

**5-401. [Bail] Pretrial release.**

**A. Hearing.**

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

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

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

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

**[A-]B. Right to [bail] pretrial release; recognizance or unsecured appearance bond.**

Pending trial, any [person bailable] defendant eligible for pretrial release under Article [2,] II, Section 13 of the New Mexico Constitution, shall be ordered released pending trial on the [person's] defendant's personal recognizance or upon the execution of an unsecured appearance bond in an amount set by the court, [subject to any release conditions imposed pursuant to Paragraph C of this rule,] unless the court makes [a written finding that such] written findings of particularized reasons why the release will not reasonably [assure] ensure the appearance of the [person] defendant as required. The court may impose non-monetary conditions of release under Paragraph D of this rule, but the court shall impose the least restrictive condition or combination of conditions that will reasonably ensure the appearance of the defendant as required and the safety of any other person or the community.

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

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

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

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

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

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

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

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

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

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

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

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

(3) maintain or commence an educational program;

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

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

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

(7) comply with a specified curfew;

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

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

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

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

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

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

**[B.]E. Secured ~~[bonds]~~ bond.** If the court makes ~~[a written finding that]~~ findings of the reasons why release on personal recognizance or ~~[upon execution of an]~~ unsecured appearance bond, in addition to any non-monetary conditions of release, will not reasonably ~~[assure]~~ ensure the appearance of the ~~[person]~~ defendant as required, the court may require a secured bond for the defendant's release. ~~[or will endanger the safety of any other person or the community, in addition to any release conditions imposed pursuant to Paragraph D of this rule, the court shall order the pretrial release of such person subject to the first of the following types of secured bonds which will reasonably assure the appearance of the person as required and the safety of any person and the community.]~~

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

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

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

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

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

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

(a) *Percentage bond.* [the execution of a bail] The court may require a secured appearance bond executed by the defendant in [a] the full amount specified in the order setting conditions of release, [specified amount executed by the person and] secured by a deposit [of] in cash of ten percent (10%) of the amount [set for bail] specified. [; or secured by such greater or lesser amount as is reasonably necessary to assure the appearance of the person as required.] The deposit may be returned as provided in Paragraph M of this rule. [The cash deposit may be made by or assigned to a paid surety licensed under the Bail Bondsmen Licensing Law provided such paid surety also executes a bail bond for the full amount of the bail set;]

(b) *Property bond.* The court may require the execution of a [bail] property bond by the defendant or by unpaid sureties in the full amount [of the bond] specified in the order setting conditions of release, secured by [and] the pledging of real property [as required by] in accordance with Rule [5-401A] 5-401.1 NMRA[; or].

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

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

(ii) a [bail] surety bond [with] executed by licensed sureties in accordance with Rule 5-401.2 NMRA for one hundred percent (100%) of the full amount specified in the order setting conditions of release. [as provided in Rule 5-401B NMRA or execution by the person of an appearance bond and deposit with the clerk of the court, in cash, of one-hundred percent (100%) of the amount of the bail set, such deposit to be returned as provided in this rule.

Any bail, property or appearance bond shall be substantially in the form approved by the Supreme Court.

~~C. **Factors to be considered in determining conditions of release.** The court shall, in determining the type of bail and which conditions of release will reasonably assure appearance of the person as required and the safety of any other person and the community, take into account the available information concerning:~~

~~(1) — the nature and circumstances of the offense charged, including whether the~~

~~offense is a crime of violence or involves a narcotic drug;~~

~~(2) — the weight of the evidence against the person;~~

~~(3) — the history and characteristics of the person, including:~~

~~(a) — the person's character and physical and mental condition;~~

~~(b) — the person's family ties;~~

~~(c) — the person's employment status, employment history and financial~~

~~resources;~~

~~(d) — the person's past and present residences;~~

~~(e) — the length of residence in the community;~~

~~(f) — any facts tending to indicate that the person has strong ties to the~~

~~community;~~

~~(g) — any facts indicating the possibility that the person will commit new~~

~~crimes if released;~~

~~(h) — the person's past conduct, history relating to drug or alcohol abuse, criminal history and record concerning appearance at court proceedings; and~~

