

## **A Response to the American Bail Coalition’s Pamphlet: Pretrial Release – A Criminal Justice Pandemic**

The American Bail Coalition, which represents the interests of the commercial bail bonding for profit industry,<sup>1</sup> has been distributing a pamphlet that seeks to discredit pretrial services programs. In this pamphlet, the Bail Coalition asks 20 self-serving questions about pretrial services programs, and then answers those questions from the perspectives of the bail bonding for profit industry. This document, drafted by a network of pretrial services program executives, provides responses to the questions and how the Bail Coalition answered those questions, from the perspectives of prominent national organizations and officials.

### ***Question 1: What is pretrial release?***

**Bail Coalition’s Answer:** “It is normally a local governmental entity that releases criminal defendants from jail, at no cost to the defendant.”

**Alternate Answer:** A person who has been arrested and charged with a criminal offense may be able to obtain pretrial release in most jurisdictions through any one of several mechanisms, including:

- release on their own recognizance (ROR)
- release with non-financial conditions designed to minimize risks of danger to the community and failure to appear in court
- release through 10 percent deposit bail – where the bail deposit will be returned to the defendant if he appears at all court hearings
- release on a full cash or property bail, where the money or property is returned to the defendant if he appears at all court hearings, or
- release to the commercial bail bonding agent, who collects a non-fundable fee, usually ten percent of the face amount of the bail.<sup>2</sup>

A pretrial services program, which is typically a local government entity, conducts an investigation of arrestees and assesses their risks of misconduct, so that the judicial officer can make the most informed decision – selecting from this range of pretrial release options.<sup>3</sup>

### ***Question 2: Where does pretrial release get its money?***

**Bail Coalition Answer:** “Their operations are normally funded by local tax dollars. An average pretrial release program can have a budget in excess of \$1 million.”

**Alternate Response:** Assuming that by “pretrial release” the pamphlet is referring to pretrial services programs, these programs are typically funded by local tax dollars. In fact, the National Association of Counties, which represents the interests of elected county government leaders,

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<sup>1</sup> The mission of the American Bail Coalition, as stated on its web site ([www.americanbailcoalition.com](http://www.americanbailcoalition.com)), is: “Dedicated to the long-term growth and continuation of the surety bail bond industry.”

<sup>2</sup> See, for example, ABA Standards for Criminal Justice: Pretrial Release, Third Edition, 2007, page 101.

<sup>3</sup> The appropriate roles of a pretrial services program are described in ABA Pretrial Release Standard 10-1.10, page 54.

recognizing the importance of these programs, encourages local governments to establish pretrial programs.<sup>4</sup> As for the budget of pretrial services programs, a national survey of such programs conducted in 2001 found that 75 percent of pretrial programs have budgets of less than \$1 million.<sup>5</sup> These programs are not paid by the number of defendants that are released, rather they provide neutral information to the court so that the court can make the most informed decision.

***Question 3: How did pretrial release get its start?***

**Bail Coalition Answer:** “It can be traced back to the early 1960s as a means of providing release to the financially indigent defendant who was not charged with a serious crime.”

**Alternate Response:** The Bail Coalition answer is essentially correct.

***Question 4: Isn't that a worthwhile program?***

**Bail Coalition Answer:** “Yes, but the unfortunate fact is that these types of programs have been expanded beyond the original scope of just providing for the release on the non-violent indigent.”

**Alternate Answer:** It is true that pretrial services programs have expanded beyond the scope of the original programs founded in the 1960s. What the pamphlet fails to mention is that these programs evolved in response to three significant changes in the laws pertaining to pretrial release. First, when pretrial programs started in the early 1960s, the sole purpose of bail was to assure the appearance of the accused in court. Since the early 1970s, most states plus the federal government have modernized their bail laws to incorporate danger to the community, an issue of significant concern to the public, as a second – and in many states – the primary purpose of bail.

Second, most states plus the federal government have re-written their bail laws to establish a range of release conditions and create a presumption of release on the least restrictive conditions designed to reasonably assure community safety and court appearance. This change was designed for two purposes: to address the inherent inequity for the indigent of a system that relied heavily on money bail; and in recognition that defendants pose a range of risks that need to be matched with a range of release and detention options.

Third, most states and the federal government have amended their bail laws to specify all the factors that the bail-setting judicial officer must take into consideration in making the pretrial release decision. Typically, these factors include the nature of the offense and the weight of the evidence, and the history and characteristics of the accused, such as character, physical and mental condition, family ties, employment, length of residence in the community, community ties, history related to drug or alcohol abuse, and criminal history, and whether, at the time of the arrest of the accused, the accused was on probation, parole, or pretrial release. This is an enormous amount of information that must be collected, synthesized and presented to the judicial

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<sup>4</sup> National Association of Counties, *The American County Platform and Resolutions 07-08, Justice and Public Safety*, page 5.

