VIRGINIA EARLY REPRESENTATION MANUAL

Arnold Ventures

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This manual is designed to help support public defense lawyers in Virginia to improve the provision of early representation practices through zealous, effective, and informed efforts on behalf of those persons accused of criminal offenses. Parts of this manual were taken directly from NACDL's Texas Bail Manual (2020), Harris County Bail Manual (2018) and Wisconsin Bail Manual (2018). These works all build upon the framework created by NACDL's New Jersey Pretrial Manual (2016) and Colorado Bail Book (2015). Great appreciation goes out to the authors of these works.

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"Pretrial decisions determine mostly everything."

– PROFESSOR CALEB FOOTE, JOHN JAY COLLEGE OF CRIMINAL JUSTICE AND GRADUATE CENTER, CITY UNIVERSITY OF NEW YORK

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Part I:

Introduction

There are "myriad responsibilities that counsel may be required to undertake that must be completed long before trial if the defendant is to benefit meaningfully from his right to counsel."

– *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895, 903-04 (Mass. 2004)

The right to counsel is one of the foundations of the American criminal legal system, serving to protect individuals from the power of the state by equipping them with a zealous, skilled, and resourced advocate working on their behalf. Decades of case law have honed the legal underpinnings of this right, addressing what types of cases require the government to provide representation to those who need it (including: all felonies,[1] any misdemeanor that may include an actual or suspended term of incarceration,[2] and direct appeal[3]), as well as what the fundamental expectations there are on the quality of that representation.[4]

What is less clearly decided is *when* that representation must begin. The Supreme Court has provided only marginal guidance, staking out with clarity that the right to counsel *attaches* the first time a defendant appears before a judicial officer, is informed of the charges against them, and has restrictions imposed on their liberty, but then requiring only that qualified counsel be appointed "within a ***reasonable time after attachment*** to allow for adequate representation at any critical stage before trial as well as trial itself."[5]

While the case law may not specify whether counsel is constitutionally required to be present and available ***for*** the initial appearance, the critical importance of the pretrial period has been demonstrated over and over again. From research that shows stark differences in case outcomes based on whether a person is released or detained prior to trial,[6] to stories of promptly finding

1. *Gideon v. Wainwright,* 372 U.S. 335 (1963).

2. *Alabama v. Shelton*, 535 U.S. 654 (2002) and *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

3. *Douglas v. California*, 372 U.S. 353 (1963), *Evitts v. Lucey*, 469 U.S. 387 (1985).

4. *Strickland v. Washington*, 466 U.S. 668 (1984).

5. *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008) (emphasis added).

6. Laura and John Arnold Foundation, *Research Summary: Pretrial Crim. Just. Rsch.* (Nov. 2013). [hereinafter *LJAF Pretrial Crim. Just. Rsch.*].

and securing critical case evidence before it is lost or destroyed,[7] it is hard to deny that the events that happen in the first few days often set the trajectory of the entire case. As the Supreme Court astutely explained more than 50 years ago, in this early pretrial period events may happen that "might well settle the accused's fate and reduce the trial itself to a mere formality."[8]

But the role of counsel in the first few days of a case is more than just addressing bail or locating witnesses. Attorneys are needed to help address a defendant's pressing medical and mental health needs; explain legal rights and case procedures; and safely facilitate communications with family and community members as well as, when appropriate, with prosecutors and law enforcement.[9]

Meaningful early representation helps protect individuals from a legal system that often punishes persons before they are convicted, forces guilty pleas to obtain release, and incarcerates the poor simply because they cannot afford to buy their freedom. This manual is designed to help support public defense lawyers in Virginia to improve the provision of early representation practices through zealous, effective, and informed efforts on behalf of those persons accused of criminal offenses.

7. Matt Sledge, *Second Bunny Friend Park shooting suspect released after bail reduction*, The Advocate, Dec. 29, 2015 (updated Oct. 2, 2018) https://www.theadvocate.com/new_orleans/news/second-bunny-friend-park-shooting-suspect-released-after-bail-reduction/article_62d29638-334d-5ae7-9610-c51a72c240ea.html.

8. *U.S. v. Wade*, 388 U.S. 218, 224 (1967).

9. CRIM. JUST. STANDARDS FOR THE DEF. FUNCTION Standard 4-3.7 (Am. Bar Ass'n 4th ed. 2017), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [hereinafter ABA DEF. STDS.].

Part II:

Pretrial Detention and Bail

"In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."

– Chief Justice Rehnquist, *U.S. v. Salerno*, 481 U.S. 739, 755 (1987)

Despite the Constitution's promise that every person is presumed innocent until proven guilty, the reality for many is that this promise is a hollow one. Nationally, nearly 70% of individuals in jail[10] are being held pre-trial and are awaiting their day in court.[11] While Virginia fares better than many other states, still nearly 50% of people in Virginia's jails are pretrial detainees.[12]

Although most people arrested will ultimately be released prior to trial,[13] the days and weeks they spend in pretrial detention have long-lasting effects. In Virginia, for roughly 1 in 8 arrestees, they will remain detained for their entire pretrial period.[14] Many of these individuals are held on minimal secured bonds that they are unable to post.[15]

Early detention decisions distort all aspects of the criminal justice system that follow. Research repeatedly shows that individuals who are detained pretrial

10. "Jail" refers to local detention centers typically used for those who are awaiting trial or disposition and those sentenced to serve brief periods of detention. By contrast "prison" refers to facilities used for individuals who have been convicted and are serving a more substantial sentence.

11. Zhen Zeng, U.S. Dep't of Just., Bureau of Just. Stat., NCJ 307086, *JAIL INMATES IN 2022 – STAT. TABLES* (2023). *See also*, Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2024*, PRISON POLICY INITIATIVE, https://www.prisonpolicy.org/reports/pie2024.html (Mar. 14, 2023).

12. PRETRIAL JUSTICE, LEGAL AID JUSTICE CENTER (2023), https://www.justice4all.org/what-we-do/criminal-legal-system/pretrial-justice/ (last visited Feb. 8, 2024); *Incarceration Trends in Virginia*, VERA INSTITUTE (2019) (stating that 45% of Virginia's jail population were held pretrial) https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-virginia.pdf (last visited Feb. 8, 2024).

13. *Virginia Pretrial Data Project: Findings from 2019 and 2020 Cohorts*, VA. CRIM. SENT'G COMM'N, at 26-28 (2023) [hereinafter 2019-20 *Va. Pretrial Data Rep.*]. Note, for ease of identifying the year of the data, the Virginia Pretrial Data Project Reports will be referred to by the year associated with the data it is reporting on, rather than the year it was published.

14. *2019-20 Va. Pretrial Data Rep., Id.*, at 18, Chart 2 (Of the 96,135 people arrested for a jailable offense in 2018, 12,654 or roughly 13% remained detained throughout their entire pretrial period).

15. *Secured Bond Study Highlights*, VA. STATE CRIME COMM'N, https://vscc.virginia.gov/2022/VSCC%20Secured%20Bond%20Study%20Highlights%20FINAL.pdf (Jan. 2022) (stating that 78% of pretrial detainees held the entire pretrial period studied were indigent and the median bond was $2,500).

fare worse across every measure of the criminal justice system than their similarly situated peers who are released pending the disposition of their cases.[16]

National research shows that those detained prior to trial are:

- More likely to be convicted.
- More likely to be sent to jail or prison.
- More likely to receive a longer sentence.
- More likely to be re-arrested up to 2 years after their case ends.[17]

It is easy to identify reasons for these outcomes. Individuals held in jail for just a few days face the loss of their jobs and housing, suffer disruptions to their education, training, and may lose access to critical medical and mental health services. Their incarceration also places added pressures on familial relationships and disconnects them from their community. For many, pleading guilty becomes the most accessible and immediate avenue for release and relief. But those who purchase their freedom with their plea face long-term harms including barriers to employment and employment mobility, housing, education, and services. Many will sacrifice their community voice, losing the opportunity to vote or to serve on a jury. Others may face fines, fees, and costs that keep them tethered to the criminal legal system. It is for all these reasons that it is important for counsel to promptly address a client's pretrial detention status.[18]

Importantly, research shows that when the rates of pretrial release are increased, there are no appreciable negative effects on appearance rates or public safety.[19] Consistently, the overwhelming majority of individuals released pending the resolution of their case appear in court and are not arrested for new violations of the law.

The importance of prompt, effective advocacy at initial appearance cannot be overstated. What happens in the hours and days immediately after arrest shapes the course of an individual's case, influences the stability of their family, and impacts the future of their

16. *LJAF Pretrial Crim. Just. Rsch., supra* note 6.

17. *See*, Dottie Carmichael & Miner P. Marchbanks III, *Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes, and Costs*, Tex. A&M Univ. Pub. Pol'y Rsch. Inst. (Oct. 2012), https://ppri.tamu.edu/portfolio-items/wichita-co/; Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201 (2018), http://dx.doi.org/10.1257/aer.20161503; Christopher Lowenkamp et al., *The Hidden Costs of Pretrial Detention*, Laura and John Arnold Foundation (2013), https://ppri.tamu.edu/portfolio-items/wichita-co/

18. "In every case where the client is detained, defense counsel should discuss with the client, as promptly as possible, the client's custodial or release status and determine whether release, a change in release conditions, or less restrictive custodial conditions, should be sought." ABA DEF. STDS., *supra* note 9, at 4-3.2.

19. *See, e.g.*, *Report of the Reconvened Joint Committee on Criminal Justice*, N.J. Reconvened J. Comm. on Crim. Just. Reform, at 2 (June 6, 2023) ("Defendants released pretrial today also appear for court more consistently than before [criminal justice reform]: in 2014, the court appearance rate was 92.7% as compared to 97.1% in 2020."); Press Release, Harris County, Tex. Office of Justice and Safety, *Harris County Misdemeanor Bail Reform is Helping to Reduce Crime* (Sept. 8, 2022) ("large-scale changes have produced **no increase** in new offenses by persons arrested for misdemeanors."), https://oca.harriscountytx.gov/ODonnell-Consent-Decree. *See generally*, Sarah Staudt, *Releasing People Pretrial Doesn't Harm Public Safety*, PRISON POLICY INITIATIVE (July 6, 2023), https://www.prisonpolicy.org/blog/2023/07/06/bail-reform/#:~:text=No%20matter%20the%20type%20of,narrow%20lens%20of%20crime%20rates.

entire community. Avoiding unnecessary pretrial detention should be among the criminal legal system's highest priorities and defense counsel's staunchest efforts.

This manual is a tool designed to aid defense attorneys in their efforts to share their client's story and affect their release. It includes relevant state and federal law; advice on how to gather and utilize that information effectively; materials to aid counsel in understanding and challenging the use of risk assessment tools; and suggestions on how to address some of the problems faced during pretrial release proceedings relating to charge types and client circumstances. Finally, the manual provides critical information on other early-stage representation activities that can have a lasting impact on the outcome of a client's case.

A. THE VIRGINIA PRETRIAL DATA PROJECT

Faced with a lack of data related to the pretrial process in Virginia, in 2018, the Virginia State Crime Commission (VSCC) oversaw a major collaboration aimed at collecting and integrating charging, arrest, court, and disposition data from an array of state and local government agencies.[20] The initial data focused on adults charged with a criminal offense in the Commonwealth in October 2017, gathering information on nearly 23,000 individuals and following their cases for up to 15 months.[21] The study examined a wide array of variables including demographic information, charge type, criminal history,[22] bond amount and conditions, attorney type, court appearance, and disposition.[23] In 2021, the VSCC released its first report, focusing specifically on those individuals who were charged with an offense punishable by incarceration and arrested (i.e., those who were not released on a summons).

The analysis, including the completion of a Public Safety Assessment (PSA), for each of the 11,487 individuals who had been arrested, demonstrated that the overwhelming majority of those released pretrial, appeared for court and were not arrested for any new criminal offenses during their pretrial period.[24]

Under legislation passed in 2021, the Commonwealth now collects the data year-round.[25] Responsibility for gathering, integrating, and publishing the data now rests with the Virginia Criminal Sentencing Commission (VCSC).[26] To date, data has been collected and posted for 2018, 2019 and 2020.27 In 2022, the VCSC published

20. *Virginia Pre-trial Data Project: Final Report*, VA. STATE CRIM. COMM'N, at 3 (Sept. 2021) [hereinafter 2017 Va. Pretrial Data Rep.], https://vscc.virginia.gov/VirginiaPretrialDataProject/VSCC%20PreTrial%20Data%20Project_Final%20Report.pdf.

21. *Id.*, at 3.

22. Due to limitations on accessing national criminal record information, the study relied solely on Virginia criminal history data.

23. *2017 Va. Pretrial Data Rep., supra* note 20.

24. *Id.* at 2.

25. VA. CODE ANN. § 19.2-134.1 (2021).

26. The data sets can be accessed on the VSCS website: VA. CRIM. SENT'G COMM'N: 2019-2020 Va. Pretrial Data Project, http://www.vcsc.virginia.gov/pretrialdataproject2020.html (last visited Feb. 21, 2024).

27. Data is collected and organized by calendar year (CY) (Jan. 1 to Dec. 31).

"The defendant with means can afford to pay bail. He can afford to buy his freedom. But the poorer defendant cannot pay the price. He languishes in jail weeks, months, and perhaps even years before trial. He does not stay in jail because he is guilty. He does not stay in jail because any sentence has been passed. He does not stay in jail because he is any more likely to flee before trial. He stays in jail for one reason only – he stays in jail because he is poor."

– President Lyndon Johnson, at the signing of the Bail Reform Act of 1966

its analysis of the 2018 data,[28] and in 2023 it published its report analyzing both the 2019 and 2020 datasets.[29] Many of the findings from the initial analysis continue to hold true, including the fact that the majority of those arrested and released prior to trial are not arrested for any new charges and appear for all their court dates while awaiting their case to conclude.

