

**NEW MEXICO SUPREME COURT
AD HOC PRETRIAL RELEASE COMMITTEE MEETING
April 11, 2018; 1:00 p.m. - 5:00 p.m.
State Bar Center, Albuquerque NM, and by phone**

To attend by phone, please use this phone number and passcode:
**Toll free number: 1-800-747-5150
Access code: 0652946**

AGENDA:

Welcome and announcements.

- All amendments reflected in the discussion drafts of the -409 rules included with these materials have been approved by the committee.
- Update on the status of proposed amendments to the competency rules.

- 1. Roll call.**
- 2. Approve meeting notes from March 21, 2018 meeting.**

For agenda items 3-6, please refer to Summary of Proposals, March 1 Materials, pp. 8-21.

- 3. Comments to Rule 5-409 remaining for the Committee to consider.**
 - (a) Paragraph (B), Motion for pretrial detention**
 - This proposal was tabled at the last meeting, pending any new input from the 2nd Judicial District Court.
 - (b) (New) Paragraph (F), Initial hearing (LOPD)**
 - Consider any new input from the district courts (Judge Nash).
 - (c) Paragraph (G), Order for pretrial detention (2nd District Court); and (H), Order setting conditions of release (2nd District Court).**
 - (d) Paragraph (J), Expedited trial scheduling (LOPD).**
 - (e) Paragraph (K), Successive motions for pretrial detention and motions to reconsider (LOPD).**
 - (f) Paragraph (L), Appeal (LOPD).**
- 4. Review of comments related to Rule 5-401 NMRA.**
- 5. Review of comments related to Rule 5-403 NMRA.**
- 6. Review of comments related to Rule 5-408 NMRA.**
- 7. Next meeting: If needed, determine whether next meeting will be May 2 or May 3.**
- 8. Other business.**

Agenda Item 2

**NEW MEXICO SUPREME COURT
AD HOC PRETRIAL RELEASE COMMITTEE
MEETING NOTES**

**March 21, 2018; 1:00 p.m. - 5:00 p.m.
State Bar Center, Albuquerque, NM, and by phone**

COMMITTEE MEMBERS PRESENT:

Professor Leo Romero, Chair
Jonathan Ibarra (designee of Ben Bauer)
Jason Clack (by phone)
Jeff Rein and Richard Pugh (designees of Matthew Coyte)
Hon. Buddy Hall (by phone)
Jason Jaramillo
Anne Kelly
Gerald Madrid
Rep. Moe Maestas
Hon. Nan Nash
Hon. Conrad Perea (by phone)
Lisa Simpson
John Sugg (designee of Rick Tedrow)
Hon. Alan Torgerson
Hon. Victor Valdez
Hon. Ann Yalman

COMMITTEE MEMBERS ABSENT:

Hon. Gerald Baca
Douglas Decker
Hon. Sandra Engel
Rep. Nate Gentry
Sen. Daniel Ivey-Soto
Hon. Elise Larsen
Judith Olean

OTHERS PRESENT:

Joy Willis
James Grayson
Sally A. Paez (staff)
Terri L. Saxon (staff)

- Professor Leo Romero called the meeting to order at 1:05 p.m. After roll call, **Judge Nan Nash moved to approve the meeting notes from the March 1, 2018 meeting of the committee. Judge Victor Valdez seconded the motion, and it carried on a unanimous vote.**

- 1. **Review and discuss the proposed amendments to Rule 5-409 NMRA drafted after the March 1, 2018 meeting.**

- The committee first discussed the proposed change to Paragraph B, which was Professor Romero’s suggestion to break the first sentence into two sentences for clarity, as follows: “The prosecutor may file a written expedited motion for pretrial detention at any time. The motion shall be filed in both the court where the case is pending and in the district court.” After a thorough discussion with input from members of the committee, including members from the bench, the NMDAA, and the LOPD, the committee approved different language.

- **Jonathan Ibarra moved to amend Paragraph B as follows: “The prosecutor**

may file a written expedited motion for pretrial detention at any time in [both] either the court where the cases is pending [and] or in the district court.”; and to add a new Subparagraph (B)(1)(c) as follows: (1) The prosecutor shall immediately deliver a copy of the motion to . . . (c) the magistrate or metropolitan court, if the case is pending in the magistrate or metropolitan court and the motion is filed in the district court.” John Sugg seconded the motion, and it carried on a unanimous vote.

- Next, the committee discussed the proposed change to Paragraph F: “The district court shall hold a hearing on the motion for pretrial detention to determine whether the defendant may be likely to pose a threat to the safety of others if released pending trial and 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.” Professor Romero proposed this change consistent with paragraph 29 of the *Groves* opinion, stating that there are two components to the clear and convincing evidence standard. Anne Kelly expressed concern that this language does not track the constitutional amendment, and John Sugg suggested instead retaining language directly from the constitutional amendment. Other committee members pointed out that the ruling in *Groves* is the Supreme Court’s interpretation of the constitutional amendment, and accordingly informs courts regarding how to apply the constitutional amendment. After discussion, the committee approved different language.
- **Judge Victor Valdez moved to amend this sentence as follows: “The district court shall hold a hearing on the motion for pretrial detention to determine whether the defendant poses a danger to the safety of any other person or the community if released pending trial and 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. Judge Alan Torgerson seconded the motion. Anne Kelly and John Sugg opposed the motion, and it carried on a majority vote.**
- **Jonathan Ibarra moved to add the same language to Subparagraph (F)(4). Judge Nan Nash seconded the motion. Anne Kelly and John Sugg opposed the motion, and it carried on a majority vote. Mr. Ibarra then moved to add the same language to Paragraph G. Lisa Simpson seconded the motion. With Anne Kelly and John Sugg opposing, the motion carried on a majority vote.**
- Professor Romero then turned the committee’s attention to the proposal by the LOPD, NMCDLA, and 2nd District Court to add language at the end of Subparagraph (F)(2), as follows: “At least twenty-four (24) hours before the hearing, the prosecutor shall provide the defendant with all evidence relating to the motion for pretrial detention that is in the possession of the prosecutor or is reasonably available to the prosecutor. All exculpatory evidence known to the prosecutor must be disclosed. The prosecutor may introduce

evidence at the hearing beyond that referenced in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to the hearing. The district court may impose sanctions on the prosecutor for a failure to comply with this rule, including, but not limited to, denial of the motion for pretrial detention, monetary sanctions, exclusion of the undisclosed evidence from the detention hearing, a continuance of the hearing provided the defendant is not prejudiced by the delay, release of the defendant pursuant to Rule 5-401, or any other remedy the court determines is appropriate.” At the last meeting, the committee voted down a conceptual proposal to add a sanctions provision to this subparagraph, but agreed to consider actual proposed language if presented. John Sugg expressed concern with the sanctions, given the twenty-four hour time frame in this subparagraph, and described instances where this burden would be very hard for a prosecutor to meet. The committee discussed the kinds of evidence that would be required at the pretrial detention hearing, and what would be reasonably available at that stage of the proceedings. Judge Nash said she is open to other language, but wants the rule to be clear that courts do have the power to sanction a prosecutor for failing to disclose evidence to a defendant in a timely manner. Representatives of the different stakeholders on the committee expressed their concerns with timing, disclosure, and related issues. After considering several motions on different amendments, the committee agreed to revise Subparagraph (F)(2) as drafted by Sally Paez.

- **Sally Paez revised Subparagraph (F)(2) as follows:**

“(2) *Discovery.* [At least twenty-four (24) hours before the hearing, the]

(a) The prosecutor shall [provide] promptly disclose to the defendant [with] prior to the hearing

(i) all evidence [relating to the motion for pretrial detention that is in the possession of] that the prosecutor [or is reasonably available to the prosecutor. All] intends to rely on at the hearing, and

(ii) all exculpatory evidence known to the prosecutor [must be disclosed. The prosecutor may introduce evidence at the hearing beyond that referenced in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to the hearing].

(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.

