BAIL BONDS - MYTHS, REALITY, AND PRISON POPULATION MANAGEMENT

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As a consequence of widespread misunderstanding regarding the nature of bail bonds, The Professional Bail Agents Association of Hawaii and similar organizations are engaging in an ongoing program of education to explain to lawmakers, judges, and other decision-makers the valuable role bail bonds can play with respect to all aspects of correctional facility population management and other issues affecting pretrial release of suspects.

Bail bondsmen play a key role with respect to the judicial system by securing the release from prison of pretrial detainees and guaranteeing their appearance in court at the time of trial. These services are provided efficiently and at no cost to the public.

Many of the current myths about bail bonds can be traced to a position paper that was included in the American Bar Association Standards for Criminal Justice. Chapter 10 of the second edition of that document, on Pretrial Release, discusses at length the period between arrest and trial. The essential dilemma is that the defendant has not been convicted of a crime, and is therefore presumed innocent under our system of jurisprudence. Yet, some form of limit to the defendant's liberty may be appropriate to protect society's interests.

The first edition of the standards had criticized the concept of bail as being a from of wealth discrimination, in that only persons with money could afford to bail themselves out of prison while awaiting trial. To correct this perceived injustice, Congress enacted the Bail Reform Act of 1966, which established a broad policy in

favor of release through government pretrial release agencies, on the presumption that some form of meaningful supervision would be imposed on released defendants.

By the time the second edition of Standards was issued, the ABA had come to see the failures of bail reform, noting that "pretrial crime and abscondence remain serious problems." The ABA attempted to develop a detailed procedure to ensure that defendants are held for reasons other than the inability to meet monetary conditions, and that during their incarceration, pretrial detainees would be separated from the convicted persons serving sentences. Yet, the only mechanism the ABA advocates for supervising released persons awaiting trial is the pretrial services agency, a form of government agency which has proven its in ability to adequately monitor released suspects.

Despite all the attempts at reform, we still have crowded jails. Moreover, the record of pretrial release agencies shows an average 25% failure to appear rate. The system as it currently operates clearly is not working as it was intended to do. The ABA cites data reported by W. Thomas in *Bail Reform in America* which appears to support the contention that large numbers of defendants have been released through pretrial agencies without greatly adding to the number of defendants who failed to appear. However, Thomas' 1976 data has subsequently been proven incorrect; new data from the Bureau of Justice Statistics clearly demonstrate that the failure to appear rates are greater than before reforms, and continuing to rise. Additionally, evidence is growing that defendants released on nonmonetary conditions are rearrested at a higher rate than defendants released on traditional surety bonds.

The ABA correctly reasons that "if even a small fraction of the sums allocated to detention were diverted to programs providing meaningful supervision for released defendants, many such defendants could be safely released prior to trial." We agree that the high cost to the public of incarcerating persons awaiting trial are a compelling

reason to explore alternatives, in addition to the principle that punishment should not be imposed unless and until a person is actually convicted.

Our position is that no one solution can be expected to resolve all the various crises facing our judicial system, especially with respect to prison population management. Significant criteria for evaluating the effectiveness of any form of pretrial release are meaningful supervision and the percentage of defendants who actually appear at the time of trial. As part of the selection of methods available to address those two key issues, the bail bond can play a significant role in handling many persons awaiting trial.

No bail bondsman could succeed with the high failure to appear rates of the pretrial agencies. The forfeiture of the full amounts of bail in even a very small percentage of cases would quickly prove overwhelming and automatically guarantee business failure. Bail bondsman stay in business by successfully delivering defendants at the time of trial.

The ABA is reluctant to accept the use of any form of monetary bail, characterizing it as "archaic, unfair, and ineffective." The ABA reasons that monetary conditions for release should only be imposed as a last resort, should be tailored to individual circumstances, and "should not involve utilization of a compensated surety."

And yet, the creation of large government pretrial release agencies has, in effect, produced a new level of profit compensation, in that the employees staffing these agencies are paid with funds raised as taxes. As these agencies grow in an attempt to keep pace with the growing numbers of releasees with whom they work, the financial cost to the public grows commensurately.

The ABA advocates a system of pretrial services agencies with three separate

functions: 1) "rigorous supervision" of released defendants; 2) "coordination, support, and supervision to private organizations and persons serving as pretrial custodians"; and 3) social services for all released defendants awaiting trial. While such a system might be ideal if it worked, the ABA realistically confesses that many jurisdictions provide no meaningful supervision for defendants awaiting trial, and that efforts to meet all three conditions "are likely to be ineffective if the resources to enforce them are not provided." A good case could be made that pretrial detention would cost less than a state-funded system which could adequately fulfill for all released defendants the functions the ABA considers essential.

However, if the pretrial release agencies concentrated their efforts on those defendants most likely to benefit from their services, the effectiveness of the agencies would be enhanced. A greater use of other methods, such as traditional bail and own recognizance release, would free pretrial agencies from almost guaranteed failure.

The ABA does accept that monetary conditions to release are appropriate in some cases. We agree with the ABA that "the sole purpose of monetary conditions is to assure the defendant's appearance" and that "monetary conditions should be set no higher than that amount reasonably required to assure the defendant's appearance in court." Bail bondsmen would be able to provide services in a far greater number of cases if bail amounts were set more reasonably.

In the growing number of cases where bail amounts are set at levels substantially higher than would be required to assure appearance at trial, the risk to the bail bondsman is substantially higher than the level of compensation would warrant. The ABA itself points out that the Supreme Court has held that the eighth amendment permits only financial conditions necessary to prevent abscondence. By this standard, excessively high bail is an unjustified form of punishment and contrary to the spirit of the Constitution. The ABA standards "do not authorize utilization of monetary

conditions as a *sub rosa* system of preventive detention."

We agree with the ABA that the courts should have available a large inventory of methods to deal with the various situations of defendants released prior to trial. Wise use both of nonmonetary conditions, with systematic enforcement efforts, and of monetary conditions, should enable most criminal defendants to be safely released awaiting trial.

The ultimate arbiters of which defendants should be released from prison while awaiting trial are the judges. Additionally, it is the judges who set the amounts of bail, within guidelines provided by law. The power of judges to make these determinations should not be usurped by pretrial release agencies or emergency release programs. Bail bondsmen operate within the framework provided by judges; only those defendants allowed bail within reasonable amounts are prospective clients for surety bail.

Bail bondsmen play an integral role in the pretrial release process, by enabling more defendants to meet the conditions of bail than would otherwise be possible, by securing efficient releases for eligible defendants, and by ensuring the appearance of defendants at the time of trial. This service is provided at nominal cost to the defendant, and at no cost to the judiciary or the taxpayers.