~~(i) — whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal or completion of an offense under federal, state or local law;~~

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

~~(5) — any other facts tending to indicate the person is likely to appear.~~

**~~D. — Additional conditions; conditions to assure orderly administration of justice.~~**

~~The court, upon release of the defendant or any time thereafter, may enter an order, that such person's release be subject to:~~

~~(1) — the condition that the person not commit a federal, state or local crime during the period of release; and~~

~~(2) — the least restrictive of, or combination of, the following conditions the court finds will reasonably assure the appearance of the person as required, the safety of any other person and the community and the orderly administration of justice:~~

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

~~(b) — a condition that the person maintain employment, or, if unemployed, actively seek employment;~~

~~(c) — a condition that the person maintain or commence an educational program;~~

~~(d) — a condition that the person abide by specified restrictions on personal associations, place of abode or travel;~~

~~(e) — a condition that the person avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense;~~

~~(f) — a condition that the person report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;~~

~~(g) — a condition that the person comply with a specified curfew;~~

~~(h) — a condition that the person refrain from possessing a firearm;~~

destructive device or other dangerous weapon;

(i) — a condition that the person refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;

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

(k) — a condition that the person submit to a urine analysis or alcohol test upon request of a person designated by the court;

(l) — a condition that the person return to custody for specified hours following release for employment, schooling, or other limited purposes;

(m) — a condition that the person satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.]

**[E.]F. [Explanation of conditions by court.] Order setting conditions of release; findings regarding secured bond.**

(1) ***Contents of order setting conditions of release.*** The [release order of the court] order setting conditions of release shall

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

[(-)] (b) advise the [person] defendant of

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

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

[(-)] (iii) the consequences of intimidating a witness, victim, or informant or otherwise obstructing justice[; and

(3) — unless the defendant is released on personal recognizance, set forth the circumstances which require that conditions of release be imposed].

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

[F.]G. **[Detention] Pretrial detention.** [Upon motion by the state to detain a person without bail pending trial, the court shall hold a hearing to determine whether bail may be denied pursuant to Article 2, Section 13 of the New Mexico Constitution.] If the prosecutor files a motion for pretrial detention, the court shall follow the procedures set forth in Rule 5-409 NMRA.

[G.]H. **[Review] Case pending in district court; motion for review of conditions of release.** [A person for whom bail is set by]

(1) ***Motion for review.*** If the district court requires a secured bond for the defendant's release under Paragraph E of this rule or imposes non-monetary conditions of release under Paragraph D of this rule, and the defendant remains in custody [and who after] twenty-four (24) hours [from the time of transfer to a detention facility continues to be detained] after the

issuance of the order setting conditions of release as a result of the [person's] defendant's inability to ~~[meet the bail set]~~ post the secured bond or meet the conditions of release in the present case, the defendant shall, ~~[upon]~~ on motion of the defendant or the court's own motion, be entitled to ~~[have]~~ a hearing to review the ~~[amount of bail set]~~ conditions of release.

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

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

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

[H.]I. ***Amendment of conditions.*** The court ~~[ordering the release of a person on any condition specified in this rule]~~ may amend its order setting conditions of release at any time ~~[to increase the amount of bail set or impose additional or different conditions of release]~~. If ~~[such]~~ the amendment of the ~~[release]~~ order ~~[results]~~ may result in the detention of the ~~[person as a result of the person's inability to meet such conditions or in the release of the person on a condition requiring the person to return to custody after specified hours, the provisions of Paragraph G of this rule shall apply]~~ defendant or in more restrictive conditions of release, the court shall not amend the order without a hearing. If the court is considering revocation of the defendant's pretrial release or modification of the defendant's conditions of release for violating the a condition of release, the court shall follow the procedures set forth in Rule 5-403 NMRA.

[F.]J. ***Record of hearing.*** A record shall be made of any hearing held by the district court ~~[pursuant to]~~ under this rule.

[J.] ***Return of cash deposit.*** If a person has been released by executing an appearance bond and depositing a cash deposit set pursuant to Subparagraph (1) or (3) of Paragraph B of this rule, when the conditions of the appearance bond have been performed and the defendant's guilt for whom bail was required has been adjudicated by the Court, the clerk

shall return the sum which has been deposited to the person who deposited the sum, or that person's personal representatives or assigns.]