(c) The district court may impose an appropriate sanction on the prosecution for failure to comply with this rule.”

John Sugg moved to adopt this revision. Judge Alan Torgerson seconded the motion, and it carried on a unanimous vote with Judge Buddy Hall abstaining because he had to miss a portion of this discussion.

- Next, the committee considered Judge Hall’s proposed revision to Paragraph I to clarify the conditions under which a magistrate or metropolitan court’s may release a defendant if a district court has issued a pretrial detention order.
 - **Judge Buddy Hall moved to amend Paragraph I as follows: “Upon completion of the hearing, if the case is pending in the magistrate or metropolitan court, the district court shall promptly transmit to the magistrate or metropolitan court a copy of either the order for pretrial detention or the order setting conditions of release. If the district court has issued an order for pretrial detention, the magistrate or metropolitan court shall not release the defendant as long as felony charges remain pending. If the district court has issued an order setting conditions of release, the magistrate or metropolitan court shall enforce the conditions set by the district court. Upon either the dismissal of all felony charges or at the conclusion of a preliminary examination under Rule 6-202 NMRA or Rule 7-202 NMRA, the[The] magistrate or metropolitan court may modify the order setting conditions of release upon a showing of good cause[~~–but as long as the case remains pending, the magistrate or metropolitan court may not release a defendant who has been ordered detained by the district court~~].” Judge Nan Nash seconded the motion, and it carried on a unanimous vote.**
- The committee then considered the proposed new commentary to Paragraph F, which incorporates the three factors in *Groves*.
 - **Jonathan Ibarra moved to adopt the new commentary. Judge Ann Yalman seconded the motion, and it carried on a unanimous vote.**
- The committee considered the proposed new commentary to Subparagraph (F)(3), which incorporates language from *State v. Torrez* to highlight that a defendant in a pretrial proceeding has a greater liberty interest than a defendant on probation.
 - **Jonathan Ibarra moved to adopt the new commentary, consistent with the committee’s discussion at the March 1 meeting. Judge Ann Yalman seconded the motion, and it carried on a unanimous vote.**
- The committee next considered the proposed amendments to the commentary to Subparagraph (F)(5), which delete references to out-of-state authority and instead cite to New Mexico case law.
 - **Jonathan Ibarra moved to accept the proposed amendments. Judge Ann Yalman seconded the motion, and it carried on a unanimous vote.**
- The proposed new commentary to Subparagraph (F)(6) addresses the factors a court may

consider in assessing whether a prosecutor has met its burden of proving by clear and convincing evidence that a defendant should not be released pending trial, and incorporates the factors set forth in *Groves* and *Ferry*.

- **Judge Nan Nash moved to accept the new commentary. Lisa Simpson seconded the motion, and it carried on a unanimous vote.**
- The committee considered the changes to the commentary to Paragraph I proposed by Judge Buddy Hall.
- **Judge Nan Nash moved to accept the proposed amendments. Jonathan Ibarra seconded the motion, and it carried on a unanimous vote.**
- John Sugg raised a question regarding what the courts are to do when the competency of a defendant is an issue. After discussion, Professor Romero suggested that this was likely not an issue the committee could address at this time, but the committee could raise the issue in its report to the Supreme Court. Sally Paez also said this issue may be addressed in proposed amendments to the competency rules.
- Professor Romero next called for a vote of the committee members in favor of the minority report circulated by the NMDAA. **Five members, Gerald Madrid, Anne Kelly, Jason Jaramillo, John Sugg, and Judge Buddy Hall supported the minority position.**

2. **Comments to Rule 5-409 remaining for the committee to consider.**

- The next set of agenda items the committee discussed were the comments to Rule 5-409 that it had not previously considered, beginning with a suggestion by the 2nd District Court to add a requirement to Paragraph B for a prosecutor to certify in a pretrial detention motion whether the prosecutor plans to indict or proceed to a preliminary examination. Judge Nash and Joy Willis clarified that the proposal is not to direct a prosecutor which option to select, but simply to select one or the other. After discussion, the committee agreed to table this suggestion until the next meeting.
- The committee then considered the NMDAA's proposal to amend the last sentence of Subparagraph (E)(1), as follows: "All authority of any person to release a defendant pursuant to such designation is terminated upon receipt of a detention motion until [~~further court order~~]
 - (a) the district, metropolitan, or magistrate court finds no probable cause under Rules 5-301(C), 6-203(C), or 7-203(C) NMRA;
 - (b) the district, metropolitan, or magistrate court dismisses the current charges; or
 - (c) the district court orders that conditions of release can reasonably protect the safety of any person and the community and imposes such conditions of

release.” Committee members expressed several concerns with the proposal. After a thorough discussion with input from the NMDAA, the 2nd District Court, and the LOPD, the committee voted on the proposed amendment.

- **John Sugg moved to accept the NMDAA’s proposed amendments to Subparagraph (E)(1). Anne Kelly seconded the motion, and it failed on a majority vote with Anne Kelly, John Sugg, and Gerald Madrid voting in favor and all others opposed.**
- Finally, the committee began a review of the LOPD’s proposed new Paragraph F, Initial hearing. After a discussion, Judge Nash said she will send this proposal to the chief judges of the district courts and solicit input from them, with an emphasis on input from rural districts.
- In the interest of time, Professor Romero adjourned the meeting at 5:00 p.m.

Next meeting: Wednesday, April 11, 2018, at 1:00 p.m., at the State Bar Center in Albuquerque, New Mexico.

Agenda Item 3

1 **5-409. Pretrial detention.**

2 A. **Scope.** Notwithstanding the right to pretrial release under Article II, Section
3 13 of the New Mexico Constitution and Rule 5-401 NMRA, under Article II, Section 13 and
4 this rule, the district court may order the detention pending trial of a defendant charged with
5 a felony offense if the prosecutor files a written motion titled “Expedited Motion for Pretrial
6 Detention” and proves by clear and convincing evidence that no release conditions will
7 reasonably protect the safety of any other person or the community.

8 B. **Motion for pretrial detention.** The prosecutor may file a written expedited
9 motion for pretrial detention at any time. The motion shall be filed either in [both] the court
10 where the case is pending [~~and~~] or in the district court. The motion shall include the specific
11 facts that warrant pretrial detention.

12 (1) The prosecutor shall immediately deliver a copy of the motion to
13 (a) the detention center holding the defendant, if any;
14 (b) the defendant and defense counsel of record, or, if defense
15 counsel has not entered an appearance, the local law office of the public defender or, if no
16 local office exists, the director of the contract counsel office of the public defender; and
17 (c) the magistrate or metropolitan court, if the case is pending in
18 the magistrate or metropolitan court and the motion is filed in the district court.

19 (2) The defendant may file a response to the motion for pretrial detention
20 in the district court, but the filing of a response shall not delay the hearing under Paragraph

1 F of this rule. If a response is filed, the defendant shall promptly provide a copy to the
2 assigned district court judge and the prosecutor.

3 C. **Case pending in magistrate or metropolitan court.** If a motion for pretrial
4 detention is filed in the magistrate or metropolitan court and a probable cause determination
5 has not been made, the magistrate or metropolitan court shall determine probable cause under
6 Rule 6-203 NMRA or Rule 7-203 NMRA. If the court finds no probable cause, the court
7 shall order the immediate personal recognizance release of the defendant under Rule 6-203
8 NMRA or Rule 7-203 NMRA and shall deny the motion for pretrial detention without
9 prejudice. If probable cause has been found, the magistrate or metropolitan court clerk shall
10 promptly transmit to the district court clerk a copy of the motion for pretrial detention, the
11 criminal complaint, and all other papers filed in the case. The magistrate or metropolitan
12 court's jurisdiction to set or amend conditions of release shall then be terminated, and the
13 district court shall acquire exclusive jurisdiction over issues of pretrial release until the case
14 is remanded by the district court following disposition of the detention motion under
15 Paragraph I of this rule.

