UNM SCHOOL of LAW

August 3, 2018

Chief Justice Judith Nakamura
C/o Joey Moya, Chief Clerk
New Mexico Supreme Court
237 Don Gaspar Avenue
Santa Fe, NM 87501

Re: Report and Recommendations of the Ad Hoc Pretrial Release Committee

Dear Chief Justice Nakamura:

On behalf of the Ad Hoc Pretrial Release Committee, I am pleased to submit the committee's report and recommendations regarding proposed amendments to the new pretrial detention rules and the amendments to the pretrial release rules that took effect on July 1, 2017.

In September 2017, the New Mexico District Attorneys' Association (NMDAA) asked the Supreme Court to adopt a variety of amendments to Rule 5-409 NMRA. In response, the Court invited the Law Offices of the Public Defender (LOPD) and New Mexico courts to respond to the NMDAA's letter and to submit any additional input on the rules governing pretrial release and detention. The Court received input from the following courts and entities.

- District Attorney Rick Tedrow on behalf of the NMDAA;
- Margaret Strickland on behalf of the New Mexico Criminal Defense Lawyers Association (NMCDLA);
- Public Defender Bennett Baur of behalf of the LOPD;
- Chief Judge Nan Nash and Judge Charles Brown on behalf of the Second Judicial District Court;
- Judge James Martin on behalf of the Third Judicial District Court;
- Judge Matthew Reynolds on behalf of the Seventh Judicial District Court;
- Judge Karen Townsend on behalf of the Eleventh Judicial District Court;
- Judge Edward Benavidez and Judge Vidalia Chavez on behalf of the Bernalillo County Metropolitan Court;
- Judge Bill Liese on behalf of the Farmington Municipal Court;
- Judge Elise Larsen on behalf of the Grants Municipal Court;
- Judge Ben Harrison on behalf of the Hobbs Municipal Court;
- Judge Alan Kirk on behalf of the Los Alamos Municipal Court; and
- Judge Robert Cook on behalf of the Rio Rancho Municipal Court.

The Supreme Court referred this input to the committee, which held meetings on November 20, 2017, and December 15, 2017. At these meetings the committee had time to consider some of the NMDAA's proposed amendments to Rule 5-409 NMRA but was unable to consider the remaining issues raised by the NMDAA or the issues raised by the other

commenters. On December 21, 2017, I submitted a report to the Court, describing the committee's proposed amendments to Rule 5-409 and recommending that the amendments be published for comment.

On January 11, 2018, Justice Charles Daniels sent a letter to the committee on behalf of the Court. The Court thanked the committee for its work but asked the committee to submit further recommendations prior to publication for comment. Specifically, the Court asked the committee to (1) consider all of the remaining requests for rule amendments; (2) provide information regarding any opposition on the part of legislative and district attorney representatives, especially with regard to the pros and cons of the wording of the committee's proposed new Subparagraph (F)(7) of Rule 5-409 (permissive inferences); (3) reconsider its proposals in light of recent precedential opinions including *State v. Ferry*, 2018-NMSC-004, 409 P.3d 918; *State ex rel. Torrez v. Whitaker*, 2018-NMSC-005, 410 P.3d 201; and *State v. Groves*, 2018-NMSC-006, 410 P.3d 193; and (4) provide minority reports from any dissenters, describing areas of disagreement and explanations of minority positions.

Following the receipt of Justice Daniels' letter, the committee held six additional meetings, on March 1, 2018; March 21, 2018; April 11, 2018; May 2, 2018; June 14, 2018; and July 23, 2018. The committee considered the outstanding requests for rule amendments, and it approved amendments to Rules 5-401, 6-401, 7-401, and 8-401 NMRA (pretrial release); Rules 5-403, 6-403, 7-403, and 8-403 NMRA (revocation of release); Rules 5-301, 5-408, 6-203, 6-408, 7-203, 7-408, 8-202 and 8-408 NMRA (pretrial release by designee); Rules 5-409, 6-409, and 7-409 NMRA (pretrial detention); and Forms 9-212, 9-212A, and 9-212C NMRA (bench warrant).

The committee recommends that these proposed amendments be published for comment. The committee also recommends the withdrawal of Supreme Court Order No. 17-8300-003, which was issued on March 10, 2017, prior to the adoption of the new pretrial detention rules and the amendments to the pretrial release rules.

This letter explains the committee's recommendations, including minority positions where applicable. Committee members have also been invited to submit separate minority reports. Paragraph references in this letter refer to the district court rules. The committee recommends corresponding amendments to the limited jurisdiction rules as appropriate. The committee-approved drafts of the magistrate, metropolitan, and municipal court rules reflect these amendments.

A. PRETRIAL DETENTION: RULES 5-409, 6-409, AND 7-409 NMRA

As explained in the introduction to this report, in late 2017 the committee held two meetings to consider proposed amendments to Rule 5-409(F) and submitted a report and recommendations on December 21, 2017. The recommendations set forth in the December 2017 report reflected many compromises reached between the prosecutors and defense attorneys on the committee, as well as compromises made by the judges on the committee. When the

committee reconvened in 2018, members were hesitant to revisit issues that had been fully debated and discussed in 2017.

This report focuses on the committee's work in 2018. In 2018, the committee reconsidered the recommendations set forth in the December 2017 report only to the extent necessary to consider recent precedential opinions issued by the Supreme Court or to inform the Court more fully about dissenting views. The committee spent the majority of its time discussing the rule change proposals that the committee did not have time to discuss in 2017.

1. Paragraph A; Scope.

The NMDAA suggested adding the following language to the end of Paragraph A: "Pretrial detention hearings are to be limited to determining whether release of the defendant would present a danger to any person or the community. They are not intended to require any party to obtain or produce discovery except as set forth in this rule."

A majority of the committee concluded that the proposed language was inaccurate and unnecessary. The first sentence is inaccurate because the district court may perform other functions at a detention hearing, such as making a probable cause determination or setting conditions of release. The second sentence is unnecessary because it addresses discovery, which is the focus of Subparagraph (F)(2) of the rule. The majority concluded that the existing paragraph is appropriately tied to the language of Article II, Section 13 of the New Mexico Constitution and does not recommend adopting the proposed language. One committee member disagreed with the majority and recommends that the Court adopt the proposed language to prevent protracted discovery disputes and to ensure that the scope of a pretrial detention hearing is appropriately limited.

2. Paragraph B; Motion for pretrial detention.

The Second Judicial District Court suggested that Paragraph B should require the prosecutor to certify in a motion for pretrial detention that the prosecutor will indict the case or be prepared to proceed with a preliminary examination within the ten-day deadline set forth in Rule 5-302(A)(1) NMRA. The district court explained that in a significant number of cases, the prosecutor seeks pretrial detention but then fails to timely indict or proceed to preliminary examination, which requires the court to "dismiss the case without prejudice and discharge the defendant." Rule 5-302(A)(3). Some committee members opposed this proposal because it could impede prosecutorial discretion in a situation where it is appropriate to withdraw the motion for pretrial detention, e.g., where a witness recants or other circumstances change. The committee ultimately tabled this proposal without a vote.

While reviewing Paragraph B, the committee considered whether amendments should be made to the provision that requires the prosecutor to file a detention motion in both the district court and the court where the case is pending. Some committee members thought the dual filing requirement leads to unnecessary confusion, especially in busy urban jurisdictions with a high volume of motions. Other committee members thought the dual filing requirement is useful because it ensures that the magistrate court receives timely notice of the filing of a motion. The

committee concluded that the rule should be amended to give districts flexibility to adopt different procedures depending on whether the district is urban or rural and whether the district receives a high volume or low volume of motions. In the committee's experience, different districts are following different procedures already. In the Second Judicial District, motions are filed in the metropolitan court and transferred to the district court. In other parts of the state, motions are filed in the district court, but the magistrate court case number is listed on the motion.

The committee unanimously recommends amending Paragraph B to provide that (1) a detention motion may be filed either in the court where the case is pending or in the district court, and (2) if the case is pending in the limited jurisdiction court and the motion is filed in the district court, the prosecution must provide a copy of the motion to the limited jurisdiction court.

3. Paragraph C; Case pending in magistrate or metropolitan court.

On June 13, 2018, the NMDAA submitted a rule change request asking the committee to add the following provision to the end of Paragraph C: "The district court shall not review the magistrate or metropolitan court's determination of probable cause but may take into account the weight of the evidence against the defendant in evaluating the pretrial detention motion." The NMDAA was concerned that the Second Judicial District Court has denied detention motions as a docket management tool rather than deciding the motions on their merits and that district court judges have reviewed probable cause determinations made by metropolitan court judges.