<sup>5</sup> John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21<sup>st</sup> Century: A Survey of Pretrial Services Programs*, Washington, D.C., Bureau of Justice Assistance, 2003, page 6.

officer – all within hours of the arrest – so that the judicial officer can make an informed decision regarding the most appropriate release or detention status of the defendant. For the past 30 years, the American Bar Association and the National District Attorneys Association have said that all jurisdictions should have pretrial services programs to perform these functions for the court.<sup>6</sup>

As to whether pretrial services programs, given these changes in bail laws, are “worthwhile,” here is what a county commissioner and board member of the National Association of Counties told a U.S. House of Representatives sub-committee in 1990: “Pretrial services programs are established mechanisms for assisting jurisdictions to make informed decisions as to which arrestees can be safely released to the community with supervision to await trial and which should be held in jail.”<sup>7</sup>

***Question 5: So, what’s wrong?***

**Bail Coalition Answer:** “This method of release is now being applied to defendants charged with a wide range of criminal offenses, including violent felons, who are financially capable of paying for their release if required to do so.”

**Alternate Response:** The pamphlet does not address why we should want a system where violent felons are allowed to pay for their release. According to national standards, dangerous defendants should be detained without bail, or at minimum have their release limited through restrictive non-financial conditions.<sup>8</sup> As noted above, bail laws have been re-written to require a wide range of options to match the wide range of risks posed by defendants.

***Question 6: Once it provides a defendant with a free release, then what is its function?***

**Bail Coalition Answer:** “The program is supposed to maintain contact with the defendant and make sure that person comes back to court, as directed, until the case is over.”

**Alternate Response:** This question has a false premise. A pretrial program does not provide the defendant with any kind of release – free or otherwise. Rather, the program makes a recommendation to the court about the most appropriate release mechanism in each individual case designed to reasonably assure both the safety of the community, which is ignored by the pamphlet, and court appearance.

***Question 7: Does it do a good job of this?***

**Bail Coalition Answer:** No. It has a very high failure to appear rate.

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<sup>6</sup> American Bar Association, *supra* note 2; the National District Attorneys Association, *National Prosecution Standards*, Standard 45.4, page 142, 1990.

<sup>7</sup> Testimony of Mark Ravenscraft before the House Sub-Committee on Government Information, Justice, and Agriculture of the Committee on Government Operations, April 14, 1990.

<sup>8</sup> The American Bar Association (Standard 10-5.8, page 124), the National District Attorneys Association (Standard 45.8, page 147), and the National Association of Pretrial Services Agencies (Standard 2.8, page 43) all call for the detention without bail in appropriate cases where no conditions can reasonably assure the safety of the public.

**Alternate Response:** The Bail Coalition answer assumes that pretrial services is a single entity with a single track record. But there are hundreds of pretrial programs around the country. As with any other type of program, in some jurisdictions the pretrial program is very effective, with impressive outcomes in terms of rearrest and failure to appear rates, while in others the program is not as effective. There are many reasons for this, ranging from resource allocation to management issues. There are enough jurisdictions, though, where pretrial programs are responsible for high release rates coupled with low failure rates to know that the model of gathering information and providing the court with options works.

**Question 8: *When the defendant fails to appear in court, is anybody held responsible?***

**Bail Coalition Answer:** “Other than the defendant, no. No one is financially responsible for the defendant’s failure to appear.”

**Alternate Response:** When a defendant who is in non-financial pretrial release fails to appear in court, the responsibility lies exactly where it belongs – on the defendant. And there are consequences to the defendant of failing to appear in court, including remand into custody and being charged with a separate bail jumping offense.<sup>9</sup>

**Question 9: *Does anyone within the Pretrial Release program go after them?***

**Bail Coalition Answer:** “No. The apprehension of the defendant is usually left to the local law enforcement authorities, the officers responsible for the enforcement of outstanding warrants. This is a minimally staffed section of the law enforcement agency.”

**Alternate Response:** Many pretrial services programs have procedures in place, or even specialized units, that seek to locate defendants who have failed to appear in court and have them return voluntarily.

**Question 10: *Doesn’t this form of release actually reward the defendant?***

**Bail Coalition Answer:** “It can certainly be viewed in that way. Defendants enjoy their release from custody at no financial cost and have no subsequent direct supervision which will require their appearance in court. Nor is there a financial penalty required of someone because of a defendant’s failure to appear in court. Nor does anyone go after them.”