16 D. **Case pending in district court.** If a motion for pretrial detention is filed in
17 the district court and probable cause has not been found under Article II, Section 14 of the
18 New Mexico Constitution or Rule 5-208(D) NMRA, Rule 5-301 NMRA, Rule 6-203
19 NMRA, Rule 6-204(B) NMRA, Rule 7-203 NMRA, or Rule 7-204(B) NMRA, the district
20 court shall determine probable cause in accordance with Rule 5-301 NMRA. If the district

1 court finds no probable cause, the district court shall order the immediate personal
2 recognizance release of the defendant under Rule 5-301 NMRA and shall deny the motion
3 for pretrial detention without prejudice.

4 E. **Detention pending hearing; warrant.**

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

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

18 F. **Pretrial detention hearing.** The district court shall hold a hearing on the
19 motion for pretrial detention to determine whether the defendant poses a danger to the safety
20 of any other person or the community if released pending trial and whether any release

1 condition or combination of conditions set forth in Rule 5-401 NMRA will reasonably
2 protect the safety of any other person or the community.

3 (1) *Time.*

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

7 (i) the filing of the motion for pretrial detention; or

8 (ii) the date the defendant is arrested as a result of the
9 motion for pretrial detention.

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

13 (i) _____ for up to three (3) days if in the motion for pretrial
14 detention the prosecutor requests a preliminary hearing to be held immediately before the
15 detention hearing;

16 _____ (ii) for up to three (3) days upon a showing that
17 extraordinary circumstances exist and justice requires the [~~delay~~] extension;

18 [(~~ii~~)](iii) upon the defendant filing a written waiver of
19 the time limit; or

20 [(~~iii~~)](iv) upon stipulation of the parties.

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

4 (2) **Discovery.** ~~[At least twenty-four (24) hours before the hearing, the]~~

5 (a) The prosecutor shall [provide] promptly disclose to the
6 defendant [with] prior to the hearing

7 (i) all evidence [relating to the motion for pretrial
8 detention that is in the possession of] that the prosecutor [or is reasonably available to the
9 prosecutor. All] intends to rely on at the hearing, and

10 (ii) all exculpatory evidence known to the prosecutor [must
11 be disclosed. The prosecutor may introduce evidence at the hearing beyond that referenced
12 in the motion, but the prosecutor must provide prompt disclosure to the defendant prior to
13 the hearing].

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

19 (c) The district court may impose an appropriate sanction on the
20 prosecution for failure to comply with this rule.

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

8 (4) ***Prosecutor’s burden.*** The prosecutor must prove by clear and
9 convincing evidence that the defendant poses a danger to the safety of any other person or
10 the community if released pending trial and that no release conditions will reasonably protect
11 the safety of any other person or the community.

12 (5) ***Evidence.*** The New Mexico Rules of Evidence shall not apply to the
13 presentation and consideration of information at the hearing. The parties may proceed by
14 proffer, documentary submission, witness testimony, other relevant evidence, or any
15 combination thereof. New Mexico court records may be considered without certification.

16 (6) ***Factors to be considered.*** The court shall consider any fact relevant
17 to the nature and seriousness of the danger to any person or the community that would be
18 posed by the defendant’s release and any fact relevant to the likelihood that conditions of
19 release will reasonably protect the safety of any person or the community, including but not
20 limited to the following:

1 (a) the nature and circumstances of the offense charged, including
2 whether the offense is a crime of violence;

3 (b) the weight of the evidence against the defendant;

4 (c) the history and characteristics of the defendant, including

5 (i) the defendant's character, physical and mental
6 condition, past conduct, history relating to drug or alcohol abuse, and criminal history;

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

10 (iii) whether the defendant has a history of violations of
11 probation, parole, or conditions of release in the ten (10) years preceding the current charges;

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

14 (e) any facts tending to indicate that the defendant may or may not
15 commit new crimes if released;

16 (f) whether the defendant has been ordered detained under Article
17 II, Section 13 of the New Mexico Constitution based on a finding of dangerousness in
18 another pending case or was ordered detained based on a finding of dangerousness in any
19 prior case; and

20 (g) any available results of a pretrial risk assessment instrument

1 approved by the Supreme Court for use in the jurisdiction, provided that the court shall not
2 defer to the recommendation in the instrument but shall make an independent determination
3 of dangerousness and community safety based on all information available at the hearing.

4 (7) *Permissive inference.* Subject to rebuttal by the person charged, it
5 shall be a permissive inference that no release conditions will reasonably protect the safety
6 of any other person or the community upon a finding of probable cause that the person
7 committed a felony while on conditions of release for a felony; provided that there is a
8 separate finding of clear and convincing evidence that one of the felonies involved violence.

9 As used in this rule, “violence” means use of a deadly weapon or infliction of great bodily
10 harm.

11 G. **Order for pretrial detention.** The court shall issue a written order for
12 pretrial detention at the conclusion of the pretrial detention hearing if the court determines
13 by clear and convincing evidence that the defendant poses a danger to the safety of any other
14 person or the community if released pending trial and that no release conditions will
15 reasonably protect the safety of any other person or the community. The court shall file
16 written findings of the individualized facts justifying the detention as soon as possible, but
17 no later than two (2) days after the conclusion of the hearing.

18 H. **Order setting conditions of release.** The court shall deny the motion for
19 pretrial detention if, on completion of the pretrial detention hearing, the court determines that
20 the prosecutor has failed to prove the grounds for pretrial detention by clear and convincing

1 evidence. At the conclusion of the pretrial detention hearing, the court shall issue an order
2 setting conditions of release under Rule 5-401 NMRA. The court shall file written findings
3 of the individualized facts justifying the denial of the detention motion as soon as possible,
4 but no later than two (2) days after the conclusion of the hearing.

5 I. **Further proceedings in magistrate or metropolitan court.** Upon
6 completion of the hearing, if the case is pending in the magistrate or metropolitan court, the
7 district court shall promptly transmit to the magistrate or metropolitan court a copy of either
8 the order for pretrial detention or the order setting conditions of release. If the district court
9 has issued an order for pretrial detention, the magistrate or metropolitan court shall not
10 release the defendant as long as felony charges remain pending. If the district court has issued
11 an order setting conditions of release, the magistrate or metropolitan court shall enforce the
12 conditions set by the district court. Upon either the dismissal of all felony charges or at the
13 conclusion of a preliminary examination under Rule 6-202 NMRA or Rule 7-202 NMRA,
14 the[The] magistrate or metropolitan court may modify the order setting conditions of release
15 upon a showing of good cause[; but as long as the case remains pending, the magistrate or
16 metropolitan court may not release a defendant who has been ordered detained by the district
17 court].

18 J. **Expedited trial scheduling for defendant in custody.** The district court
19 shall provide expedited priority scheduling in a case in which the defendant is detained
20 pending trial.

1 K. **Successive motions for pretrial detention and motions to reconsider.** On
2 written motion of the prosecutor or the defendant, the court may reopen the detention hearing
3 at any time before trial if the court finds that information exists that was not known to the
4 movant at the time of the hearing and that has a material bearing on whether the previous
5 ruling should be reconsidered.

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

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

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

17 **Commentary.** —

18 **Paragraph A** - In addition to the detention authority for dangerous defendants authorized
19 by the 2016 amendment to Article II, Section 13 of the New Mexico Constitution, a court
20 conceivably could be faced with a request to detain under the preexisting exception to the

1 right to pretrial release in “capital offenses when the proof is evident or the presumption
2 great.” As a result of the repeal of capital punishment for offenses committed after July 1,
3 2009, this provision will be applicable only to offenses alleged to have been committed prior
4 to that date for which capital punishment may be imposed.

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

8 **Paragraph C** - Under Paragraph C, the filing of a motion for pretrial detention deprives the
9 magistrate or metropolitan court of jurisdiction to set or amend the conditions of release. The
10 filing of the motion does not, however, stay the case in the magistrate or metropolitan court.
11 Nothing in this rule shall prevent timely preliminary examinations from proceeding while
12 the detention motion is pending.

