-915-5958

gbyers@da.state.nm.us

<http://donaanacountyda.com/>



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**New Mexico
Courts**

Alyssa Segura <supams@nmcourts.gov>

[rules.supremecourt-grp] Open for Comment Form submitted on Supreme Court

1 message

Supreme Court <noreply@nmcourts.gov>

Thu, Mar 21, 2024 at 3:04 PM

Reply-To: noreply@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Name	Megan
	Kirtley
Phone Number	575-397-2471
Email	mkirtley@da.state.nm.us
Proposal Number	Proposal-2024-001-Pretrial-Release-and-Detention-comments-begin-on-p.-63
Comment	Comment from the Fifth Judicial District Attorney's office
	The proposed amendment Rule 5-409(F)(6) explicitly referencing failure to appear is an important addition. Pretrial detention serves to prevent defendants from evading the criminal process and the amendment furthers that purpose.
	The proposed amendment Rule 5-403(C)(2) advances the rights of victims and provides safeguards for the public while protecting the due process rights of defendants. Please consider including misdemeanor criminal sexual contact (NMSA 1978, Section 30-9-12(D)) to the definition of an "Enumerated Misdemeanor."



**New Mexico
Courts**

Alyssa Segura <supams@nmcourts.gov>

Fwd: Message from KM_368e

Michelle Castillo Dowler <metrmxc@nmcourts.gov>

Thu, Mar 21, 2024 at 4:26 PM

To: rules.supremecourt@nmcourts.gov

Cc: Alyssa Segura <supams@nmcourts.gov>, Amy Feagans <supajf@nmcourts.gov>

Please accept this letter from the Rules of Criminal Procedure for State Courts Committee regarding public comment to the Court's proposed Rule 2024-001 - Pretrial Release and Detention.

Thank you.



SKM_368e24032116300.pdf

130K



Chambers of
Judge Michelle Castillo Dowler
Metropolitan Court
Division XIII

State of New Mexico
Bernalillo County
Metropolitan Court

401 Lomas NW
Albuquerque, New Mexico 87102
P.O. Box 133
Albuquerque, New Mexico 87103
Telephone (505) 841-8193
Fax (505) 222-4813

March 21, 2024

Elizabeth A. Garcia
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848

Re: Proposal 2024-001 Commentary by Rules of Criminal Procedure Committee

Chief Clerk Garcia,

Please accept this letter for the Court from their committee. Thank you for your assistance.

The Committee appreciates the Court allowing us to make a comment on these rules as a group. This is a short comment regarding things we wanted to address to the Court collectively. Some members of the Committee are likely to also comment in their individual capacities or as part of other groups to which they belong.

First, in Rule 5-403 (C)(2) (and the corresponding 6- and 7- rules), the Court proposes that, upon allegation of a violation by arrest for a new felony or enumerated misdemeanor, the required hearing under (D) shall happen before the judge who initially set conditions of release. In practice, we believe this causes problems. First, this would mean that judges who might have spent months or even years presiding over a case would have important decisions, which could require expedited trial settings, made by judges who were not presiding over the case and only set initial conditions of release because they happened to be covering arraignments at the time. Second, there could be times when the original (or assigned) judge is not available, and the strict timelines would not have compliance. Third, it prevents judicial economy (for the judges and the parties) by not allowing one judge to hear such motions on behalf of any/all judges who have

pending cases. The committee believes that language from SB 271 is appropriate – “The person shall remain in custody until each judge assigned to any of the person's pending previous felony cases or another judge assigned for that purpose considers modification or revocation of the person's conditions of release.” Of course, the word felony would not apply with the use of enumerated misdemeanors. (Though the committee unanimously believes our proposed change would be appropriate for all Magistrate and Metro Court cases, and for the majority of District Court cases, there were mixed opinions as to how this should apply in cases where a detention motion was filed under Rule 5-409 NMRA, and a later conditions of release issue occurs. The majority of the committee believed that the hearing should stay with the assigned judge, but the Court may want to consider an exception in that limited circumstance.)

Second, in 5-403 (C)(3), enumerated misdemeanors includes battery against a household member, but not aggravated battery against a household member (no great bodily harm). This seems to be an oversight which should be corrected.

Third, the Committee is interested in discussing whether there should be remedies for violations of the timelines enumerated in the pretrial release rules, as many courts across the state have reached different conclusions in regard to that question, and different solutions. This is a question that requires more time to discuss than the Committee had before these comments were due. Thus, we would request that the Court allow us an opportunity to have that conversation.

Thank you for your consideration, and we stand ready to assist the Court in its decisions however we are able.

(Committee member Mr. Wertheim recused himself from this discussion due to previous representation regarding some of these issues.)

Thank you,



Michelle Castillo Dowler

Chair, Rules of Criminal Procedure for State Courts Committee

cc:

Alyssa Segura, Amy Feagans and Rules of Criminal Procedure Committee Members



[rules.supremecourt-grp] NMMJA Comments on Proposed Amendments to 6-401 & 6-403

1 message

Jimmy Foster <artmjcf@nmcourts.gov>

Fri, Mar 22, 2024 at 10:49 AM

Reply-To: artmjcf@nmcourts.gov

To: Supreme Court Rules <rules.supremecourt-grp@nmcourts.gov>

Cc: Noreen Hendrickson <tucmnlh@nmcourts.gov>

Good morning,

Attached is a letter from the NM Magistrate Judge's Association containing comments on the proposed amendments to Rules 6-401 and 6-403.

Thank you,
Judge Chuck Foster
President, NMMJA

Thank you,
Chuck Foster, Jr. |Magistrate Judge
Fifth Judicial District |Eddy County, Division III
|109 N 15th St |Artesia, NM 88210
|c: 575.988.5973 |p: 575.746.2481 |f: 575.746.6763 |e: artmjcf@nmcourts.gov



2024-03-22 NMMJA comments RE 6-401 6-403 Amendments.pdf
428K

NEW MEXICO MAGISTRATE JUDGES ASSOCIATION

109 N. 15TH ST. – ARTESIA, NM 88210

P: 575.746.2481 – F: 575.746.6763

Hon. Jimmy “Chuck” Foster, Jr.
President
Eddy County, Division III
5th Judicial District
109 N. 15th St
Artesia, NM 88210

Hon. Clipper G. Miller
Vice President
Lea County, Division III
5th Judicial District
2110 N. Alto Dr.
Hobbs, NM 88240

Hon. Noreen Hendrickson
Secretary/Treasurer
Quay County, Division I
10th Judicial District
122 W. Center St.
Tucumcari, NM 88401

Members of the Board:

Hon. Christopher Baca
Guadalupe Co, 4th Judicial District
Hon. Stacey Biel

San Juan Co, 11th Judicial District

Hon. Sara Blankenhorn
Taos Co, 8th Judicial District

Hon. Russell Bradford
San Juan Co, 11th Judicial District

Hon. Keith Clayton
Lea Co, 5th Judicial District

Hon. Brent Detsoi
McKinley Co, 11th Judicial District

Hon. Megan Fish
Eddy Co, 5th Judicial District

Hon. Cindy Garza
Mora Co, 4th Judicial District

Hon. James “Jimmie” Jones
Lea Co, 5th Judicial District

Hon. Christopher Mitchell
Roosevelt Co, 9th Judicial District

Hon. Christian Montano
San Miguel Co, 4th Judicial District

Hon. Felix Pena
Colfax Co, 8th Judicial District

Hon. KC Rogers
Chaves Co, 5th Judicial District

Hon. Cynthia Sanders
McKinley Co, 11th Judicial District

Hon. Johnny Valdez
Cibola Co, 13th Judicial District

Hon. Tina Garcia
Pro Tem, Retired

Elizabeth Garcia
Chief Clerk of Court
New Mexico Supreme Court
PO Box 848
Santa Fe, NM 87504

RE: Proposal 2024-001 – Pretrial Release and Detention [Rules 5-401, 5-403, 5-409, 6-401, 6-403, 7-401, 7-403-8-401, and 8-403 NMRA]

Date: March 22, 2024

Dear Ms. Garcia,

On behalf of the New Mexico Magistrate Judge’s Association, we appreciate this opportunity to comment on the proposed revisions to the Rules of Criminal Procedure for the Magistrate Courts.

