

14.5: Pretrial Release, Bond and Bail

Checklist: Annotated

Applicable Law:

N.M. Const. art. II, §13.

NMRA 8-401

IMPORTANT NOTE: *Under the New Mexico Constitution, art. II, §13, defendants are presumed innocent until proven guilty and therefore **must** be given an opportunity to be released pending trial (except in certain limited circumstances not relevant to Municipal Courts, such as cases involving capital crimes). According to our constitution, defendants must be released on their own recognizance or upon an unsecured appearance bond (with or without conditions of release) unless such release will not reasonably assure the defendant's appearance in court or the safety of another or the community as a whole. In that case, the court must set a secured bond amount and appropriate release conditions. By requiring a secured bond, the court provides the defendant an opportunity to be released: if the defendant pays the bond, the defendant is released from custody with release conditions.*

_____ 1. **Is the defendant still in custody?**

_____ 2. **If yes, consider the following factors** [to determine what type of release is appropriate]:

_____ The nature and circumstances of the offense(s) charged, including whether the offense is a crime of violence or involves a narcotic drug;

_____ The weight of the evidence against the defendant;

_____ Defendant's character;

_____ Defendant's mental and physical condition;

_____ Defendant's family ties;

_____ Defendant's employment status, employment history, and financial resources;

_____ Defendant's past and present residences;

_____ Length of the defendant's residence in the community;

_____ Facts tending to indicate the defendant has strong ties to the community;

_____ Facts indicating the possibility that the defendant will commit new crimes if released;

_____ Defendant's past conduct, history relating to drug or alcohol abuse, criminal history, and history concerning appearances at court proceedings;

_____ Whether at the time of the offense or of arrest the defendant was on probation, parole, or other release pending trial, sentencing, appeal, or completion of an offense under federal, state, or local law;

_____ The nature and seriousness of the danger to any person or the community that would be posed by the defendant's release; and,

_____ Any other facts tending to indicate whether the defendant is likely to appear.

_____ 3. Based on those considerations, **determine whether releasing the defendant on his or her own recognizance or with an unsecured appearance bond, with or without release conditions, will:**

_____ Reasonably assure the defendant's appearance in court;

_____ Reasonably prevent the defendant from unlawfully interfering with the judicial process; and

_____ Reasonably secure the safety of all members of the community.

_____ 4. **Release Options: Unsecured and Secured Appearance Bonds**

[Each of the following options requires the defendant to sign an appearance bond, which is a promise to appear in court at a future date. The appearance bond may be unsecured or secured.]

An unsecured appearance bond either sets no bail at all, or sets bail at a certain amount but only requires the defendant to pay the amount if he or she fails to appear or to comply with a condition of release.

A secured appearance bond requires the defendant to pay or pledge a certain amount upfront, with a later refund or voiding of the pledge, as incentive for the defendant to appear in court and comply with the conditions of release. An appearance bond may be secured in a number of ways: by the defendant or a surety posting a full or partial cash deposit with the court, by execution of a bail bond by a surety, or by execution of a property bond. A surety is an individual or business that guarantees to pay the full amount if the defendant fails to appear or comply with the conditions.

*Reminder: The N.M. Constitution requires release on the defendant's recognizance or release with an unsecured appearance bond **unless** such release will not reasonably assure the defendant's appearance in court, the safety of another, or the safety of the community. If you have determined that release on the defendant's own recognizance or on an unsecured*

appearance bond is insufficient to meet these goals, release the defendant on the first of the following types of secured bonds that will reasonably assure the appearance of the defendant as required and the safety of any person and the community.]

Release on an Unsecured Appearance Bond

_____ Release on Personal Recognizance. The defendant signs an appearance bond, with no bail set. Other conditions may be imposed. (Go to #5.) *[You must release the defendant on his or her own recognizance unless you have determined that this will not assure the defendant's appearance or will not secure the safety of another or the community.]*

OR

_____ Release to the Custody of a Third Party who becomes responsible for assuring the defendant's appearance and compliance with all conditions. The defendant signs an appearance bond and agrees to remain in the custody of a Third Party. The Third Party agrees to supervise the defendant and report any violation of the conditions of release to the court. No bail is set. Other conditions may be imposed. (Go to #5.)

OR

_____ Release on an Unsecured Appearance Bond. The defendant signs an appearance bond and the court sets the amount of bail but does not require a cash deposit or pledge of property. Other conditions may be imposed. (Go to #5.)