13 **Paragraphs C and D** - Federal constitutional law requires a “prompt judicial determination
14 of probable cause” to believe the defendant committed a chargeable offense, before or within
15 48 hours after arrest, in order to continue detention or other significant restraint of liberty.
16 *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991). A finding of probable cause
17 does not relieve the prosecutor from proving the grounds for pretrial detention by clear and
18 convincing evidence.

19 **Paragraph F** - Paragraph F sets forth procedures for pretrial detention hearings. The court
20 must “make three categories of determinations” at a pretrial detention hearing: “(1) which

1 information in any form carries sufficient indicia of reliability to be worthy of consideration,
2 (2) the extent to which that information would indicate that a defendant may be likely to pose
3 a threat to the safety of others if released pending trial, and (3) whether any potential pretrial
4 release conditions will reasonably protect the safety of others.” *State v. Groves,*
5 2018-NMSC-006, ¶ 29, 410 P.3d 193, 198 (internal quotation marks and citation omitted).

6 Subparagraph (F)(1)(b)(i) authorizes an extension of time if the prosecutor requests
7 a preliminary hearing to be held immediately before the detention hearing.

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

17 Subparagraph (F)(5) provides that the Rules of Evidence do not apply at a pretrial
18 detention hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. In *Torrez*, the Supreme
19 court clarified that “neither the United States Constitution nor the New Mexico Constitution
20 categorically requires live witness testimony at pretrial detention hearings.”

1 2018-NMSC-005, ¶ 110. The court may rely on “credible proffers and other summaries of
2 evidence, law enforcement and court records, or other nontestimonial information” in
3 determining whether the prosecutor has met its burden under Article II, Section 13. *Id.* ¶ 3.
4 In doing so, the court should exercise “sound judicial discretion in assessing the reliability
5 and accuracy of information presented in support of detention, whether by proffer or direct
6 proof.” *Id.* ¶ 81. The “court necessarily retains the judicial discretion to find proffered or
7 documentary information insufficient to meet the constitutional clear and convincing
8 evidence requirement in the context of particular cases.” *Id.* ¶ 3. [~~Like other types of~~
9 ~~proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the~~
10 ~~court is responsible “for assessing the reliability and accuracy” of the information presented.~~
11 ~~*See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial~~
12 ~~detention hearing the judge “retains the responsibility for assessing the reliability and~~
13 ~~accuracy of the government’s information, whether presented by proffer or by direct proof”);~~
14 ~~*State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the~~
15 ~~discretion of the detention hearing court to determine whether a pretrial detention order may~~
16 ~~be supported in an individual case by documentary evidence, proffer, one or more live~~
17 ~~witnesses, or other forms of information the court deems sufficient); *see also United States*~~
18 ~~*v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the~~
19 ~~sentencing judge considers has sufficient indicia of reliability to support its probable~~
20 ~~accuracy, the information may properly be taken into account in passing~~

1 sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39,
2 43, 150 N.M. 84, 257 P.3d 904 (explaining that in a probation revocation hearing, the court
3 should focus on the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97
4 N.M. 749, 643 P.2d 618 (holding in a probation revocation hearing that hearsay untested for
5 accuracy or reliability lacked probative value).]

6 Subparagraph (F)(6) lists factors that the court may consider in assessing whether the
7 prosecutor has met its burden of proving by clear and convincing evidence that the defendant
8 may be likely to pose a threat to the safety of others if released pending trial and whether any
9 potential pretrial release conditions will reasonably protect the safety of others. These factors
10 include the nature and circumstances of the charged offense and the defendant’s history and
11 characteristics. See *State v. Groves*, 2018-NMSC-006, ¶¶ 32-33, 410 P.3d 193 (explaining
12 that the defendant’s past conduct can help the court assess whether the defendant poses a
13 future threat of danger). In *State v. Ferry*, the Supreme Court explained that “the nature and
14 circumstances of a defendant’s conduct in the underlying charged offense(s) may be
15 sufficient, despite other evidence, to sustain the [prosecutor’s] burden of proving by clear and
16 convincing evidence that the defendant poses a threat to others or the community.”
17 2018-NMSC-004, ¶ 6, 409 P.3d 918. If the prosecutor meets this initial burden, the
18 prosecutor must also demonstrate by clear and convincing evidence that “no release
19 conditions will reasonably protect the safety of any other person or the community.” *Id.* “For
20 example, the [prosecutor] may introduce evidence of a defendant’s defiance of restraining

1 orders; dangerous conduct in violation of a court order; intimidation tactics; threatening
2 behavior; stalking of witnesses, victims, or victims' family members; or inability or refusal
3 to abide by conditions of release in other cases.” *Id.*

4 _____ Subparagraph (F)(7) provides for a permissive inference based on certain findings.
5 Specifically, Subparagraph (F)(7) creates a permissive inference if the defendant committed
6 a felony while on conditions of release for a previous felony, and either the charged felony
7 or previous felony involved violence.

8 **Paragraph I** - If the district court issues a detention order under Paragraph G of this rule,
9 the magistrate or metropolitan court cannot release the defendant while [~~the case is~~] felony
10 charges remain pending. The magistrate or metropolitan court should, however, issue a
11 release order if the state files a voluntary dismissal or if the court dismisses the case under
12 other rules, such as Rule 6-202(A)(3) or (D)(1) NMRA or Rule 7-202(A)(3) or (D)(1)
13 NMRA.

14 **Paragraph J** - Paragraph J requires the district court to prioritize the scheduling of trial and
15 other proceedings for cases in which the defendant is held in custody. *See generally United*
16 *States v. Salerno*, 481 U.S. 739, 747 (1987) (concluding that the detention provisions in the
17 Bail Reform Act, 18 U.S.C. § 3142, did not violate due process, in part due to “the stringent
18 time limitations of the Speedy Trial Act,” 18 U.S.C. § 3161); Am. Bar Ass’n, *ABA Standards*
19 *for Criminal Justice: Pretrial Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction
20 should establish, by statute or court rule, accelerated time limitations within which detained

1 defendants should be tried consistent with the sound administration of justice.”).

2 **Paragraph L** - Either party may appeal the district court’s ruling on the detention motion.

3 Under Article II, Section 13, an “appeal from an order denying bail shall be given preference

4 over all other matters.” *See also State v. Chavez*, 1982-NMSC-108, ¶ 6, 98 N.M. 682, 652

5 P.2d 232 (holding that the state may appeal a ruling where it is an aggrieved party under

6 Article VI, Section 2 of the New Mexico Constitution).

7 **Paragraph M** - Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory

8 right to excuse a judge who is conducting a detention hearing. *See* NMSA 1978, § 38-3-9.

9 Paragraph M does not prevent a judge from being recused under the provisions of the New

10 Mexico Constitution or the Code of Judicial Conduct either on the court’s own motion or

11 motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.

12 [Commentary adopted by Supreme Court Order No. 17-8300-005, effective for all cases

13 pending or filed on or after July 1, 2017; as amended by Supreme Court Order No.

14 _____, effective for all cases pending or filed on or after _____.]

1 **6-409. Pretrial detention.**

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

10 B. **Motion for pretrial detention.** The prosecutor may file a written expedited
11 motion for pretrial detention at any time. The motion shall be filed either in [both] the
12 magistrate court [and] or in the district court. The motion shall include the specific facts that
13 warrant pretrial detention. If the case is pending in the magistrate court and the motion is
14 filed in the district court, the prosecutor shall immediately deliver a copy of the motion to the
15 magistrate court.

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

1 D. **Determination of motion by district court.** If probable cause has been
2 found, the magistrate court clerk shall promptly transmit to the district court clerk a copy of
3 the motion for pretrial detention, the criminal complaint, and all other papers filed in the
4 case. The magistrate court’s jurisdiction to set or amend conditions of release shall then be
5 terminated, and the district court shall acquire exclusive jurisdiction over issues of pretrial
6 release until the case is remanded by the district court following disposition of the detention
7 motion under Paragraph E of this rule.