The proposed revision to Rule 6-403(B)(1) and 6-403(C)(1) references notice of a non-technical violation. We believe it would be beneficial to either include language defining a technical/non-technical violation or reference a rule that does define these types of violations.

The proposed addition of Rule 6-403(C)(2) states “A defendant previously released by any court in this state pending any felony charge or pending a charge for an Enumerated Misdemeanor who is charged with a new felony or new Enumerated Misdemeanor alleged to have occurred during the period of initial release, shall be held without bond and without conditions of release pending an initial hearing pursuant to Paragraph D.” The proposed language is unclear as to which case the defendant would be held without bond until that initial hearing. Language clarifying which case, be it the new case or the original case(s) would be beneficial.

In addition, there is no mechanism for notifying the original court of the violation. Some district court judges believe that judges notifying other judges of potential conditions of release violations would be considered ex-parte communication. Additional language is requested to provide a process for notifying the court/judge responsible for holding the initial hearing for a violation of conditions of release.

The last sentence in the proposed Rule 6-403(C)(2) states “The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant.” We feel this may be problematic. In multi-judge courts, the judge who conducted the arraignment or first appearance may not be the currently assigned judge on a case. In some instances, the arraigning judge may have been excused or have recused themselves from the case and would be barred from hearing any matter on that case. We believe the initial hearing should be heard by the judge currently presiding over the pending case, as that judge would be in the best position to consider or review conditions of release.

NEW MEXICO MAGISTRATE JUDGES ASSOCIATION

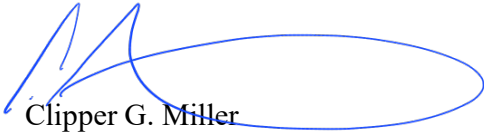
109 N. 15TH ST. – ARTESIA, NM 88210

P: 575.746.2481 – F: 575.746.6763

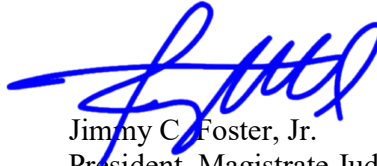
The proposed addition of Rule 6-403(C)(3) lists the proposed Enumerated Misdemeanor charges. We would respectfully suggest the addition of four other misdemeanor charges: Indecent Exposure 30-9-14, Enticement of a Child 30-9-1, Aggravated Battery 30-3-5(B), and Malicious Sharing of Judge's Personal Information 30-3-20. We feel these offenses are severe enough to warrant the attention the proposed changes are looking to address.

The New Mexico Magistrate Judge's Association appreciates the opportunity to provide comment on these proposed rule modifications. Thank you for your consideration.

Yours, very sincerely and respectfully,



Clipper G. Miller
Vice President, Magistrate Judge's Association
Magistrate Judge, Lea County Division I



Jimmy C. Foster, Jr.
President, Magistrate Judge's Association
Magistrate Judge, Eddy County Division III



[rules.supremecourt-grp] Comment on Proposal 2024-001 - Pretrial Release and Detention

1 message

Victoria LeBlanc <victoria.leblanc@da2nd.state.nm.us>

Fri, Mar 22, 2024 at 1:17 PM

Reply-To: victoria.leblanc@da2nd.state.nm.us

To: rules.supremecourt@nmcourts.gov

Good afternoon,

For consideration, attached please find the Second Judicial District Attorney's Office's official comment on **Proposal 2024-001 - Pretrial Release and Detention**.

Should you have any questions or need anything further from our office, please do not hesitate to contact us.

Thank you,

Victoria LeBlanc

Deputy District Attorney, Policy and Planning
Office of the Second Judicial District Attorney

[520 Lomas Blvd. NW](#)
[Albuquerque, NM 87102](#)

Phone: (505) 526-2543

Victoria.LeBlanc@da2nd.state.nm.us



DA's Office Official Comment on Proposal 2024-001 - Pretrial Release and Detention .pdf

118K



**OFFICE OF THE DISTRICT ATTORNEY
SECOND JUDICIAL DISTRICT
STATE OF NEW MEXICO
SAM BREGMAN
DISTRICT ATTORNEY**

March 22, 2024

Elizabeth A. Garcia, Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504

RE: Comment on Proposal 2024-001 – Pretrial Release and Detention

Dear Chief Clerk of Court,

Pursuant to Rule 23-106.1(C) NMRA, this letter serves as official comment on the proposed amendments in “Proposal 2024-001 – Pretrial Release and Detention.”

The Second Judicial Attorney’s Office strongly supports the adoption of the proposed rules changes. There are two areas of the proposed changes that we believe should remain in their current form.

The proposed amendment of 5-401(B) NMRA deletes the following language “unless the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required.” This language is useful as it allows the court to impose stricter conditions of release for a defendant who has a history of failing to appear for court or failure to comply with prior conditions of probation or pretrial release. This language should remain in the proposed amendments.

The proposed amendments under 5-403(C)(3) NMRA and 7-403(C)(3) NMRA establish “Enumerated Misdemeanors” for the purpose of defendants being “held without bond and without conditions of release pending an initial hearing” if the defendant is charged with any new felony or an enumerated misdemeanor while a current felony or enumerated misdemeanor charge is pending. Although the proposed enumerated misdemeanors under 5-403(C)(3) and 7-403(C)(3) list multiple misdemeanor offenses, many are also excluded. Some exclusions include, but are not limited to: Resisting Arrest, Violation of Restraining Order, Battery, and Shoplifting.

Currently, under 7-403 NMRA, if a defendant with a pending misdemeanor is charged with an additional felony or misdemeanor, the Bernalillo County Metropolitan Court is in the practice of holding defendants without bond until a revocation hearing or a modification for conditions of release hearing is conducted. Under this practice, there are no specific misdemeanors this applies



to, as it applies to *all* new charges, including all misdemeanor offenses. Should the proposed amendments creating “Enumerated Misdemeanors” in 5-403(C)(3) and 7-403(C)(3) be enacted, this current practice is likely to change. Meaning, that instead of all new misdemeanor charges prompting hearings for revocation or modification for conditions of release in Metropolitan Court, only new charges listed in the enumerated misdemeanors would trigger a no bond hold pending a hearing.

Our office takes the position of continuing the practice currently set in Bernalillo County Metropolitan Court, which allows for *any* new offense, while a current case is pending, to prompt a no bond hold until a revocation hearing or a modification to conditions of release hearing is conducted. We also support, and in fact, encourage this same function to be applied in District Court. Currently in District Court, if a defendant is charged with any new offense, the State must file a motion to the court for revocation or modification of conditions of release. Applying the same practice in District Court as set in Metropolitan Court would automatically allow the Court to assess the new charges for public safety.

We appreciate you taking our position and comment into consideration. Please do not hesitate to contact my office with any questions or concerns.

Sincerely,

Sam Bregman
Second Judicial District Attorney



[rules.supremecourt-grp] Open for Comment Form submitted on Supreme Court

1 message

Supreme Court <noreply@nmcourts.gov>

Fri, Mar 22, 2024 at 4:03 PM

Reply-To: noreply@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Name	Bennett
	Baur
Phone Number	5056293011
Email	BennettJ.Baur@lopdm.us
Proposal Number	2024-01
Comment	See uploaded comment.
File Upload	https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/formidable/6/Rule-comment-2024-01-Ben-Baur-LOPD.pdf



Rule-comment-2024-01-Ben-Baur-LOPD.pdf

126K



March 22, 2024

Dear Chief Clerk Garcia,

I am submitting my comment on Rule Proposal 2024-001 on behalf of the New Mexico Law Offices of the Public Defender.

I believe Senate Bill 271, passed in the 2024 Legislative Session, sufficiently addresses perceived issues with the court's current process for handling certain alleged violations of conditions of release based on new charges. Senate Bill 271 was debated in several legislative committees; during that process, it was amended in key ways that made the bill reasonable and practical. The bill then directed the Supreme Court to promulgate rules in accordance with the bill. However, those legislative changes are not reflected in this Rule Proposal.