The committee majority does not recommend the adoption of this proposal. Committee members thought that the district court has authority to review the metropolitan court's probable cause determination and that the court should release the defendant if there is no probable cause. One committee member disagreed with the majority and voted in support of the proposal.

4. Paragraph E; Proposals for initial review mechanism.

The committee considered various ideas for incorporating an initial review mechanism into Rule 5-409. The LOPD proposed the addition of the following new paragraph:

> **Initial hearing.** Within twenty-four (24) hours of the filing of a motion seeking pretrial detention in the district, magistrate, or metropolitan court, the case shall be reviewed by the district court. To facilitate that review, immediately upon filing a motion seeking pretrial detention, the prosecutors shall provide a copy of the motion, the criminal complaint, and any available criminal history and risk assessment instrument to the district court. As part of that review, the district court shall
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> (1) determine whether probable cause exists based upon review of the criminal complaint;
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> (2) set discovery obligations upon demand of the parties;
>
> (3) determine whether detention pending evidentiary hearing is warranted and, if not, order conditions of release; and

(4) schedule the case for hearing on the detention motion. Defendant is permitted, but not required to provide information to the court for this initial review.

The committee also considered a proposal from Chief Judge Nan Nash on behalf of the Second Judicial District Court that would permit the district court to release certain defendants from custody pending a detention hearing, as follows:

> Upon receipt of a motion for pretrial detention, the district court shall review the motion to determine whether the motion establishes probable cause to believe the defendant has committed a felony offense and alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution.
>
> If the motion alleges sufficient facts, the defendant shall remain in custody pending the hearing on the motion.
>
> If the motion fails to allege sufficient facts, the court shall enter an order setting conditions of release pending the hearing on the motion and a notice of hearing.

James Grayson submitted written comments opposing the district court's proposal on behalf of the Second Judicial District Attorney's Office.

Committee members who supported the adoption of an initial review proposal were concerned about the correlation between the length of time the defendant stays in jail pending trial and the likelihood that the defendant will reoffend. *See generally* Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 Stan. L. Rev. 711 (2018); Ryan Cotter, *The Hidden Cost of Pretrial Detention* (May 2016); Laura & John Arnold Foundation (LJAF), *Research Summary* (Nov. 2013).

In New Mexico, this correlation was recently recognized in the Legislative Finance Committee (LFC) report titled "Program Evaluation: Review of the Criminal Justice System in Bernalillo County," issued July 19, 2018. The LFC report states that "MDC bookings data indicates a strong relationship between length of initial jail stay on a felony arrest and likelihood of picking up another felony arrest." *Id.* at 41. "This relationship holds regardless of severity or type of crime of initial arrest or length of rapsheet of individual." *Id.* "Researchers suggest this is linked to the loss of the defendants' stability-providing structures while incarcerated, like employment, housing, family and community relationships." *Id.*

Committee members who supported an initial review proposal also expressed concern about the way Rule 5-409 has been implemented by prosecutors, especially the Second Judicial District Attorney's Office. Under the current structure of Rule 5-409, the filing of a pretrial detention motion results in automatic detention pending a hearing on the motion. Committee members were concerned that prosecutors are filing unwarranted motions, which results in an unnecessary loss of liberty and increased recidivism. Committee members stated that the number of detention motions in the Second Judicial District has greatly increased since March 2018 due to the adoption of a policy under which detention motions are filed based on case type, without

an individualized inquiry. Committee members reported that only about 40% of detention motions have been granted in the Second Judicial District and that the median amount of time these defendants were held in custody was eleven days. Additionally, in many cases in which a detention motion is filed the defendant is subsequently released because the detention motion is withdrawn, the case is dismissed by the prosecution, or the case is dismissed by the court due to failure to meet the deadline for holding a preliminary examination. Although most of the discussion centered on perceived problems in the Second Judicial District, committee members also raised concern that prosecutors in other parts of the state are filing boilerplate detention motions that lack specific facts.

Prosecutors and committee members sympathetic to their position responded that Article II, Section 13 of the New Mexico Constitution puts the burden on the state to determine whether to file a motion for pretrial detention. Prosecutors feel compelled to file these motions at or before the defendant's first appearance to prevent the release of a dangerous defendant. But prosecutors have little information available to them at this stage of the proceedings and lack sufficient time to file an individualized motion. District attorneys conduct an ongoing review to determine whether detention is appropriate and work hard to present all of the relevant information at the detention hearing. It is inevitable, no matter how careful the district attorney's office is, that on occasion someone may be detained an extra day or two, but that has to be weighed against the potential harm in releasing a dangerous defendant on a technicality or because the district attorney did not have all of the information when the motion to detain was filed.

As an alternative to an initial review provision, the committee also discussed and debated the adoption of a mechanism that would allow the prosecutor to obtain a twenty-four hour no-bond hold while gathering information and determining whether a detention motion is warranted. Language to implement this suggestion was never drafted.

After lengthy debate, a majority of the committee approved the following provision, which would permit (but not require) the district court to review the detention motion and supporting documents and to release a defendant pending a hearing on the motion if the court determines that the motion lacks sufficient facts to justify pretrial detention:

> Upon receipt of a motion for pretrial detention, the district court may review the motion and any supporting documents to determine whether the motion alleges sufficient facts that, if true, would justify pretrial detention under Article II, Section 13 of the New Mexico Constitution. If the motion alleges sufficient facts, the defendant shall remain in custody pending the hearing on the motion. If the motion fails to allege sufficient facts, the court may enter an order setting conditions of release pending the hearing on the motion and a notice of hearing.

Ten committee members approved this amendment, and seven committee members opposed it. Some committee members did not think a statewide rule change was needed and that the issues in the Second Judicial District should be resolved through improved communication or mediation. Committee members also suggested that the district court's inherent authority to

manage its docket includes the authority to deny without prejudice an insufficient detention motion. These committee members thought the district court should exercise this authority, noting that the prosecution retains discretion to file a new motion that meets the requirements of the rule at any time.

5. Subparagraph (E)(1); Defendant in custody when motion is filed.

The NMDAA submitted two proposals concerning Subparagraph (E)(1). In its letter submitted on September 26, 2017, the NMDAA suggested revising the last sentence of the subparagraph 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;
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> (b) the district, metropolitan, or magistrate court dismisses the current charges; or
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> (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.

A majority of the committee opposed these amendments. Some committee members were concerned that the proposal may not contemplate all of the mechanisms for release. The majority believed that the current rule's requirement of a court order for release was sufficient to protect the community and prevent unnecessary detention. The majority also trusted district court judges to apply Rule 5-409 correctly in the absence of an enumerated list of grounds for release. The majority does not recommend adopting the proposed language.

A minority of three committee members supported adoption of the proposal. These committee members suggested that the proposed language would help to ensure that the district court issues clear findings regarding the reason for release and that the district court determines the merits of the motion before the defendant is released.

On June 13, 2018, the NMDAA submitted another proposal for the committee's consideration. The NMDAA asked the committee to add the following language to the end of Subparagraph (E)(1): The district court shall not order the defendant's release for any reason other than the merits of the motion or the dismissal of the case. The NMDAA also proposed the following commentary: The limitation on release of the defendant serves to protect the community and is consistent with New Jersey law. The New Jersey Supreme Court has held that sanctions against the state "cannot include release of a defendant. Only the failure of the State to establish probable cause or to overcome the presumption of release justifies release." *State v. Dickerson*, 177 A.3d 788, 803 (N.J. 2018).

The committee debated whether a motion that does not meet the technical requirements of the rule should be denied without prejudice. Some committee members thought a detention motion should never be denied based on a technicality. Others thought the court should deny a

detention motion without prejudice if it does not meet the requirements of the rule. Committee members noted that the NMDAA proposal appears to conflict with the initial review mechanism approved by the committee majority and that the proposed language fails to contemplate other situations that may result in release, such as an agreement between the parties to release the defendant pending a hearing or a finding of no probable cause.

A committee vote on this proposal was tied, with six in favor and six opposed. The proposal is not included in the committee-approved draft since it was not approved by a majority.

6. Supreme Court Order No. 17-8500-003 & Subparagraph (E)(2); Defendant not in custody when motion is filed.

The committee recommends that the Supreme Court withdraw Order No. 17-8500-003 (Mar. 10, 2017), which was issued before the adoption of the -409 rules. The order sought to prevent the inadvertent release of defendants under a jailhouse bail schedule while a detention proceeding is pending or while a detention order is in effect. The order recognized the need for "immediate action pending review and amendment of relevant release and detention rules." The Supreme Court did not withdraw the order upon the adoption of the -409 rules in July 2017.

