

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

2 A. **Hearing.**

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

7 (a) if the defendant remains in custody, three (3) days after the date of
8 arrest if the defendant is being held in the local detention center, or five (5) days after the date of
9 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 release
12 conditions hearing and is not ordered released at the hearing, the matter shall be continued for no
13 longer than three (3) additional days for a further hearing to review conditions of release, at which
14 the defendant shall have the right to assistance of retained or appointed counsel.

15 B. **Right to pretrial release; recognizance or unsecured appearance bond.** Pending
16 trial, any defendant eligible for pretrial release under Article II, Section 13 of the New Mexico
17 Constitution, shall be ordered released pending trial on the defendant's personal recognizance or
18 upon the execution of an unsecured appearance bond in an amount set by the court, unless the
19 court makes written findings of particularized reasons why the release will not reasonably ensure
20 the appearance of the defendant as required. The court may impose non-monetary conditions of
21 release under Paragraph D of this rule, but the court shall impose the least restrictive condition or
22 combination of conditions that will reasonably ensure the appearance of the defendant as required
23 and the safety of any other person or the community.

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

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

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

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

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

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

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

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

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

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

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

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

12 (3) maintain or commence an educational program;

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

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

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

19 (7) comply with a specified curfew;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 (b) advise the defendant of

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

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

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

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

17 **G. Pretrial detention.**

18 (1) If the prosecutor files a motion for pretrial detention, the court shall follow
19 the procedures set forth in Rule 5-409 NMRA.

20 (2) The court may schedule a detention hearing within the time limits set forth
21 in Rule 5-409(F)(1) NMRA and give notice to the prosecutor and defendant when

22 (a) The defendant is charged with a felony offense

23 (i) involving the use of a firearm;

1 (ii) involving the use of a deadly weapon resulting in great
2 bodily harm or death,

3 (iii) which authorizes a sentence of life in prison without the
4 possibility of parole, or

5 (b) A public safety assessment tool flags potential new violent criminal
6 activity for the defendant.

7 (3) If the prosecutor does not file an expedited motion for pretrial detention by
8 the date scheduled for the detention hearing, the court shall treat the hearing as a pretrial release
9 hearing under this rule and issue an order setting conditions of release.

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

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

18 (2) ***Review hearing.*** The district court shall hold a hearing in an expedited
19 manner, but in no event later than five (5) days after the filing of the motion. The defendant shall
20 have the right to assistance of retained or appointed counsel at the hearing. Unless the order setting
21 conditions of release is amended and the defendant is thereupon released, the court shall state in
22 the record the reasons for declining to amend the order setting conditions of release. The court
23 shall consider the defendant's financial ability to secure a bond. No defendant eligible for pretrial

1 release under Article II, Section 13 of the New Mexico Constitution shall be detained solely
2 because of financial inability to post a secured bond unless the court determines by clear and
3 convincing evidence and makes findings of the reasons why the amount of secured bond required
4 by the court is reasonably necessary to ensure the appearance of the particular defendant as
5 required. The court shall file written findings of the individualized facts justifying the secured
6 bond as soon as possible, but no later than two (2) days after the conclusion of the hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

- 13 (a) set a hearing no later than ten (10) days after the filing of the petition
14 and promptly transmit a copy of the notice to the magistrate, metropolitan, or municipal court;
15 (b) deny the petition summarily; or
16 (c) amend the order setting conditions of release without a hearing.

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

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

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

6 N. **Release from custody by designee.** The chief judge of the district court may
7 designate by written court order responsible persons to implement the pretrial release procedures
8 set forth in Rule 5-408 NMRA. A designee shall release a defendant from custody prior to the
9 defendant’s first appearance before a judge if the defendant is eligible for pretrial release under
10 Rule 5-408 NMRA, but may contact a judge for special consideration based on exceptional
11 circumstances. No person shall be qualified to serve as a designee if the person or the person’s
12 spouse is related within the second degree of blood or marriage to a paid surety who is licensed to
13 sell property or corporate bonds within this state.

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

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

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

22 R. **Judicial discretion; disqualification and excusal.** Action by any court on any
23 matter relating to pretrial release shall not preclude the subsequent statutory disqualification of a

1 judge. A judge may not be excused from setting initial conditions of release or reviewing a lower
2 court's order setting or revoking conditions of release unless the judge is required to recuse under
3 the provisions of the New Mexico Constitution or the Code of Judicial Conduct.

4 [As amended, effective January 1, 1987; October 1, 1987; September 1, 1990; December 1, 1990;
5 September 1, 2005; as amended by Supreme Court Order No. 07-8300-029, effective December
6 10, 2007; by Supreme Court Order No. 10-8300-033, effective December 10, 2010; as amended
7 by Supreme Court Order No. 14-8300-017, effective for all cases pending or filed on or after
8 December 31, 2014; as amended by Supreme Court Order No. 17-8300-005, effective for all cases
9 pending or filed on or after July 1, 2017; as amended by Supreme Court Order No. 20-8300-013,
10 effective for all cases pending or filed on or after November 23, 2020.]