The deviations from Senate Bill 271 found in this Rule will lead to increased workloads for prosecutors, defense attorneys and court staff, with no evidence indicating an increase in public safety or reduction in recidivism. This Rule Proposal *requires* a hearing rather than allowing a court to review matters on pleadings when they deem it appropriate. Meanwhile, it provides no remedy if that hearing is not held within the suggested time frame. It also mandates that the particular judge who that set the conditions oversee the hearing, rather than allowing the court to assign another judge when necessary. In addition, the Rule Proposal expands the hold and hearing requirement to many misdemeanors.

We should always seek ways to improve and be more efficient in how we address people who may continue to threaten community safety. In this pursuit, we must ensure the parties in the court system are appropriately supported to handle any additional logistical and practical burdens. Although proposed rule amendments do not call for fiscal impact statements, I believe it is important to make it clear that these changes would indeed lead to additional workload that would fall to prosecutors, defense attorneys and the courts. I would ask that the Supreme Court consider amending the Rules to enact the provisions of Senate Bill 271, rather than so significantly expanding the bill's scope through these amendments to the Rule.

Bennett J. Baur

Chief Public Defender



[rules.supremecourt-grp] Bernalillo County Metropolitan Court commentary to Proposed revisions to pretrial release rules

1 message

Aaron Baca <metracb@nmcourts.gov>
Reply-To: metracb@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Fri, Mar 22, 2024 at 4:18 PM

Greetings:

Attached is a letter from Bernalillo County Metropolitan Court Chief Judge Joshua Sanchez with commentary on the proposed revisions to the pretrial release rules.

--

Aaron Baca, Staff Attorney
Office of the General Counsel
Bernalillo County Metropolitan Court
[401 Lomas Blvd. NW](#)
[Albuquerque, NM 87102](#)
Phone: (505) 841-9840

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Letter to SupCtRulesCmmtee re Comments to Proposed Rule Changes [Combined 3-22-24].pdf
457K



Chambers of
Judge Joshua J. Sánchez
Chief Judge
Metropolitan Court
Division IV

State of New Mexico
Bernalillo County
Metropolitan Court

401 Lomas NW
Albuquerque, New Mexico 87102
Telephone (505) 841-8285
Fax (505) 222-4804

March 22, 2024

VIA EMAIL
Elizabeth A. Garcia
Chief Clerk of Court
New Mexico Supreme Court
PO BOX 848
Santa Fe, NM 87504-0848
Rules.supremecourt@nmcourts.gov

Re: *Proposal 2024-001* – Pretrial Release and
Detention [Rules 5-401, 5-403, 5-409, 6-401, 6-403,
7-401, 7-403, 8-401, and 8-403 NMRA]

Dear Ms. Garcia:

On behalf of the Metropolitan Court, we appreciate the opportunity to comment on the proposed revisions to the Rules of Criminal Procedure regarding Pretrial Release and Detention, and specifically the Rules of Criminal Procedure for the Metropolitan Courts.

Rules 7-401 and 7-403 are intended to provide “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, 337 P.3d 1276, and we applaud the intent of the proposed revisions to reinforce those rights, streamline court processes, and incorporate recent Legislative mandates regarding reconsideration of pretrial release provisions for some defendants.

Presently, the deadlines for initial hearings required under Rule 7-403 are suspended under Supreme Court Order No. 22-8500-013 (*see attached*), and the proposed revisions would seem to conflict with the suspended deadlines. Even though the suspension of deadlines was instituted to relieve stresses on court resources because of COVID-19-related restrictions, the suspension of those deadlines fashioned greater efficiencies and protections of defendants’ rights and are worthy of retention in the proposed revisions. The needs of the Bernalillo County Metropolitan Court and the Second Judicial District Court require limited virtual hearing space to effectuate timely pretrial release hearings. Those limitations remain regardless of COVID-19, and the suspension of the requirement to hold initial hearings within three (3) days of a defendant’s detention in favor of

holding full evidentiary hearings within seven (7) days makes for more efficient use of courtroom resources and for the speedier pretrial release of defendants. Arguably, reinstituting initial hearing deadlines under Rule 7-403(D)(1) would strain virtual courtroom resources beyond their capacity. We propose incorporating the suspension of deadlines created by Order No. 22-8500-013 in the place of the Rule 7-403(D)(1) deadlines.

With the same expediency in mind, we also propose to not strike the language “on motion of the defendant or the court’s own motion” as is currently suggested in the proposed revision to Rule 7-401(H). The proposed revision would institute an automatic hearing to review conditions of release for certain defendants held on secured bonds or non-monetary conditions who remain in custody. Unfortunately, there is no mechanism by which the Court can track whether a defendant remains in custody after initial conditions have been set, so the Court actually depends on a defendant’s motion to review conditions so that it can reassess whether changes are needed to a defendant’s conditions of release. Striking the language that currently allows defendants to move the court, in our view, eliminates a mechanism by which to effectuate the pretrial release provisions of Article II, Section 13.

The proposed revision of Rule 7-403 that adds the new sections of 7-403(C)(2) and (3) may be overly broad given the language of Senate Bill 271, which was signed into law earlier this month. SB 271 requires that when a court receives notice that a person on pretrial release for a felony is arrested for a subsequent felony, that the court issue an order holding that person in custody until each judge assigned to any of the person’s pending previous felony cases considers modification of the person’s conditions of release. In its current form, the proposed rule revision would require the courts to issue a hold order for a person on pretrial release for a felony whenever the court receives notice of that person being charged with a new felony or certain Enumerated Misdemeanors (to include battery of a household member, NMSA 1978, Sec. 30-3-15; stalking, NMSA 1978, Sec. 30-3A-3; violation of an order of protection, NMSA 1978, Sec. 40-13-6; harassment, NMSA 1978, Sec. 30-3A-2; driving under the influence of intoxicating liquor or drugs, NMSA 1978, Sec. 66-8-102, and operating a motorboat while under the influence of intoxicating liquor or drugs, NMSA 1978, Sec. 66-13-3). The proposed revision to Rule 7-403 to include Enumerated Misdemeanors was not authorized by the Legislature as part of SB 271. We propose striking this language from the proposed revision.

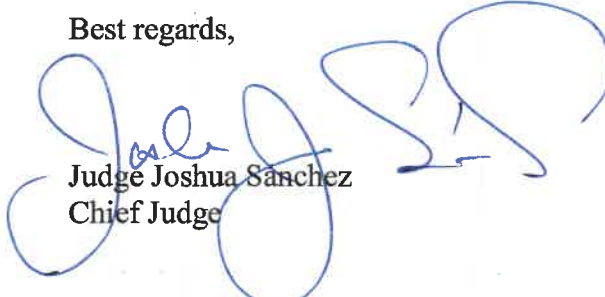
The inclusion of Enumerated Misdemeanors to the proposed revision of Rule 7-403(C)(2) presents an additional challenge. It is often the case that law enforcement officers do not arrest a person on an Enumerated Misdemeanor, regardless of whether that person is already on pretrial release for a felony or other Enumerated Misdemeanor. The proposed revision requires that a person who is on pretrial release provisions for a previous felony or Enumerated Misdemeanor be held in custody until the judge assigned to the previous case has the opportunity to reconsider that person’s release provisions. However, SB271 directs that a person who is on pretrial release for a previous felony be held only if that person is *arrested* on a subsequent felony charge. The proposed revision to Rule 7-403 to require holds regardless of the person’s arrest status does not appear to have been authorized by the Legislature.

Most problematic of all, however, is that the proposed Rule 7-403(C)(2) would require the “initial hearing required by Paragraph D . . . be conducted by the court that initially released the defendant.” This requirement is wholly unworkable in practice because in the Metropolitan Court judges hear felony first appearances and misdemeanor custody arraignments and set initial release conditions on a rotation system whereby the judge who is assigned to a case is usually not necessarily the same judge who presides over the arraignment and conditions of release hearing. It is not unusual in the Metropolitan Court for felony first appearances and misdemeanor custody arraignments to be heard by *pro tem* judges. That would mean, according to the proposed Rule 7-403(C)(2), that the judge actually assigned to a particular case – the judge most familiar with that case – would not be permitted to review a defendant’s conditions of release when that defendant is subsequently charged with a new felony or Enumerated Misdemeanor. We propose that the final sentence of the proposed Rule 7-403(C)(2) be deleted entirely; or, at the least, that the language “the court that initially released the defendant” be replaced with “the judge assigned to the defendant’s case(s).”