Committee members reported that there has been confusion regarding the interpretation of the order and the interplay between the order and the -409 rules. Some people have interpreted the order to require the metropolitan court to remand defendants into custody upon the filing of a detention motion, including defendants who had previously been released pending trial. This interpretation arguably conflicts with Rule 5-409, which divests the metropolitan court of jurisdiction upon the filing of a detention motion, *see* Paragraph C, and permits the district court to issue either an arrest warrant or a summons and notice of hearing, *see* Subparagraph (E)(2).

The committee concluded that the order is unnecessary and confusing because the substance of the order is addressed by the rules. The committee unanimously recommends that the Court withdraw Order No. 17-8500-003.

7. Standard for pretrial detention articulated in recent opinions.

Several provisions in the existing rule state that pretrial detention is appropriate when no release conditions will reasonably protect the safety of any other person or the community. *See* Paragraphs (F), (F)(4), and (G). The committee based this articulation of the detention standard on the plain language of Article II, Section 13 of the New Mexico Constitution, which has subsequently been interpreted by the Supreme Court. In *Groves*, 2018-NMSC-006, ¶ 29, the Court explained that the district court must conduct a three-part inquiry as follows:

> a detention hearing requires a judge to make three categories of determinations in deciding whether pretrial detention should be ordered: (1) "which information in any form carries sufficient indicia of reliability to be worthy of consideration," (2) "the extent to which that information would indicate that a defendant may be likely to pose a threat to the safety of others if released pending trial," and (3) "whether any potential pretrial release conditions 'will reasonably protect the

> safety' of others, as required by the new constitutional standard in Article II, Section 13."

(Quoting *Torrez*, 2018-NMSC-005, ¶¶ 99-102.) Similarly, in *Ferry*, 2018-NMSC-004, ¶ 3, the Court articulated the standard as follows:

> The prosecuting authority has the burden of proving by clear and convincing evidence that (1) the defendant poses a future threat to others or the community, and (2) no conditions of release will reasonably protect the safety of another person or the community.

The committee discussed whether the standard set forth in the rule should be revised to reflect this recent case law. Some committee members supported adding language from *Groves*: "the defendant may be likely to pose a threat to the safety of others if released pending trial." Other committee members preferred the formulation set forth in *Ferry*: "the defendant poses a future threat to others or the community." After much discussion, a majority of the committee approved the addition of the following language to Paragraph F, Subparagraph (F)(4), and Paragraph G: "poses a danger to the safety of any other person or the community if released pending trial." The majority thought this amendment would clarify the standard for pretrial detention by specifying the required findings. Two committee members opposed this amendment on the ground that the existing rule provisions are consistent with Article II, Section 13.

8. Subparagraph (F)(1)(a); Time limit.

The Court received several suggestions to change the time limit for holding the detention hearing. The NMDAA suggested changing the time limit from five days to seven days. The Seventh Judicial District Court suggested changing the time limit from five days to "on the next criminal docket." The Eleventh Judicial District Court suggested changing the time limit from five days to ten days. Finally, the NMCDLA suggested changing time limit from five days to three days.

Alternatively, the NMCDLA suggested that the deadline should be five *calendar* days, and not five days under Rule 5-104 NMRA, which excludes weekends and holidays. Additionally, if the hearing is not timely held, the NMCDLA suggested that the rule should provide a remedy; specifically, the defendant should be released pending the hearing.

Prior to the Supreme Court's adoption of the five-day limit, the committee debated the appropriate deadline at considerable length and submitted a recommendation to the Court that reflected a compromise. The committee concluded that the five-day deadline is workable and does not recommend amending the deadline at this time.

9. Subparagraph (F)(1)(b)(i); Preliminary examinations and associated time extension.

The Court received several suggestions about the interplay between a detention hearing and a preliminary examination. The NMDAA suggested that the following provision should be added to the rule:

> Upon the request of the prosecutor, the district court shall set the matter for a preliminary hearing to be held concurrently with the motion for pretrial detention and, for cases pending in the magistrate or metropolitan court, shall provide notice to the magistrate or metropolitan court that the preliminary hearing is to be held in the district court.

The Second Judicial District Court supported the idea of holding a preliminary examination immediately prior to the detention hearing but suggested that this procedure should be mandatory in all cases, and not solely on request of the prosecutor. The Seventh Judicial District Court opposed the idea of requiring the district court to hold a preliminary examination in conjunction with the detention hearing.

In its December 21, 2017, committee report, the committee recommended the adoption of a new Subparagraph (F)(1)(b)(i), which would permit the district court to extend the time for holding the detention hearing "for up to three (3) days if in the motion for pretrial detention the prosecutor requests a preliminary hearing to be held immediately before the detention hearing." The committee did not change its recommendation in 2018. Please see the December 2017 report for additional information about this recommendation.

10. Subparagraph (F)(1)(b)(ii).

Representative Antonio Maestas suggested changing the word "delay" to "extension" in Subparagraph (F)(1)(b)(ii). The committee unanimously recommends this amendment.

11. Proposed New Subparagraph (F)(1)(c); Notice.

The NMDAA suggested adding the following subparagraph:

> (c) *Notice.* The court shall promptly notify the parties of the date of the hearing and shall comply with the notice requirement in NMSA 1978, Section 31-26-10 of the Victims of Crime Act, where applicable.

Fifth Judicial District Attorney Dianna Luce explained that in some judicial districts, the parties receive insufficient notice of the pretrial detention hearing, in some cases because the court sets the hearing a few hours before the hearing is scheduled to begin. This prevents the district attorney from providing notice to the victim. Representatives from the Second Judicial District Court reported that they have been using Odyssey for automated notification and are able to provide prompt notice of the pretrial detention hearing, usually within two or three hours after the motion is filed.

To ensure adequate notice in all jurisdictions, a majority of the committee approved the addition of a new subparagraph (F)(1)(c) as follows: "The court shall

promptly schedule the hearing and notify the parties of the hearing setting within one (1) business day after the filing of the motion." Two committee members opposed this amendment on the ground that the notice problem should be solved through automation or internal operating procedures in judicial districts where notice has been inadequate.

12. Subparagraph (F)(2); Discovery.

The Court received several suggestions for revising the discovery provisions set forth in Subparagraph (F)(2). The NMDAA suggested revising the provision 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.~~] Pretrial detention is not intended to be a discovery tool for either party. Both parties, however, shall disclose or make available in advance of the hearing any evidence intended to be introduced at the hearing. 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 LOPD suggested adding the following sentence to the existing provision: "Failure to provide such discovery to the defendant shall result in either a dismissal of the motion or immediate release of the defendant pending a later reset of the hearing at such time as the discovery is permitted." The LOPD also suggested the adoption of corresponding commentary, as follows:

> Subparagraph (F)(2) requires that "all evidence relating to the motion" be provided by the prosecutor to the defendant. Such evidence means any evidence referenced in any documentary or testimonial evidence used to establish probable cause that a crime has been committed. *See State v. Robinson*, 160 A.3d 1 (N.J. 2017) (explaining that under rule requiring reports and statements be turned over, that meant any report or statement mentioned in the complaint or reports used for the detention hearing).

Finally, both the NMCDLA and the Second Judicial District Court suggested that the rule should provide a specific remedy for failure to comply with discovery orders.

Discovery was a highly contentious topic during committee discussions, and the proposals submitted by the NMDAA or the LOPD did not garner support from a committee majority. But the committee was able to reach compromises on several amendments to the existing discovery provision. First, the committee concluded that the existing twenty-four hour disclosure deadline is unworkable in cases where the parties do not have adequate notice in advance of the hearing. To address this, the committee revised the provision to state that disclosure must be prompt in all cases but that the twenty-four hour disclosure deadline applies only in cases where the hearing is held more than two business days after the filing of the motion. Second, the committee concluded that the following language is ambiguous, causing

disputes: "all evidence relating to the motion for pretrial detention that is in the possession of the prosecutor or is reasonably available to the prosecutor." The committee revised the provision to require disclosure of "all evidence that the prosecutor intends to rely on at the hearing." Finally, the committee believed that the district courts have inherent authority to impose sanctions for the violation of discovery orders and concluded that this authority should be expressly acknowledged in the rule as follows: "The district court may impose an appropriate sanction on the prosecution for failure to comply with this rule." These amendments were unanimously approved by the committee.