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

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

**(2) Felony case.** A [person] defendant charged with [an] a felony offense [which is not within magistrate or metropolitan court trial jurisdiction and] who has not been bound over to the district court may file a petition in the district court for release under this rule at any time after the [person's] defendant's arrest. [with the clerk of the district court for release pursuant to this rule Jurisdiction of the magistrate or metropolitan court to release the accused shall be terminated upon the filing of a petition for release in the district court. Upon the filing of the petition, the district court may:

(1) — continue the bail set and any condition of release imposed by the magistrate or metropolitan court;

(2) — impose any bail or condition of release authorized by Paragraphs A, B or D of this rule;

(3) — continue any revocation of release imposed pursuant to Rule 5-403 NMRA; or

(4) — after a hearing, revoke the release of a defendant pursuant to Subparagraph (2) of Paragraph A of Rule 5-403 NMRA.]

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

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

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

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

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

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

of the following actions:

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

(b) deny the petition summarily; or

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

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

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

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

~~[L.]N. **Release from custody by designee.** [Any or all of the provisions of this rule, except the provisions of Paragraphs F, G and K of this rule, may be carried out by responsible persons designated in writing by the] The chief judge of the district court may designate by written court order responsible persons to implement the pretrial release procedures set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody prior to the defendant's first appearance before a judge if the defendant is eligible for pretrial release under Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional circumstances. No person shall be qualified to serve as a designee if [such] the person or [such] the person's spouse is~~

~~[(1)] related within the second degree of blood or marriage to a paid surety who is licensed to sell property or corporate bonds within this state. [or~~

~~(2) — employed by a jail or detention facility unless designated in writing by the chief judge of the judicial district in which the jail or detention facility is located.]~~

~~[M.]O. **Bind over [in] to district court.** [The] For any case that is not within magistrate or metropolitan court trial jurisdiction, upon notice to that court, any bond shall [remain in the magistrate or metropolitan court, except that it shall] be transferred to the district court upon the filing of an information or indictment [or bind over to that] in the district court.~~

~~[N.]P. **Evidence.** Information [stated in, or] offered in connection with or stated in any proceeding held or order entered [pursuant to] under this rule need not conform to the New Mexico Rules of Evidence.~~

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

~~[P.]R. **Judicial discretion; disqualification and excusal.** Action by any court on any matter relating to [bail] pretrial release shall not preclude the subsequent statutory [or constitutional] disqualification of a judge. A judge may not be excused from setting initial conditions of release or reviewing a lower court's order setting or revoking conditions of release~~

unless the judge is required to recuse under the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

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

**Committee commentary.** — [Under Section 13 of Article 2 of the New Mexico Constitution, every accused, except a person accused of first degree murder where the proof is evident or the presumption great, is entitled to bail. Paragraph E was added in 1990 to recognize the amendment of Article 2, Section 13 of the New Mexico Constitution which permits the denial of bail for 60 days by an order entered within 7 days after incarceration if:

(1) — the defendant is accused of a felony and has been previously convicted of two or more felonies within the state; or

(2) — the defendant is accused of a felony involving the use of a deadly weapon and has a prior felony conviction within this state.]

This rule provides “the mechanism through which a person may effectuate the right to pretrial release afforded by Article II, Section 13 of the New Mexico Constitution.” *State v. Brown*, 2014-NMSC-038, ¶ 37, 338 P.3d 1276. In 2016, Article II, Section 13 was amended (1) to permit a court of record to order the detention of a felony defendant pending trial if the prosecutor proves by clear and convincing evidence that the defendant poses a danger to the safety of any other person or the community and that no release condition or combination of conditions will reasonably ensure the safety of any other person or the community; and (2) to require the pretrial release of a defendant who is in custody solely due to financial inability to post a secured bond. This rule was derived from the [Federal Bail Reform Act of 1966, as amended] federal statute governing the release or detention of a defendant pending trial. [Under the federal bail law, the right to bail is restated as the right to have conditions of release set by the court.] See 18 U.S.C. §[§] 3142. [et seq. The 1990 amendments to Paragraphs B and C of this rule were taken from Subsections (g) and (c), respectively, of 18 USCA § 1342.]

