

8-401. Pretrial release.

A. Hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 **D. Non-monetary conditions of release.** In its order setting conditions of release, the
22 court shall impose a standard condition that the defendant not commit a federal, state, or local
23 crime during the period of release. The court may also impose the least restrictive particularized

condition, or combination of particularized conditions, that the court finds will reasonably ensure the appearance of the defendant as required, the safety of any other person and the community, and the orderly administration of justice, which may include the condition that the defendant

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

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

(3) maintain or commence an educational program;

(4) abide by specified restrictions on personal associations, place of abode, or travel;

(5) avoid all contact with an alleged victim of the crime or with a potential witness who may testify ~~[concerning]~~about the offense;

(6) report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;

(7) comply with a specified curfew;

(8) refrain from possessing a firearm, destructive device, or other dangerous weapon;

(9) refrain from any use of alcohol or any use of an illegal drug or other controlled substance without a prescription by a licensed medical practitioner;

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

1 [(40)] (11) undergo available medical, psychological, or psychiatric treatment,
2 including treatment for drug or alcohol dependency, and remain in a specified institution if
3 required for that purpose;

4 [(41)] (12) submit to a drug test or an alcohol test on request of a person designated
5 by the court;

6 [(42)] (13) return to custody for specified hours [~~following~~]after release for
7 employment, schooling, or other limited purposes; and

8 [(43)] (14) satisfy any other condition that is reasonably necessary to ensure the
9 appearance of the defendant as required and the safety of any other person and the community.

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

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

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

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

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

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

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

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

(b) ***Property bond.*** The court may require the execution of a property bond by the defendant or by unpaid sureties in the full amount specified in the order setting conditions of release, secured by the pledging of real property in accordance with Rule 8-401.1 NMRA.

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

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

(ii) a surety bond executed by licensed sureties in accordance with Rule 8-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release.

F. Order setting conditions of release; contents.

(1) *Contents of order setting conditions of release.* The order setting conditions of release shall

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

(b) advise the defendant of

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

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

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

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

G. Motion for review of conditions of release by the municipal court.

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

1 motion of the defendant or the court's own motion, be entitled to a hearing to review the conditions
2 of release.

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

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

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

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

I. **Petition to district court.**

(1) ***Defendant must seek review by municipal court before filing petition in district court.*** The defendant may file a petition in the district court for review of the municipal court's order setting conditions of release only after the municipal court has ruled on a motion to review the conditions of release under Paragraph G of this rule. The defendant shall attach to the district court petition a copy of the municipal court order disposing of the defendant's motion for review.

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

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

(3) *Municipal court's jurisdiction pending determination of the petition.*

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

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

(a) set a hearing no later than ten (10) days after the filing of the petition and promptly ~~transmit~~send a copy of the notice to the municipal court;

(b) deny the petition summarily; or

(c) amend the order setting conditions of release without a hearing.

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

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

1 case. If the court determines that insufficient progress has been made, then the court shall issue an
2 appropriate scheduling order.

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

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

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

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

21 O. **Judicial discretion; disqualification.** Action by any court on any matter relating
22 to pretrial release shall not preclude the subsequent disqualification of a judge under the provisions
23 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.]

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

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

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

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

14 Paragraph D lists various non-monetary conditions of release. The court must impose the
15 least restrictive condition, or combination of conditions, that will reasonably ensure the appearance
16 of the defendant as required and the safety of any other person and the community. *See Brown*,
17 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard
18 conditions ~~[prior to]~~before a court appearance, the judge should review the conditions at the
19 defendant's first appearance to determine whether any particularized conditions should be imposed
20 under the circumstances of the case. Paragraph D also permits the court to impose non-monetary
21 conditions of release to ensure the orderly administration of justice. This provision was derived
22 from the American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*,
23 Standard 10-5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the

1 condition. The court should make a determination [~~as to~~]about whether the defendant can afford
2 to pay all or a [~~portion~~]part of the cost, or whether the court has the authority to waive the cost,
3 because detaining a defendant [~~due to~~]because of inability to pay the cost associated with a
4 condition of release is comparable to detaining a defendant [~~due to~~]because of financial inability
5 to post a secured bond.