8 E. **Further proceedings in magistrate court.** Upon completion of the hearing,
9 if the case is pending in the magistrate court, the district court shall promptly transmit to the
10 magistrate court a copy of either the order for pretrial detention or the order setting
11 conditions of release. If the district court has issued an order for pretrial detention, the
12 magistrate court shall not release the defendant as long as felony charges remain pending. If
13 the district court has issued an order setting conditions of release, the magistrate court shall
14 enforce the conditions set by the district court. Upon either the dismissal of all felony charges
15 or at the conclusion of a preliminary examination under Rule 6-202 NMRA, the [The]
16 magistrate court may modify the order setting conditions of release upon a showing of good
17 cause[, but as long as the case remains pending, the magistrate court may not release a
18 defendant who has been ordered detained by the district court].
19 [Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed
20 on or after July 1, 2017; as amended by Supreme Court Order No. _____,
21 effective for all cases pending or filed on or after _____.]

1 **Committee commentary.** —

2 Paragraph C — Federal constitutional law requires a “prompt judicial determination
3 of probable cause” to believe the defendant committed a chargeable offense, before or within
4 48 hours after arrest, in order to continue detention or other significant restraint of liberty.
5 *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

6 Paragraph D — Upon the filing of a motion for pretrial detention and a finding of
7 probable cause, the magistrate court is deprived of jurisdiction to set or amend the conditions
8 of release. The filing of the motion does not, however, stay the case in the magistrate court.
9 Nothing in this rule shall prevent timely preliminary examinations from proceeding while
10 the detention motion is pending.

11 Paragraph E — If the district court issues a detention order under Rule 5-409 NMRA,
12 the magistrate court cannot release the defendant while [~~the case is~~] felony charges remain
13 pending. The magistrate court should, however, issue a release order if the state files a
14 voluntary dismissal or if the court dismisses the case under other rules, such as Rule
15 6-202(A)(3) or (D)(1) NMRA.

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

1 **7-409. Pretrial detention.**

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

10 B. **Motion for pretrial detention.** The prosecutor may file a written expedited
11 motion for pretrial detention at any time. The motion shall be filed either in [both] the
12 metropolitan court [and] or in the district court. The motion shall include the specific facts
13 that warrant pretrial detention. If the case is pending in the metropolitan court and the motion
14 is filed in the district court, the prosecutor shall immediately deliver a copy of the motion to
15 the metropolitan court.

16 C. **Determination of probable cause.** If a motion for pretrial detention is filed
17 in the metropolitan court and a probable cause determination has not been made, the
18 metropolitan court shall determine probable cause under Rule 7-203 NMRA. If the court
19 finds no probable cause, the court shall order the immediate personal recognizance release
20 of the defendant under Rule 7-203 NMRA and shall deny the motion for pretrial detention

1 without prejudice.

2 D. **Determination of motion by district court.** If probable cause has been
3 found, the metropolitan court clerk shall promptly transmit to the district court clerk a copy
4 of the motion for pretrial detention, the criminal complaint, and all other papers filed in the
5 case. The metropolitan court's jurisdiction to set or amend conditions of release shall then
6 be terminated, and the district court shall acquire exclusive jurisdiction over issues of pretrial
7 release until the case is remanded by the district court following disposition of the detention
8 motion under Paragraph E of this rule.

9 E. **Further proceedings in metropolitan court.** Upon completion of the
10 hearing, if the case is pending in the metropolitan court, the district court shall promptly
11 transmit to the metropolitan court a copy of either the order for pretrial detention or the order
12 setting conditions of release. If the district court has issued an order for pretrial detention, the
13 metropolitan court shall not release the defendant as long as felony charges remain pending.
14 If the district court has issued an order setting conditions of release, the metropolitan court
15 shall enforce the conditions set by the district court. Upon either the dismissal of all felony
16 charges or at the conclusion of a preliminary examination under Rule 7-602 NMRA, the
17 ~~[The]~~ metropolitan court may modify the order setting conditions of release upon a showing
18 of good cause~~[-, but as long as the case remains pending, the metropolitan court may not~~
19 ~~release a defendant who has been ordered detained by the district court].~~

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

1 effective for all cases pending or filed on or after _____.]

2 **Committee commentary.** —

3 Paragraph C — Federal constitutional law requires a “prompt judicial determination
4 of probable cause” to believe the defendant committed a chargeable offense, before or within
5 48 hours after arrest, in order to continue detention or other significant restraint of liberty.
6 *Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 47, 56 (1991).

7 Paragraph D — Upon the filing of a motion for pretrial detention and a finding of
8 probable cause, the metropolitan court is deprived of jurisdiction to set or amend the
9 conditions of release. The filing of the motion does not, however, stay the case in the
10 metropolitan court. Nothing in this rule shall prevent timely preliminary examinations from
11 proceeding while the detention motion is pending.

12 Paragraph E — If the district court issues a detention order under Rule 5-409 NMRA,
13 the metropolitan court cannot release the defendant while [~~the case is~~] felony charges remain
14 pending. The metropolitan court should, however, issue a release order if the state files a
15 voluntary dismissal or if the court dismisses the case under other rules, such as Rule
16 7-202(A)(3) or (D)(1) NMRA.

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

Agenda Item 4

1 **5-401. Pretrial release.**

2 A. **Hearing.**

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

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

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

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

16 B. **Right to pretrial release; recognizance or unsecured appearance bond.**

17 Pending trial, any defendant eligible for pretrial release under Article II, Section 13 of the
18 New Mexico Constitution, shall be ordered released pending trial on the defendant's personal
19 recognizance or upon the execution of an unsecured appearance bond in an amount set by
20 the court, unless the court makes written findings of particularized reasons why the release
21 will not reasonably ensure the appearance of the defendant as required. The court may

1 impose non-monetary conditions of release under Paragraph D of this rule, but the court shall
2 impose the least restrictive condition or combination of conditions that will reasonably
3 ensure the appearance of the defendant as required and the safety of any other person or the
4 community.

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

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

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

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

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

20 (b) whether, at the time of the current offense or arrest, the
21 defendant was on probation, on parole, or on other release pending trial, sentencing, or

1 appeal for any offense under federal, state, or local law;

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

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

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

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

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

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

20 (3) maintain or commence an educational program;

21 (4) abide by specified restrictions on personal associations, place of

1 abode, or travel;

2 (5) avoid all contact with an alleged victim of the crime or with a potential
3 witness who may testify concerning the offense;

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

6 (7) comply with a specified curfew;

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

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

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

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

16 (12) return to custody for specified hours following release for
17 employment, schooling, or other limited purposes;

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

21 E. **Secured bond.** If the court makes findings of the reasons why release on

1 personal recognizance or unsecured appearance bond, in addition to any non-monetary
2 conditions of release, will not reasonably ensure the appearance of the defendant as required,
3 the court may require a secured bond for the defendant's release.

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

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

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

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

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

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

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

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

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

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

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

14 F. **Order setting conditions of release; findings regarding secured bond.**

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

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

20 (b) advise the defendant of

21 (i) the penalties for violating a condition of release,

1 including the penalties for committing an offense while on pretrial release;
2 (ii) the consequences for violating a condition of release,
3 including the immediate issuance of a warrant for the defendant's arrest, revocation of
4 pretrial release, and forfeiture of bond; and

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

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

10 G. **Pretrial detention.** If the prosecutor files a motion for pretrial detention, the
11 court shall follow the procedures set forth in Rule 5-409 NMRA.

12 H. **Case pending in district court; motion for review of conditions of release.**

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

20 (2) ***Review hearing.*** The district court shall hold a hearing in an

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

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

21 (4) ***Subsequent motion for review.*** The defendant may file subsequent

1 motions for review of the order setting conditions of release, but the court may rule on
2 subsequent motions with or without a hearing.