After the committee approved these amendments, on June 13, 2018, the NMDAA asked the committee to consider adding the following language to the end of the proposed new sanction provision set forth in Subparagraph (F)(2)(c): "The district court's authority to sanction shall be exercised with great caution and only upon a finding of bad faith by the state." The NMDAA also proposed the following commentary: "The district court has the inherent authority to sanction any party for bad-faith conduct but must exercise this power 'sparingly and with circumspection.'" *State ex rel. N.M. Highway & Transp. Dep't v, Baca*, 1995-NMSC-033, ¶ 25, 120 N.M. 1. Committee members were concerned that this proposal may be inconsistent with New Mexico law. Although bad faith is relevant to the imposition of sanctions, it is not necessarily a prerequisite. *See generally State v. Le Mier*, 2017-NMSC-017, ¶ 19, 394 P.3d 959 ("Where discovery violations inject needless delay into the proceedings, courts may impose meaningful sanctions to effectuate their inherent power and promote efficient judicial administration."). A motion to adopt the proposal did not receive a second, so the committee did not vote on the proposal.

13. Subparagraph (F)(5); Evidence.

The Court received four proposals to amend the evidence provision. First, the NMDAA suggested adding the following language:

> The parties may proceed by proffer, documentary submission, or witness testimony, or any combination thereof. The court shall not require any party to submit evidence or information in any particular form. At the request of a party or on the court's own motion, the court may take judicial notice of information contained in official New Mexico court records.

Second, the NMCDLA suggested that the prosecutor should be required to present information on dangerousness besides the criminal complaint. Similarly, the Second Judicial District Court expressed concerns about prosecutors relying on complaints and proffers alone and suggested specifying the types of evidence that should be presented. And finally, the LOPD suggested adding the following to the end of the existing provision: "but evidence secured in violation of the United States Constitution or Constitution of the State of New Mexico shall not be admissible or considered by the court."

In its December 21, 2017, committee report, the committee recommended adding the following sentence to Subparagraph (F)(5): "The parties may proceed by proffer, documentary submission, witness testimony, other relevant evidence, or any combination thereof. New

Mexico court records may be considered without certification." The committee did not change this recommendation in 2018. Please see the December 2017 report for additional information. The committee did, however, conclude that the committee commentary should be updated with quotations to the Supreme Court's recent opinion in *Torrez*, 2018-NMSC-005. These updates are set forth in the committee-approved draft.

14. Proposed New Subparagraph (F)(6); Factors to be considered.

The NMDAA proposed the addition of factors that the court shall consider at a pretrial detention hearing. Most of the factors are taken from the list of the factors set forth in Rule 5-401(C). In its December 21, 2017, report, the committee recommended a new Subparagraph (F)(6) based on the NMDAA's suggestion. The committee did not change this recommendation in 2018. Please see the December 2017 report for additional information. The committee did, however, conclude that the committee commentary should be updated based on the Supreme Court's recent opinions in *Groves*, 2018-NMSC-006, ¶¶ 32-33; and *Ferry*, 2018-NMSC-004, ¶ 6. These updates are set forth in the committee-approved draft.

15. Proposed New Subparagraph (F)(7); Permissive inference.

The Court received two proposals aimed at defining "danger" for purposes of determining whether a defendant should be detained pending trial.

The NMDAA suggested the addition of a requirement that the district court consider whether a felony offense or offender falls into any of the following categories established by other legal provisions: serious violent offender, habitual offender, use of a firearm to commit a felony, possession of a firearm by a convicted felon, sex offender, habitual DUI, habitual DV, or crime committed while incarcerated or on probation or parole.

The NMCDLA suggested designating "dangerous" crimes for which pretrial detention may be ordered, using either the list from the competency statute, *see* NMSA 1978, § 31-9-1.4 ("a felony that involves the infliction of great bodily harm on another person; a felony that involves the use of a firearm"; aggravated arson; criminal sexual penetration; or criminal sexual contact of a minor), or the list of serious violent offenses set forth in NMSA 1978, § 33-2-34 (L)(4).

Before the committee discussed either of these suggestions in depth, Senator Daniel Ivey-Soto and Representative Nate Gentry asked the committee to instead consider the adoption of presumptions. In its December 21, 2017, report, the committee recommended a new Subparagraph (F)(7) as follows:

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

felonies involved violence. As used in this rule, "violence" means use of a deadly weapon or infliction of great bodily harm.

The committee-approved language represented a compromise by committee members. Although the proposal did not have the strong support of anyone on the committee, the committee felt compelled to take prompt action on this issue due to concern that the Legislature would adopt a statutory presumption without sufficient input from the criminal justice stakeholders represented on the committee. The committee therefore worked out a compromise. Please see the December 2017 report for additional information.

In 2018, I encouraged committee members to submit additional information regarding the pros and cons of the language recommended by the committee majority and expressly invited the prosecutors and legislative representatives on the committee to submit minority reports for the Court's consideration.

Judge Alan Torgerson suggested that the provision should use the term "presumption" instead of "permissive inference." This terminology would be consistent with federal law, *see* 18 U.S.C. § 3142(e)(2). Judge Torgerson also opposed the requirement that there must be "clear and convincing evidence" that one of the felonies involved violence. He found this requirement unclear and unnecessary, given that the clear and convincing evidence standard applies to the court's overall detention determination. Judge Torgerson recommends the following edits to the provision approved by the committee majority:

> [***~~Permissive inference~~***] ***Presumption*.** Subject to rebuttal by the person charged, it shall be [~~a permissive inference~~] presumed that no release conditions will reasonably protect the safety of any other person or the community upon a finding of probable cause that the person committed a felony while on conditions of release for a felony; provided [~~that there is a separate finding of clear and convincing evidence~~] that one of the felonies involved violence. As used in this rule, "violence" means use of a deadly weapon or infliction of great bodily harm.

Additionally, on March 16, 2018, District Attorney John Sugg submitted a minority report on behalf of the NMDAA. The committee reviewed the NMDAA's minority report at a meeting held March 21, 2018, and five committee members voted in support of the NMDAA's position.

16. Proposed New Subparagraph (F)(8). Decision on motion required; continuance on request.

The Court received a suggestion from the NMDAA to add the following subparagraph to Paragraph F:

> (8) ***Decision on motion required; continuance on request.*** The court shall decide the motion based on the evidence and information in the motion or presented at the hearing and shall not delay consideration of or deny the motion pending further discovery or submission of additional or different evidence, except that either party may move the court to continue the hearing for up to three

(3) days for good cause shown. During any continuation of the hearing the defendant shall remain in custody.

The committee concluded that this proposal is unnecessary in light of recent opinions issued by the Supreme Court. The committee concluded, however, that the committee commentary should be updated based on the Court's recent opinion in *Torrez*, 2018-NMSC-005. These updates are set forth in the committee-approved draft.

17. Paragraphs G & H; Order for pretrial detention or order setting conditions of release.

The Court received a suggestion from the Second Judicial District Court to extend the deadline for the district court to file its written decision following a detention hearing. Chief Judge Nan Nash reported that in recent months the volume of detention motions has increased to about 40-50 per week and that the district court has been struggling to produce adequate orders within the two-day time period set forth in the existing rule. Although the district court would prefer to draft its own orders, the deadline has forced the court to require the parties to draft the orders. *See* Rule 5-121(A) NMRA. This puts a large burden on the parties, who also have trouble meeting the two-day deadline.

Committee members agreed that the district court needs sufficient time to draft an adequate written order. Under *Ferry*, 2018-NMSC-004, ¶¶ 8-9, the appellate courts consider only the reasoning articulated in the written order and do not consider the court's oral ruling. Although committee members sympathized with the district court and understood the practical difficulty of drafting a large number of detention orders every week, some committee members were concerned that extending the deadline would delay the appeal process. *See generally* N.M. Const. art. II, § 13 ("An appeal from an order denying bail shall be given preference over all other matters.").

To ensure that the district court has adequate time to draft its orders, a majority of ten committee members recommends changing the deadline set forth in Paragraphs G and H from two days to five days, as calculated under the general time computation rule, Rule 5-104(A) NMRA. A minority of seven committee members opposed this recommendation because they did not want to delay the appeal process and believed that the appropriate way to resolve the pressure on the district court would be to prevent the filing of frivolous detention motions or to permit the district court to dispose of frivolous motions without a hearing.

18. Paragraph I; Further proceedings in magistrate or metropolitan court.

The committee considered several suggestions for amending Paragraph I. First, the Bernalillo County Metropolitan Court and the LOPD suggested that once a detention motion has been filed, all further proceedings should be transferred to the district court, and the case should not be remanded to magistrate or metropolitan court. The committee did not support this amendment, noting that many cases remain within the metropolitan court's trial jurisdiction or get dismissed without becoming a district court case.

Alternatively, if cases are transferred back to metropolitan court, the metropolitan court suggested that the district court should be required to transmit its order to the metropolitan court within 24 hours (currently, the rule says "promptly"). The committee agreed with this suggestion and recommends changing "promptly" to "within one (1) day." The committee recommends consistent amendments to the corresponding review provisions set forth in the -401 and -403 rules.