6 As set forth in Paragraph E, the only purpose for which the court may impose a secured
7 bond is to ensure that the defendant will appear for trial and other pretrial proceedings for which
8 the defendant must be present. *See State v. Ericksons*, 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746
9 P.2d 1099 (“[T]he purpose of bail is to secure the defendant’s attendance to submit to the
10 punishment to be imposed by the court.”); *see also* NMSA 1978, § 31-3-2(B)(2) (1993)
11 (authorizing the forfeiture of bond [~~upon~~]on the defendant’s failure to appear).

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

17 Secured bond cannot be used for the purpose of detaining a defendant who may pose a
18 danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53
19 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set
20 high bail for the purpose of preventing a defendant’s pretrial release.”); *see also Stack v. Boyle*,
21 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated
22 to ensure the defendant’s appearance in court “is ‘excessive’ under the Eighth Amendment”).

1 The court should consider the authorized types of secured bonds in the order of priority set
2 forth in Paragraph E. The court must first consider requiring an appearance bond secured by a cash
3 deposit of [~~10%~~] ten percent (10%). No other percentage is permitted under the rule. If [~~this~~] a
4 cash deposit of ten percent (10%) is inadequate, the court then must consider a property bond
5 [~~where the~~] involving property that belongs to the defendant or other unpaid surety. If neither of
6 these options is sufficient to reasonably ensure the defendant's appearance, the court may require
7 a cash or surety bond for the defendant's release. If the court requires a cash or surety bond, the
8 defendant has the option either to execute an appearance bond and deposit [~~100%~~] one hundred
9 percent (100%) of the amount of the bond with the court or to purchase a bond from a paid surety.
10 Under Subparagraph (E)(2)(c), the defendant alone has the choice to post the bond by a one
11 hundred percent (100%) cash deposit or a surety. The court does not have the option to set a cash-
12 only bond or a surety-only bond; it must give the defendant the choice of either. A paid surety may
13 execute a surety bond or a real or personal property bond only if the conditions of Rule 8-401.2
14 NMRA are met.

15 Paragraph F governs the contents of an order setting conditions of release. *See* Form 9-303
16 NMRA (order setting conditions of release). Although pretrial release hearings are not required to
17 be a matter of record in the municipal court, Paragraph F requires the court to make written findings
18 justifying the imposition of a secured bond, if any. Judges are encouraged to enter their written
19 findings on the order setting conditions of release at the conclusion of the hearing. If more detailed
20 findings are necessary, the judge should make [~~such~~]any supplemental findings in a separate
21 document within two (2) days of the conclusion of the hearing.

22 Paragraph G sets forth the procedure for the defendant to file a motion in the municipal
23 court for review of the conditions of release. Paragraph I sets forth the procedure for the defendant

1 to petition the district court for review of the conditions of release set by the municipal court.
2 Article II, Section 13 of the New Mexico Constitution requires the court to rule on a motion or
3 petition for pretrial release “in an expedited manner” and to release a defendant who is being held
4 solely ~~[due to]~~because of financial inability to post a secured bond. A defendant who wishes to
5 present financial information to a court to support a motion or a petition for pretrial release may
6 present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall
7 be entitled to appear and participate personally with counsel before the judge conducting any
8 hearing to review the conditions of release, rather than by any means of remote electronic
9 conferencing.

10 Paragraph J requires the municipal court to prioritize the scheduling of trial and other
11 proceedings for cases in which the defendant is held in custody ~~[due to]~~because of inability to post
12 bond or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747
13 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142, did not
14 violate due process, in part ~~[due to]~~because of “the stringent time limitations of the Speedy Trial
15 Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial Release*,
16 Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or court rule,
17 accelerated time limitations within which detained defendants should be tried consistent with the
18 sound administration of justice.”). This rule does not preclude earlier or more regular status review
19 hearings. The purpose of the hearing is to determine how best to expedite a trial in the case. A
20 meaningful review of the progress of the case includes assessment of the parties’ compliance with
21 applicable deadlines, satisfaction of discovery obligations, and witness availability, among other
22 matters. If the court determines that the parties have made insufficient progress on these measures,
23 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 ~~[such]~~that person is related within the second degree of blood or marriage to a paid surety licensed in this state to execute bail bonds. A jailer may be appointed as a designee. Paragraph L and Rule 8-408 NMRA govern the limited circumstances under which a designee shall release an arrested defendant from custody ~~[prior to]~~before that defendant's first appearance before a judge.

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

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

5 [Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or
6 after July 1, 2017; as amended by Supreme Court No. 22-8300-015, effective for all cases pending
7 or filed on or after December 31, 2022.]