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

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

11 K. **Cases pending in magistrate, metropolitan, or municipal court; petition
12 for release or review by district court.**

13 (1) *Case within magistrate, metropolitan, or municipal court trial*
14 *jurisdiction.* A defendant charged with an offense that is within magistrate, metropolitan,
15 or municipal court trial jurisdiction may file a petition in the district court for review of the
16 magistrate, metropolitan, or municipal court's order setting conditions of release only after
17 the magistrate, metropolitan, or municipal court has ruled on a motion to review the
18 conditions of release under Rule 6-401(H) NMRA, Rule 7-401(H) NMRA, or Rule 8-401(G)
19 NMRA. The defendant shall attach to the district court petition a copy of the magistrate,
20 metropolitan, or municipal court order disposing of the defendant's motion for review.

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

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

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

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

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

11 (4) ***Magistrate, metropolitan, or municipal court’s jurisdiction pending***
12 ***determination of the petition.*** Upon the filing of a petition under this paragraph, the
13 magistrate, metropolitan, or municipal court’s jurisdiction to set or amend the conditions of
14 release shall be suspended pending determination of the petition by the district court. The
15 magistrate, metropolitan, or municipal court shall retain jurisdiction over all other aspects
16 of the case, and the case shall proceed in the magistrate, metropolitan, or municipal court
17 while the district court petition is pending. The magistrate, metropolitan, or municipal court’s
18 order setting conditions of release, if any, shall remain in effect unless and until the district
19 court issues an order amending the conditions of release.

20 (5) ***District court review.*** The district court shall rule on the petition in
21 an expedited manner. Within three (3) days after the petition is filed, the district court shall

1 take one of the following actions:

2 (a) set a hearing no later than ten (10) days after the filing of the
3 petition and promptly transmit a copy of the notice to the magistrate, metropolitan, or
4 municipal court;

5 (b) deny the petition summarily; or

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

7 (6) District court order; transmission to magistrate, metropolitan, or
8 municipal court. The district court shall promptly transmit to the magistrate, metropolitan,
9 or municipal court a copy of the district court order disposing of the petition, and jurisdiction
10 over the conditions of release shall revert to the magistrate, metropolitan, or municipal court.

11 L. **Expedited trial scheduling for defendant in custody.** The district court
12 shall provide expedited priority scheduling in a case in which the defendant is detained as
13 a result of inability to post a secured bond or meet the conditions of release.

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

19 N. **Release from custody by designee.** The chief judge of the district court may
20 designate by written court order responsible persons to implement the pretrial release

1 procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from
2 custody prior to the defendant's first appearance before a judge if the defendant is eligible
3 for pretrial release under Rule 5-408 NMRA, but may contact a judge for special
4 consideration based on exceptional circumstances. No person shall be qualified to serve as
5 a designee if the person or the person's spouse is related within the second degree of blood
6 or marriage to a paid surety who is licensed to sell property or corporate bonds within this
7 state.

8 O. **Bind over to district court.** For any case that is not within magistrate or
9 metropolitan court trial jurisdiction, upon notice to that court, any bond shall be transferred
10 to the district court upon the filing of an information or indictment in the district court.

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

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

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

1 of Judicial Conduct.
2 [As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1,
3 1990; September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective
4 December 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10,
5 2010; as amended by Supreme Court Order No. 14-8300-017, effective for all cases pending
6 or filed on or after December 31, 2014; as amended by Supreme Court Order No.
7 17-8300-005, effective for all cases pending or filed on or after July 1, 2017; amended by
8 Supreme Court Order No. _____, effective _____.]

9 **Committee commentary.** — This rule provides “the mechanism through which a
10 person may effectuate the right to pretrial release afforded by Article II, Section 13 of the
11 New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016,
12 Article II, Section 13 was amended (1) to permit a court of record to order the detention of
13 a felony defendant pending trial if the prosecutor proves by clear and convincing evidence
14 that the defendant poses a danger to the safety of any other person or the community and that
15 no release condition or combination of conditions will reasonably ensure the safety of any
16 other person or the community; and (2) to require the pretrial release of a defendant who is
17 in custody solely due to financial inability to post a secured bond. This rule was derived from
18 the federal statute governing the release or detention of a defendant pending trial. See 18
19 U.S.C. § 3142.

20 This rule was amended in 2017 to implement the 2016 amendment to Article II,
21 Section 13 and the Supreme Court’s holding in *Brown*, 2014-NMSC-038. Corresponding

1 rules are located in the Rules of Criminal Procedure for the Magistrate Courts, *see* Rules
2 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401
3 NMRA, and the Rules of Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

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

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

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

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

19 Paragraph D lists various non-monetary conditions of release. The court must impose
20 the least restrictive condition, or combination of conditions, that will reasonably ensure the
21 appearance of the defendant as required and the safety of any other person and the

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

13 As set forth in Paragraph E, the only purpose for which the court may impose a
14 secured bond is to ensure that the defendant will appear for trial and other pretrial
15 proceedings for which the defendant must be present. *See State v. Ericksons*,
16 1987-NMSC-108, ¶ 6, 106 N.M. 567, 746 P.2d 1099 (“[T]he purpose of bail is to secure the
17 defendant’s attendance to submit to the punishment to be imposed by the court.”); *see also*
18 NMSA 1978, § 31-3-2(B)(2) (authorizing the forfeiture of bond upon the defendant’s failure
19 to appear).

20 The 2017 amendments to this rule clarify that the amount of secured bond must not
21 be based on a bond schedule, i.e., a predetermined schedule of monetary amounts fixed

1 according to the nature of the charge. Instead, the court must consider the individual
2 defendant's financial resources and must set secured bond at the lowest amount that will
3 reasonably ensure the defendant's appearance in court after the defendant is released.

4 Secured bond cannot be used for the purpose of detaining a defendant who may pose
5 a danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038,
6 ¶ 53 ("Neither the New Mexico Constitution nor our rules of criminal procedure permit a
7 judge to set high bail for the purpose of preventing a defendant's pretrial release."); *see also*
8 *Stack v. Boyle*, 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount
9 reasonably calculated to ensure the defendant's appearance in court "is 'excessive' under the
10 Eighth Amendment"). A felony defendant who poses a danger that cannot be mitigated
11 through the imposition of non-monetary conditions of release under Paragraph D of this rule
12 should be detained under Article II, Section 13 and Rule 5-409 NMRA.

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

15 The court must first consider requiring an appearance bond secured by a cash deposit
16 of 10%. If this is inadequate, the court then must consider a property bond where the property
17 belongs to the defendant or other unpaid surety. If neither of these options is sufficient to
18 reasonably ensure the defendant's appearance, the court may require a cash or surety bond
19 for the defendant's release. If the court requires a cash or surety bond, the defendant has the
20 option either to execute an appearance bond and deposit 100% of the amount of the bond
21 with the court or to purchase a bond from a paid surety. A paid surety may execute a surety

1 bond or a real or personal property bond only if the conditions of Rule Rule 5-401.2 NMRA
2 are met.

3 Paragraph F governs the contents of an order setting conditions of release. *See* Form
4 9-303 NMRA (order setting conditions of release). Paragraph F also requires the court to
5 make written findings justifying the imposition of a secured bond, if any. Judges are
6 encouraged to enter their written findings on the order setting conditions of release at the
7 conclusion of the hearing. If more detailed findings are necessary, the judge should make
8 such supplemental findings in a separate document within two days of the conclusion of the
9 hearing.

10 Paragraph G addresses pretrial detention of a dangerous defendant under Article II,
11 Section 13. If the defendant poses a danger to the safety of any other person or the
12 community that cannot be addressed through the imposition of non-monetary conditions of
13 release, the prosecutor may file a motion for pretrial detention. If the prosecutor files a
14 motion for pretrial detention, the district court must follow the procedures set forth in Rule
15 5-409 NMRA.