Finally, the Third Judicial District Court suggested eliminating the provision that permits the magistrate or metropolitan court to alter the conditions of release set by the district court. Judge Buddy Hall agreed with this suggestion and alerted the committee that this provision has been problematic for the magistrate courts. Defense attorneys routinely rely on this provision to ask the magistrate court to alter the conditions of release set by the district court, which results in unnecessary hearings. To address this concern, the committee unanimously approved amendments that require the magistrate or metropolitan court to follow and enforce the conditions of release set by the district court unless or until the felony charges are dismissed. The committee also approved corresponding amendments to the commentary.

19. Paragraph J; Expedited trial scheduling.

The Second Judicial District Court and the LOPD asked the committee to define "expedited" for purposes of Paragraph J. The committee discussed this issue at length. Committee members were concerned that the lack of specificity in this provision has resulted in different interpretations by different judges. Some committee members supported the adoption of a specific time limit, such as one year. Other committee members objected to the adoption of a specific time limit. By way of compromise, the committee approved the addition of the following language: "On the written motion of the prosecutor or the defendant, or on the court's own motion, the court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year." The committee also approved new committee commentary, as follows: "The purpose of a status review hearing under Paragraph J is to ensure that a defendant is not held without an expedited trial setting." The committee recommends adopting consistent amendments to the expedited trial provisions set forth in Rule 5-401(L) and Rule 5-403(I).

The committee discussed whether a similar provision should be added to the rules for limited jurisdiction courts. The one-year time limit for holding a status review hearing would not make sense for the limited jurisdiction courts because the limited jurisdiction courts still have a six-month rule. *See* Rules 6-506, 7-506, and 8-506 NMRA. The committee considered the adoption of a shorter time limit for limited jurisdiction courts, such as three months. A majority of the committee concluded, however, that the status review hearing provision is unnecessary in the limited jurisdiction courts.

20. Paragraph K; Successive motions for pretrial detention and motions to reconsider.

The committee considered three suggestions for revising Paragraph K. First, the NMCDLA suggested that if the prosecutor withdraws a motion to reconsider, the prosecutor

should be required to wait at least a week before the prosecutor can re-file the motion. The committee did not agree with this suggestion.

Second, the Third Judicial District Court suggested clarifying whether a successive detention motion or motion to reconsider should be filed in the magistrate court or the district court. The committee concluded that Article II, Section 13 of the New Mexico Constitution gives the district court sole jurisdiction over motions for pretrial detention, including successive motions and motions to reconsider. The committee did not think it was necessary to spell this out in the rule.

Finally, the LOPD suggested clarifying what constitutes "information [that] exists" that was not known to the movant at the time of the detention hearing. The committee agreed that the paragraph should be clarified to ensure consistent interpretation and application by different judges and courts. A majority of the committee approved the following amendments, with one committee member opposed:

> On written motion of the prosecutor or the defendant, the court may reopen the detention hearing at any time before trial if the court finds that information exists that was not known to the movant at the time of the hearing or if circumstances have changed subsequent to the hearing, and if such information or circumstance [~~and that~~] has a material bearing on whether the previous ruling should be reconsidered.

Additionally, the committee unanimously agreed to add the following commentary:

> The district court may rule on a motion under Paragraph K with or without a hearing. The district court has inherent discretion to reconsider its ruling on a motion for pretrial detention. *See Sims v. Sims*, 1996-NMSC-078, ¶ 59, 122 N.M. 618, 930 P.2d 153 ("District courts have plenary power over their interlocutory orders and may revise them . . . at any time prior to final judgment." (internal citation omitted)); *see also State v. Brown*, 2014-NMSC-038, ¶ 13, 338 P.3d 1276 (recognizing that a pretrial release decision is interlocutory).

21. Paragraph L; Appeal.

The committee considered a suggestion from the LOPD to add the following sentence to Paragraph L: "The appellate court will review the findings and conclusions of the district court de novo." The committee noted that the existing standard of review is set forth in Rule 12-204(D)(2)(b) as follows:

> The decision of the district court shall be set aside only if it is shown that the decision
>
> (i) is arbitrary, capricious, or reflects an abuse of discretion;
> (ii) is not supported by substantial evidence; or
> (iii) is otherwise not in accordance with law.

The committee concluded that if the proposed amendments to Rule 5-409(L) were adopted, Rule 12-204 would need to be revised accordingly. Some committee members supported the idea of a mixed standard of review, under which the appellate court would review findings of fact for abuse of discretion and conclusions of law de novo. After discussion, however, the committee decided not to submit a recommendation on this issue. The committee concluded that proposed amendments to the standard of review should be addressed by the Supreme Court or the Appellate Rules Committee.

22. Committee commentary about Subparagraph (F)(3); the defendant's rights.

The LOPD suggested adding the following citation to the end of the committee commentary for Paragraph F to further define the defendant's rights: "*State v. Segura*, 2014-NMCA-037, 321 P.3d 140 (noting that an accused has a higher liberty interest than a probationer or parolee, and that a defendant has a due process right to examine witnesses and evidence presented by the State)." The committee discussed this suggestion and determined that it would be better to update the commentary based on the Supreme Court's recent opinion in *Torrez*, 2018-NMSC-005. The updates are set forth in the committee-approved draft.

B. REVOCATION: RULES 5-403, 6-403, 7-403, AND 8-403 NMRA

1. Interplay between Rule 5-403 & Rule 5-409.

During the course of its discussions, the committee considered the interplay between revocation proceedings under Rule 5-403 and detention proceedings under Rule 5-409. Committee members observed that district courts often hold parallel proceedings under both rules, which is inefficient since the two rules set forth separate time lines and procedures. Twelfth Judicial District Attorney John Sugg opined that prosecutors underutilize Rule 5-403 because Rule 5-409 provides an automatic hold pending a detention hearing, whereas Rule 5-403 presumes a summons. He also believed that district attorneys file motions under both rules because (1) the district attorney must hurry to file a Rule 5-409 motion before the defendant is released and, especially in large jurisdictions, may not realize that the defendant was on pretrial release in another case; and (2) even if the defendant is being held on a revocation order under Rule 5-403, the district attorney will want to have a detention order in place under Rule 5-409 if the case involving the revocation order gets resolved.

Committee members generally agreed that it would be good to coordinate the determination of revocation motions and detention motions and to encourage prosecutors to move for revocation in appropriate cases. Given the committee's support for these concepts, District Attorney Sugg volunteered to draft proposed rule amendments for the committee's consideration.

a. Rule 5-403(C); Issuance of summons or bench warrant.

To encourage prosecutors to use Rule 5-403, District Attorney Sugg proposed the addition of the following language to Paragraph C, which would make the issuance of a warrant

mandatory in situations where the defendant has committed a felony offense or an offense listed in Rule 5-408(B)(2) while released pending trial:

> (1) The court shall issue a bench warrant for the defendant if the court finds that there is probable cause to believe that the defendant committed a federal, state, or local crime while on release if
>
> (a) any single new offense is punishable by a term of imprisonment of one year or more;
>
> (b) a new offense was committed in another state and is classified as a misdemeanor in that state, but the offense would have been classified as a felony if committed in this state; or
>
> (c) is an offense listed in Rule 5-408(B)(2) NMRA.

The committee was sharply divided on whether these amendments should be adopted. Committee members who opposed the proposal raised the following concerns: (1) the provision would remove the court's existing discretion to issue a summons in appropriate cases; (2) the provision appears to put a burden on the court to determine whether the defendant committed a felony while released pending trial; (3) defendants would be held for a long period of time pending a Rule 5-403 hearing; (4) statistically, a defendant who is in custody obtains worse results at the hearing than a defendant who is released; and (5) the proposal will not remove the political incentive for the district attorney to file unwarranted detention motions.

Other committee members supported the proposal as part of the solution to the revolving door problem. These committee members noted that the automatic warrant provision would not apply to a defendant who committed a less serious violation of the conditions of release, such as failing a urine test, and would apply only to defendants who commit a new felony offense or an offense that raises public safety concerns.

After much discussion and debate, a committee majority narrowly approved the proposal at a meeting held June 14, 2018, with eight committee members in favor and seven committee members opposed. But at the next meeting, held July 23, 2018, the committee reconsidered the proposal, and a majority voted to change the mandatory "shall" to a discretionary "may." A minority of four committee members opposed this change.

The committee-approved draft therefore includes the amendments to Paragraph C with the discretionary "may." But the original proponents of the amendments, including District Attorney Sugg, withdrew their support for the proposal when the "shall" was changed to "may." And other committee members concluded that the committee-approved amendments are unnecessary because the current rule already gives the court discretion to issue bench warrants in appropriate cases. Thus, it may not be necessary to include the proposed amendments to Paragraph C in the drafts that are published for comment and ultimately considered for adoption.

b. Proposed new paragraph for Rules 5-403 and 5-409.