[In 1990 this rule was amended to encourage more releases on personal recognizance. Release conditions may now be imposed in addition to the execution of a unsecured personal appearance bond or a secured bond. Because bail and additional conditions of release will usually be set initially by a magistrate or metropolitan court judge, Rules 6-401 and 7-401 NMRA govern the procedure in those courts. The magistrate, municipal and metropolitan court bail rules were derived from and are substantially identical to this rule.] This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13 and the Supreme Court’s holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in the Rules of Criminal Procedure for the Magistrate Courts, see Rules 6-401 NMRA, the Rules of Criminal Procedure for the Metropolitan Courts, see Rule 7-401 NMRA, and the Rules of Procedure for the Municipal Courts, see Rule 8-401 NMRA.

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

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

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

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

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

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

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

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

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

The court should consider the authorized types of secured bonds in the order of priority [they are to be considered by the judge or designee] set forth in Paragraph E. [The first priority is release upon the execution of a personal recognizance or unsecured appearance bond. If the court determines that release on personal recognizance or upon the execution of an unsecured bond will not reasonably assure the appearance of the defendant as required, the court may require a secured bond.

If a secured bond is required to assure the appearance of the defendant, the judge or designee] The court must first consider requiring an appearance bond [with] secured by a cash deposit of 10% [or such other percentage of the amount of the bond]. If this is inadequate, the court then must consider a property bond where the property belongs to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure the defendant's appearance, the court may require a cash or surety bond for the defendant's release. If the court [has not authorized a cash deposit of less than 100% of the amount of bond set,] requires a cash or surety bond, the defendant [may] has the option either to execute an appearance bond and deposit [one hundred percent (100%)] of the amount of the bond with the court [Last of all the defendant may] or to purchase a bond from a paid surety. A paid surety may execute a [corporate] surety bond or a real or personal property bond [- A real or personal property bond may only be executed by a paid surety] only if the conditions of Rule [5-401B] Rule 5-401.2 NMRA are met. [Under the 1990 amendments to Rule 5-401B NMRA, a bond which has as collateral real or personal property is authorized only in those districts in which an order has been entered finding that the pledging of an irrevocable letter of credit will result in the detention of persons otherwise eligible for release.]

Paragraph F governs the contents of an order setting conditions of release. See Form 9-303 NMRA (order setting conditions of release). [Although bail hearings are not required to be a matter of record in the magistrate, metropolitan, or municipal courts, Form 9-302A] Paragraph F also requires [the judge or designee to set forth] the court to make written findings justifying the imposition of [the reasons why] a secured bond, if any [was required rather than release on personal recognizance]. Judges are encouraged to enter their written findings on the order setting conditions of release at the conclusion of the hearing. If more detailed findings are necessary, the judge should make such supplemental findings in a separate document within two days of the conclusion of the hearing.

[The provision allowing the court to set additional conditions of release in order to assure "the orderly administration of justice" was derived from American Bar Association Standards Relating to Pretrial Release, Section 5.5 (Approved Draft 1968) and 18-USCA § 3142 and Rule 46(b) of the Federal Rules of Criminal Procedure.]

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

Paragraphs H and K provide avenues for a defendant to seek district court review of the conditions of release. Paragraph H applies to a defendant whose case is pending before the district court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate, metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a petition for pretrial release "in an expedited manner" and to release a defendant who

is being held solely due to financial inability to post a secured bond. A defendant who wishes to present financial information to a court to support a motion or petition for pretrial release may present Form 9-301A NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear and participate personally with counsel before the judge conducting any hearing to review the conditions of release, rather than by any means of remote electronic conferencing.

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

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

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

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

Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a judge who is setting initial conditions of release. See NMSA 1978, § 38-3-9. Paragraph R of this rule does not prevent a judge from being recused under the provisions of the New Mexico

Constitution or the Code of Judicial Conduct either on the court's own motion or motion of a party. See N.M. Const. art. VI, § 18; Rule 21-211 NMRA.  
[As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as amended by Supreme Court Order No. 17-8300-005, effective July 1, 2017.]