16 Paragraphs H and K provide avenues for a defendant to seek district court review of
17 the conditions of release. Paragraph H applies to a defendant whose case is pending before
18 the district court. Paragraph K sets forth the procedure for a defendant whose case is pending
19 in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court
20 to rule on a motion or a petition for pretrial release “in an expedited manner” and to release
21 a defendant who is being held solely due to financial inability to post a secured bond. A

1 defendant who wishes to present financial information to a court to support a motion or
2 petition for pretrial release may present Form 9-301A NMRA (pretrial release financial
3 affidavit) to the court. The defendant shall be entitled to appear and participate personally
4 with counsel before the judge conducting any hearing to review the conditions of release,
5 rather than by any means of remote electronic conferencing.

6 Paragraph L requires the district court to prioritize the scheduling of trial and other
7 proceedings for cases in which the defendant is held in custody due to inability to post bond
8 or meet the conditions of release. *See generally United States v. Salerno*, 481 U.S. 739, 747
9 (1987) (concluding that the detention provisions in the Bail Reform Act, 18 U.S.C. § 3142,
10 did not violate due process, in part due to “the stringent time limitations of the Speedy Trial
11 Act, 18 U.S.C. § 3161”); Am. Bar Ass’n, *ABA Standards for Criminal Justice: Pretrial
12 Release*, Standard 10-5.11 (3d ed. 2007) (“Every jurisdiction should establish, by statute or
13 court rule, accelerated time limitations within which detained defendants should be tried
14 consistent with the sound administration of justice.”).

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

1 appearance before a judge.

2 Paragraph O requires the magistrate or metropolitan court to transfer any bond to the
3 district court upon notice from the district attorney that an information or indictment has
4 been filed. *See* Rules 6-202(E)-(F), 7-202(E)-(F) NMRA (requiring the district attorney to
5 notify the magistrate or metropolitan court of the filing of an information or indictment in
6 the district court).

7 Paragraph P of this rule dovetails with Rule 11-1101(D)(3)(e) NMRA. Both provide
8 that the Rules of Evidence are not applicable to proceedings in district court with respect to
9 matters of pretrial release. Like other types of proceedings where the Rules of Evidence do
10 not apply, at a pretrial release hearing the court is responsible “for assessing the reliability
11 and accuracy” of the information presented. *See United States v. Martir*, 782 F.2d 1141, 1145
12 (2d Cir. 1986) (explaining that in a pretrial detention hearing the judge “retains the
13 responsibility for assessing the reliability and accuracy of the government’s information,
14 whether presented by proffer or by direct proof”); *see also United States v. Marshall*, 519 F.
15 Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the sentencing judge
16 considers has sufficient indicia of reliability to support its probable accuracy, the information
17 may properly be taken into account in passing sentence.”), *aff’d* 719 F.2d 887 (7th Cir.1983);
18 *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84, 257 P.3d 904 (explaining that
19 in a probation revocation hearing, the court should focus on the reliability of the evidence).
20 Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a
21 judge who is setting initial conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph R of

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1 this rule does not prevent a judge from being recused under the provisions of the New
2 Mexico Constitution or the Code of Judicial Conduct either on the court's own motion or
3 motion of a party. *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.
4 [As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as
5 amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed
6 on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective
7 _____.]

Agenda Item 5

1 **5-403. Revocation or modification of release orders.**

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

4 (1) if the defendant is alleged to have violated a condition of release; or

5 (2) to prevent interference with witnesses or the proper administration of
6 justice.

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

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

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

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

18 D. **Initial hearing.**

19 (1) The court shall hold an initial hearing as soon as practicable, but no
20 later than three (3) days after the defendant is detained.

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

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

5 E. **Evidentiary hearing.**

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

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

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

20 (1) continue the existing conditions of release;

21 (2) set new or additional conditions of release in accordance with Rule

1 5-401 NMRA; or

2 (3) revoke the defendant's release, if the court finds by clear and
3 convincing evidence that

4 (a) the defendant has willfully violated a condition of release and
5 that no condition or combination of conditions will reasonably ensure the defendant's
6 compliance with the release conditions ordered by the court; or

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

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

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

13 H. **Review of conditions.** If the court enters an order setting new or additional
14 conditions of release, the defendant may file a motion to review the conditions under Rule
15 5-401(H) NMRA. If, upon disposition of the motion, the defendant is detained or continues
16 to be detained because of a failure to meet a condition imposed, or is subject to a requirement
17 to return to custody after specified hours, the defendant may appeal in accordance with Rule
18 5-405 NMRA and Rule 12-204 NMRA.

19 I. **Expedited trial scheduling for defendant in custody.** The district court
20 shall provide expedited priority scheduling in a case in which the defendant is detained

1 pending trial.

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

6 K. **Petition for review of revocation order issued by magistrate,
7 metropolitan, or municipal court.** If the magistrate, metropolitan, or municipal court
8 issues an order revoking the defendant's release, the defendant may petition the district court
9 for review under this paragraph.

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

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

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

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

17 (2) ***Magistrate, metropolitan, or municipal court's jurisdiction pending
18 determination of the petition.*** Upon the filing of the petition, the magistrate, metropolitan,
19 or municipal court's jurisdiction to set or amend conditions of release shall be suspended
20 pending determination of the petition by the district court. The case shall proceed in the

1 magistrate, metropolitan, or municipal court while the petition is pending.

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

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

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

7 (ii) set a hearing to be held within ten (10) days after the
8 filing of the petition and promptly transmit a copy of the notice to the magistrate,
9 metropolitan, or municipal court.

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

13 (4) ***Transmission of district court order to magistrate, metropolitan, or***
14 ***municipal court.*** The district court shall promptly transmit the order to the magistrate,
15 metropolitan, or municipal court, and jurisdiction over the conditions of release shall revert
16 to the magistrate, metropolitan, or municipal court.

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

19 L. **Judicial discretion; disqualification and excusal.** Action by any court on
20 any matter relating to pretrial release or detention shall not preclude the subsequent statutory
21 disqualification of a judge. A judge may not be excused from reviewing a lower court's order

1 revoking conditions of release unless the judge is required to recuse under the provisions of
2 the New Mexico Constitution or the Code of Judicial Conduct.

3 [As amended, effective September 1, 1990; as amended by Supreme Court Order No.
4 13-8300-046, effective for all cases pending or filed on or after December 31, 2013; as
5 amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed
6 on or after July 1, 2017; as amended by Supreme Court Order No. _____, effective
7 _____.]

8 **Committee commentary.**— The 2017 amendments to this rule clarify the procedure
9 for the court to follow when considering revocation of the defendant’s pretrial release or
10 modification of the defendant’s conditions of release for violating the conditions of release.
11 In *State v. Segura*, 2014-NMCA-037, 321 P.3d 140, the Court of Appeals held that due
12 process requires courts to afford the defendant notice and an opportunity to be heard before
13 the court may revoke the defendant’s bail and remand the defendant into custody. *See also*
14 *Tijerina v. Baker*, 1968-NMSC-009, ¶ 9, 78 N.M. 770, 438 P.2d 514 (explaining that the
15 right to bail is not absolute); *id.* ¶ 10 (“If the court has inherent power to revoke bail of a
16 defendant during trial and pending final disposition of the criminal case in order to prevent
17 interference with witnesses or the proper administration of justice, the right to do so before
18 trial seems to be equally apparent under a proper set of facts.”); *State v. Rivera*,
19 2003-NMCA-059, ¶ 20, 133 N.M. 571, 66 P.3d 344 (“Conditions of release are separate,
20 coercive powers of a court, apart from the bond itself. They are enforceable by immediate
21 arrest, revocation, or modification if violated. Such conditions of release are intended to

1 protect the public and keep the defendant in line.”), *rev’d on other grounds*,
2 2004-NMSC-001, 134 N.M. 768, 82 P.3d 939.