In addition to the proposed amendments to Rule 5-403(C), District Attorney Sugg drafted proposed new paragraphs for Rules 5-403 and 5-409 intended to establish a more streamlined procedure for dealing with contemporaneous revocation and detention motions involving a single defendant. He also drafted corresponding amendments to Rule 5-409(F)(1)(a) to govern the time limit for holding a detention hearing for a defendant who has been subject to both revocation and detention motions.

The proposed new paragraph for Rule 5-403 provided as follows:

> **Concurrent "Expedited Motion for Pretrial Detention" under Rule 5-409 NMRA.** If the prosecutor has filed an "Expedited Motion for Pretrial Detention" under Rule 5-409 NMRA in another case, and the district court is considering revocation or modification of release under this rule, the district court shall consider whether the defendant's conditions of release should be modified or revoked under this rule prior to hearing the "Expedited Motion for Pretrial Detention" under Rule 5-409. If the district court enters an order revoking the defendant's conditions of release under Subparagraph (F)(3) of this rule, the Rule 5-409 hearing shall be held in abeyance. If the district court continues the existing conditions of release or at any time sets new or additional conditions of release that will result in the release of the defendant from physical custody, the district court shall order the defendant to be held until disposition of the "Expedited Motion for Pretrial Detention" under Rule 5-409.

Although committee members generally supported the goal of this proposal, committee members raised a number of practical problems during the course of discussion. For example, committee members were concerned that in many situations, the revocation motion and detention motion will be pending before different judges or different courts. The committee was therefore concerned that the proposal would lead to an array of timing, notice and communication, and case management challenges. The committee concluded that these practical problems rendered the proposal unworkable. Committee members were also concerned that the proposal would result in defendants being released who should be held, or in defendants being held who should be released. Some committee members opposed holding the detention proceedings in abeyance and thought that if the defendant is subject to a revocation order, either the district attorney should withdraw the detention motion or the district court should deny the detention motion without prejudice. The district attorney could then re-file for detention if the defendant is going to be released. Other committee members thought the district court should deny a detention motion without prejudice anytime the defendant is being held for another reason, e.g., a revocation order, a federal hold, or a probation violation. These committee members argued that a defendant who is being held in another case does not pose any present danger to the community. The prosecutors on the committee opposed a procedure for withdrawal or denial of the detention motion because this could result in a dangerous defendant being released before the district attorney has an opportunity to re-file for detention.

The discussion pointed out that the challenges of coordinating motions under Rule 5-403 and Rule 5-409 are too complicated to be resolved by statewide rule. Committee members expressed the view that courts, prosecutors, and defense counsel could coordinate these proceedings within a judicial district or on a case-by-case basis.

District Attorney Sugg ultimately withdrew this proposal after the committee voted to change "shall" to "may" in Rule 5-403(C), as described above. In his view, the proposal was dependent on the adoption of a mandatory bench warrant provision in Rule 5-403. As a result, the committee did not vote on the proposed new paragraphs intended to coordinate revocation and detention proceedings.

2. Subparagraph (D)(1); Initial hearing (time).

The Court received two suggestions to change the time limit for holding the initial hearing. The Seventh Judicial District Court suggested changing the time limit from three days to "on the next criminal docket." The Eleventh Judicial District Court suggested changing the time limit from three days to ten days. The committee did not agree with these suggestions. The committee thought "on the next criminal docket" would be an unworkable deadline because this varies considerably from jurisdiction to jurisdiction. And the committee concluded that ten days would be too long to hold a defendant in custody pending a revocation hearing.

Some committee members were concerned, however, that the three-day deadline can be problematic when the defendant is arrested in another county because it can be difficult or impossible to transport the defendant within three days. A majority of the committee recommends adopting language adapted from the arraignment rules for magistrate court, *see* Rules 6-401(A)(1)(a) and 6-506(A)(2), as follows:

> The court shall hold an initial hearing for a defendant who is in custody as soon as practicable, but in any event no later than three (3) days after the date of arrest if the defendant is being held in the local detention center, or no later than five (5) days after the date of arrest if the defendant is not being held in the local detention center.

Two committee members opposed this proposal, noting that the existing magistrate court rules permit the defendant to appear by video if there is insufficient time to transport the defendant. *See* Rules 6-109, 6-110A NMRA.

3. Subparagraph (D)(2); Initial hearing (options).

The Bernalillo County Metropolitan Court suggested adding an additional option as follows: "or commence a prosecution for contempt, or contempt sanctions, under Rule 5-112(D) NMRA." The committee concluded that this amendment is unnecessary because the court has independent authority to initiate contempt proceedings against the defendant for violating a court-ordered condition of release. The committee does not recommend the amendment.

4. Subparagraph (E)(1); Evidentiary hearing (time).

The Bernalillo County Metropolitan Court suggested changing the time limit from seven days after the initial hearing to ten days to allow three days for mailing and to allow the district attorney to comply with the notice provisions in the Victims of Crime Act, NMSA 1978, § 31-26-9(B) ("The district attorney's office shall provide the victim with oral or written notice, in a timely fashion, of a scheduled court proceeding attendant to the criminal offense.").

Committee members concluded that the seven-day limit provides sufficient time for the court and parties to prepare for the hearing and for the district attorney to notify the victim. It would be inappropriate to extend the time period beyond seven days because the defendant is being held in custody. The committee does not recommend the amendment.

5. Subparagraph (E)(2); Evidentiary hearing (defendant's rights).

The Bernalillo County Metropolitan Court suggested clarifying that the defendant shall be afforded the opportunity "to present any information in mitigation." The committee did not think this added language is necessary because it is implicit in existing provision. The committee does not recommend the amendment.

6. Paragraph F; Order at completion of evidentiary hearing.

The Bernalillo County Metropolitan Court made two suggestions for amending Paragraph F. First, the metropolitan court suggested adding "impose sanctions" as an additional course of action that the court may take at the completion of the evidentiary hearing. Committee members voiced concern that, according to the pretrial literature, sanctions are not appropriate in the pretrial context. The court can increase the conditions of release or revoke release, but the imposition of sanctions constitutes punishment and should be reserved for post-conviction. Committee members were also concerned that the proposed language was too broad and failed to provide judges with adequate guidance and constraints regarding the scope of the sanction authority. Other committee members pointed out that there are existing mechanisms that allow the court to revoke release pending the defendant's compliance with certain conditions, such as completion of an alcohol treatment program. The committee concluded that the proposed sanction provision is unnecessary and does not recommend its adoption.

Second, the metropolitan court suggested that the evidentiary standard for revocation should be restructured based on the federal revocation statute, 18 U.S.C. § 3148. A majority of the committee agreed with this suggestion. The paragraph as restructured sets forth a two-prong test. The first prong of the test addresses the defendant's violation of conditions of release. The standard of proof for the first prong depends on whether the violation is (1) the commission of a new offense, for which there must be probable cause; or (2) some other violation, for which there must be clear and convincing evidence. The second prong requires clear and convincing evidence that either (1) no condition or combination of conditions will reasonably ensure the defendant's compliance with the release conditions ordered by the court; or (2) revocation is necessary to prevent interference with witnesses or the proper administration of justice. Both prongs must be met for revocation. If both prongs are met, the rule still gives the court discretion to decide whether to revoke release.

Some committee members opposed this amendment because they believed that each component of the revocation standard should be subject to the clear and convincing evidence standard, consistent with the standard for pretrial detention under Article II, Section 13 of the New Mexico Constitution. Others supported the probable cause standard for commission of a new offense because probable cause is the standard for arresting or detaining someone accused of committing a crime. A majority of eight committee members approved the proposal, with six opposed.

7. Paragraph I; Expedited trial scheduling for defendant in custody.

The LOPD asked the committee to define "expedited" for purposes of Paragraph I. Consistent with its recommendation for Rule 5-401(L) and Rule 5-409(J), the committee recommends adding the following language: "On the written motion of the prosecutor or the defendant, or on the court's own motion, the court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year." The committee also recommends the addition of new committee commentary, as follows: "The purpose of a status review hearing under Paragraph I is to ensure that a defendant is not held without an expedited trial setting." The committee does not recommend corresponding amendments to the limited jurisdiction rules.

8. Subparagraph (K)(4); Transmission of district court order to magistrate, metropolitan, or municipal court.

The Bernalillo County Metropolitan Court suggested that when a case is transferred to the district court for a review hearing under Rule 5-403, the case should remain in the district court. The committee did not support this amendment, noting that many cases remain within the metropolitan court's trial jurisdiction or get dismissed without becoming a district court case. Alternatively, if cases are transferred back to metropolitan court, the metropolitan court suggested that the district court should be required to transmit its order to the metropolitan court within 24 hours (currently, the rule says "promptly"). The committee agreed and recommends changing "promptly" to "within one (1) day."