OR

Release on a Secured Appearance Bond

_____ Appearance Bond Secured by Bail Bond and Partial Cash Deposit. The defendant signs an appearance bond, the court sets bail, and a percentage of the amount of bail must be deposited with the court before the defendant is released. The court determines the percentage of bail to be deposited. Additional conditions may be imposed. (Go to #5.)

OR

_____ Appearance Bond Secured by Full Cash Deposit. The defendant signs an appearance bond, the court sets bail, and 100% of the amount of bail must be deposited with the court before the defendant is released. The deposit may be paid by the defendant or by a surety. Additional conditions may be imposed. (Go to #5.)

OR

_____ Appearance Bond Secured by a Bail Bond Executed by the Defendant and an Unpaid Surety. An unpaid surety is someone other than a bail bondsman. Typically, an unpaid surety is a family member or close friend. The defendant signs an appearance bond, the court sets bail, and the defendant and the unpaid surety execute a bail bond in the full amount of the bail by pledging sufficient real or personal property. Additional conditions may be imposed. (Go to #5.) *[If the court uses this option, Form 9-304 (Bail Bond) must be completed.]*

OR

_____ Appearance Bond Secured by a Bail Bond Executed by the Defendant and a Paid Surety (Bail Bondsman). The defendant signs an appearance bond, the court sets bail, and the defendant and the paid surety execute a bail bond. Additional conditions may be imposed. (Go to #5.) *[If the court uses this option, Form 9-304 (Bail Bond) must be completed.]*

_____ **5. Conditions of Release.**

[The court must impose the least restrictive conditions that will reasonably assure the defendant's appearance, the safety of any person and the community, and the orderly administration of justice. There is no additional requirement that the conditions be reasonably related to the crime charged. For example, in a domestic violence case where no weapons were used, it is within the court's discretion to inquire about—and restrict--defendant's access to or possession of guns or other weapons.]

The court may require the defendant to:

- _____ Refrain from committing a federal, state, or local crime during release;
- _____ Remain in the custody of a designated person who agrees to supervise the defendant and report any violation of a condition of release to the court. Third party custody is permissible only if the designated third party is reasonably able to assure the court that the defendant will appear and will not pose a danger to the safety of another or the community;
- _____ Maintain employment or actively seek employment;
- _____ Maintain or begin an educational program;
- _____ Comply with restrictions on personal associations, place of abode or travel, as specified by the court;
- _____ Comply with an electronic monitoring device;

- _____ Avoid all contact with the alleged victim of the crime and with any potential witness who may testify about the offense, including any co-defendants;
- _____ Report on a regular basis to a designated pretrial services agency or other agency agreeing to supervise the defendant;
- _____ Comply with a specified curfew;
- _____ Refrain from possessing a firearm, destructive device or other dangerous weapon;
- _____ Refrain from excessive or any use of alcohol and any use of a narcotic drug or other controlled substance without a prescription by a licensed medical practitioner;
- _____ Undergo available medical, psychological, psychiatric, or substance abuse treatment, and remain in a specified institution if required for that purpose;
- _____ Submit to drug or alcohol testing upon the request of a person designated by the court;
- _____ Return to custody for specified hours following release for employment, schooling, or other limited purposes; and/or
- _____ Satisfy any other condition that is reasonably necessary to assure the defendant's appearance as required and to assure the safety of any other person and the community.

_____ **6. Complete Necessary Paperwork.**

- _____ Order Setting Conditions of Release and Appearance Bond *[Criminal Form 9-302. To be used if the defendant is to be released on personal recognizance or an unsecured appearance bond.]*

OR

- _____ Order Setting Conditions of Release and Bail Bond *[Criminal Form 9-303. To be used if the defendant is to be released on a secured appearance bond or bail bond. Note: If a surety provides bond for the defendant, Criminal Form 9-304 also must be completed.]*

OR

_____ Release Order and Bond [*Criminal Form 9-303A. This “short” form is used instead of Criminal Form 9-303 if the defendant is to be released on a secured or unsecured appearance bond or bail bond without many release conditions.*]

OR

_____ Bail Bond [*Criminal Form 9-304. To be used if a paid or unpaid surety provides bond for the defendant. If the surety is paid, only the first part of the form must be completed. If the surety is unpaid, both parts of the form must be completed. The second part of the form, “Justification of Sureties,” pledges the surety’s real or personal property as security.*]