B. WHY PRETRIAL RELEASE MATTERS

Research has repeatedly shown that an individual's pretrial status shapes virtually every aspect of their case.[30] Even a single day of detention can have profound impacts on case outcomes.[31] As the American Bar Association (ABA) recognizes, the "[d]eprivation of liberty pending trial is harsh and oppressive, subjects' defendants to economic and physical hardship, interferes with their ability to defend themselves, and in many instances, deprives their families of support."[32] As a result, the decisions made in the hours following someone's arrest are among the most crucial.

Those released within the first 23 hours of detention not only have a higher likelihood of their case being dismissed and of being provided deferred adjudication opportunities, they also face a reduced likelihood of being incarcerated and shorter sentences than

28. *Virginia Pretrial Data Project: Findings from the 2018 Cohort*, VA. CRIM. SENT'G COMM'N, (Dec. 2022), http://www.vcsc.virginia.gov/pretrialdataproject/Pretrial%20Data%20Project%20-%20Findings%20from%202018%20Cohort%20FINAL.pdf [hereinafter *2018 Va. Pretrial Data Rep.*].

29. *2019-20 Va. Pretrial Data Rep., supra* note 13.

30. *2017 Va. Pretrial Data Rep., supra* note 20, at 80, Table 53 (finding defendants who remained detained the entire pretrial period had higher conviction rates (77%) than those released before trial (56%)). See also, Léon Digard & Elizabeth Swavola, *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Evidence Brief, Apr. 2019 (collecting studies demonstrating worse outcomes for people held in pretrial detention compared to their released peers), https://www.vera.org/downloads/publications/Justice-Denied-Evidence-Brief.pdf; Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J. L. & Econ. 529 (2017) (finding that pretrial detention increases conviction rates by at least 13%); and Will Dobbie, Jacob Goldin, & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 Am. Econ. Rev. 201, 225 (2018) (finding that pretrial release decreases guilty outcomes by 15%, mainly due to increased plea-bargaining power).

31. Christopher Lowenkamp, *The Hidden Costs of Pretrial Detention Revisited* (2022), https://craftmediabucket.s3.amazonaws.com/uploads/HiddenCosts.pdf. *See also*, Carmichael & Marchbanks, *supra* note 17; Stephanie Holmes Didwania, *The Immediate Consequences of Federal Pretrial Detention*, 22 Am. L. & Econ. Rev. 24 (2020).

32. *ABA STANDARDS FOR CRIM. JUST.: PRETRIAL RELEASE*, Std. 10-1.1 (AM. BAR ASS'N 3d ed. 2007) [hereinafter ABA Pretrial Release Stds].

JAIL	▪ **4x greater likelihood of being sentenced to jail** ▪ **3x longer jail sentence**
PRISON	▪ **3x greater likelihood of being sentenced to prison** ▪ **2x longer prison sentence**

those with similar charges and prior history.[33] Moreover, those released in the first 23 hours are less likely to be arrested for a new offense pending the disposition of their case.[34]

1. Case Outcomes

In general, individuals who are detained continuously prior to trial face poorer case outcomes when compared to those released at some point during the pretrial period.[35]

Notably, in Virginia, of those arrested and charged with a criminal offense, **over 30% had their charges dismissed, nolle prosequi, or were found not guilty.**[36] However, persons detained for the full pre-trial period were disproportionately likely to be convicted (76%) in comparison to those who were arrested but released at some point during the pendency of their case (58%).[37]

2. Short Periods of Incarceration, Big Impacts

Even brief periods of incarceration can have major consequences. Research reveals that incarceration for as little as 24 hours can negatively impact appearance rates, lead to new arrests, and other outcomes.[38] Those held in custody just a few days face the loss of their job and stable income. Lost employment can quickly lead to loss of housing, food insecurity, disruptions to childcare access, and interrupted medical and mental health care, placing those detained at greater risk

33. Lowenkamp (2022), *supra* note 31.

34. *Id.*

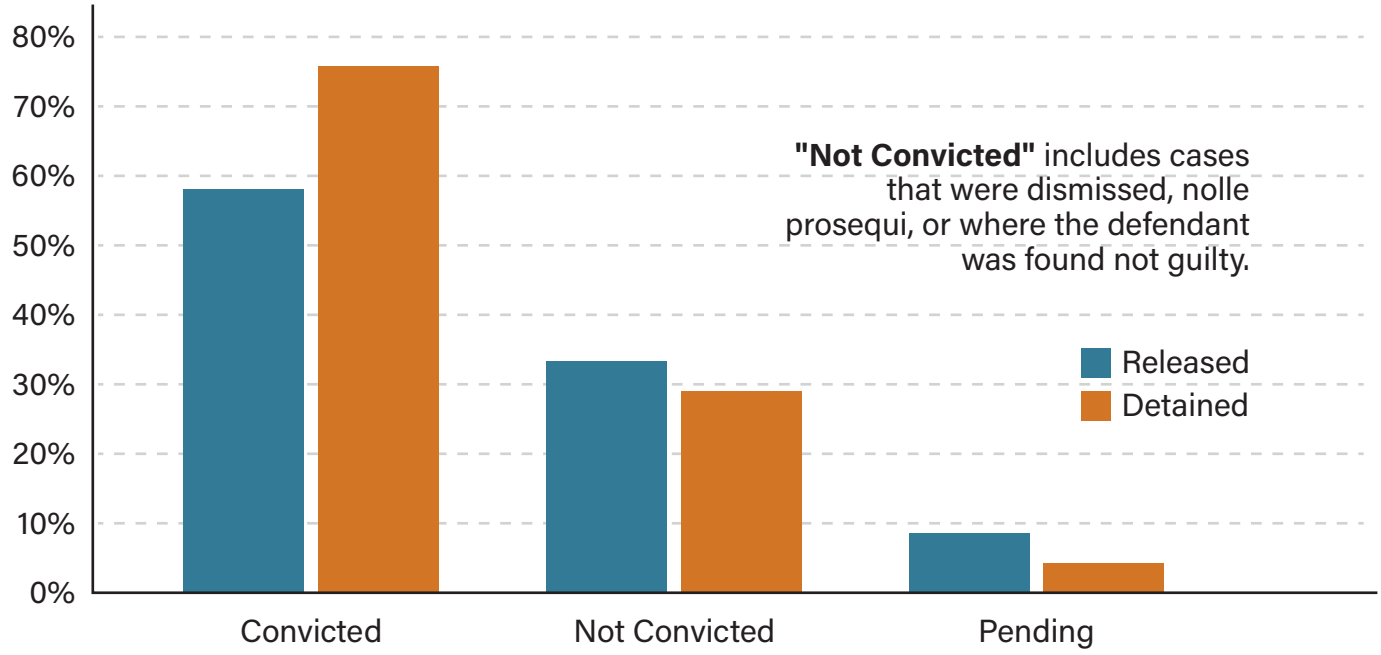
35. *LJAF Pretrial Crim. Just. Rsch., supra* note 6; Dobbie et al, *supra* note 17. *See also*, Carmichael & Marchbanks, *supra* note 17; Didwania, *supra* note 31.

36. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 42, Table 17 (The Pretrial Data project followed cases for a minimum of 15 months or whenever their case was disposed of whichever occurred first. In 2018 31.5% of cases were dismissed, nolle prosequi, or resulted in a not guilty verdict; in 2019, 31.2% were dismissed, nolle prosequi, or resulted in a not guilty verdict; and in 2020 35.31% of cases were dismissed, nolle prosequi, or resulted in a not guilty verdict.).

37. *2018 Va. Pretrial Data Rep., supra* note 28, at 98, Table 53. Similar data was reported with the 2017 cohort; *2017 Va. Pretrial Data Rep., supra* note 20 (77% conviction rate for those detained in comparison to a 56% conviction rate for those released.). Note, 2019-20 *Va. Pretrial Data Rep., supra* note 13, which included data on the CY2019 and CY2020 cohorts, did not report on final case outcomes based upon pretrial release status. It only reported aggregate case outcome data.

38. Lowenkamp (2022), *supra* note 31. *See generally,* Paul Heaton, *The Expansive Reach of Pretrial Detention*, 98 N.C. L. Rev. 369 (2020).

Final Case Disposition-2018 Cohort



for repeated contact with the criminal legal system. Even when new employment is obtained, those individuals are less able to take time off work or have less savings to utilize for transportation, childcare costs, and forgoing a day's pay for each ensuing court appearance. Overtime, these stressors increase an accused person's risk of "failure." Missed court appearances and new arrests expose them to re-arrest, revocation of bond, and reincarceration.

A recent examination of over 1.4 million cases in Kentucky demonstrated that compared to similarly situated individuals who were released, **those detained more than 23 hours:**

- **Are more frequently sentenced to jail or prison.**
- **Receive longer sentences.**
- **Are more likely to be arrested during the pretrial period.**[39]

And a study of the impact of recent reforms in Harris County, Texas[40] demonstrates that prompt action to facilitate release has resulted in:

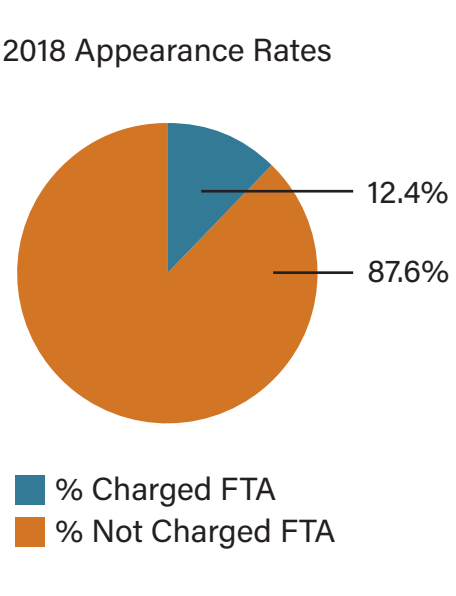
- A decrease in the number of people pleading guilty to misdemeanor charges.[41]
- An increase in the number or people being acquitted or having their case dismissed.[42]

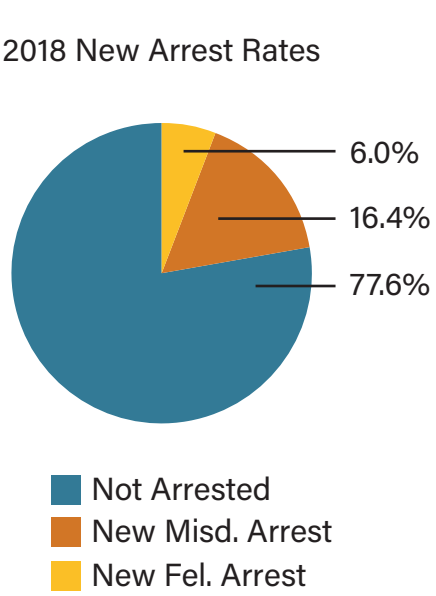
39. Lowenkamp (2022), *supra* note 31, at 4-5.

40. Settlement of the 2016 class action lawsuit, *ODonnell et al v. Harris County* replaced reliance on a secured bail schedule with rules that favor prompt release on a personal bond for most individuals and providing substantive, individualized bail hearings for those ineligible for immediate release. ODonnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

41. Brandon L. Garrett et al., *Monitoring Pretrial Reform in Harris County: Sixth Report of the Court Appointed Monitor*, INDEPENDENT MONITOR FOR THE ODONNELL V. HARRIS CONSENT DECREE (Mar. 3, 2023) at vii, https://sites.law.duke.edu/odonnellmonitor/wp-content/uploads/sites/26/2023/03/ODonnell-Monitor-Sixth-Report-v.25.pdf (Showing the rate of pleas declining from more than 30,000 in 2016 to less than 10,000 by 2021.).

42. *Id.*, at vii (Dismissals and acquittals rose from 31% in 2015 to 56% in 2021.).





- No measurable increase in re-arrest rates within 1 year of release and a 6% decrease in arrest rates 3 years after release.[43]

3. Most individuals released prior to trial appear and are not re-arrested.

In Virginia, the Pretrial Data Project's data repeatedly shows the majority of individuals arrested but released prior to trial appear for all their court dates and are not arrested for new charges.[44] Data from over 225,000 people arrested and subsequently released between 2018 and 2020, reveals more than 86% of those individuals appeared for all their court dates, and roughly 78% were not arrested for any new, jailable criminal charge during the pendency of their case.[45]

Failure to Appear Rates

In 2018, of the 83,481 people arrested and subsequently released, 12.4% of them were subsequently charged with failing to appear. This rate holds true for the 2019 cohort as well (78,429 individuals were released with 12.6% of them later charged with failing to appear). The data from 2020, unsurprisingly, has a measurable increase in failure to appear rates (16.2%). As the VCSC analysts noted, the complexities accompanying the events of the pandemic likely contributed to this spike and may not be reflective of typical patterns.

> "Due to the health emergency, the court systems in Virginia, just like other states, quickly altered the hearing/court schedules to contain or decrease the spread of the virus, which led to delayed case processing and case backlogs. This may have led to more confusion regarding upcoming hearing dates and . . . may have resulted in higher failure to appear . . . . rates observed for the CY2020 cohort." [46]

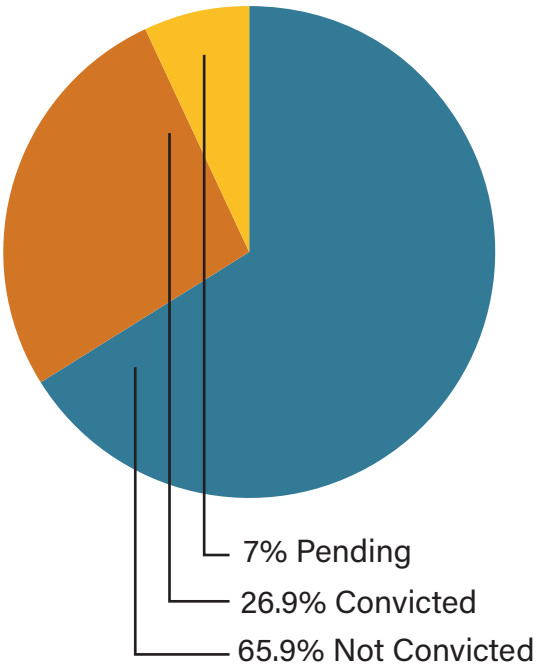
43. Paul Heaton, *The Effects of Misdemeanor Bail Reform*, QUATTRONE CENTER (Aug. 16, 2022).

44. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 37-38, Chart 6.

45. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 49, Table 19 (78.8% of those released were not arrested for a new, jailable criminal offense in Virginia).

46. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 38.

Disposition of FTA Charges
2018 Cohort



It is important to note that the data indicates most of those charged with failing to appear during their pretrial period are **not** ultimately **convicted** of doing so.

An in-depth examination by the VCSC of 12.4% individuals from the 2018CY cohort who were charged with failing to appear showed that 65.9% of them were ultimately *not* convicted of failing to appear.[47]

The analysis also revealed that **nearly 1 in 3 people** charged with failing to appear for court **were arrested the same day as their court appearance**.[48]

Practice Tip:

Attorneys should not assume that clients charged with or convicted of failing to appear did so willfully. Research by the VCSC revealed 4.5% of people charged with FTA in 2018 were detained the *entire* pretrial period.

It is important for defenders to follow up with clients about the circumstances of any FTA charges and, when available, to check court records that may provide critical information.[49]

Re-Arrest Rates

Most people released prior to trial are not charged with a new criminal offense[50] during their pretrial period. Across all three years of pretrial data, better than 75% of those released pretrial were **not charged** with a new, jailable offense.[51]

For those arrested for a new charge during their pretrial period, the majority of new arrests were for misdemeanor offenses.[52] Of all those released in 2018, only 6% were

47. *2018 Va. Pretrial Data Rep., supra* note 28, at 78 (26.9% were convicted of FTA and the remaining 7.2% still had their failure to appear charge pending 15 months after the end of the 2018 calendar year.); *id*. at 73.

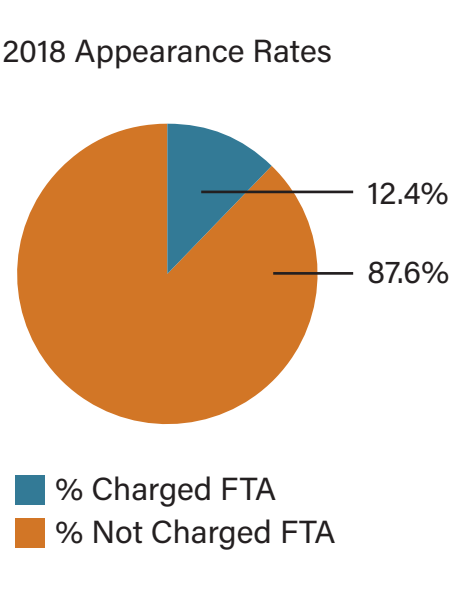
48. *2018 Va. Pretrial Data Rep., supra* note 28, at 77 (Reporting 31.2% of those charged with failing to appear were arrested the same day as their alleged failure to appear occurred.).

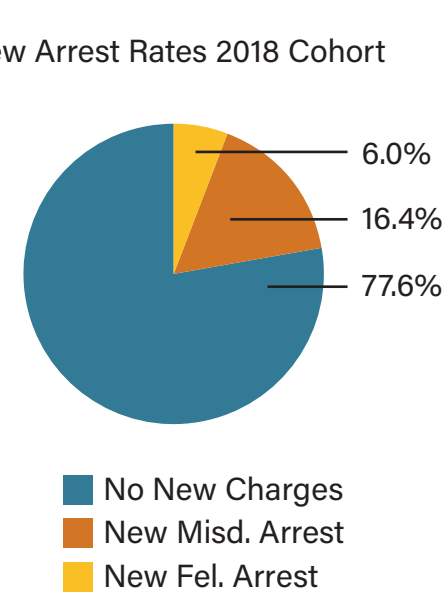
49. *2018 Va. Pretrial Data Rep., supra* note 28, at 73 (In their analysis, the VCSC notes there is no available information as to whether such charges were the result of refusals to come to court, medical or mental health issues, failure to transport, or other unknown reasons.)

50. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 37 (The Pretrial Data Project only collects information relating to Virginia charges. No data is collected regarding federal or out-of-state arrests.).

51. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 37-38.

52. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 38. 2017 *Va. Pretrial Data Rep., supra* note 20, at 69, Table 45 (For the CY2018 cohort, only 10% of those released were arrested for a new felony charge during their pre-trial period.).





arrested for a new felony offense, while 16.4% of those released were charged with a new, jailable misdemeanor offense. Similar data was reported in 2019.[53] Additionally, of those charged with a new crime during their pretrial period, less than half were convicted of that new offense.[54]

C. CONCERNS ABOUT THE USE OF MONEY BAIL

Over the past three decades the reliance upon monetary bail has steadily increased.[55] This change has occurred despite the fact that there is no empirical evidence that the imposition of cash bail reduces the likelihood than an individual will be arrested during the pretrial period or increases the likelihood they will appear in court.[56] Instead the requirement to post a monetary bail is often rooted in a mistaken belief that by having some financial stake, an individual is more likely to fulfill their bail requirements.

53. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 38.

54. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 68, Chart 9 (Overall, 46% of those with a new, in-state jailable offense arrest were convicted; 41% were not convicted; and 13% still had their new charge pending at the conclusion of their case.); *id.* at 72, Chart 10 (Of those with an arrest for a new felony offense, 33% were not convicted of their new charge, 38% were convicted, and 29% still had their new charge pending.); *id.* at 76, Chart 11 (Of those with an arrest for a new misdemeanor offense, 46% were not convicted of their new charge, 46% were convicted, and 8% still had their new charge pending.).

55. Ram Subramanian et al., *Incarceration's Front Door: The Misuse of Jails in America*, VERA INSTITUTE (July 2015) at 30. See also, Nicole Zayas Manzano, *The High Price of Cash Bail*, 48:3 ABA HUM. RTS. MAG.: ECON. ISSUES IN CRIM. JUST. (Apr. 12, 2023). To learn more about the history of monetary bail, *see* Timothy Schnacke et al., *History of Bail and Pretrial Practices*, PRETRIAL JUST. INST. (Sept. 2010).

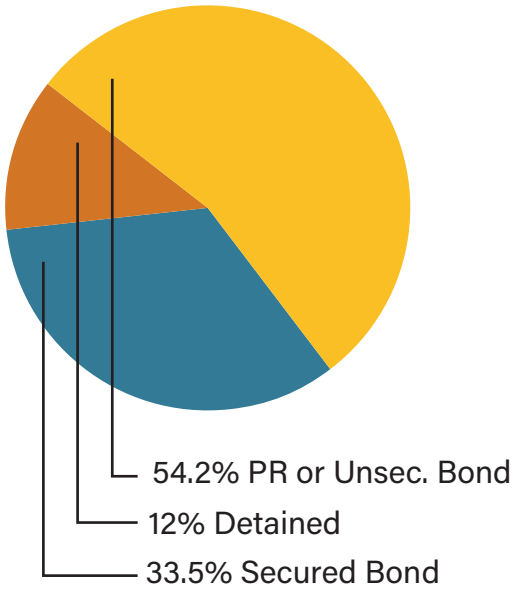
56. *See* ODonnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017) (overruled based on *Younger* abstention doctrine by *Daves v. Dallas Cty*, 64 F.4th 616 (5th Cir. 2023).).

***40%** of Americans say they would have trouble covering a $400 emergency.*[57]

***58%** of Americans have less than $1,000 in savings.*

***26%** of Americans have no savings.*[58]

2019 Pretrial Release by Bond Type



However, given that more than 90% of individuals who have a secured bond will rely on the services of a bondsman,[59] the personal "skin in the game" argument may hold little weight. Those individuals are paying a percentage of the bail to the bondsman in the form of a non-refundable fee. This sunk cost remains even if they fulfill every condition.[60] They only face an additional financial penalty if they subsequently violate a term of their release ***and*** the court pursues forfeiture of the bond. In such instances it is the bondsman who is financially liable to the court, and the defendant is liable to the bondsman. In this regard, once the initial payment to the bondsman is made, the secured bond, in so far as the individual defendant is concerned, is no different than an unsecured bond. By contrast, if the individual had posted a cash bond, their compliance with their release conditions is directly connected to their ability to regain the money they have posted.

57. *Report on the Economic Well-Being of U.S. Households in 2017*, Board of Governors of the Federal Reserve System (May 2018) at 21 (Note: figure is the ability to pay the expense immediately using cash or a cash equivalent (such as a credit card that can be paid off within 30 days).

58. *See, e.g.,* Cameron Huddleston, *Survey: 69% of Americans Have Less Than $1,000 in Savings,* GOBANKINGRATES: LIFE AND MONEY (Dec.16, 2019), https://web.archive.org/web/20201112001604/https://www.gobankingrates.com/saving-money/savings-advice/americans-have-less-than-1000-in-savings/.

59. *2018 Cohort Pretrial Data Project: Statewide and Locality Descriptive Findings*, VA. CRIM. SENT'G COMM'N (Dec. 1, 2022) at Table 6 [hereinafter *2018 Va. Pretrial Data Project Descriptive Findings*]; *2019 Cohort Pretrial Data Project: Locality Descriptive Findings*, VA. CRIM. SENT'G COMM'N (Dec. 1, 2023) at Table 6 [hereinafter *2019 Va. Pretrial Data Project Descriptive Findings*]; *2020 Cohort Pretrial Data Project: Locality Descriptive Findings*, VA. CRIM. SENT'G COMM'N (Dec. 1, 2023) at Table 6 [hereinafter *2020 Va. Pretrial Data Project Descriptive Findings*]. *2020 Cohort Pretrial Data 2020 Cohort Pretrial Data Project: Locality Descriptive Findings,* VA. CRIM. SENT'G COMM'N (Dec. 1, 2023) at Table 6 [hereinafter *2020 Va. Pretrial Data Project Descriptive Findings*].

60. *ODonnell*, 251 F. Supp. 3d at 1109 ("The up-front payment of the bondsman's premium is a sunk cost, and is not recoverable even if the defendant appears for every court date. Neither secured nor unsecured bonds provide meaningfully different financial incentives.").

	2018		2019		2020	
	PR/ Unsec. Bond	Secured Bond	PR/ Unsec. Bond	Secured Bond	PR/ Unsec. Bond	Secured Bond
Placed on Pretrial Supervision	38.1%	61.9%	44.2%	55.8%	49.3%	50.7%
Not Placed on Pretrial Supervision	63.3%	36.7%	65.1%	34.9%	67.2%	32.8%

	2018		2019		2020	
	PR / Unsec. Bond Only	PR / Unsec. Bond + Supervision	PR / Unsec. Bond Only	PR / Unsec. Bond + Supervision	PR / Unsec. Bond Only	PR / Unsec. Bond + Supervision
Appearance Rate	88.4%	87%	88.3%	86.9%	84.5%	84.3%

	2018		2019		2020	
	PR / Unsec. Bond Only	PR / Unsec. Bond + Supervision	PR / Unsec. Bond Only	PR / Unsec. Bond + Supervision	PR / Unsec. Bond Only	PR / Unsec. Bond + Supervision
Appearance Rate	88.4%	87%	88.3%	86.9%	84.5%	84.3%

In Virginia, roughly 1 in 3 defendants is released on a secured bond.[61] When setting a secured bond, judicial officers may be expecting the individual to use the services of a bail bondsman, with the belief that such an approach creates an additional layer of accountability. However, the Commonwealth frequently takes a "belt and suspenders" approach, with a measurable number of individuals being required to both post a secured bond and be placed on pretrial supervision with a local community corrections office.[62] According to the Pretrial Data Project, at least half of all individuals released on a secured bond were also required to be on pretrial supervision.[63]

While overall, more than 87% of those released appeared for their court dates, it is worth noting that individuals who had both a secured bond ***and*** pretrial supervision had slightly higher appearance rates than those arrested and released on a secured bond without supervision.[64]

By contrast, of those released on personal recognizance or an unsecured bond, individuals on pretrial had slightly lower appearance rates than those released on an unsecured bond alone.[65] It is critical to note, however, that individuals placed on pretrial supervision may have been placed on supervision because of additional circumstances or prior history that may indicate they are at a greater risk to miss court than those released on personal recognizance or an unsecured bond alone.

PRACTICE POINT:

In discussing bail options with a client, consider seeking a minimal secured bond that the client could post in cash. This would, arguably, increase the client's financial incentives to comply with their release terms, as they would regain their money by doing so.

For example, if the court were inclined to set bail at $2,500, consider asking the court to set bail at $250 instead. Rather than paying the bondsman $250 to post the bond (a sunk cost that is non-refundable), the defendant could pay $250 to the court, with the knowledge that fully complying with their release conditions will ensure they receive back all $250 at the conclusion of their case. If the court felt compelled to have a larger financial incentive at stake, the court could combine the secured bond with an additional unsecured bond.

Of course, it is important to discuss this fully with the client, as some individuals rely on

61. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 26, Table 3 (Data for the 2018 and 2019 cohorts is very similar. In 2018, 13.2% of defendants were detained the entire pretrial period, 35.3% were released on a secured bond, and 51.5% were released on personal recognizance or an unsecured bond. In 2020, with efforts during the pandemic to reduce jail populations, release rates were slightly higher, with 10.5% of defendants remaining detained throughout their pretrial period, 32% released on a secured bond, and 57.5% released on personal recognizance or an unsecured bond.).

62. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 33, Table 7.