For these reasons, the Court recommends that Proposal 24-001 be approved with the modifications suggested here.

We appreciate the opportunity to share our suggestions for changes. As always, please feel free to contact us if you wish to discuss these matters further or if we can provide any additional information.

Best regards,



Judge Joshua Sanchez
Chief Judge

Cc: Judges of the Bernalillo County Metropolitan Court
Lissa Lowe, Court Executive Officer
Arthur W. Pepin, Director, Administrative Office of the Courts
Karl Reifsteck, Deputy Director, Administrative Office of the Courts
Dana Cox, General Counsel, Bernalillo County Metropolitan Court
Aaron Baca, Office of the General Counsel, Bernalillo County Metropolitan Court

1 **IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

2 **March 17, 2022**

3
4 **NO. 22-8500-013**

5 **IN THE MATTER OF THE TEMPORARY**
6 **SUSPENSION OF REQUIRED INITIAL**
7 **HEARINGS UNDER RULES 7-403(D)(1)**
8 **AND 7-802(C)(2) NMRA OF THE RULES**
9 **OF CRIMINAL PROCEDURE FOR THE**
10 **METROPOLITAN COURTS**

11
12 **ORDER**

13 WHEREAS, this matter having come before the Court upon recommendation
14 by the Bernalillo County Metropolitan Court to temporarily suspend the deadlines
15 for initial hearings for alleged violations of conditions of release or probation under
16 Rules 7-403(D)(1) and 7-802(C)(2) NMRA of the Rules of Criminal Procedure for
17 the Metropolitan Courts;

18 WHEREAS, under Rule 7-403(A)(1), (D)(1) NMRA, when a defendant is
19 alleged to have violated a condition of release and the defendant is in custody at the
20 local detention center, the court must hold an initial hearing as soon as practicable
21 but no later than three (3) days after the defendant is detained;

1 WHEREAS, under Rule 7-802(B), (C)(2) NMRA, when a probationer is
2 alleged to have violated a condition of probation and the probationer is in custody at
3 the local detention center, the court must hold an initial hearing as soon as practicable
4 but no later than three (3) days after the probationer is detained;

5 WHEREAS, under Rule 7-403(A)(1), (E)(1) NMRA, when a defendant is
6 alleged to have violated a condition of release and the defendant is in custody, the
7 court must hold an evidentiary hearing as soon as practicable but no later than seven
8 (7) days after the initial hearing;

9 WHEREAS, under Rule 7-802(B), (D) NMRA, when a probationer is alleged
10 to have violated a condition of probation and the probationer is in custody, the court
11 must hold an adjudicatory hearing on the violation charged as soon as practicable
12 but no later than ten (10) days after the initial hearing;

13 WHEREAS, the Metropolitan Detention Center in Bernalillo County has been
14 operating under the Center for Disease Control and the New Mexico Department of
15 Health COVID-19 protocols;

16 WHEREAS, compliance with these protocols requires that all inmates are
17 quarantined upon intake and housed according to their medical status;

1 WHEREAS, these protocols further require that an inmate be tested for
2 COVID-19 between five (5) and seven (7) days of intake and that if an inmate tests
3 negative, the inmate can be moved to general population on day eleven (11) of
4 quarantine;

5 WHEREAS, if an inmate refuses to take a COVID-19 test, the inmate must
6 remain quarantined for fourteen (14) days before moving to general population on
7 the fifteenth (15th) day;

8 WHEREAS, the Metropolitan Detention Center has limited equipment and
9 virtual courtroom space available for defendants in quarantine;

10 WHEREAS, in addition to the needs of the Bernalillo County Metropolitan
11 Court, the Second Judicial District Court also requires use of the limited virtual
12 hearing space at the Metropolitan Detention Center to conduct required hearings;

13 WHEREAS, given the competing needs of the Second Judicial District Court,
14 the Bernalillo County Metropolitan Court has encountered difficulties scheduling
15 initial violation hearings as required by Rules 7-403(D)(1) and 7-802(C)(2);

16 WHEREAS, the Bernalillo County Metropolitan Court also requires use of
17 the limited virtual in-custody hearing space at the Metropolitan Detention Center to

1 conduct first appearances for alleged felony cases and custody arraignments for
2 alleged misdemeanor cases; and

3 WHEREAS, the Court having considered the foregoing and being sufficiently
4 advised, Chief Justice Michael E. Vigil, Justice C. Shannon Bacon, Justice David K.
5 Thomson, Justice Julie J. Vargas, and Justice Briana H. Zamora concurring;

6 NOW, THEREFORE, IT IS ORDERED that the TEMPORARY
7 SUSPENSION of all initial hearings for defendants being held in custody for an
8 alleged violation of a condition of release under Rule 7-403(D)(1) NMRA and all
9 initial hearings for probationers being held in custody for an alleged violation of a
10 condition of probation under Rule 7-802(C)(2) NMRA is APPROVED for all cases
11 filed or pending in the Bernalillo County Metropolitan Court on or after **March 17,**
12 **2022.**

13 IT IS FURTHER ORDERED that for as long as the suspension of initial
14 hearings remains in place for in-custody defendants, the evidentiary hearing on any
15 alleged violation of a condition of release under Rule 7-403(E) NMRA shall be held
16 as soon as practicable but no later than seven (7) days after the defendant is detained.

17 IT IS FURTHER ORDERED that for as long as the suspension of initial
18 hearings remains in place for in-custody probationers, the adjudicatory hearing on

1 any alleged violation of a condition of probation under Rule 7-802(D) NMRA shall
2 be held as soon as practicable but no later than ten (10) days after the probationer is
3 detained.

4 IT IS FURTHER ORDERED that the above-referenced temporary suspension
5 of Rules 7-403(D)(1) and 7-802(C)(2) NMRA shall be **effective March 17, 2022.**

6 IT IS SO ORDERED.



WITNESS, the Honorable Michael E. Vigil, Chief Justice of the Supreme Court of the State of New Mexico, and the seal of said Court this 17th day of March, 2022.

Sally A. Paez, Acting Clerk of Court
Supreme Court of New Mexico

A handwritten signature in black ink, reading "Sally A. Paez", written over a horizontal line.

Sally A. Paez, Acting Chief Clerk of the Supreme Court
of the State of New Mexico



**New Mexico
Courts**

Alyssa Segura <supams@nmcourts.gov>

[rules.supremecourt-grp] Fwd: Legislation and Rules Sub-Committee Proposed Revisions

Ann Keith <supalk@nmcourts.gov>
Reply-To: supalk@nmcourts.gov
To: rules.supremecourt@nmcourts.gov

Fri, Mar 22, 2024 at 8:44 AM

Attached is a memo and proposed rule revisions regarding the implementation of SB 271 from the NMJC's legislation and rules sub-committee.

Thank you,

Emilio J. Chavez
Chief Judge
Eighth Judicial District
[105 Albright Street, Suite N](#)
[Taos, NM 87571](#)

2 attachments

 **Memo Proposed Rule Revisions.docx**
31K

 **L&R Sub-Committee's Proposed revisions district court 5-401, 5-403, 5-409.docx**
35K

5-208. Issuance of warrant for arrest and summons.

A. Time. Upon the docketing of any criminal action, the court may issue a summons or arrest warrant.

B. Preference for summons. The court shall issue a summons, unless the defendant is pending a previous felony case and the requirements of Paragraph C of this rule are met or in its discretion, the court finds that the interests of justice would be better served by the issuance of a warrant and if the requirements of Paragraph C of this rule are met. There shall be no bond on an arrest warrant for a defendant pending a previous felony case.

C. Basis for warrant. The court may issue a warrant for arrest upon an indictment or a sworn written statement of the facts showing probable cause for issuance of the warrant. The showing of probable cause shall be based upon substantial evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant the court may require the affiant to appear personally and may examine under oath the affiant and any witnesses the affiant may produce, provided that such additional evidence shall be reduced to writing and supported by oath or affirmation. The court may also permit a request for an arrest warrant by any method authorized by Rule 5-211(F) NMRA for search warrants and may issue an arrest warrant remotely provided that the requirements of Rule 5-211(F) NMRA and this rule are met.