**Alternate Response:** With the consequences facing a defendant for failing to appear in court – revocation of the release and commitment to jail or the filing of new charges – it is hard to see how a defendant is being rewarded. Also, the Bail Coalition response does not address threats to community safety.

**Question 11: *Doesn’t this method of release seem to support the maxim that if you reward poor performance, you just get more poor performance?***

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<sup>9</sup> See ABA Standard 10-5.5, NDAA Standard 45.7, and NAPSA Standard 4.3.

**Bail Coalition Answer:** “Yes it does. It also sends the message to defendants that the crimes for which they are accused are not taken seriously by the community.”

**Alternate Response:** This question cleverly raises two issues – a reward and poor performance. What is the reward? How does the threat of bond revocation and the filing of bail jumping charges send a message to the defendant that the offense is not taken seriously? What is the poor performance? Who is performing poorly – the pretrial services program that is providing judicial officers with information and options, or the judicial officers themselves? No evidence is presented that suggests poor performance.

**Question 12: *Doesn't this penalize the taxpayers, who have done nothing wrong?***

**Bail Coalition Answer:** “Yes. The local taxpayers, through the use of their tax dollars, have a criminal defendant released back to the community without any direct supervision guaranteeing appearance in court. Nor is there a party looked to by the community to bear a financial burden in the form of a penalty for a defendant's failure to appear. Most importantly, the local community is exposed to the continued threat that the defendant may commit additional crimes while out on bail.”

**Alternate Response:** Pretrial programs do directly supervise defendants in the community – not only to minimize the risks of failure to appear, but also to protect the safety of the community, which again is ignored by the Bail Coalition. Money bail, on the other hand, is designed solely as a mechanism for minimizing the risks of failure to appear. Money bail does nothing to address community safety issues. Moreover, taxpayers in jurisdictions where there is a high reliance on money bail pay an enormous price in jail construction and operation costs to unnecessarily detain defendants who could be safely released.

**Question 13: *Can't this be perceived as a type of taxpayer-funded “criminal welfare” program?***

**Bail Coalition Answer:** “Yes it can. The taxpayer pays for the law enforcement personnel who initially arrest the suspects who are then housed in a taxpayer-funded jail. Defendants are then provided with taxpayer-funded public defenders and released under a ‘free release’ program as described above. If the defendants do eventually appear in court (paid for by the taxpayer) and are convicted of the charges, they are incarcerated in a taxpayer-funded prison. At no point do the defendants assume any financial responsibility for their own actions.”

**Alternate Response:** The Bail Coalition answer correctly points out that every entity in the criminal justice system, including the police, the courts, the jails and the pretrial services programs that provide information and options to the bail setting judge, is taxpayer-funded. The administration of justice is a governmental function – indeed, one of the most important of governmental functions. Governmental functions are funded, at least primarily, by the taxpayer. The pamphlet does not address how this represents “criminal welfare.”

**Question 14: *Are local taxpayers aware such a program exists?***

**Bail Coalition Answer:** “No.”

**Alternate Response:** The Bail Coalition provides no evidence for this bold claim. Pretrial programs throughout the country routinely engage in community outreach activities. At minimum, pretrial services programs are as open to the public as any other government program.

**Question 15: *Is there an alternative way for defendants to be released prior to their trials?***

**Bail Coalition Answer:** “Yes. It is called the commercial bail bonding industry.”

**Alternate Response:** The American Bar Association, the National District Attorneys Association, and the National Association of Pretrial Services Agencies have consistently been calling for the elimination of the commercial bail bonding for profit industry for the past 30-40 years.<sup>10</sup> As the National District Attorneys Association has said, “the methods that have at times been adopted by bondsmen are dire and dramatic, often illegal, and many times unnecessary since the bondsman’s risk of loss is extremely low.”<sup>11</sup> The National Advisory Commission on Criminal Justice, appointed in 1973 by the U.S Department of Justice, had this to say: “Whatever steps might be appropriate to insure appearance, the Commission vigorously endorses the removal of professional bondsmen from the entire area of pretrial release.”<sup>12</sup> Bail bonding for profit has been eliminated in Kentucky, Illinois, Wisconsin, and Oregon, and it is barely used in many other jurisdictions, including throughout the federal system.

**Question 16: *How does it work?***

**Bail Coalition Answer:** “The defendant, or a family member or friend, engages the services of a licensed bondsman, who possesses a state-issued insurance license to secure his release from custody.”

**Alternate Response:** This is true.

**Question 17: *Does this cost the taxpayer?***

**Bail Coalition Answer:** “No. To the contrary, should the defendant fail to appear, the bondsman agrees to surrender him to court or pay the authorities the face amount of the bail bond posted to secure the defendant’s release.”