63. *2019-20 Va. Pretrial Data Rep., supra* note 13, at 33, Table 7.

64. *2018 Va. Pretrial Data Project Descriptive Findings, supra* note 59, at Table 1; *2019 Va. Pretrial Data Project Descriptive Findings, supra* note 59, at Table 1; *2020 Va. Pretrial Data Project Descriptive Findings, supra* note 59, at Table 1.

65. *2018 Va. Pretrial Data Project Descriptive Findings, supra* note 59, at Table 1; *2019 Va. Pretrial Data Project Descriptive Findings, supra* note 59, at Table 1; *2020 Va. Pretrial Data Project Descriptive Findings, supra* note 59, at Table 1.

installment payments with a bondsman,[66] making a cash bond a less attractive alternative as they cannot secure their freedom until 100% of the funds are deposited. It is also important to be aware that a low bond amount (under $1,000) will likely not be of interest to a bail bondsman, leaving the client only able to post that amount in cash or property.

In general, the use of cash bail ties release to resources rather than to risk, allowing those with access to resources to purchase their freedom, while those without such resources are forced to remain in detention.

66. Many bail bond companies advertise low down payments. *See, e.g.,* APEX BAIL BONDS, https://www.apexbailbond.com/bail-bonds-payment-plans (last visited Feb. 21, 2024) (offers payment plans and financing); HALF-DOWN BAIL BONDS, https://www.halfdownbailbonding.com/services (last visited Feb. 21, 2024) (advertises only 5% of the bail be paid upfront); MR. BAIL VIRGINIA, https://mrbailvirginia.com/ (last visited Feb. 21, 2024) (promises payment plans as low as 1% down.).

Part III:

How Bail Works in Virginia

A. DEFINITIONS AND KEY TERMINOLOGY

Bail refers to a person's release from custody. This release can include certain terms and conditions.

> *"The pretrial release of a person from custody upon those terms and conditions specified by order of an appropriate judicial officer."*[67]

Recognizance: is a form of release in which a person executes a written promise to appear in court and abide by any other terms set as a condition of release. There is no amount of money specified, pledged, or paid when a person is released on recognizance.

> *"[A] signed commitment by a person to appear in court as directed and to adhere to any other terms ordered by an appropriate judicial officer as a condition of bail."*[68]

Sometimes individuals mistakenly use the term "personal recognizance" or "PR" bond when referring to an unsecured bond. Any release on one's "recognizance," by definition, does not involve any dollar amount being pledged or promised. Care should be taken to avoid the use of such incorrect terminology.

Bond refers generally to the financial terms and conditions of a person's release. Bonds involve a specified amount of money and can be secured or unsecured.

> *"Posting by a person or his surety of a written promise to pay a specific sum, secured or unsecured, ordered by an appropriate judicial officer as a condition of bail to assure performance of the terms and* conditions contained in the recogni*zance."*[69]

Unsecured Bond: a bond in which a person's release is conditioned upon their pledging or committing to a specified amount of money, but they are not required to pay any of that money upfront to be released. However, if the person fails to appear for court, the court may revoke the bond and may require the person to pay all or some of the amount pledged.

Secured Bond: a bond in which release is conditioned upon the deposit of a set amount of money. The person may not be released until the specified amount is deposited. Secured bonds can be posted in several ways. The choice as to the method to be used to post the bond is the decision of the accused.[70]

- **Cash:** 100% of the bond amount is deposited. The money is fully refunded to the person posting the bond so long as the defendant appears for all court proceedings.
- **Corporate Surety:** the use of commercial company (a licensed bail bondsman) to

67. VA. CODE ANN. § 19.2-119.

68. VA. CODE ANN. § 19.2-119.

69. VA. CODE ANN. § 19.2-119.

70. VA. CODE ANN. § 19.2-123(3).

Factor	Admission to Bail §19.2-120	Terms of Bail §19.2-121	Notes
Nature & circumstances of the offense.	X	X	
Whether a firearm was used.	X	X	
Weight of the evidence.	X	X	
Risk for obstruction of justice or threat to a witness, victim, or juror.	X	X	§19.2-120 includes risk of threat or harm to a family or household member as well.
History of appearance in court, "flight to avoid prosecution," and prior failures to appear at court.	X	X	§19.2-120 specifically refers to "convictions" for failure to appear.
Record of convictions.	X	X	Both use the term "conviction" rather than arrest or charge.
Length of residence in the community.	X	X	
Employment	X	X	
Education	X	X	
Family ties	X	X	
Medical conditions and involvement in treatment.	X		
Mental health conditions and involvement in treatment.	X		
Substance use and treatment.	X		
Financial resources of the accused and their ability to pay bond.		X	
"[A]ny other information which the court considers relevant" to determining whether the person is "unlikely to appear for court proceedings."		X	§19.2-121 only calls for the consideration of other factors that bear on a person's likelihood of appearance.

post the bond. The company charges the defendant a fee of 10% of the bond amount for their service in posting the bond. This fee is non-refundable regardless of the outcome of the case.

Property: the bond is secured through real or personal property. The property owner(s) must demonstrate they have sufficient equity in the property to fully satisfy the bond amount.[71]

Bond Conditions: are the non-monetary terms of release set by a judicial officer. These can include requirements to avoid certain places or activities (such as prohibiting a defendant from going to a particular address or from consuming alcohol) as well as affirmative requirements (such as living at a particular address or maintaining employment).[72]

Judicial Officer: unless specified otherwise, the term includes magistrates; judges in General District, Juvenile & Domestic Relations, and Circuit Courts; and judges/justices of Virginia's appellate courts.

B. LEGAL STANDARDS FOR SETTING BAIL

1. Relevant Virginia Law

Virginia law begins with the premise that all individuals should be given bail unless there is probable cause to believe the person will not appear or their liberty will constitute an unreasonable danger to themselves or others.[73]

Virginia Code §19.2-120 states that "[a] person who is held in custody pending trial or hearing . . . **shall be admitted to bail** by a judicial officer, ***unless*** there is probable cause to believe that:

1. He will not appear for trial or hearing or at such other time and place as may be directed, or
2. His liberty will constitute an unreasonable danger to himself, family or household members as defined in § 16.1-228, or the public."

2. Factors To Be Considered

When a person is arrested for either a felony or misdemeanor charge, the judicial officer must first decide whether to release the individual, with the default being that a person "shall be admitted to bail" unless there is probable cause to believe they will not appear for court or will pose an unreasonable risk of danger to themselves or others.[74] In determining whether to admit a person to bail, judicial officers are to consider:[75]

- **The person's history**
  - How long a person has lived in the community.
  - Their involvement in employment.
  - Their Involvement in education.
  - Their medical conditions and treatment
  - Their mental health conditions and involvement in treatment
  - Their substance use and involvement with treatment
  - Their family ties.
  - Any other ties to the community.

71. VA. CODE ANN. § 19.2-123(3).

72. VA. CODE ANN. §§ 19.2-121; 19.2-123.

73. VA. CODE ANN. § 19.2-120(A). Note, the Virginia Constitution does not expressly mandate that individuals receive bail, but rather only prohibits the setting of "excessive" bail. Va. Const. art. I §9.

74. VA. CODE ANN. § 19.2-120(A).

75. VA. CODE ANN. § 19.2-120(B).

- **The person's "record of convictions."**
  - *Note: the statute specifically refers to "convictions" not record of arrests.*
- **The person's history of appearance at court or their "flight to avoid prosecution or convictions for failure to appear at court proceedings."**
  - *Note: the statute specifically refers to "flight to avoid prosecution" rather non-appearance more generally, and "convictions" for failure to appear, not record of charges for failing to appear.*
- **Case details**
  - The nature and circumstances of the offense
  - Whether a firearm was alleged to have been used
  - The weight of the evidence
- **Risk for obstruction of justice**
  - Whether the person is "likely" to attempt to obstruct justice or threaten, injure, or intimidate a witness, juror, victim, or household member.

3. Determining the Type and Conditions of Release

If the person is to be admitted to bail, the judicial officer must then determine the type of release and the conditions of release.[76]

The least restrictive type of release is recognizance. If a recognizance is not appropriate, other options the judicial officer may utilize include:

- An unsecured bond.
- A secured bond.
- Placing the defendant in the custody of a designated person (such as a family member) or organization.[77]
- Holding the individual without bond.

Once the type of release is determined, the judicial officer may set conditions of release including:[78]

- Restricting travel (such as not leaving the state).
- Restricting associations and contacts (such as not associating with co-defendants or having contact with the complaining witness).
- Restricting where a person can reside.
- Restricting contacts with household members.[79]
- Requiring the defendant to maintain or actively seek employment.
- Requiring the defendant maintain or enroll in an educational program.
- Complying with a curfew.
- Prohibiting the possession of firearms or other dangerous weapons.
- Refraining from the "excessive" use of alcohol.
- Refraining from the use of any controlled substance not prescribed by a health care provider.
- Submitting to drug and/or alcohol testing.
- Being placed on home electronic incarceration
- Being placed on GPS monitoring (note: this condition is limited to use with those having a secured bond)

76. VA. CODE ANN. §19.2-121.

77. VA. CODE ANN. §§ 19.2-123(A)(1), (2a), (3). Note: When a person is placed in the custody of a 3rd party, that individual is typically required to sign the release documents agreeing to serve in that role and to report any violations to the court or pretrial agency.

78. VA. CODE ANN. § 19.2-123(3)(a).

79. VA. CODE ANN. § 16.1-228 (defining "Household" member).

The Code also provides a **catch all provision** allowing the judicial officer to impose "any other condition deemed *reasonably necessary* to assure appearance as required, and to assure [the defendant's] good behavior pending trial."[80]

Individuals released on a recognizance bond are subject to the following conditions, along with any additional special conditions added by the judicial officer:[81]

- Appear at the date, time, and location specified as well as any other times to which the case may be continued.
- Not leave the Commonwealth. (Note: a judicial officer may waive this condition).
- Keep the peace and be of good behavior during the pendency of the case.

PRACTICE POINT:

When considering issues surrounding release, it is just as important to consider the terms being imposed as it is to consider the financial conditions for release. When interviewing a client, it is critical to obtain information that can help inform release conditions and to discuss the potential conditions the court may impose. For example, does the client's work or family obligations take them out of the state? If so, prohibitions on travel can prove highly problematic and undermine protective factors the client has such as employment or family support.

Some jurisdictions take a kitchen sink approach to setting conditions, directing every person to abide by a lengthy set of restrictions and obligations, believing it is not burdensome or problematic to do so and may even believe those conditions are "helpful." These "blanket conditions" raise both legal and practical concerns. From a constitutional standpoint, a defendant has a right to due process, which includes the right to individualized decisions when restrictions are placed on their liberty.[82]

As an advocate, it is critical to argue that conditions be individually tailored to only those reasonably necessary to assure that defendant's appearance and good behavior based on the facts and circumstances of the client and the case. Over-conditioning can have many harmful consequences including interfering with employment and family responsibilities. Under no circumstances should pretrial release conditions be used as a form of punishment.

The factors for determining if a person should be admitted to bail[83] and if so, what the terms and conditions of such bail should involve[84] are very similar, but it is important to recognize some of the specific differences and details for each provision.

4. Special Considerations

If arrested for ***a felony***, a person may only be released on a ***secured bond*** if they:

- Have previously been convicted of a felony.
- Are presently on bond for an unrelated arrest.

80. VA. CODE ANN. § 19.2-123(4) (emphasis added).

81. VA. CODE ANN. § 19.2-135.

82. U.S. CONST. AMEND. XIV, § 11. In some jurisdictions, challenges to blanket pretrial conditions have also utilized an Eighth Amendment/Excessive Bail analysis. For a more detailed discussion of the development of this case law, *see* Kenneth J. Rose & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision*, THE PRETRIAL JUSTICE INST. (June 2011) (produced under a grant from the U.S. Bureau of Just. Assistance awarded to the Va. Dep't of Crim. Just. Serv.).

83. VA. CODE ANN. § 19.2-120.

84. VA. CODE ANN. § 19.2-121.

(Note an individual who is on recognizance for an unrelated arrest, is not "on bond".)

- Are on probation or parole.[85]

The requirement for a secured bond can be waived by the court with the agreement of the Commonwealth.

PRACTICE POINT:

While some statutory provisions require the setting of a secured bond, there are no rules regarding the amount of that bond. When appropriate, consider advocating for a *de minimus* secured bond (such as $1) along with a more significant unsecured bond.

5. Drug and Alcohol Screening

If the jurisdiction is served by a pretrial services agency, that agency may request, prior to a bail hearing, that a defendant to give a urine sample or take a breath test to test for the presences of drugs and/or alcohol.[86]

The test can only be used to consider (or reconsider) appropriate conditions of release.[87] "[I]n no event shall the judicial officer have access to any screening or test results prior to making a bail release determination" or setting the amount of bond. The screening results can only be used, along with any recommendations by the pretrial agency, to set appropriate conditions of release.[88] Anyone who has tested positive may be ordered to refrain from using alcohol or illegal drugs and be subjected to periodic testing.[89] The results of such testing are only admissible in a proceeding to impose a sanction for a violation of a condition of release.[90]

6. Other Virginia Bail Provisions

Appeal of Bail Decisions: Any bail decision made by a judge may be appealed to the next highest court up to the Virginia Supreme Court.[91]

- Both the defense and the Commonwealth may appeal a bail decision.
- When an appeal is made, the court from which the decision is being appealed may, upon good cause, stay the execution of its order for as long as "reasonably practicable" for the appealing party to get an expedited

85. VA. CODE ANN. § 19.2-123(A).

86. VA. CODE ANN. § 19.2-123(B). Note: this testing can only be done if the agency has a screening program approved for this purpose by the chief judge of the jurisdiction's general district court.