D. Form.

(1) Warrant. The warrant shall be signed by the court and shall contain the name of the defendant or, if the defendant's name is unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged and shall command that the defendant be arrested and brought before the court.

(2) Summons. The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court at a stated time and place. A summons or arrest warrant shall be substantially in the form approved by the Supreme Court.

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 and is not pending a felony charge in this state, 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;

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

(c) if the defendant remains in custody and is pending a felony charge in this state, three (3) days after the date of an initial hearing by the court presiding over a defendant pending a felony charge or enumerated misdemeanor in this state if the defendant is being held in the local detention center, or five (5) days after the date of an initial hearing by the court presiding over a defendant pending a felony charge or enumerated misdemeanor if the defendant is not being held in the local detention.

(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.

(3) **Local detention center; defined.** A “local detention center” is one that is commonly used by the ~~district~~ court in the normal course of business and not necessarily within the territorial jurisdiction of the court.

B. Right to pretrial release; recognizance or unsecured appearance bond. ~~Pending trial, any~~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 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-[redundant].~~ The court may order execution of a secured appearance bond only if the court makes written findings of particularized reasons why the release will not reasonably ensure the appearance of the defendant as required [redundant] under Paragraphs E and F of this rule.

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 and the financial resources of the defendant. In addition, the court may take into account the available information 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 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 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;
- (11) ~~undergo an available assessment regarding mental health or drug or alcohol dependency; 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 after release for employment, schooling, or other limited purposes; and
- (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 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 about secured bond.

(1) **Contents of order setting conditions of release.** The written order setting conditions of release shall be provided to the defendant at the conditions of release hearing prior to release or if not in custody within five (5) days of the issuance of the written order, and;

(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 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 the 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; or

(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 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~~initial conditions of the motion~~release hearing.~~ 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 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 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.~~ [All district court hearings are recorded]

K. **Cases pending in magistrate, metropolitan, or municipal court; petition 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.*** 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 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. The court shall not release the defendant if the defendant is pending an initial hearing under 5-403 NMRA for a felony until the initial hearing has been completed.

(6) ***District court order; transmission to magistrate, metropolitan, or municipal court.*** The district court shall promptly 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 six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.~~

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 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, on notice to that court, any bond shall be transferred to the district court 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.

Committee Commentary – The 2024 amendment recompiled references to court-ordered available medical, psychological, or psychiatric treatment from paragraph H of this rule to rule 5-409(F)(6)(h) NMRA.

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~~shall consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor, upon notice of non-technical violation of a condition of release by a court pretrial services agency, 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;~~ temporary detention of certain defendants.

(1) Upon motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings as to why amended or revoked conditions of release are unnecessary, or 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.

(2) A defendant previously released by any court in this state pending any felony charge who is charged with a new felony for new-enumerated misdemeanor alleged to have occurred during the period of ~~initial release~~, the court shall issue an order holding the defendant be held without bond and without conditions of release pending an initial hearing pursuant to Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant.

~~[(3) For the purposes of this Paragraph, an "Enumerated Misdemeanor" means: battery against a household member contrary to NMSA 1978 § 30-3-15, stalking contrary to NMSA 1978 § 30-3A-3, violation of an order of protection contrary to NMSA 1978 § 40-13-6, harassment contrary to NMSA 1978 § 30-3A-2, driving under the influence of intoxicating liquor or drugs contrary to NMSA 1978 § 66-8-102, or operating a motorboat while under the influence of intoxicating liquor or drugs contrary to NMSA 1978 § 66-13-3.]~~

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. If the defendant is not in custody, the hearing shall be held no later than ten (10) days after the motion or notice of alleged violation is filed.

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(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. If the defendant is not in custody, the evidentiary hearing shall be held no later than ten (10) 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, and 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 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 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 and shall be filed within three (3) days of the evidentiary hearing. If the court continues or amends the defendant's conditions of release, then a written order continuing or amending the defendant's conditions of release shall be provided to the defendant at the time of

release or if the defendant is not in custody within five (5) days of the issuance of the order; ~~at the evidentiary hearing.~~

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, 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. The court shall hold a status review hearing in any case in which the defendant has been held for more than six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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.*** 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 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 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.

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 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 motion for an expedited pretrial detention hearing at any time in the court where the case is pending. The motion shall include the specific facts that warrant pretrial detention and shall specify whether the state is requesting a preliminary examination to establish probable cause. If the state requests a preliminary examination, the motion shall also specify whether the state is requesting that an 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) 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 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 shall proceed to conduct the defendant's first appearance under Rule [6-501](#) NMRA or Rule [7-501](#) NMRA and thereafter promptly 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 shall then close the case and its jurisdiction shall be terminated, and the district court shall acquire exclusive jurisdiction over the case, except as provided in Paragraph I of this rule.

D. **Case 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 made under Rule [5-301](#) NMRA, Rule [6-203](#) NMRA, or Rule [7-203](#) NMRA, the district court shall determine probable cause in accordance with Rule [5-301](#) NMRA. If the court finds no probable cause, the 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 under that designation is terminated on 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. Expedited pretrial detention hearing. The district court shall hold 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. On the request of the prosecutor or on the court's own motion, the 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.

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

(i) for three (3) days to five (5) days, as provided in Subparagraph (F)(1)(b) of this rule, if in the motion for pretrial detention the prosecutor requests or the court on its own motion orders a preliminary hearing to be held concurrently with the detention hearing;

(ii) for up to three (3) days on a showing that extraordinary circumstances exist and justice requires the extension;

(iii) on the defendant filing a waiver of the time limit; or

(iv) on stipulation of the parties.

(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 on 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) the defendant's criminal history, including prior convictions and previous instances of failure to appear in court for a criminal matter in any jurisdiction; and~~

~~(h) the results of diagnostic screening demonstrating the defendant's need for, and the availability of medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency.~~

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. An order containing findings of the individualized facts justifying the detention must be filed 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. 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 six (6) months and every six (6) months thereafter. The purpose of the status review hearing is to conduct a meaningful review of the progress of the case. If the court determines that insufficient progress has been made, then the court shall issue an appropriate scheduling order.

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.

Memo

To: New Mexico Judicial Council
From: NMJC Legislation and Rules Sub-Committee
cc: New Mexico Supreme Court
Date: March 21, 2024
Re: Proposed Rule Revisions to Implement SB 271

This memorandum is provided by the NMJC Legislation and Rules Subcommittee to summarize the comments regarding the proposed revisions to the New Mexico Rules of Criminal Procedure that are designed to effectuate Senate Bill 271 (2024). Additionally, the subcommittee has attached recommended revisions to Rules 5-401 NMRA and 5-403 NMRA that address some essential revisions that were not addressed in the Administrative Office of the Courts' proposed revisions.

As a threshold matter, SB 271 requires the judge hearing a new case to hold a defendant in custody until the judge or judges presiding over any pending previous felony case conduct a hearing regarding conditions of release. Although the proposed revisions of 401 and 403 attempt to fully implement SB 271, they do not address a situation where a

defendant is arrested on an arrest warrant and can post bond. *See* Rules 5-208 NMRA, 6-206 NMRA, 7-206 NMRA, and 8-205 NMRA. The rules for arrest warrants would need to contain a section that prohibits the release of a defendant that has pending previous felony case. Additionally, the sub-committee would suggest that Forms 9-210 and 9-210A need to be amended to require law enforcement to verify and indicate whether the defendant has any pending felony cases.

Following the needed adjustments to the rules for arrest warrants, to fully effectuate SB 271, Rules 5-401 NMRA, 6-401 NMRA, 7-401NMRA, and 8-401 NMRA must be amended to instruct the judge presiding over the “new” felony case to hold the defendant until modification or revocation of conditions of release is addressed by the judge presiding over a previous felony.