**Alternate Response:** There is no recent research showing the extent to which bail bondsmen, rather than taxpayer-funded law enforcement officers, apprehend defendants who fail to appear in court. There is one study, done in 1972, so it is certainly dated, that showed that 89 percent of defendants who had failed to appear after bonding out to a bail bondsman in Los Angeles were apprehended by the police, with no help from the bondsman.<sup>13</sup>

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<sup>10</sup> ABA Standard 10-1.4, NDAA Standard 45.6, NAPS Standard 1.4(f).

<sup>11</sup> National District Attorneys Association, *National Prosecution Standards – First Edition*, 1977, page 142.

<sup>12</sup> *National Advisory Commission on Criminal Justice Standards and Goals: Courts*, Standard 4.6, 1978, page 83.

<sup>13</sup> Office of the County Counsel, *Survey of County Counsel Case Files of Actions to Exonerate Bail Forfeiture*, Los Angeles, 1972.

**Question 18:** *So under this method, are the defendants, their friends or family held financially accountable for their actions after release, as well as for their initial release from jail?*

**Bail Coalition Response:** “Yes.”

**Alternate Response:** The National District Attorneys Association has this to say on the question: “The assumption that the bail system, through bondsmen, aids society by giving a defendant a financial stake in appearing in court is fallacious.”<sup>14</sup> The Association goes on: “The result (of the use of bail bonding for profit) has been inequities and injustices that must be resolved for the sake of the American system of justice.”<sup>15</sup>

**Question 19:** *Isn’t this a fairer, more cost-effective method for the taxpayer?*

**Bail Coalition Answer:** “Yes.”

**Alternate Response:** No other common-law country in the world allows bail bonding for profit.<sup>16</sup> Abrogating the responsibility for one of the most important decisions during the processing of a criminal case – whether the defendant is to be released or held while that case is pending – is unparalleled with anything else within the administration of justice. Abrogating this responsibility to private, profit-motivated businesses – a practice that has repeatedly been condemned by the American Bar Association and the National District Attorneys Association – hardly seems fairer to the taxpayer. But rather than claiming to speak for taxpayers, as the Bail Coalition’s pamphlet does, taxpayers should make their own judgments.

**Question 20:** *Why don’t local government leaders insist on just doing it this way?*

**Bail Coalition Answer:** “You’d have to ask them.”

**Alternate Response:** The National Association of Counties, which is comprised of local government leaders, has this to say on the issues of methods of pretrial release:

- “The local judiciary should be encouraged to establish alternatives to the money bail system, such as release on recognizance and supervised release programs.”
- “County governments are urged to establish an intake screening process for the purpose of determining the overall needs of persons charged and assessing risks, in order to select persons charged for release on recognizance (ROR) pretrial programs.”
- “The National Association of Counties recommends that to ease the financial burden of bail on poor defendants, all states enact defendant-based percentage bail laws. NACo also recommends that states and localities make greater use of such non-financial pretrial

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<sup>14</sup> Ibid, page 143.

<sup>15</sup> Ibid.

<sup>16</sup> F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives*, New York, Praeger Publishers, 1991.

release options such as citation release and release on recognizance where there is a reasonable expectation that public safety will not be threatened.”<sup>17</sup>

The cover of the American Bail Coalition pamphlet contains the following claim: “Thousands of violent defendants are released everyday to roam our streets and neighborhoods.” What the pamphlet fails to mention is that most of these violent defendants are released through the intercession of a commercial bail bonding agent. Here are some data from the Bureau of Justice Statistic’s State Court Processing Statistics program, which tracks felony case processing in 40 of the 75 most populous counties in the country:

- Of all defendants charged with rape, 33% were released through a bail bondsman, 6% were released on ROR, and 4% were released on non-financial conditions. An additional 36% were held in jail only because they could not afford the bondsman’s fee – if they could have, they too would have been released.
- Of all defendants charged with robbery, 17% were released through a bail bondsman, 7% were released ROR, and 8% were released on non-financial conditions. An additional 50% were held in jail solely because they could not afford the bondsman’s fee.
- Of all defendants charged with felony assault, 28% were released through a bail bondsman, 8% were released ROR, and 10% were released on non-financial conditions. An additional 33% were held only because they could not afford the bondsman’s fees.
- Of all defendants charged with other violent felonies, 34% were released through a bail bondsman, 12% were released ROR, and 9% were released on non-financial conditions. An additional 30% were held solely because they could not afford the bondsman’s fees.

Thus, the primary vehicle for release of defendants charged with violent offenses is the commercial bail bondsman. Once these potentially violent defendants have purchased their freedom from the bondsmen, there are no restrictions in place that would address their risks to public safety.

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<sup>17</sup> National Association of Counties, supra note 4, pages 4, 5 and 7.