87. VA. CODE ANN. § 19.2-123(B) ("The judicial officer and agency shall inform the accused or juvenile being screened or tested that the results shall be used by a judicial officer only at a bail hearing and only to determine appropriate conditions of release or to reconsider the conditions of bail at a subsequent hearing.").

88. VA. CODE ANN. § 19.2-123(B) (". . . in no event shall the judicial officer have access to any screening or test result prior to making a bail release determination or to determining the amount of bond, if any. Following this determination, the judicial officer shall consider the screening or test results and the screening or testing agency's report and accompanying recommendations, if any, in setting appropriate conditions of release. In no event shall a decision regarding a release determination be subject to reversal on the sole basis of such screening or test results.").

89. VA. CODE ANN. § 19.2-123(B).

90. VA. CODE ANN. § 19.2-123(B).

91. VA. CODE ANN. § 19.2-124.

hearing in the next highest court.[92] However, if the person who has been granted bail has been released from custody on that bail, then there can be no stay of that person's release.[93]

Increases in Bond Amounts: If the bond amount is subsequently deemed insufficient, the Commonwealth may, on "reasonable notice" to the person (and any surety) move the court to increase the amount of bond, add or amend release conditions or revoke the bail set.[94] Bail increases and revocations are subject to appeal in the same manner as the initial bail itself.[95]

Failure to Appear: A person who fails to appear in court may face criminal charges, as well as the modification or revocation of their initial bail.

- **Criminal Charges:**
  - To hold a person criminal liable, the state must demonstrate the defendant's failure to appear is "willful."[96]
  - If initially charged with a felony, any failure to appear is a Class 6 felony.[97]
    - If initially charged with a misdemeanor, any failure to appear is a Class 1 misdemeanor.[98]
  - In the alternative, the court may charge the individual with contempt of court (under §19.2-456), but a person cannot be sentenced for both failure to appear (under §19.2-128) and contempt for the same court absence.[99]
- **Bail implications**
  - If a person willfully fails to appear the court can order the "forfeiture" of any security given (secured bond) or pledged (unsecured bond).[100]
  - The court may also order the "revocation" of a person's bail.[101]
  - Revocation and forfeiture are distinct practices. The court can elect to proceed with either one or with both.

92. If the Commonwealth requests a stay, defense counsel should be prepared to argue how long the stay should last. This will depend on the schedule of the next highest court in that jurisdiction. Some jurisdictions permit indefinite stays, but this violates the terms of the statute.

93. VA. CODE ANN. § 19.2-124.

94. VA. CODE ANN. § 19.2-132. In *Dorsey v. Commonwealth*, 32 Va. App. 154 (Va. Ct. App. 2000), the Court of Appeals of Virginia held that a trial court can revoke or modify bail *sua sponte*, despite the plain wording of §19.2-132. If a judge attempts do this, or the Commonwealth tries to revoke or modify bail without prior written notice, defense counsel should argue that prior written notice is a basic requirement of the Due Process Clause of the Fourteenth Amendment and must be given prior to a restriction on liberty.

95. VA. CODE ANN. § 19.2-132.

96. VA. CODE ANN. § 19.2-128.

97. VA. CODE ANN. §19.2-128(B).

98. VA. CODE ANN. § 19.2-128(C).

99. VA. CODE ANN. § 19.2-129.

100. VA. CODE ANN. § 19.2-128(A) ("Whoever, having been released . . . willfully fails to appear . . . shall, after notice to all interested parties, incur a forfeiture of any security which may have been given or pledged for his release, unless one of the parties can show good cause for excusing the absence, or unless the court, in its sound discretion, shall determine that neither the interests of justice nor the power of the court to conduct orderly proceedings will be served by such forfeiture.").

101. VA. CODE ANN. § 19.2-132.

- **Revocation** is the cancellation of the existing release from custody provision. When bail is revoked, the individual who had been the subject of that bail will be remanded to custody.
  - Thereafter the court may elect to reinstate the bond with the same or additional financial and non-financial terms and conditions.
  - **Forfeiture** is the imposition of a financial penalty in the form of all or part of the security given or pledged. Forfeiture is a civil proceeding.
    - When the court orders a bond is forfeited, the surety has 150 days to bring the defendant before the court.[102] If they do not appear within 150 days, an order of default is issued and the bond is forfeited.
    - If the accused appears within 24 months from the finding of default, the court may refund all or part of the forfeited funds.[103]

C. RELEVANT CONSTITUTIONAL PROVISIONS

When addressing state bail practices and statutory rules trigger several state and federal constitutional provisions, most notably, the rights to **due process** and **equal protection**. "[I]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[104]

While the Supreme Court in *U.S. v. Salerno* made clear there is no constitutional right to bail,[105] there is a prohibition on the imposition of any term, including financial, that is greater than "reasonably calculated" to assure a person's appearance and good behavior pending trial.[106]

> "The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty. Without this conditional privilege, even those wrongly accused are punished by a period of imprisonment while awaiting trial and are handicapped in consulting counsel, searching for evidence and witnesses, and preparing a defense."[107]

The Fourteenth Amendment Due Process Clause prohibits states from depriving a person of life, liberty, or property without due process of law. There are two components to the due process clause: substantive due process and procedural due process.

- **Substantive Due Process:** prevents government from engaging in conduct that "shocks the conscious" or interferes

102. VA. CODE ANN. § 19.2-143.

103. VA. CODE ANN. § 19.2-130.

104. United States v. Salerno, 481 U.S. 739 (1987) (In upholding the provision of the federal Bail Reform Act of 1984, which permitted courts to detain individuals without bail, the Court noted the process was accompanied by substantial procedural protections, including an adversarial hearing in which the government had to demonstrate by clear and convincing evidence that no release conditions could reasonably assure the person's appearance and safety of the community.).

105. *Salerno*, 481 U.S. at 752 ("The Eighth Amendment addresses pretrial release by providing merely that '[e]xcessive bail shall not be required.' This Clause, of course, says nothing about whether bail shall be available at all.").

106. Stack v. Boyle, 342 U.S. 1, 4 (1951); U.S. Const. amend. VIII; Va. Const. art. 1, §9.

107. *Stack, 342 U.S. at 8.*

with rights "implicit in the concept of ordered liberty."[108]

- **Procedural Due Process:** prevents government from depriving persons of life, liberty, or property in an unfair manner. This means that even if the government's action does not, itself, violate substantive due process, the manner in which it is done can still violate procedural due process.

In *Salerno*, in addition to the Eighth Amendment challenge, the petition asserted the federal Bail Reform Act violated his due process rights. The substantive due process claim was that the Act's authorization of pretrial detention (a liberty deprivation) constituted punishment before trial. Although ruling against Salerno, the Supreme Court recognized that pretrial detention *could* violate due process if bail was being used to *punish a defendant*. Although unsuccessful for Salerno, practitioners should keep in mind that substantive due process claims may arise when pretrial detention is punitive rather than protective in nature.

Salerno also challenged the procedural due process aspects of the Act. In upholding the federal statute, the Court found the procedural protections adequate. In so doing, the Court set out standards that can serve as constitutional guideposts for pretrial detention hearings. The protections for detainees highlighted by the *Salerno* Court included:

- The right to counsel at the detention hearing.
- The right to testify on one's own behalf.
- The right to present information by proffer or otherwise.
- The right to cross-examine witnesses who appear at the hearing.
- The requirement that the government prove its case for detention by clear and convincing evidence.
- The requirement that the judicial officer making the detention decision be guided by statutory factors such as the nature and circumstances of the charge, the weight of the evidence, the history and character of the accused, and the danger to the community.
- That the judicial officer must make written findings of fact and articulate their reasons for any decision to detain.[109]

Across the country many of these Fourteenth Amendment protections are serving as a basis for systemic challenges in state court.[110]

The Fourteenth Amendment Equal Protection Clause prohibits states from denying any person the equal protection of the laws. When applied in the context of fundamental rights, such as the right to liberty, wealth can be considered a "suspect class" triggering heightened 14th amendment protections

108. Rochin v. California, 342 U.S. 165, 169, 172 (1952).

109. *Salerno*, 481 U.S. at 754.

110. *See, e.g.*, Allison v. Allen, No. 19-cv-1126 (M.D. N.C. filed Nov. 2019); Friend v. City of Stamford, No. 18-cv-1736 (D. Conn. filed Aug. 13, 2019); Ross v. Blount, No. 2:19-cv-11076 (E.D. Mich. filed Apr. 14, 2019); Dixon v. City of St. Louis, No. 4:19-cv-00112 (E.D. Mo. filed Jan. 28, 2019), appeal docketed (8th Cir.); Phila. Cmty. Bail Fund v. Arraignment Ct. Magistrates, No. 21-EM-2019 (Pa. filed Mar. 12, 2019); Caliste v. Cantrell, 937 F.3d 525 (5th Cir. 2019) (*see also*, Consent Decree entered June 2019); ODonnell v. Harris Cty Tex., 892 F.3d 147, 162-63 (5th Cir. 2018) (overruled based on *Younger* abstention doctrine by *Daves v. Dallas Cty*, 64 F.4th 616 (5th Cir. 2023).

under the equal protection clause.[111] In the bail context this provision has been used in systemic litigation to raise challenges to both the use of money bail and the use of bail schedules (pre-set bail amounts that are based on the charge without consideration of individual case and defendant circumstances).[112]

Under Virginia law,[113] and arguably under the equal protection clause of the 14th Amendment, a court must consider the financial resources of each individual defendant when setting bail. While a person may not be "entitled" to a bail they can afford, they are entitled to a bail which is no higher and no more onerous than what is reasonably necessary to assure a person's appearance in court and good behavior pending disposition. Bail amounts that are excessive, or formulaic may offend equal protection and thereby be subject to a constitutional challenge.

111. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (prohibiting a system in which indigent defendants are unable to pursue direct appeals because they are required to pay for transcripts); Douglas v. California, 372 U.S. 353 (1963) (limiting access to counsel for direct appeals based on financial resources); Roberts v. LaVallee, 389 U.S. 40 (1967) (indigent defendants are entitled to free transcripts of preliminary hearings for use at trial); Bearden v. Georgia, 461 U.S. 660 (1983) (unconstitutional to incarcerate a probationer who was unable to pay his fine and restitution without first considering if he had made a bona fide effort to pay and, if so, without considering alternative forms of punishment).

112. *See, e.g.*, Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018); ODonnell v. Harris County, 892 F.3d 147 (5th Cir. 2018). These cases build on the rational of the Supreme Court's ruling in *Bearden v. Georgia*, 461 U.S. 660 (1983) holding that to "deprive [a convicted defendant] of his conditional freedom simply because, through no fault of his own, he cannot pay [a] fine . . . would be contrary to the fundamental fairness required by the Fourteenth Amendment." *Bearden*, 461 U.S. at 672-73. *See generally*, Kellen Funk, *The Present Crisis is American Bail*, 128 Yale L.J.F. 1098 (2019); Jenny E. Carroll, *The Due Process of Bail*, 55 Wake Forest L. Rev. 757 (2020).

113. VA. CODE ANN. § 19.2-121.

Part IV:

Role of Counsel at Initial Appearance

There are several functions the lawyer can fulfill when present at initial appearance. These include ensuring the client understands the information the court is providing; helping advocate for the client's interests regarding appointment of counsel and scheduling of future court appearances; protecting the client from self-incrimination; presenting relevant information to the court on the client's behalf; and advocating for amendments to bail and release conditions. Being present at the initial appearance can also facilitate communications with the client's support network.

State and national performance guidelines reinforce the importance of representation at the initial hearing. The ABA's Criminal Justice Standards for the Defense Function (Standard 4-3.2) call for counsel to zealously pursue efforts to secure a client's release as quickly as possible, while also endeavoring to ensure that such release utilizes the least restrictive provisions.

The standards also highlight the crucial role counsel plays in making sure clients understand the terms and conditions of their release and their pending court appearances. These early days are an especially stressful time for clients and their supporters. Stress can make it very difficult for individuals to fully process and understand information. At the same time, they are engaging with an array of legal system actors including law enforcement, magistrates, detention center staff, and court personnel. This is a time in which an attorney can help answer questions, minimize confusion and misunderstandings, and increase a client's opportunity for pretrial success.

Strategies attorneys can employ include:

- Use plain language to explain bond conditions and legal terms.
- Use a highlighter to mark key dates, addresses, phone numbers and obligations.
- Create a basic form summarizing key information in a visually easy to understand format by using plain language and bullet point lists.[114]

In addition, by beginning engagement at this early stage, the attorney may also be able to initiate investigative efforts more promptly and address vital medical and mental health needs.

A. RELEVANT ETHICAL AND PERFORMANCE STANDARDS

The Virginia Rules of Professional Conduct apply to representation at all stages of the case, including initial appearance.[115] In addition to these rules, guidance for providing meaningful early stage representation can be drawn from the ABA's Standards for the Criminal Defense Function (ABA Criminal

114. CENTER FOR PLAIN LANGUAGE, *Five Steps to Plain Language*, https://centerforplainlanguage.org/learning-training/five-steps-plain-language/ (last visited February 20, 2024).

115. VA. RULES OF PRO. CONDUCT (Va. Bar Ass'n 2024) [hereinafter VA. RPC].

Defense Standards)[116] as well as the Virginia Indigent Defense Commission Standards of Practice (SoP).[117]

At the core of client representation is an attorney's obligations to serve as an advisor, an advocate, and a negotiator.

> "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others."[118]

These intersecting commitments shape the attorney-client relationship, and each has an important role in early representation.

B. INFORMATION GATHERING

1. Logistics of the Client Interview

A thorough understanding of the client as well as the client's background can be a key tool in advocating for release. A robust initial client interview, however, serves far more than just as a catalyst to gain this information. It also builds client confidence, improves the attorney-client relationship, helps ease client stress, and enhances the overall defense of the case.[119] The challenge facing a lawyer at initial appearance is balancing the need for a meaningful initial interview with the limited time (and possibly limited privacy) available. To help attorneys make the most of the initial interview, attorneys should do their best to target key information that can be used for early advocacy efforts such as bail, identify the most immediate needs of the client and the case, while also providing a measure of humanity and compassion to the client during difficult moments.