For example, 5-401(A)(1) NMRA must include a provision that modifies sub-section (a) if the defendant remains in custody **and is not pending a felony charge in this state . . .** and creates sub-section (c) **if the defendant remains in custody and is pending a felony charge in this state, three (3) days after the date of an initial hearing by the court presiding over a defendant pending a felony charge in this state if the defendant is being held in the local detention center, or five (5) days after the date of an initial hearing by the court presiding over a defendant pending a felony charge if the defendant is not being held in the local detention.**

The overall comments and suggestions provided by the judicial entities cover various aspects of proposed amendments to NMRA (New Mexico Rules Annotated). A general

overview reveals that many entities expressed concerns about increased workload for judges due to revisions affecting pretrial matters, potentially diverting focus from case disposition. The comments also addressed concerns that the revisions (1) did not define a "technical violation"; (2) burden on pretrial services (PTS); (3) issues with judges making specific findings justifying release; inclusion of "Enumerated Misdemeanors" in automatic hold provision questioned, suggesting it exceeds legislative intent; (4) practical challenges regarding the "same" judge hearing alleged violations; (5) time limits for filing orders; removal of judges' ability to order treatment as a condition of release questioned, along with relevance of drug/alcohol testing without treatment; (6) opposition to changes in procedures for expedited hearings and particularized findings for secured bonds; and (7) questions regarding notification process for judges when defendants are arrested on new charges, especially if out of district. Overall, the comments highlight concerns about workload, practicality, legislative alignment, and notification processes within proposed amendments to the NMRA related to pretrial release and detention.

The sub-committee believes that many of these comments can be addressed in the proposed changes and although sympathetic to the workload concerns, SB 271 is the law. However, the sub-committee did recognize that "enumerated misdemeanors" were not part of the legislation and their inclusion might create issues with courts being required to determine a previous pending enumerated misdemeanor in municipal court, which most courts do not have access to pending municipal cases. Moreover, if enumerated misdemeanors are removed from the proposed revision, there will not be scenarios where

municipal judges are holding defendants on an “enumerated misdemeanor” waiting for the magistrate court, metropolitan court, or district court to conduct a 403 hearing on previous pending felony or enumerated misdemeanor.

Given the urgency inherent in aligning procedural rules with the mandates of the already enacted SB 271, the sub-committee worked expeditiously to attempt to incorporate many of the comments and concerns raised by the various entities into a recommendation to the NMJC to be provided to the New Mexico Supreme Court and the Rules of Criminal Procedure Committee upon approval. The attachment is the sub-committee’s current recommendation.



[rules.supremecourt-grp] Proposal 2024-001

1 message

'Ibarra, Jonathan' via Supreme Court Rules <rules.supremecourt-grp@nmcourts.gov>

Fri, Mar 22, 2024 at 8:04 PM

Reply-To: jonathanl.ibarra@lopdm.us

To: "rules.supremecourt@nmcourts.gov" <rules.supremecourt@nmcourts.gov>

Hi,

Please accept this as my comment on the listed proposal. Please let me know if you have any questions.

Thanks!

Jonathan L. Ibarra

Assistant Public Defender



Rule Comment 2024-001.docx

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Comment on Rule Proposal 2024-001

Dear Ms. Garcia,

Please accept this as my comment on this proposal. I am speaking here only for myself – not my employer, or any committee or organization to which I belong. (Some of those have already made their own comments, with and without my assistance.)

I begin with a general comment. On the one hand, I appreciate that this Court has, frankly, paid more attention to the rule making process than many Supreme Courts in the past. In my (possibly uneducated) view, many previous Courts have very much deferred to their committees, and didn't seem to do much writing of their own. However, I fear that the Court sometimes does more than it should in this area. The Court has committees for a reason, and the ones that I have worked on, and I am fortunate enough to have served on several, have been diligent and hard-working. And the Court's efforts to assure various backgrounds on those committees is generally successful, and lead to good discussions. I could speak more to this (and would be happy to if the Court requests), but the point I want to make is that I believe that your Rules of Criminal Procedure Committee (RCPC) could have helped shape these rules in a beneficial way. The Committee has already sent a comment about a few things, and I will endeavor to not repeat too much of that commentary, though I will still comment to some extent.

I will try my best not to say much more than necessary in my comments on the proposal. I am always more than happy to expand upon my thoughts, as I am sure you know. I will go generally straight through the proposal, rather than by priorities, because I'm not positive what my priorities would be.

First, an overall comment. A reason I think this should have gone to the RCPC is that I believe (and long have) that a big thing missing from the 400 rules is a remedy or consequence for timelines being violated. After he retired, Justice Daniels and I had a conversation about that. His point was that rules should just be followed, so consequences weren't needed. That is an admirable concept in theory, which does not work in practice. In practice, the timelines in these rules get violated fairly regularly, and then courts struggle as to what to do when that happens, and widely disparate actions result. What happens in such occasions should not be entirely dependent on which judge is acting on any given day. And if people accused of a crime are granted rights by this Court to certain timelines, there should not just be a shrug from the presiding judge when they are ignored,

which happens far too often. A rule without a consequence isn't really a rule – it's a guideline. And these guidelines get ignored when they should not be. I would ask that the Court send these rules to the RCPC for a discussion on remedies.

I do not believe any substantive changes were made to the 6- or 7- rules that were not in the 5- rules, so I will just write regarding the 5- rules with the understanding that it would apply across the different rule sets.

5-401

The Court has stricken (D)(11) regarding treatment. The commentary states that it was recompiled to 5-409, but it really wasn't, and shouldn't say that it actually did that. And, of course, 5-409 only deals with a subset of cases, and only in the district court. I have mixed feelings about taking this out – some people I talked to think it will make judges more likely to hold people that they would have previously released if they could require treatment, and others felt like this provision was used to keep people in custody waiting to get into such treatment. On balance, I lean slightly toward the former. And, of course, Rule 5-403 reflects back to this rule, not 5-409. Reconsideration of conditions of release under 403 is where I think it is especially likely that a court might want to use treatment as a requirement. If the Court feels like this is being abused by trial courts, then I support taking it out (though not the way it is now in 5-409, which I will get to presently). But the Court should be very sure of that, and perhaps update 403 to include that possibility. But I more suspect this is just a bad removal.

The change to (F)(1) is a good one to require that the defendant receive a copy of the conditions of release. Something needs to be done for those defendants who speak languages other than English, however, as giving non-English speakers a copy of their conditions of release in English isn't really much of a help.

Rule 5-403

The change in (B)(1) from “may” to “shall” seems like a push toward revocation, even though it is still a requirement that violations be proven and revocation be essentially the only remaining choice. Further, the State could easily abuse this rule, as now a motion is required to be considered no matter how frivolous the motion may be. “May” makes better sense than “shall.”

In (C)(1), the Court requires that order with reasons why revocation/amendment are not required, even though, again, the standard should be that they are not required, and only carefully delineated reasons should have to be given to amend or revoke conditions. Under the proposed Rule, even if the motion from the State is frivolous, the Court would be required to detail findings rather than just deny the motion summarily. This seems to be contrary to the spirit of the Constitutional default and the explicit statement in Rule 5-401 of only requiring such conditions as are the least restrictive necessary.

Like other commenters, I have issues with going beyond SB 271 and including “enumerated misdemeanors” as part of this rule in (C)(2). This change will require significantly more hearings in an expedited manner, as well as having a number of people being held for several days (or, of course, longer) that may not have been previously. This change also goes beyond SB 271 in requiring an actual hearing. The bill itself doesn’t actually require a hearing – there could be a circumstance where the Court can see by the pleadings that a charge does not have probable cause and, thus, is not going to revoke conditions of release. The rule as written does not even require that there be probable cause for that new charge in order to trigger a hold that could last for days, which seems, frankly, unfair.

More importantly, the proposal is overly specific in a poor way. The RCPC commented on this as well, but the language in SB 271 was really well done after it was amended to reflect the best practice. We should let the judge assigned to the case be the court to determine whether to revoke, not some judge who happened to be covering custody arraignments one day. Especially since revocation comes with priority scheduling for trial – that would mean that potentially the unassigned judge was drastically impacting the docket of the assigned judge. Further, we need to allow for judges to be unavailable by allowing a judge to be substituted. Otherwise, the Court is essentially not allowing a judge to take any longer two days off at a time, because they have to have the initial hearing within three days. And, of course, there are times when a defendant has more than one pending case, where judges would be willing to have one judge hear all of the cases together for the sake of efficiency. We shouldn’t write the rule in a manner which requires more hearings if they are not necessary – we should allow judicial economy if that is what the judges prefer.