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

21 This rule was amended in 2017 to implement the 2016 amendment to Article II, Section 13
22 and the Supreme Court's holding in *Brown*, 2014-NMSC-038. Corresponding rules are located in
23 the Rules of Criminal Procedure for the Magistrate Courts, *see* Rules 6-401 NMRA, the Rules of

1 Criminal Procedure for the Metropolitan Courts, *see* Rule 7-401 NMRA, and the Rules of
2 Procedure for the Municipal Courts, *see* Rule 8-401 NMRA.

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

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

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

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

17 Paragraph D lists various non-monetary conditions of release. The court must impose the
18 least restrictive condition, or combination of conditions, that will reasonably ensure the appearance
19 of the defendant as required and the safety of any other person and the community. *See Brown*,
20 2014-NMSC-038, ¶¶ 1, 37, 39. If the defendant has previously been released on standard
21 conditions prior to a court appearance, the judge should review the conditions at the defendant's
22 first appearance to determine whether any particularized conditions should be imposed under the
23 circumstances of the case. Paragraph D also permits the court to impose non-monetary conditions

1 of release to ensure the orderly administration of justice. This provision was derived from the
2 American Bar Association, *ABA Standards for Criminal Justice: Pretrial Release*, Standard 10-
3 5.2 (3d ed. 2007). Some conditions of release may have a cost associated with the condition. The
4 court should make a determination as to whether the defendant can afford to pay all or a portion
5 of the cost, or whether the court has the authority to waive the cost, because detaining a defendant
6 due to inability to pay the cost associated with a condition of release is comparable to detaining a
7 defendant due to financial inability to post a secured bond.

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

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

19 Secured bond cannot be used for the purpose of detaining a defendant who may pose a
20 danger to the safety of any other person or the community. *See Brown*, 2014-NMSC-038, ¶ 53
21 (“Neither the New Mexico Constitution nor our rules of criminal procedure permit a judge to set
22 high bail for the purpose of preventing a defendant’s pretrial release.”); *see also Stack v. Boyle*,
23 342 U.S. 1, 5 (1951) (stating that secured bond set higher than the amount reasonably calculated

1 to ensure the defendant’s appearance in court “is ‘excessive’ under the Eighth Amendment”). A
2 felony defendant who poses a danger that cannot be mitigated through the imposition of non-
3 monetary conditions of release under Paragraph D of this rule should be detained under Article II,
4 Section 13 and Rule 5-409 NMRA.

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

7 The court must first consider requiring an appearance bond secured by a cash deposit of
8 10%. If this is inadequate, the court then must consider a property bond where the property belongs
9 to the defendant or other unpaid surety. If neither of these options is sufficient to reasonably ensure
10 the defendant’s appearance, the court may require a cash or surety bond for the defendant’s release.
11 If the court requires a cash or surety bond, the defendant has the option either to execute an
12 appearance bond and deposit 100% of the amount of the bond with the court or to purchase a bond
13 from a paid surety. A paid surety may execute a surety bond or a real or personal property bond
14 only if the conditions of Rule Rule 5-401.2 NMRA are met.

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

21 Paragraph G addresses pretrial detention of a dangerous defendant under Article II, Section
22 13. If the defendant poses a danger to the safety of any other person or the community that cannot
23 be addressed through the imposition of non-monetary conditions of release, the prosecutor may

1 file a motion for pretrial detention. If the prosecutor files a motion for pretrial detention, the district
2 court must follow the procedures set forth in Rule 5-409 NMRA.

3 Paragraphs H and K provide avenues for a defendant to seek district court review of the
4 conditions of release. Paragraph H applies to a defendant whose case is pending before the district
5 court. Paragraph K sets forth the procedure for a defendant whose case is pending in the magistrate,
6 metropolitan, or municipal court. Article II, Section 13 requires the court to rule on a motion or a
7 petition for pretrial release “in an expedited manner” and to release a defendant who is being held
8 solely due to financial inability to post a secured bond. A defendant who wishes to present financial
9 information to a court to support a motion or petition for pretrial release may present Form 9-301A
10 NMRA (pretrial release financial affidavit) to the court. The defendant shall be entitled to appear
11 and participate personally with counsel before the judge conducting any hearing to review the
12 conditions of release, rather than by any means of remote electronic conferencing.

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

22 Under NMSA 1978, Section 31-3-1, the court may appoint a designee to carry out the
23 provisions of this rule. As set forth in Paragraph N, a designee must be designated by the chief

1 district court judge in a written court order. A person may not be appointed as a designee if such
2 person is related within the second degree of blood or marriage to a paid surety licensed in this
3 state to execute bail bonds. A jailer may be appointed as a designee. Paragraph N and Rule 5-408
4 NMRA govern the limited circumstances under which a designee shall release an arrested
5 defendant from custody prior to that defendant's first appearance before a judge.

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

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

1 Consistent with Rule 5-106 NMRA, a party cannot exercise the statutory right to excuse a
2 judge who is setting initial conditions of release. *See* NMSA 1978, § 38-3-9. Paragraph R of this
3 rule does not prevent a judge from being recused under the provisions of the New Mexico
4 Constitution or the Code of Judicial Conduct either on the court’s own motion or motion of a party.
5 *See* N.M. Const. art. VI, § 18; Rule 21-211 NMRA.
6 [As amended by Supreme Court Order No. 07-8300-029, effective December 10, 2007; as
7 amended by Supreme Court Order No. 17-8300-005, effective for all cases pending or filed on or
8 after July 1, 2017.]