Location: To the extent possible, defense counsel should strive to conduct all client meetings in a private, confidential space.[120] This helps with promoting a level of comfort in sharing private information and may allow the client to be more emotionally vulnerable and more present (focused) in their communications. However, when that is not possible, attorneys should limit communications to those matters which can be discussed in more public spaces and endeavor to conduct a confidential follow-up meeting with the client as soon as practicable.

Group Communications: Depending on the arrangements, there may be some information the attorney can relay to the entire group of potential clients at the start of the interview. This is a good way to orient clients on the process and identify your overarching goals. Providing an understanding of what to expect can also help reduce client anxiety. It is, however, important to keep in mind that group settings can prevent attorneys from recognizing whether an individual fully understands the information being given and may inhibit people from asking questions. As a result, it is important to follow up group meetings with individual conversations. These individual meetings should include asking the client questions to

116. ABA DEF. STDS., *supra* note 9.

117. VA. INDIGENT DEF. COMM'N, *Standards of Practice for Indigent Defense Counsel* (Dec. 2021) [hereinafter Va. SoP].

118. VA. RPC, *supra* note 115, preamble.

119. ABA DEF. STDS., *supra* note 9, stds. 4-3.1, 4-3.3(a).

120. ABA DEF. STDS., *supra* note 9, std. 4-3.1(e).

help better determine if they fully understood the information given in the group setting and allow space for questions.

Preparation: Being as prepared as possible for the client meeting will allow the attorney to focus conversation on key issues and will assist in providing meaningful answers to questions the client may have.[121] To the extent possible, before meeting with the client, attorneys should:

- Obtain and review all available **relevant case information** including:
  - » Charging document (such as arrest warrants and criminal complaints).
  - » Pretrial service agency reports and recommendations.
  - » Pretrial risk assessment scores, calculations, and recommendations.
  - » Magistrate Bail Checklist.[122]
  - » Current bail conditions.
  - » Law enforcement reports.
  - » No contact and emergency protective orders.
- Review the client's **criminal history**, including any prior failure to appear and probation (or parole) violations.
- Obtain information about any other **detainers** that may be in place (such as those from other jurisdictions, probation, or immigration).

In addition, it is important for the attorney to be familiar with local resources and local practices relating to bond and pretrial release including:

- What **services** are available to and/or utilized for pretrial supervision.
- Are there **special conditions** the magistrate, court, or pretrial services may impose such as:
  - » Drug or alcohol testing?
  - » Maintaining or seeking employment?
  - » Travel restrictions?
  - » A curfew?
  - » Prohibitions on contact with particular people or places?
  - » Use of GPS, electronic monitoring, or alcohol monitoring devices?
- Are there any **fees** associated with any of these services?
- Do any of the conditions requires **other services** such as internet or a phone?
- How does the court and/or pretrial **monitor compliance** with these conditions?
- Are there other requirements that can **delay release** when such conditions are imposed?

2. The Meeting with the Client

There are two aspects of information sharing during the attorney-client meeting — getting information *from* the client and giving information to the client.[123] Regardless of the nature of the charge or the other circumstances of a case, the attorney should be prepared to both receive and give information.

What information is most pertinent and pressing, as well as the sequence of the conversation, must be guided by both the attorney's knowledge and experience and the client's needs and priorities. In some instances, addressing bail may be

121. VA. SOP, *supra* note 117, r. 2.2.

122. VA. CODE ANN. § 19.2-121 requires magistrates to fill out a Supreme Court issued form that describes the bail factors and gives a brief explanation for why they made their decision. This form often includes a summary of the client's record, a summary of the officer's description of the facts, and observations about the client, including information relevant to mental health or substance use disorders.

123. VA. SOP, *supra* note 117, r. 2.2(B); ABA DEF. STDS., *supra* note 9, stds. 4-3.1, 4-3.3.

the most critical to the client and the case may lend itself to a bond hearing at the initial appearance. In that case questions relating to employment and community ties may be at the forefront of the conversation. In other cases, priorities may be communicating with family members; locating witnesses and collecting evidence; or addressing mental health needs. While an issue may not seem especially critical to the lawyer, it may be the most critical to the person being detained.

Being responsive to client concerns, even if you are unable to redress them at that moment, is important to building a foundation for trust and confidence in the future attorney-client relationship. Even if the initial appearance attorney will not retain the case in the future, the client's experience in those moments can color how they perceive every future interaction with a lawyer. As a result, beginning a client meeting by asking a few initial questions, such how they are doing or what they want to discuss first, can help an attorney quickly assess how to best proceed as well as restore a sense of dignity and power to the client during a very dehumanizing and powerless time.

In thinking about the sequence of the conversation, always consider prioritizing getting information from the client and leading with identifying the client's specific questions or needs. Even when pressed for time attorneys should, whenever practical, lead by having the client voice their concerns/questions first so that the attorney can be responsive to the accused's needs and concerns. While this may limit the amount of time a lawyer has to ask their own questions, addressing client needs and identifying their concerns can go a long way in building a meaningful relationship and increased trust in public defense and the legal system more generally.

PRACTICE POINTER:

Some good questions to ask at the start of the initial meeting can include:

- » What name do you prefer to use/what do you go by?
- » What language do you prefer to communicate in?
- » How are you doing?
- » What do you want to talk about first?
- » Does your family know you have been arrested? Do you want them to know?
- » Is there anyone you want me to call or talk with for you?

Information FROM the client:

Bail: When bail is a relevant consideration for the initial appearance or a time shortly thereafter, attorneys should focus on gathering information that is responsive to the factors the court will consider. In developing information, the attorney should seek to develop information that can help tell the client's story to facilitate release such as:

- **Ties to the Community:** such as family, residence, community engagement, education, and employment.
- **Roles and Responsibilities:** what are examples of others trusting the client, such as job responsibilities and promotions, prior or current military service, and family obligations.
- **Release Plans:** including where the client will stay, plans for transportation to court, and other obligations, how the client will post bail.
- **Financial Resources and Obligations:** such as who does the client help support and what resources does the client have to post bail.
- **Physical and Mental Health:** including medications, treatment history, and disabilities.

- **Court History:** including previous history of appearing for court and complying with probation conditions, as well as prior convictions, pending cases, and any existing probation or bond status.
- **Immigration status** including any detainers or current proceedings.

A more complete list of suggested topics and questions are included in Appendix A.

Information TO the client

Information to provide to the clients (either individually or in a group setting) include:

- **Introducing yourself:** including your name and role of representing them.
  - » **Confidentiality:** Explain that your communications are confidential, and you will not share their information with anyone else unless the client gives you permission to do so. If the location of the interviews is not going to be private, also explain to the clients that because others may be able to hear what is being discussed, it will be important to be careful about sharing personal or case related information.
  - » **Limited representation:** If your representation is limited to only representing them for initial appearance, make that clear to the client, but also be sure to explain what steps will follow to ensure they have counsel appointed for their case if they want it and are eligible.
- **Explain your goals:** to learn more about them and their case and to give them important information that can help them navigate the court process.
- **Explain the process:** both logistics and substance, recognizing some of the concerns clients may have during these stages and addressing them.
- **Explain how they can help:** including the sharing of information with you during the interview, the importance of their demeanor during the hearing, and why it's important for them to be cautious about sharing any case or personal information with others that are incarcerated.

Examples of logistical information:

- What order the cases are called by the court.
- Where the client will go when their name is called.
- What is the process for requesting court-appointed counsel.

A sample description of substantive information:

> *The prosecutor or court may read aloud the charges and other information about the case. This can be upsetting or frustrating because we may not agree with what the report says. It may be missing important information, it may be mistaken, and it may be untrue. Today, however, is not the day we can fight the charges or tell our side of what happened. There will be an opportunity to do that later. We will remind the judge that you are presumed to be innocent and that the judge must keep in mind that these are just accusations. In some cases we may have the opportunity to tell the judge about you and why you should be released, in others we can help in getting a proper court date set and identifying areas for investigation. To help us in these efforts it is important when we meet with each of you shortly, that we use our time well to address the most pressing and immediate needs about the case.*

Other information to share with the client during the individual meetings with them can include:[124]

124. VA. SOP, *supra* note 117, r. 2.2, Initial Interview.

Warning the client about the dangers associated with jail cell and body searches, the jail's practice of recording phone calls, monitoring visitation, and reading mail, and with the risks associated with speaking with others in custody about the case.

Explaining any current bond terms as well as terms associated with any no contact or protective orders. It is important to warn the client that they can face criminal charges for violating the order even if the other party initiated the contact or says the order has been lifted.

Advising the client of the charges and penalty range. Given the complexity of this type of conversation, it can also be helpful to let the client know that upon meeting with a permanent lawyer, the attorney can give them a more complete understanding of the charges and factors that relate to the possible punishments.

Addressing how to request counsel, if the client wishes to do so, and what the process will be if the client makes such a request. This should include information on how soon the client can expect to speak with the permanent lawyer, how to reach that lawyer, and that you would like to share the information you get from this meeting with that permanent lawyer.

Providing the client with information on what to expect at the initial appearance in court, including addressing whether the court will likely take up the issue of bail at the initial appearance, as well as what upcoming court dates are for and how long the process may take.

Checking to make sure the client understands the information you (and others) are providing. Barriers to understanding can arise in many forms. Some are temporary and situational (stress, anxiety, lack of sleep), some related to the use of unfamiliar jargon (legal terms), but some are more foundational (limited education, intellectual or developmental disabilities). Regardless of the reason, it is critical that the attorney take steps to identify and mitigate their gaps in understanding.[125]

It is incumbent upon the attorney to take affirmative steps to help bridge the gap. The use of open-ended questions as well as asking clients to explain, in their own words, what the next step will be, what their choices are, or why they are making a particular decision, are all useful techniques to better gauge understanding. When asking clients to explain a decision they are making or paraphrase a concept you discussed, it is helpful to let them know why you are asking them to do so. This is especially true when asking clients about choices they are making, as that can be perceived as your suggesting they change their mind.

Some examples of how to use this approach include:

> *"I know this can be a bit overwhelming and you probably have a million things you are thinking about right now, so I want to make sure you were able to fully understand what your choices are for this hearing. Can you explain to me what you understand the options are?"*
>
> *"I want to understand why you are making this choice. I am not asking you to explain your decision because I think the choice is wrong or bad. The reason I am asking is to make sure I did a good job in explaining the options to you, and the best way for me to know that is to listen to you explaining your decisions."*

125. VA. RPC, *supra* note 115, r.1.4, comment (5) (Communication includes providing the client with "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."). See also, ABA DEF. STDS., *supra* note 9, std. 4-3.1(d).

PRACTICE POINT:

In assessing whether the client understands information, the attorney must do more than just ask "do you understand" or advise the client to "let me know if you don't understand something." There are many reasons people may not indicate they are having problems including: not realizing they misunderstand the information; fear, shame, or embarrassment about their challenges (this can be especially true for individuals with intellectual or developmental disabilities who work to keep them hidden); situational inability to process the information (such as stress or hyper focus on immediate concerns like their job or family); organic inability to process information (such as processing delays or ADHD); and trauma (from their arrest or contact with the police). Another critical factor is power dynamics. Clients may not feel comfortable asking questions of the lawyer or the court.

3. Case information:

Sometimes it will be important to identify and collect case-related information promptly.[126] This is especially true as it relates to possible video evidence that may provide an alibi, an alternate view of the events, or other information that relates to the client's degree of culpability and/or mitigates punishment. Video evidence can be recorded over in a matter of days, so it can be critical to identify key locations, ascertain whether there may be video evidence, and work promptly to view it and seek its preservation.

A prompt identification of where such critical evidence may be found can be the difference between positive and negative case outcomes.[127]

Early investigation may include:

- Collecting and preserving
  - » Video recordings
  - » Social media posts
  - » Text messages
  - » Digital data
- Photographs and/or video of the scene of any relevant event before conditions change.
- Photographs of any injuries (or if relevant, the lack of injuries) to the client or other key individuals.
- Identifying, locating and interviewing witnesses before their memories fade or are impacted by subsequent events, or before they can no longer be located.

Other case-related information that may be appropriate to collect during the initial meeting includes:[128]

- The name of any co-defendants and their arrest status.
- The names (and relationship) of any witnesses, including any complaining witnesses.
- The location(s) of relevant events including where the offense is alleged to have occurred and where any arrest occurred.
- Whether the client made any written or oral statements to law enforcement.
- Whether any search warrants were executed.
- Whether anything was seized from the client, including any cell phone or computer.

126. ABA DEF. STDS., *supra* note 9, std. 4-3.3(c)(iii).

127. *See, e.g.,* Jonathan Bullington, *Joseph Allen, once Bunny Friend Park shooting suspect, released from jail,* Nola.com (Dec. 10, 2015), https://www.nola.com/news/crime_police/article_9b1e211c-1d31-550f-9e94-8a1dc5ab0a6d.html.

128. VA. SOP, *supra* note 117, r. 2.2, Initial Interview.

Close-ended Question	Open-ended Question
Do you pay child support?	Who do you help support? Who relies on the money you earn?
Do you have a disability?	Did you get any additional help or support at school? Do you have anyone who helps you make decisions about important things?
Were you interrogated?	Tell me about what happened when you got to the police station.

In addition to case-related information, attorneys should consider whether there are other time-sensitive opportunities to be promptly explored, including opportunities for cooperation, serving as a confidential informant, or providing information on other past, present, or future criminal activity.[129]

4. Who to contact

Another critical piece of information to gather is who the client wants, needs, and/or gives you permission to contact. Knowing who is in the client's network, whether they are aware of the client's arrest or the charges, and whether the client wants you to communicate with them are important not only in examining bail, but in getting to know the client and the case. Friends and family can provide additional insight into a client's mental health or disability, share background and history relevant to the case, serve as important points of support for the client, and serve as resources the client may consult in making case decisions.