As the RCPC commented, if the Court has misdemeanors included, it needs to have Aggravated Battery against a Household Member.

In the proposal, (E)(1) has the second sentence underlined, but that was already there. The added sentence requiring that the evidentiary hearing happen within 10 days seems unnecessary to me – the rule already says as soon as practicable. With how busy our trial courts are, if they need more than 10 days, they should have that opportunity with a person out of custody.

Rule 5-409

The Court took out the use of any pretrial risk assessment instrument approved for use. That makes no sense, especially since it is the Court that would be approving the instrument for use. If the Court does not authorize such use, then this just becomes irrelevant. If the Court does authorize such use, it makes no sense to not specifically allow the judge to use that instrument. I presume that this change is related to the Court's decision in *Anderson*, but I do not believe having this provision stricken needs to follow from that decision. And, of course, the Court then adds as a factor the exact things contained by the PSA, colloquially called the Arnold Tool. It mentions prior convictions and previous instances of failure to appear, which are the primary things used in the PSA to develop its recommendation, and how it gives scores.

If the Court does ultimately take out the line about, essentially, the PSA, I am concerned about how it is replaced. Using the FTAs specifically makes it sound as if flight risk is being considered by the Court which, of course, is contrary to the Constitution. And, of course, both the criminal history and history of FTAs would already be considered part of the history and characteristics of the defendant, which is already in the rule in (F)(6)(c), and doesn't need to be repeated. Thus the change is both redundant and problematic.

In (F)(6)(h) is where the Court included things about need for treatment from 401. But I do not understand what the Court is trying to do here. Rule 5-409 is obviously limited to those cases upon which a detention motion is filed which, again, is a limited subset of all cases. (More limited in some jurisdictions than others.) So I am not convinced that limiting it to this subset of cases is wise, though, again, the Court could easily have significantly more information than my anecdotal observations. But the proposed rule doesn't say that it can simply order such treatment – it mentions results of a diagnostic screening for such issues. I am not sure what diagnostic screening the Court is intending. To my knowledge, no district is doing such screening in time to be considered at a Rule 5-409 detention hearing, which must take place generally within a week of arrest. It is, of course,

entirely possible that the Court is aware of pretrial services rolling out a new assessment tool of which practitioners like myself are not aware. But unless there is some plan to implement something like this soon, I don't know why this is put here. Having this particular screening in regard to motions to reconsider (detention or revocation or general conditions of release) could absolutely make sense, though I still have questions about availability of such a tool. But why it would be in the general part of Rule 5-409 factors, I do not understand. Without that understanding, I must recommend the Court reconsider that provision.

Other comments

I briefly want to address a few comments that have already been uploaded to the website.

Mr. Rein comments about secured bonds and bondsmen. The Court did make a change regarding secured bonds which I, frankly, think is grammatically less correct, but seems to further emphasize that secured bonds should be a last resort, so I did not otherwise comment on it. That said, in many areas of this state, secured bonds have been used regularly despite such entreaties from the Court and AOC. Anything the Court can do to remedy that in different areas of the State is a step in the right direction. In Bernalillo County, I almost never see secured bonds anymore, and when I do, it seems to be done very intentionally and appropriately. Much of the rest of the state is not so lucky.

Mr. Clack is right in that lower court judges might initially set conditions that are then continued in the district court and, thus, they would be the court that initially set conditions. That said, I assumed the Court intended the judge who set the conditions in that court initially. Of course, that goes back to my issue – some Metro judge at first appearance sets conditions at a 45 second hearing, a district judge simply continues those conditions at a district court arraignment, and then a district judge who holds a scheduling conference and maybe some status hearings and even docket calls then has its jurisdiction to hear a conditions of release violation on their case gets taken away from them. That seems problematic.

I very much appreciate the Court taking the initiative in drafting changes that I understand may have already been in process before the passage of SB 271, but which generally align with the bill's purpose. That said, I believe that the Court should reconsider as stated above. Again, I am happy to expand on any of my thoughts here should the Court request such. I've been lucky enough to practice as

a prosecutor, district judge, private defense attorney, and public defender, and to serve on a number of committees for the Court, so I feel like I have as wide of a variety of experience as almost anyone.

Thank you for your consideration.

Jonathan L Ibarra



**New Mexico
Courts**

Alyssa Segura <supams@nmcourts.gov>

[rules.supremecourt-grp] Open for Comment Form submitted on Supreme Court

Supreme Court <noreply@nmcourts.gov>

Fri, Mar 22, 2024 at 4:52 PM

Reply-To: noreply@nmcourts.gov

To: rules.supremecourt@nmcourts.gov

Name	Brett
	Loveless
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Proposal Number	2024-001
Comment	Comment attached.
File Upload	https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/formidable/6/Comments.Supreme.Court_.Rule_.5-401.03222024.1.pdf



Comments.Supreme.Court_.Rule_.5-401.03222024.1.pdf

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State of New Mexico
Second Judicial District

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March 22, 2024

Elizabeth Garcia
Chief Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504-0848
nmsupremecourtclerk@nmcourts.gov

Re: Proposed Rule Amendments for 5-401, 5-403, and 5-409 NMRA

Dear Ms. Garcia:

The Second Judicial District Court Criminal Division (“SJDC” or “Second”) thanks the New Mexico Supreme Court for the opportunity to provide comments to the proposed rule revisions for Rules 5-401, 5-403, and 5-409 NMRA.

Comments on Proposed Revisions to Rule 5-401

As an initial matter, SJDC would like to express its support for many of the proposed revisions submitted by NMJC Legislation and Rules Subcommittee. *See, for example*, NMJC’s proposed revision to Rule 5-401(D) (11) allowing a judge to order a defendant to “undergo an available assessment regarding mental health or drug or alcohol dependency; medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose,” *see also* NMJC’s proposal to eliminate the Enumerated Misdemeanor provisions in Rule 5-403.

Rule 5-401(F) (1): Proposed Rule 5-401(F) (1) requires that the written order setting conditions of release be provided to the defendant at the conditions of release hearing. As a practical matter, conditions of release are often entered when a defendant is currently located in a detention facility and providing the order setting conditions of release to an in-custody defendant can be difficult at the hearing itself, especially if the Court is using a primarily digital process. Moreover, paperwork is sometimes taken from in-custody defendants after transport back to the facility from court. SJDC suggests that what is actually imperative is that the defendant receive

a copy of the order setting conditions of release prior to release. For example, in the Second, this is generally being done by the Bernalillo County Metropolitan Detention Center at release. SJDC suggests this be modified to read:

(F)(1) Contents of order setting conditions of release. The written order setting conditions of release shall be provided to the defendant *at the conclusion of the hearing or, if the defendant is in custody, at the time of release*, and;

Rule 5-401(H) (2): The proposed revisions to 5-401(H) (2) require that the Court hold an expedited hearing when a defendant remains detained because of an inability to pay a secured bond. However, the proposed revisions remove the requirement for a written motion to be filed by defense, instead starting the five-day deadline from the time of the initial release hearing. SJDC is concerned that these revisions put an undue burden on the court to track the custody status of a defendant. Because Odyssey does not contain custody status, the court relies on manual look-up to determine when a defendant is in-custody. This provision would therefore require a judge's office to constantly monitor the custody status of a defendant by manually looking up that defendant on the detention center's website or automatically setting hearings on any case where a bond is set and then canceling those hearings when a bond is made thereby leaving less time for other types of hearings. SJDC suggests that the requirement for a written motion by defense should remain in the Rule.

Comments on Proposed Revisions to Rule 5-403

5-403(B) and (C) (1), (2), and (3): The Second has several suggestions in these sections and provides partial text of the proposed rule modifications for purposes of clarity in the discussion that follows:

B. Motion for revocation or modification of conditions of release.

(1) The court [may] shall consider revocation of the defendant's pretrial release or modification of the defendant's conditions of release on motion of the prosecutor, upon notice of non-technical violation of a condition of release by a court pretrial services agency, or on the court's own motion.

(C)(1) and (2) Issuance of summons or bench warrant; temporary detention of certain defendants.