9. Interplay between revocation rules and preliminary examination rules.

The Bernalillo County Metropolitan Court asked about the timeline in a case where the defendant's pretrial release is revoked prior to a preliminary examination and suggested clarifying whether the defendant may be detained for only ten days or may be detained for the full sixty days provided by Rule 5-302(A)(1) (time limits for preliminary examination). The committee concluded that this issue is moot because it was resolved by amendments to Rule 7-202 NMRA that took effect on December 31, 2017, which provide that revocation of the defendant's release triggers the start of a new ten-day period.

C. PRETRIAL RELEASE BY DESIGNEE: RULES 5-301, 5-408, 6-203, 6-408, 7-203, 7-408, 8-202, AND 8-408 NMRA

1. Jurisdictions that lack a designee.

The committee considered a suggestion from the NMCDLA that there needs to be a better mechanism for the immediate release of people charged with non-violent offenses. The committee agreed with this concern, especially as it relates to jurisdictions that lack a designee to release defendants under Paragraph B of the -408 rules. Under Paragraph B, a defendant is not eligible for release by designee if the defendant is "known to be on probation, on parole, or on other release pending trial, sentencing, or appeal for any offense under federal, state, or local law." Some jails and counties assert that they lack the resources and information to make this determination. These jails and counties refuse to exercise any designee authority because they are concerned about liability. As a result, defendants who are arrested on the weekend for non-violent misdemeanors often spend the weekend in jail.

The committee concluded that the -408 rules are not being implemented as intended and discussed possible ways to address this problem. Committee members supported the idea of a centralized early release program operated on a statewide basis, but the committee was concerned about a lack of funding to implement the program. Alternatively, committee members supported the idea of the court ordering the jail to implement the rule as intended, but the committee was unsure if the judicial branch had the authority to require jails to release defendants through a designee.

Judge Buddy Hall suggested a third alternative. Since judges have a constitutional duty to conduct a probable cause review within forty-eight hours of arrest, the judges could serve as the designee if a person has not been designated or the designated person is unavailable. Judge Hall reported that some jurisdictions are already doing this. The committee supported Judge Hall's suggestion. To implement the suggestion, the committee unanimously approved amendments to the -408 rules and the rules governing probable cause determinations, Rules 5-301, 6-203, 7-203, and 8-202.

Justice Daniels subsequently reported to the committee that the Administrative Office of the Courts (AOC) is trying to expand statewide the Bernalillo County Metropolitan Court's release on recognizance program. The AOC obtained a grant from the National Center for State Courts (NCSC) to initiate a pilot program in three counties. This project has the promise of achieving the early release objective of the -408 rules.

2. Subparagraph (B)(1); Persons eligible.

The committee considered the suggestion from Eleventh Judicial District Court to clarify that, "if known, a designee shall not release a person who has an outstanding bench or arrest warrant unless the outstanding warrant itself specifically provides for release." Committee members noted that jails already have procedures that preclude the release of defendants with outstanding warrants. The committee was not aware of any problems with implementing these procedures. Additionally, the committee was concerned that the proposal could result in the inappropriate detention of defendants who are arrested on warrants for minor things, e.g., unpaid child support or parking tickets. The committee does not recommend adopting this amendment.

3. Municipal court comments.

The Grants Municipal Court commented that the -408 rules may give the impression that being arrested is no big deal because there will be an immediate release. Also, municipal courts expressed concern that their designees do not have access to criminal history and other background information, which often results in persons being arrested and released on recognizance time and time again. The Farmington Municipal Court commented that releasing intoxicated homeless defendants as required by the rule requires more pretrial conferences, with a fiscal impact of $15,000-20,000. The committee concluded that these comments raise resource and implementation issues that cannot be resolved through procedural rule amendments.

D. PRETRIAL RELEASE; RULES 5-401, 6-401, 7-401, AND 8-401 NMRA

1. Subparagraph (A)(1); Time.

The Eleventh Judicial District Court suggested changing the time limit for the initial pretrial release hearing from three days to ten days. Prior to the Supreme Court's adoption of the three-day limit, the committee debated the appropriate deadline at considerable length and submitted a recommendation to the Court that reflected a compromise. The committee concluded that the three-day deadline is workable and does not recommend amending the deadline at this time.

2. Subparagraph (A)(2); Right to counsel.

The Los Alamos Municipal Court commented that defense counsel may not be available for a hearing within three days. The committee concluded that this is a resources issue that cannot be resolved through a procedural rule amendment. Additionally, committee members from rural jurisdictions noted that attorneys have been attending these hearings by phone or video because they are too far away to attend in person. This alternative has been working.

3. Paragraph B; Right to pretrial release; recognizance or unsecured appearance bond.

The Eleventh Judicial District Court commented that a magistrate court making an ex parte probable cause determination under Rule 6-203 NMRA should be permitted to detain a dangerous defendant pending a pretrial release hearing under Rule 6-401. The committee believes that these rules currently permit limited detention pending a hearing under Rule 6-401 and notes that Form 9-207A NMRA (probable cause determination) was amended effective December 31, 2017, to clarify this procedure. The committee does not recommend any rule changes in response to the comment.

The Eleventh Judicial District Court also suggested that courts should be provided with the resources necessary to collect on unsecured bonds. If these resources cannot be provided, the district court suggested the elimination of the unsecured bond option from the rule. The

committee concluded that this is a resources issue that cannot be resolved through a procedural rule amendment.

Finally, the Hobbs Municipal Court commented that most defendants can afford secured bonds and that the elimination of secured bonds for most defendants has increased the rate of failure to appear. The committee does not have adequate data to evaluate this comment. The committee recommends, however, that the AOC prioritize data collection to facilitate future evaluation of the effectiveness of the rules governing pretrial release and detention.

4. Paragraph C; Factors to be considered in determining conditions of release.

The Bernalillo County Metropolitan Court noted that Paragraph C currently mandates consideration of the defendant's financial resources and the results of a pretrial risk assessment instrument but makes consideration of the other factors optional. The court suggested that consideration of the defendant's financial resources and the risk assessment should also be optional.

The committee concluded that Article II, Section 13 of the New Mexico Constitution mandates consideration of the defendant's financial resources because it provides that a defendant "shall not be detained solely because of financial inability to post a money or property bond." The committee was divided on whether consideration of any available risk assessment results should be mandatory or optional. Some committee members felt strongly that consideration of the risk assessment should be mandatory because it is the only validated, evidence-based information available to the judge. Others thought that all of the factors in the rule should be given equal weight and considered at the court's discretion. A committee vote on this proposal tied, with seven in favor and seven opposed. The proposal is not included in the committee-approved draft since it was not approved by a majority.

The Farmington Municipal Court and Los Alamos Municipal Court commented that the municipal courts lack access to federal databases such as III and NCIC to obtain the defendant's criminal history. The committee disagreed with this comment. A representative from the Department of Public Safety attended one of committee's first meetings and reported that the municipal courts can obtain access to III and NCIC. The approval process to access these databases takes time, but in the committee's experience at least one municipal court (Santa Fe) has gained access. The committee does not recommend any rule amendments to address this concern.

5. Paragraph D; Non-monetary conditions of release

The committee considered several comments and proposals regarding the costs of non-monetary conditions of release, such as drug testing and electronic monitoring. The NMCDLA suggested that it is unconstitutional to detain a non-dangerous defendant when the defendant cannot afford to pay the costs of non-monetary conditions of release imposed by the court. The Eleventh Judicial District Court asked the committee to clarify (1) whether a defendant may be detained while making arrangements to meet the conditions imposed; and (2) whether GPS monitors or alcohol monitoring bracelets should be considered monetary or non-monetary

conditions of release, given that they require a financial outlay on the defendant's part. Finally, the Farmington Municipal Court and Los Alamos Municipal Court submitted comments stating that the municipal courts lack resources for pretrial services and other non-monetary conditions of release.

The committee notes that the existing committee commentary provides the following guidance on these issues:

> 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.

Committee member Matt Coyte said this issue should be expressly addressed in the text of the rule and suggested on behalf of the NMCDLA that the committee should add the following language to Paragraph D: "If the defendant cannot afford to pay for a cost associated with a condition of release imposed, the court shall either waive such costs or select an alternative condition of release."

Committee members agreed that it is inappropriate to detain an indigent defendant due to inability to pay the costs of non-monetary conditions of release. But the majority of the committee concluded that the proposed rule amendments were not the appropriate way to address the underlying problem. Many non-monetary conditions of release are administered by third-party providers, and courts lack authority to waive costs owed to third parties. Courts do have discretion to consider the imposition of alternative conditions of release, but this determination is best made at a hearing where the judge can talk to the defendant and explore which alternative conditions of release might be available and appropriate.