Keep in mind that it is the client's decision about the nature and degree of contact you have with the client's family. Be sure to ask the client who knows about their arrest, what information they want that person to know about the case, and who else may need to be contacted. It is important to also warn the client about the implications of sharing case information, but also recognize that the client may benefit from the input and advice of others in making important decisions. Be sure to also collect contact information for individuals in the client's network, as this can also help in the event you cannot get in touch with your client during the representation. Finally, remember that the client can restrict what information you provide and who you reach out to, but you do not breach any confidentiality or ethical rules by opting to *listen* to information others wish to share. It is, however, best, to let the client know that you have had such communication to minimize client feelings of distrust and/or betrayal.

PRACTICE POINT:

In seeking to get information, it is important to ask open-ended questions whenever possible. This allows clients to be more engaged in the conversation, provides a richer range of information than can often be gained from narrow, close-ended questions, and helps the attorney gauge whether the client may have intellectual or developmental disabilities, mental health needs, or other communication challenges.

129. ABA DEF. STDS., *supra* note 9, std. 4-3.7(e).

C. OBSERVATIONS ON BEHAVIOR AND DEMEANOR

Be sure to note in the file, as specifically as possible, observations you make about client behavior and demeanor that may indicate the person has a mental illness, intellectual or developmental disability, is under the influence, or is experiencing medical problems.

Observations may include:

- Difficulty making eye contact or inappropriate eye contact.
- Inappropriate facial expressions, laughter or expressions of emotion.
- Sensitivity to light, touch, or sounds.
- Awkward social spacing/distance during conversations.
- Repetitive physical behaviors (also known as stimming) or verbal patterns.
- Disorganized thinking or inappropriate content in response to questions.
- Persistent or hyper focus on concerns that seem inappropriate under the circumstances.
- Indications of difficulty with reading, writing, or comprehension.
- Difficulty with fine or gross motor skills.
- Difficulty speaking or disorganized speech.
- Excessive delays in responding to questions.
- Hypervigilance (such as repeatedly checking surroundings).
- Extremely strong emotions or an absence of emotion.
- Appearing distracted or responding to stimuli that is not present (such as visual or auditory hallucinations).

These observations can be crucial insights for future considerations of competency, sanity, injury, or capacity (such as whether the client could have made a knowing, voluntary, and intelligent wavier of their Miranda rights or given consent to a search).

Also note any visible injuries or complaints of pain. If possible, document these observations both in writing and with photographs. Also ensure additional follow-up (including photographs) is done in the days immediately following the arrest to preserve any evidence of injuries.

PRACTICE POINT:

What is "confidential" may vary from case to case. For example, information about where the client was living at the time of arrest may not raise confidentiality concerns in most cases but may be highly confidential for clients facing charges such as failure to register or violating a protective order.

It is also important for the attorney to discuss with the client whether to reveal certain confidential information to the court and/or the prosecutor and to abide by the client's wishes regarding such disclosure. For example, during the interview the client may share information about a medical condition. Before disclosing that information, the attorney should discuss with the client whether to do so, advising the client whether they believe such disclosure will be helpful or harmful to the client's interests. In formulating advice, the attorney should consider both the immediate interests of the client (such as securing release) and the potential long-term implications of that information (such as how it may impact a defense in the case). The client's decision in this regard shall govern the attorney's actions.[130]

130. VA. RPC, *supra* note 115, r.1.6.

Part V:

Advocating for Release

Whenever feasible, attorneys should discuss with clients the opportunity to advocate for release. In addressing this issue, attorneys should consider the nature of the charge, the client's current status (such as whether there is a detainer), and any prior court appearance and criminal history. Attorneys must also be aware of local practices, including whether conducting a bond hearing at the initial appearance may foreclose the opportunity to address bond in the general district court at a later date.[131]

In Virginia there are 3 statutory concerns for judicial officers when making decisions regarding release and bail conditions:[132]

1. Ensuring a person's presence for court proceedings.
2. Ensuring public safety (a.k.a. the accused's "good behavior").
3. Preventing the obstruction of the legal process.

When advocating for the client's release, attorneys should pursue release under the least onerous terms needed to meet those 3 purposes, while also being mindful of the client's preferences and priorities (for example, the client may prefer release on a secured bond without pretrial supervision over release on an unsecured bond with pretrial supervision).

In some cases it is not immediately appropriate to consider bond. These can include instances in which there is a need to verify information such as where a person may be able to live or the outcome of a prior case. There may also be cases in which there is a need for time to attempt contact with complaining witnesses or to conduct some investigation before bond is addressed. If it is not appropriate to pursue a bond hearing at the initial appearance, explain to the client why it may be necessary to defer acting on bond, and consider some alternatives including:

- Setting a specific date and time for a bond hearing at the initial appearance (making sure that date allows enough time for counsel to gather any needed information).
- Approaching the Commonwealth about an agreed order for bond upon verification of information.
- Requesting the local Community Corrections Program complete a pretrial

131. The Virginia Code outlines a right to appeal adverse bail decisions to the next highest court, but is silent on whether once heard, motions for bail reconsiderations may be reconsidered by the current court. (VA. CODE ANN. § 19.2-124). In some jurisdictions local practice will allow for additional hearings if new or additional information is available, but in others, courts may ascribe to a "one and done" policy, allowing defendants a single request for bond/bond modification at any particular court level and requiring subsequent requests be via the appeals process. Awareness of local practices is critical to providing the client with information to make an informed decision about whether to pursue a bail reduction at the initial appearance or to wait until the attorney and client have additional information.

132. VA. CODE ANN. §§ 19.2-120, 19.2-121.

Generalized Statements	Individualized Advocacy
Ms. Jones is employed. Ms. Jones works at Target.	For the past 6 months Ms. Jones has worked as a cashier at Target where she is entrusted with responsibilities including handling cash and credit transactions, addressing customer concerns and questions, and following company policies. Last month she earned a pay raise based on her performance.
Mr. Smith has strong ties to the community. Mr. Smith has lived here for 5 years.	For 5 years Mr. Smith has lived in our community. He currently rents an apartment on Main Street where he lives with his girlfriend, Janice, and their 7-year-old son, Michael. The family just moved there 3 months ago, having lived for the past 4 years at the Fields Apartments on Elm Street. Michael is a first grader at Huges Elementary and plays soccer in the county parks program. Janice works at Little Tykes Daycare.

evaluation and/or risk assessment to inform a subsequent bond hearing.

A. DURING THE HEARING

As noted earlier, pretrial status directly correlates with case outcomes. The client's best chance to avoid a conviction and avoid a term of incarceration if they are found guilty lies in being released pretrial. As a result, it is vital that defense attorneys take the time to make substantive, compelling, individualized arguments for each client's release.

> "During a bond hearing, counsel should not call the client as a witness, or otherwise permit the client to testify, except in extraordinary circumstances where there is a sound tactical reason for doing so. Counsel should carefully consider the implications of calling other witnesses to support pretrial release. Counsel should also consider making a proffer in lieu of testimony if local rules or procedures permit." Virginia Standards of Practice, Comment to Std. 2.3.

1. Advocate for the Individual

To help promote an individualized consideration, attorneys should:

- Refer to the client by their name.
- Be detailed and specific in referring to the client's community ties, employment, and obligations.
- Provide a specific, individualized plan for the client's release and compliance with conditions of release.

2. Advocate for the Appropriate Bail and Bail Conditions

When the When presenting bail arguments to the court, counsel should offer information

on the client's financial resources to assist the court in making an individualized bail determination. In addressing the client's financial resources, counsel should be mindful of representations the client has made in any application for court appointed counsel or the magistrate's bail checklist. If needed, counsel should be prepared to offer clarifications to incorrect or incomplete information in these documents.

As appropriate, counsel should advocate for the use of recognizances or unsecured bonds. Remind the court that requiring secured bail has numerous negative impacts and the data suggests it does little to promote public safety or maximize appearance rates. Clients may spend additional hours or days in custody while arranging for the posting of a secured bail--communicating with family and friends, accessing the funds, and, when utilized, securing the services of a bondsman, all take time. This results in increased risk for the client to lose employment, housing, and connections to community-based services.

Unnecessary hours and days in jail also have a tangible cost for the locality in the form of incurring additional daily costs for detaining a person. Further, money used to pay a bondsman, is money not available to hire counsel, pay restitution, pay child support, or other household expenses.

The average cost for a single day in jail in Virginia is $107.09/inmate. [133]

Defense attorneys should also be vigilant in guarding against the use of excessive and unnecessary conditions, especially when those conditions are not narrowly tailored to the needs of the individual client, the case facts, or the overarching goals of bail. Consider available programs and resources that may best be responsive to concerns of the court and/or needs of the client. However, be sure to discuss such conditions with the client before requesting them from the court. When conditions have financial or other requirements that may be barriers for the client, ask for waivers or partial waivers of such fees.

3. Court and Case-Specific Advocacy

Defense attorneys should be mindful of individual judges' proclivities and tailor arguments to address the most likely concerns of the court based on the judge, case facts, and client goals. It is important to be succinct and focused in argument, but not at the expense of being a zealous advocate for the individual client.

As appropriate, counsel should remind the court:

- Incarceration of even a few days can have devastating impacts.
- Years of data from the Virginia Pretrial Data Project indicate the majority of individuals released appear for court and do not incur new arrests during their pretrial period.
- The Constitution favors pretrial liberty. ("Liberty is the norm, and detention prior to trial . . . the carefully limited exception."[134])

133. FY 2021 Compensation Board, JAIL COST REP.: ANN. JAIL REVENUES AND EXPENDITURES REP. (INCLUDING CANTEEN & OTHER AUXILIARY FUNDS) (Nov. 1, 2022). The report includes a full list of cost by jail/jurisdiction. FY21 is the most current reported data.

134. United States v. Salerno, 481 U.S. 739, 755 (1987).

- The individual before the court is presumed innocent.[135]

4. Utilize Effective Advocacy Tools

Although bail hearings are brief and the issues before the court are limited, they are, nonetheless, events that require effective advocacy. Even in these constrained circumstances, defense lawyers should utilize the tools of effective advocacy such as having a clear theme and theory that tells the story of why this individual should be released. Effective narration techniques such as using trilogies[136] and parallel structure[137] should be used. Taking a few moments before presenting a case to identify and organize key points will allow for a more effective argument. Whenever possible, attorneys should utilize principles of primacy and recency,[138] so that the first and last points made in the argument are the most powerful and compelling.

Attorneys must walk a fine line between being zealous advocates and alienating the judge, but for many clients (and their families) the initial appearance represents the first time they see their attorney[139] "in action." These few minutes can create a lasting impression and set the tone for the entire attorney-client relationship.

B. RISK ASSESSMENT TOOLS

Risk assessment tools are used in a variety of ways in the criminal legal system to assess relative degrees of "risk" or likelihood of non-compliance and to identify areas for intervention and support. In the pretrial context, risk assessment tools utilize historical data to identify factors that correlate with appearance in court and re-arrests during the pretrial period. The factors are then assigned a range of points based upon their degree of connection to particular outcomes. The totals of these points translate into "scores" that fall into categories or levels of perceived "risk." Typically, these groupings are broadly described in a range from "low" to "high."

What constitutes "low" or "high" is determined by the tool's designer and/or the jurisdiction implementing the tool, but it is important to recognize these terms are defined only relative to the instrument's other categories of risk. In other words, a group that

135. In *Commonwealth v. Duse*, 295 Va. 1 (2018), the Supreme Court of Virginia found that it was reversible error for a trial court to consider the presumption of innocence at a bail hearing. That holding was based on the fact that there was presumption against bail at the time of that opinion; therefore, it no longer applies. The other cases that the Supreme Court relied upon can be easily factually distinguished.

136. Trilogies are a group of three related items. When used in communication, groups of three are especially memorable and compelling. Examples of trilogies include: "I came, I saw, I conquered," "the good, the bad, and the ugly," or "life, liberty, and the pursuit of happiness." *See* Dave Wraith, *Why Three is the Magic Number*, Alive! (Jan. 15, 2018), https://www.alivewithideas.com/blog/three-is-the-magic-number/; Mike Morrison, Primacy and Recency Effects in Learning, RAPIDBI: HUMAN RESOURCES & TALENT (Mar. 17, 2015), https://rapidbi.com/primacy-and-recency-effects-in-learning/.

137. Parallel structure involves using similar grammatical form and length of two sentences or clauses within a sentence. The rhythm of the lines creates a repetition that can make it easier for a listener to absorb and understand the information being presented. Examples of parallel structure include: "A government of the people, by the people, and for the people," or "pay any price, bear any burden, meet any hardship."

138. Primacy and recency refer to the fact that we best learn and remember the first and last things we hear. Morrison, *supra* note 136.

139. Although the particular attorney representing the client at magistration may not be the client's actual attorney for the merits of the case, the overall impression of assigned counsel as zealous, effective, and powerful advocates can have an important impact on the client's perceptions of their assigned counsel.

is "low risk" is one that has a lower calculated rate of pretrial "failure" than the group that is "high risk."[140] The tools do not make individualized assessments, but rather identify if "a person shares traits with a group who succeeded or failed at a certain rate."[141] It offers no information about how an individual will act if released.

While there are numerous concerns and limitations of risk assessments,[142] many jurisdictions across the country are using these tools as a part of their pretrial process. Currently 75% of Virginia's localities (100 of 134) are served by a pretrial services agency,[143] most of which use the Virginia Pretrial Risk Assessment Instrument Revised (VPRAI-R).[144] However several sites in the Commonwealth are currently piloting the use of the Pretrial Risk Assessment (PSA),[145] the same tool employed by the Pretrial Data Project as part of its analysis. A key distinction between the VPRAI-R and the PSA is that the VPRAI-R requires an interview, while the PSA relies solely on information relating to the current charge, prior criminal history, and demographic information.