(1) [If the court does not deny the motion on the pleadings,] Upon motion or notice of a non-technical violation of a condition of release by a court pretrial services agency, the court shall enter an order with specific findings as to why amended or revoked conditions of release are unnecessary, or 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.

(2) A defendant previously released by any court in this state pending any felony charge or pending a charge for an Enumerated Misdemeanor who is charged with a new felony or new Enumerated Misdemeanor alleged to have occurred during the period of initial release, shall be held without bond and without conditions of release pending an initial hearing pursuant to Paragraph D of this rule. The initial hearing required by Paragraph D shall be conducted by the court that initially released the defendant.

(3) For the purposes of this Paragraph, an “Enumerated Misdemeanor” means; battery against a household member contrary to Section 30-3-15 NMSA 1978, stalking contrary to Section 30-3A-3 NMSA 1978, violation of an order of protection contrary to Section 40-13-6 NMSA 1978, harassment contrary to Section 30-3A-2 NMSA 1978, driving under the influence of intoxicating liquor or drugs contrary to Section 66-8-102 NMSA 1978, or operating a motorboat while under the influence of intoxicating liquor or drugs contrary to Section 66-13-3 NMSA 1978

First, with regards to subsection (B), SJDC suggests that there should be a definition of "technical violation." If no definition is included in this subsection, there is a danger of having this provision interpreted differently across jurisdictions in New Mexico.

Second, subsection (B) appears to put the onus on pretrial services to notify the court of non-technical violations (which presumably includes new felony charges) and could be read to apply even in cases where pretrial services is not ordered by the judge. This is problematic because not all defendants are ordered to pretrial services. Defendants may not be ordered to pretrial services when they are especially low-risk or when a defendant is already being supervised by another agency, such as New Mexico Probation and Parole or federal probation. The Second estimates about 15-20% of pretrial defendants are not ordered to pretrial services. These defendants are not in the OSM management system in Odyssey—the system that is used by pretrial services to track defendants and used to provide notices to the Court of potential violations and new charges. As a practical matter, subsection (B) would seem to require all defendants to be ordered to pretrial services in order for that defendant to be tracked by the Court; this appears to be unnecessarily expensive and contrary to best practices in pretrial services programs, as pretrial services is not recommended as a standard across-the-board condition of release.

If that is not the intention of the proposed revision, SJDC suggests that the language in (B) (1) be modified to read: “The court [may] shall consider revocation of the defendant’s pretrial release or modification of the defendant’s conditions of release on motion of the prosecutor, upon notice of non-technical violation of a condition of release by a court pretrial services agency if the defendant was previously ordered to pretrial services supervision, or on the court’s own motion.”

While SJDC understands and appreciates that subsections (B) (1) and (2) appear to be provisions drafted in response to the passage of Senate Bill 271, the Second is concerned that this may put a responsibility on the Court that actually belongs to another justice stakeholder—the prosecutor. SB 271 does not contain language that specifies who notifies the Court that a defendant has been

charged with a new felony; there is a concern that the revision to Rule 5-403 unnecessarily adds to the workload and staffing problems of the Court and pretrial services when the prosecution is in a better position to provide that notice to the Court. By adding the clarifying language, above, and reading subsections (B) (1) and (2) together, the responsibility for providing notice for (B) (2), the automatic hold provision, would then lie with the prosecutor if pretrial services was not previously ordered, but would fall on pretrial services if a defendant was previously ordered to pretrial services.

SJDC is also concerned that the proposed language lacks a time frame in which the notifications of a new felony or new Enumerated Misdemeanor need to be provided to the Court, especially with regards to after-hours and weekends.

Third, SJDC suggests deleting the requirement in subsection (C) that a judge make specific findings justifying release, since our constitutional default is release pending trial. This requirement appears to be an unnecessary step for district court judges who already spend a disproportionate amount of time on release matters instead of matters involving the ultimate disposition of cases; it also involves additional and potentially unnecessary filings.

Fourth, subsection (C) (2) also appears to require that the same judge hear the alleged violation that initially released the defendant. This requirement is unworkable in large jurisdictions where judges, by necessity, operate by rotation. For example, in the Second one judge hears arraignments by rotation, another judge hears detention motions that originate in Bernalillo County Metropolitan Court from felony first appearance, and a third judge hears preliminary hearings. This is a matter of volume; the tight deadlines on these types of hearings necessitate a rotation to ensure that the matters can be heard timely. Typically the judge actually assigned to the case is not the same judge who presided over the arraignment or detention hearing or preliminary hearing where the conditions of release were initially ordered. Therefore, the revised provisions in Rule 5-403(C) (2) would mean that the judge actually assigned to a particular case would not be permitted to review a defendant's conditions of release when that defendant is subsequently charged with a new felony or Enumerated Misdemeanor. Moreover, sometimes defendants have more than one case in front of more than one judge; when a revocation motion is filed, typically one judge hears the revocation motion for all of a defendant's cases in a consolidated hearing. SJDC proposes that the final sentence of the proposed Rule 5-403(C) (2) be deleted entirely or that the language "the court that initially released the defendant" be replaced with "a judge assigned to hear the defendant's case(s)."

Fifth, SJDC is concerned that the language in 5-403 (C) (2) and (3) is overly broad, given the language of SB271. SB271 requires that when a court receives notice that a person on pretrial release for a felony is arrested for a subsequent felony, that the court issue an order holding that person in custody, pending review of the conditions. In its current form, the proposed rule revision would require the courts to issue a hold order for a person on pretrial release for a felony whenever the court receives notice of that person being charged with a new felony or certain Enumerated Misdemeanors (to include: battery of a household member, NMSA 1978, Sec. 30-3-15; stalking, NMSA 1978, Sec. 30-3A-3; violation of an order of protection, NMSA 1978, Sec.

Elizabeth Garcia
Chief Clerk of the Court
March 22, 2024
Page 5

40-13-6; harassment, NMSA 1978, Sec. 30-3A-2; driving under the influence of intoxicating liquor or drugs, NMSA 1978, Sec. 66-8-102; and operating a motorboat while under the influence of intoxicating liquor or drugs, NMSA 1978, Sec. 66-13-3). The proposed revision to Rule 5-403 to include Enumerated Misdemeanors was not included by the Legislature as part of SB 271. Similarly, Article II, Section 13, covering pretrial release and detention is also concerned with felonies. We therefore propose striking this language from the proposed revisions.

It is important to note that the prosecution can already bring a motion to revoke conditions of release when it feels it is warranted for any new charge, including misdemeanors; they can also ask for a warrant for a defendant's arrest. The Second also notes that it is concerned with an unnecessary increase in the jail population by including the "Enumerated Misdemeanors" provision; in this jurisdiction, defendants are already being moved from MDC to Santa Fe to be housed in the Department of Corrections, making scheduling hearings on those defendants more difficult.

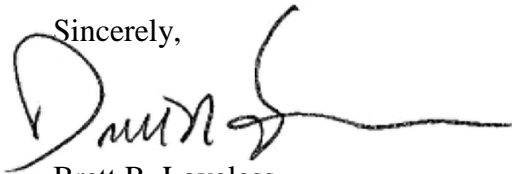
Sixth, SJDC is also concerned with the time limit for filing the order revoking (3 days) found in revised 5-403 (F)(3)(ii) and its requirement for a written order continuing or amending be provided to the defendant at the evidentiary hearing. This creates another fast deadline that appears unnecessary if a defendant is being detained. The second suggests that this time limit is unnecessarily short that the deadline and be 7 days. Additionally, this section requires another written order on COR even if the conditions are not changed which requires more paperwork and more filing for something that may not have changed.

Comments on Proposed Revisions to Rule 5-409

5-409(F)(6)(h): This revised subsection provides that the court can consider the results of diagnostic testing/screening and the need for treatment as part of its release decision. If the revised Rule 5-401 removes the ability of a court to order treatment as a condition of release, then adding this provision in 5-409 is inconsistent and will lead to confusion. If a diagnostic test indicates the defendant needs treatment, but a Court cannot order treatment as a condition of release, it would lead to the result that the defendant would be held in detention.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "Brett R. Loveless", with a long horizontal flourish extending to the right.

Brett R. Loveless
Presiding Judge
Criminal Division
Second Judicial District Court