A majority of the committee concluded that Paragraph H of the rule provides an adequate remedy. Under Paragraph H, a defendant who is in custody due to inability to meet the conditions of release, whether monetary or non-monetary, can file a motion for review of the conditions of release. A minority of three committee members supported the amendments proposed by the NMCDLA. These committee members thought that the opportunity to move for review under Paragraph H does not provide an adequate remedy to the defendant because by the time the court holds a hearing, the defendant will have been in jail long enough to compromise the defendant's job, housing, and family situation.

Although a majority of the committee believes that a review hearing is the appropriate procedure for determining whether the court should impose alternative conditions of release, this procedure does not fix the underlying problem. New Mexico courts lack adequate resources for appropriate pretrial options. All jurisdictions, both urban and rural, should have funding for pretrial services to provide information to judges and to supervise and monitor defendants who are released pending trial. Some committee members noted that pretrial supervision costs less

than jail, so local jurisdictions should be encouraged to shift existing resources away from detention centers and toward pretrial services and treatment programs.

6. Subparagraph (D)(1); Condition to remain in custody of designated person.

The Eleventh Judicial District Court asked what recourse is available if a designated person fails in his or her responsibility "to assume supervision" of the defendant and "to report any violation of a release condition to the court." The committee concluded that in this situation the court should impose different conditions of release. The committee does not recommend any rule amendments in response to this question.

7. Subparagraph (D)(13); Condition to maintain contact with attorney.

The Eleventh Judicial District Court asked whether defense counsel has a duty to inform the court if the defendant violates a court-ordered condition to maintain contact with defense counsel. The committee does not think such a burden should be placed on defense counsel and does not recommend any rule amendments in response to this question.

8. Paragraph E; Secured bond.

The Bernalillo County Metropolitan Court suggested that the court should be permitted to impose a secured bond in response to community safety concerns. The committee does not recommend this rule amendment because it would be contrary to Article II, Section 13 of the New Mexico Constitution; *State v. Brown*, 2014-NMSC-038, 338 P.3d 1276; and *Torrez*, 2018-NMSC-005.

9. Subparagraph (H)(2). Review hearing.

The Eleventh Judicial District Court suggested changing the time limit from five days to ten days. Prior to the Supreme Court's adoption of the five-day limit, the committee debated the appropriate deadline at considerable length and submitted a recommendation to the Court that reflected a compromise. The committee concluded that the five-day deadline is workable and does not recommend amending the deadline at this time.

The Bernalillo County Metropolitan Court requested guidance on how judges should assess a defendant's financial ability to post a bond. The metropolitan court proposed that if the defendant is unable to post secured bond and files a motion for review, the rule should require the defendant to plead inability to pay with some specificity, which could be accomplished by requiring the defendant to submit Form 9-301A NMRA (pretrial release financial affidavit). Committee members suggested that this proposed requirement was unnecessary because the court has authority to request that the defendant submit evidence of inability to pay, which could include Form 9-301A. In addition, the defendant is free to submit the form to support a motion for review. The committee did not vote on this proposal because committee member Judge Victor Valdez subsequently withdrew the proposal on behalf on the metropolitan court.

10. Subparagraph (K)(6); District court order; transmission to magistrate, metropolitan, or municipal court.

The Bernalillo County Metropolitan Court suggested that when a case is transferred to the district court for a review hearing under Rule 5-401, the case should remain in the district court. The committee did not support this amendment, noting that many cases remain within the metropolitan court's trial jurisdiction or get dismissed without becoming a district court case.

Alternatively, if cases are transferred back to metropolitan court, the metropolitan court suggested that the district court should be required to transmit its order to the metropolitan court within 24 hours (currently, the rule says "promptly"). The committee agreed and recommends changing "promptly" to "within one (1) day."

11. Paragraph L. Expedited trial scheduling for defendant in custody.

The LOPD suggested that "expedited" should be defined for purposes of Paragraph L. Consistent with its recommendation for Rule 5-403(I) and Rule 5-409(J), the committee recommends adding the following language: "On the written motion of the prosecutor or the defendant, or on the court's own motion, the court shall hold a status review hearing in any case in which the defendant has been held for more than one (1) year." The committee also recommends the addition of new committee commentary, as follows: "The purpose of a status review hearing under Paragraph L is to ensure that a defendant is not held without an expedited trial setting." The committee does not recommend adopting corresponding amendments for the limited jurisdiction rules.

E. BENCH WARRANT FORMS 9-212, 9-212A, and 9-212C NMRA

The Eleventh Judicial District Court suggested clarifying what the court should write in the "bond provisions" area of a bench warrant for failure to appear. *See* Form 9-212 NMRA (bench warrant for district court). The Rio Rancho Municipal Court submitted a related comment, suggesting that although it may be inappropriate to put a secured bond amount on an arrest warrant, it may be appropriate to put a secured bond amount on a bench warrant for failure to appear.

The committee reviewed Form 9-212 and concluded that it should be amended because it suggests that the court should always impose a monetary bond. To address this, the committee unanimously recommends adding the following options to the form, in addition to the existing secured bond option: (1) book and release, (2) no bond hold, and (3) other. The committee thought that these options should be listed in the order of least restrictive to most restrictive. The committee also recommends adding these options to the bench warrant forms used by the magistrate, metropolitan, and municipal courts, Forms 9-212A and 9-212C NMRA.

The committee also reviewed the juvenile traffic bench warrant, Form 9-212B NMRA, but does not recommend any amendments to this form because juvenile arrests are subject to specific statutory requirements and fall outside this committee's expertise. One committee

member expressed concern that it may be inappropriate for the municipal courts to issue juvenile warrants.

F. GENERAL COMMENTS

The Court received several suggestions that are not specific to any of the rules addressed above. First, the LOPD suggested that Bernalillo County's Case Management Pilot Project (CMO) should be expanded to the rest of the state. *See* LR2-308 NMRA. The committee did not take a position on this issue because it falls outside the scope of the committee's work.

Second, the Seventh Judicial District Court commented that it supports the adoption of legislation providing that magistrate courts are "courts of record" for purposes of conducting pretrial detention hearings. Chief Judge Nan Nash reported that the Second Judicial District Court likewise supports this. Other committee members agreed that this is a good idea. But the committee understands that legislation to do this was introduced in 2018 and did not pass. Pursuing this issue falls outside the scope of the committee's work.

Finally, the Bernalillo County Metropolitan Court raised several case management suggestions intended to improve communication between the district court and the limited jurisdiction courts and between courts and litigants. The committee concluded that most of these case management issues are moot because they have been resolved through the adoption of internal procedures. To the extent that there are outstanding case management issues, the committee believes they should be handled by the Judicial Information Division committees, not the rules committees.

G. CONCLUSION

In conclusion, the committee recommends that the Court publish for comment the proposed amendments to Rules 5-401, 6-401, 7-401, and 8-401 (pretrial release); Rules 5-403, 6-403, 7-403, and 8-403 (revocation of release); Rules 5-301, 5-408, 6-203, 6-408, 7-203, 7-408, 8-202 and 8-408 (pretrial release by designee); Rules 5-409, 6-409, and 7-409 (pretrial detention); and Forms 9-212, 9-212A, and 9-212C (bench warrant). Staff attorney Sally Paez will provide the Court with the committee-approved drafts of the rules and forms, as well as any minority reports submitted by committee members. The committee also recommends the withdrawal of Supreme Court Order No. 17-8300-003. Additional information and support for the committee's recommendations can be found in the committee's meeting notes and meeting materials. Please let us know if you need any additional information.

The committee also recommends the dissolution of the Ad Hoc Pretrial Release Committee and the creation of a new standing rules committee to address pretrial release and detention issues. New Mexico's recent pretrial reforms, including the constitutional amendment and the pretrial release and detention rules, are still in their infancy, and additional issues are bound to arise regarding their implementation. If a new committee is formed, we recommend

including some of the members of the Ad Hoc Pretrial Release Committee, who have developed a wealth of institutional memory and specialized knowledge.

If the committee's proposed amendments are published for comment, we recommend that the comments should be reviewed by either the new standing rules committee suggested above or by the existing Rules of Criminal Procedure Committee. Thank you very much for your consideration.

Sincerely,

Professor Leo M. Romero
Chair, Ad Hoc Pretrial Release Committee

Cc: Members of the Ad Hoc Pretrial Release Committee
Joey Moya, Clerk and Chief Counsel, Supreme Court
Sally Paez, Senior Counsel, Supreme Court