3 Paragraph G provides that the New Mexico Rules of Evidence do not apply at a
4 revocation hearing, consistent with Rule 11-1101(D)(3)(e) NMRA. Like other types of
5 proceedings where the Rules of Evidence do not apply, at a pretrial detention hearing the
6 court is responsible “for assessing the reliability and accuracy” of the information presented.
7 *See United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986) (explaining that in a pretrial
8 detention hearing the judge “retains the responsibility for assessing the reliability and
9 accuracy of the government’s information, whether presented by proffer or by direct proof”);
10 *State v. Ingram*, 155 A.3d 597 (N.J. Super. Ct. App. Div. 2017) (holding that it is within the
11 discretion of the detention hearing court to determine whether a pretrial detention order may
12 be supported in an individual case by documentary evidence, proffer, one or more live
13 witnesses, or other forms of information the court deems sufficient); *see also United States*
14 *v. Marshall*, 519 F. Supp. 751, 754 (E.D. Wis. 1981) (“So long as the information which the
15 sentencing judge considers has sufficient indicia of reliability to support its probable
16 accuracy, the information may properly be taken into account in passing sentence.”), *aff’d*
17 719 F.2d 887 (7th Cir.1983); *State v. Guthrie*, 2011-NMSC-014, ¶¶ 36-39, 43, 150 N.M. 84,
18 257 P.3d 904 (explaining that in a probation revocation hearing, the court should focus on
19 the reliability of the evidence); *State v. Vigil*, 1982-NMCA-058, ¶ 24, 97 N.M. 749, 643 P.2d
20 618 (holding in a probation revocation hearing that hearsay untested for accuracy or
21 reliability lacked probative value).

1 Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to
2 excuse a judge who is reviewing a lower court’s order setting or revoking conditions of
3 release. *See* NMSA 1978, § 38-3-9. Paragraph L of this rule does not prevent a judge from
4 being recused under the provisions of the New Mexico Constitution or the Code of Judicial
5 Conduct either on the court’s own motion or motion of a party. *See* N.M. Const. art. VI, §
6 18; Rule 21-211 NMRA.

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

10 [As amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or
11 filed on or after July 1, 2017.]

Agenda Item 6

1 **5-408. Pretrial release by designee.**

2 A. **Scope.** This rule shall be implemented by any person designated in writing
3 by the chief judge of the district court under Rule 5-401(N) NMRA. A designee shall execute
4 Form 9-302 NMRA to release a person from detention prior to the person's first appearance
5 before a judge if the person is eligible for pretrial release under Paragraph B, Paragraph C,
6 or Paragraph D of this rule, provided that a designee may contact a judge for special
7 consideration based on exceptional circumstances. A judge may issue a pretrial order
8 imposing a type of release and conditions of release that differ from those set forth in this
9 rule.

10 B. **Minor offenses; release on recognizance.**

11 (1) **Persons eligible.** A designee shall release a person from custody on
12 personal recognizance, subject to the conditions of release set forth in Form 9-302 NMRA,
13 if the person has been arrested and detained for a municipal code violation, game and fish
14 offense under Chapter 17 NMSA 1978, petty misdemeanor, or misdemeanor, subject to the
15 exceptions listed in Subparagraph (B)(2) of this rule; and is not known to be on probation,
16 on parole, or on other release pending trial, sentencing, or appeal for any offense under
17 federal, state, or local law.

18 (2) **Exceptions.** A person arrested for any of the following offenses is not
19 eligible for release under this paragraph:

20 (a) battery under Section 30-3-4 NMSA 1978;

21 (b) aggravated battery under Section 30-3-5 NMSA 1978;

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- 1 (c) assault against a household member under Section 30-3-12
2 NMSA 1978;
- 3 (d) battery against a household member under Section 30-3-15
4 NMSA 1978;
- 5 (e) aggravated battery against a household member under Section
6 30-3-16 NMSA 1978;
- 7 (f) criminal damage to property of a household member under
8 Section 30-3-18 NMSA 1978;
- 9 (g) harassment under Section 30-3A-2 NMSA 1978, if the victim
10 is known to be a household member;
- 11 (h) stalking under Section 30-3A-3 NMSA 1978;
- 12 (i) abandonment of a child under Section 30-6-1(B) NMSA 1978;
- 13 (j) negligent use of a deadly weapon under Section 30-7-4 NMSA
14 1978;
- 15 (k) enticement of a child under Section 30-9-1 NMSA 1978;
- 16 (l) criminal sexual contact under Section 30-9-12(D) NMSA
17 1978;
- 18 (m) criminal trespass under Section 30-14-1(E) NMSA 1978, if the
19 victim is known to be a household member;
- 20 (n) telephone harassment under Section 30-20-12, if the victim is
21 known to be a household member;

1 (o) violating an order of protection under Section 40-13-6 NMSA
2 1978; or

3 (p) driving under the influence of intoxicating liquor or drugs in
4 violation of Section 66-8-102 NMSA 1978.

5 C. **Pretrial release based on risk assessment.** A designee shall release a person
6 from custody prior to the person's first appearance before a judge if the person qualifies for
7 pretrial release based on a risk assessment and a pretrial release schedule approved by the
8 Supreme Court.

9 D. **Pretrial release under release on recognizance program.** A designee may
10 release a person from custody prior to a person's first appearance before a judge if the person
11 qualifies for pretrial release under a local release on recognizance program that relies on
12 individualized assessments of arrestees and has been approved by order of the Supreme
13 Court.

14 E. **Type of release and conditions of release set by judge.** A person who is
15 not eligible for pretrial release by a designee under Paragraph B, Paragraph C, or Paragraph
16 D of this rule shall have the type of release and conditions of release set by a judge under
17 Rule 5-401 NMRA.

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

1 **Committee commentary.** — Under NMSA 1978, Section 31-3-1 and Rule 5-401(N)
2 NMRA, the chief judge of the district court may designate responsible persons in writing
3 who are authorized to release certain arrested persons from detention prior to the arrested
4 person’s first appearance before a judge. In the past, some courts have used fixed secured
5 bond schedules tied to the level of the charged offense, rather than any individual flight risk
6 of the arrestee, a practice that has been specifically prohibited by new Subparagraph (E)(1)(d)
7 of Rule 5-401 NMRA (as reflected in the 2017 amendment), and that has constitutional
8 implications. *See, e.g.*, Memorandum and Opinion Setting out Findings of Fact and
9 Conclusions of Law, *ODonnell v. Harris Cty.*, No. 4:16-cv-01414 (S.D. Tex. Apr. 28, 2017);
10 Opinion, *Jones v. City of Clanton*, No. 2:15-cv-00034-MHT-WC (M.D. Ala. Sept. 14, 2015).

11 The provisions in this new rule provide more detailed guidance for courts for
12 authorizing release by designees, who are generally detention center or court employees, and
13 contains several situations in which release by designees can be authorized, none of them
14 including fixed secured bond schedules.

15 Paragraph B of this rule sets out a statewide standard method of automatic release by
16 designees in cases involving minor offenses, where no exercise of discretion is required on
17 the part of the designee. Subparagraph (B)(2) identifies certain offenses excepted from
18 automatic release under Subparagraph (B)(1), including the misdemeanors and petty
19 misdemeanors listed in the Victims of Crime Act, NMSA 1978, §§ 31-26-1 to -16, and the
20 Crimes Against Household Members Act, NMSA 1978, §§ 30-3-10 to -18, as well as battery,
21 enticement of a child, violating an order of protection, and driving under the influence of

1 intoxicating liquor or drugs.

2 Paragraph C of this rule will independently permit a designee to release an arrestee
3 if specifically authorized to be released through use of a Supreme Court-authorized risk
4 assessment instrument.

5 Paragraph D of this rule provides flexibility for individual courts to operate their own
6 Supreme Court-authorized release on recognizance programs that may rely on individualized
7 discretionary assessments of arrestee eligibility by designees, in addition to the release
8 authority authorized in Paragraphs B and C of this rule, so long as they are exercised within
9 the parameters of Court-approved programs.

10 [Adopted by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed
11 on or after July 1, 2017.]