One critical factor to note with both the PSA and the VPRAI-R, neither gives full consideration to the presence of "protective" factors – factors that when present improve outcomes. They only consider "risk" factors – factors that when present increase the risk of a poor outcome. The absence of a risk factor is not necessarily the same as the presence of a protective factor.

Both instruments award points for the presence of a risk factor, with the number of points based on the weight the instrument assigns to that factor relative to the others. However, neither tool has a mechanism to subtract points based on the presence of a protective factor.

Examples of Protective Factors

- Employment
- Family ties
- Community support

140. Brandon Buskey & Andrea Woods, *Making Sense of Risk Assessments*, NACDL: THE CHAMPION (June 2018), https://www.nacdl.org/Article/June2018-MakingSenseofPretrialRiskAsses.

141. Buskey & Woods (June 2018), *See also* U.S. DEP'T OF JUST.: BUREAU OF JUST. ASSISTANCE, *What is Risk Assessment*, https://bja.ojp.gov/program/psrac/basics/what-is-risk-assessment#understanding-risk-assessment (last visited Feb. 21, 2024) ("[R]isk assessments provide a probabilistic but not definitive prediction of an individual's likelihood of reoffending. Risk assessment can help practitioners understand how likely an individual is to reoffend, but it cannot predict a person's behavior with certainty.").

142. *The Use of Pretrial "Risk Assessment" Instruments: A Shared Statement of Civil Rights Concerns,* LEADERSHIP CONFERENCE ON CIV. & HUM. RTS., https://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf; *Joint Statement on Pretrial Risk Assessment Instruments: Updated March 2019*, Gideon's Promise, NACDL, NAPD, NLADA (Mar. 2019) https://www.nacdl.org/getattachment/c80216bf-84e0-429d-9750-9e49f502913d/joint-statement-on-pretrial-risk-assessment-instruments-march-2019-.pdf. *See also* Melissa Hamilton, *Risk Assessment Tools in the Criminal Legal System: Theory and Practice*, NACDL (2020), https://www.nacdl.org/Document/RiskAssessmentReport.

143. Pre-Trial Process, presentation slides, VA. STATE CRIME COMM'N (Nov. 8, 2018), https://vscc.virginia.gov/VSCC%20FINAL%20Pretrial%20Process%20Presentation.pdf.

144. Va. Risk Assessment Pretrial Instrument Instruction Manual Version 4.5, VA. DEP'T. OF CRIM. JUST. SERVICES (updated Dec. 28, 2021), https://www.dcjs.virginia.gov/sites/dcjs.virginia.gov/files/publications/corrections/virginia-pretrial-risk-assessment-instrument-vprai_2.pdf.

145. Va. Pretrial Data Project: Preliminary Findings from Recent Research, *presentation*, VA. CRIM. SENT'G COMM'N (June 12, 2023), at slide 30, http://www.vcsc.virginia.gov/2023Meetings/PretrialJun2023.pdf.

- Housing stability
- Participation in, or willingness to get, substance abuse or mental health treatment
- Positive peer relations

1. VPRAI Factors

VPRAI uses 8 factors, weighted according to level of importance, to reach a defendant's raw score. Based on the score, the defendant is assigned to one of 6 Risk Levels. Using a decision matrix, the risk level is combined with the charge type to provide a recommendation on whether to release or detain and what level and type of supervision may be appropriate. The matrix does *not* make recommendations as to bond type or amount.

2. PSA Factors

PSA uses 8 factors to generate scores in three categories: failure to appear (FTA), new crime arrest (NCA), and new violent crime arrest (NCVA). The factors are scored differently based on the category. Each category is scored separately, creating raw scores for each category. For the FTA and NCA categories, the raw score is used to assign a scaled score between 1 and 6; for the NVCA category, the raw score is used to determine if a "violence flag" is indicated. At the local level stakeholders should create a Release Condition Matrix to recommend release decisions based on the scores.

3. Risk Assessments and Advocacy

If you are in a jurisdiction that is using a risk assessment tool, be sure to understand how the tool works and what its results represent. Like sentencing guideline scores, attorneys should check to make sure their client's risk assessment score is properly calculated based on the definitions and directions utilized by the risk assessment tool. In addition, it is important for attorneys to be familiar with the associated data that the various risk categories represent. This includes understanding any relevant decision-making matrices as well as any data regarding appearance rates and/or re-arrest rates associated with varying risk levels. When advantageous, counsel should frame discussions of "risk" in positive terms, such as rates of success. For example, if there is a 15% rate of failure to appear associated with a particular risk level, counsel should consider describing that individuals with this score have an 85% success rate.

When risk assessment scores are favorable, attorneys should be prepared to highlight the data and use it to amplify their arguments. When clients have less favorable scores, attorneys should consider ways to explain or differentiate their client from their score. This can include changes in circumstances that mitigate against their perceived risk, such as a new job opportunity; or identifying key factual information, such as the age of a prior charge, that can add context to the score.

If you are in a jurisdiction that does not use a risk assessment tool, consider completing the PSA or VPRAI-R on your own and offering favorable information to the court. When utilizing this approach, consider using the PSA over the VPRAI-R because the PSA does not involve any subjective assessments. The fact that the Pretrial Data Project has applied the PSA throughout its research can be used to help mitigate any court concerns about whether the PSA is an appropriate instrument to use in the Commonwealth.

C. ADVOCATING AGAINST OVER-CONDITIONING

In securing a client's release, it is important to be mindful that placing unnecessary conditions on a person is not just excessive, it

Risk Assessment Tool Factors Comparison

Review the materials in Appendix B for more information on how the risk factors for each tool are defined and scored.

Risk Factor	VPRAI-R	PSA
Current Charge	**Yes.** Points if current charges are for felony drug, fraud or theft offenses.*	**Yes** (for NCVA category). Points if current charge involves a crime of violence.
Pending Charges	**Yes.** Points if have a pending jailable offense.	**Yes.** Points if have a pending jailable offense.
Currently on Supervision	**Yes.** Points if currently on active supervision.	**No.**
Age at Arrest	**No.**	**Yes** (for NCA and NCVA categories).
Prior Convictions	**Yes.** Points for convictions for jailable misdemeanors and felony offenses.	**Yes.** Degree of offense and points vary based on category.
Prior Convictions for Crimes Involving Violence	**Yes.** Points if have 2 or more prior convictions for enumerated crimes.	**Yes** (for NCA and NCVA categories).
Prior Failures to Appear	**Yes.** Points if have 2 or more prior failure to appear charges for a jailable offense.	**Yes** (for FTA and NCA categories). Scoring differs based on whether FTA was recent or more than 2 years ago.
Previously Incarcerated	**No.**	**Yes** (for NCA category). Points if previously sentenced to 14 days or more.
Employment at Time of Arrest	**Yes.** Points if not currently employed, a student, a primary caregiver, or retired.	**No.**
History of Substance Abuse	**Yes.** Points awarded if have a history of substance abuse (not including alcohol or marijuana).	**No.**

**VPRAI also considers the severity of the pending charge in its decision matrix.*

is harmful.[146] Over-conditioning can interfere with a person's ability to maintain their employment, care for their family, and manage their other obligations and needs. Additionally, the costs associated with such conditions can strain a defendant's limited resources. Some conditions, such as electronic monitoring or drug testing, may have fees for participation. When appropriate, defense attorneys should seek to have fees reduced, waived, or assessed as court costs based on the client's financial circumstances.

In addition to these direct costs, however, there are other costs which are harder to mitigate, and which, over the week or months a client may be on pretrial supervision, can become a significant obstacle. These include expenses for transportation to and from appointments, for securing childcare, and for missed work hours. (Clients qualifying for appointed counsel are more likely to work hourly jobs. Time spent attending pretrial appointments is time they cannot spend at work. This includes not only the time for the appointment itself, but for travel back and forth and time spent waiting). Random drug screening practices (color-coding) can exacerbate these costs, as their unpredictable nature makes it more difficult and more expensive to secure last-minute transportation, child-care, and adjustments to a work schedule.

Unnecessary supervision also overburdens pretrial officers, who are then unable to devote as much time to properly supervising individuals who are higher risk or in need of additional support.

The use of excessive conditions also erodes the presumption of innocence and can punish a person who has yet to be convicted of a crime. Often the terms of pretrial supervision are very similar to those imposed when someone is placed on probation following a conviction. While judges and prosecutors may perceive these measures as "minor," they are nevertheless restrictions on someone's liberty and should only be placed when they are specifically needed in an individual case.

Defense lawyers should always advocate that clients be released using the least restrictive conditions necessary to reasonably assure a person's appearance in court and protect public safety. Advocates should also work to ensure that any conditions imposed are individualized to the needs of the particular defendant and challenge the use of any "blanket" conditions.[147] For example, if a person is not charged with an alcohol-related offense, their pretrial release conditions should not include a prohibition on their otherwise legal consumption of alcohol.

146. *Evidence-Based Decision Making: A Guide for Pretrial Executives*, NAT'L INST. CORR.: CTR. FOR EFFECTIVE PUB. POL'Y (June 2017), https://info.nicic.gov/evidence-based-decision-making/evidence-based-decision-making/resources.

147. Marie VanNostrand, Kenneth J. Rose, & Kimberly Weibrecht, *State of the Science of Pretrial Release Recommendations and Supervision*, PRETRIAL JUST. INST. (June 2011), https://www.ncsc.org/__data/assets/pdf_file/0015/1653/state-of-the-science-pretrial-recommendations-and-supervision-pji-2011.ashx.pdf

Part VI:

Special Considerations

A. INTIMATE PARTNER/ FAMILY ABUSE CASES AND PROTECTIVE ORDERS

When clients face charges of family abuse or other forms of interpersonal violence the magistrate may have issued an Emergency Protective Order (EPO).[148] Unlike the longer-lasting Preliminary Protective Order (PPO) and Protective Order (PO) which are initiated by a party, an EPO can be issued at the request of law enforcement or by the magistrate on their own initiative.[149]

It is important for attorneys to determine if an EPO has been issued, and if so, to review its terms and conditions with the client. This can help avoid the client facing additional charges for inadvertently violating the protective order. To the extent these limitations may create challenges for the client relating to their own employment and residence, be prepared to address them with the court.

If the client is restricted from their residence, consider requesting the court permit one trip to the home (with law enforcement if necessary) to retrieve personal belongings.

Emergency Protective Order

- Lasts for 3 days or until the next session of court, whichever is later.[150]
- Does not require the consent of the complaining witness. It can be issued at the request of law enforcement or by the magistrate.
- Does not involve an adversarial proceeding or require notice to the defendant.
- Persons subject to an EPO may not transport or purchase a firearm and must surrender any concealed weapon permit (*they may, however, continue to possess (i.e. own) firearms*).[151]
- Other conditions that can be ordered under an EPO include:
  - » Prohibiting all contact between the defendant and the complaining witness (and their family members).
  - » Grant temporary possession of a residence to the complaining witness (even if the defendant is person who owns or rents the home).
  - » Grant temporary possession of a companion animal to the complaining witness.[152]

148. VA. CODE ANN. §§ 16.1-253.4, 19.2-152.8.

149. It can also be requested by a complaining witness without the filing of criminal charges.

150. VA. CODE ANN. §§ 16.1-253.4(C), 19.2-152.8(C) (The order is to expire at 11:59pm the 3rd day after it is issued, or, at 11:59pm on the next day the court is in session, whichever is later.).

151. VA. CODE ANN. § 18.2-308.1:4(A).

152. If the complaining witness meets the definition of owner as per VA. CODE ANN. § 3.2-6500.

Preliminary Protective Order

- Lasts up to 15 days or until the final Protective Order hearing, whichever is later.
  - » A PPO becomes effective upon personal service on the respondent.
- Must be requested by the complaining witness.[153]
- May only be issued by a judge.
- May be heard on an *ex parte* basis.
- Persons subject to a PPO may not possess a firearm while the PPO is in effect. They have up to 24 hours to transfer, sell, or surrender the firearm.[154]
- Other conditions that can be ordered under an PPO include:
  - » Prohibiting all contact between the defendant and the complaining witness (and their family members).
  - » Grant temporary possession of a residence to the complaining witness (even if the defendant is person who owns or rents the home) or require the defendant to provide suitable alternative housing for the complaining witness.
  - » Require the defendant to maintain utility services for the household.
  - » Grant the complaining witness and other family/household members exclusive use and possession of a cell phone number or other electronic device and prohibit the defendant from terming such service before the contract expires. The court can also prohibit the defendant from using a phone or electronic device to locate or track the complaining witness.
  - » Grant temporary possession of a companion animal to the complaining witness.
  - » Grant temporary possession of jointly owned vehicles.[155]

During the interview be sure to discuss the following with the client:

- Whether the complaining witness has any prior history of violence towards the client. If so, obtain any relevant prior charging information, including if charges have been filed before and witnesses to such violence.
- Where and with whom can the client stay if the protective order or bond conditions prevents them from returning to their home.
- Do the client and complaining witness currently:
  - » Live in the same home/community?
  - » Work in the same location/for the same organization?
  - » Have children together?
- If there are areas where there may be potential contact, develop with the client a plan to present to the court on how that can be mitigated, including an alternate place for the client to stay, transfer to another branch or change in work days/hours, and plans to address child custody.

In preparation for the hearing, be mindful of any information that indicates the complaining witness did not wish to press charges, did not want a protective order, or did not suffer any injuries.

If a protective order is issued, be sure to review with the client all the terms and restrictions. Important warnings to the client that

153. The petition for a preliminary protective order can provide defense counsel with information about the alleged offense and reasons for bias on the part of the petitioner. Obtaining the petition early in the representation, if available, can help with preparation for the bail motion or early investigation.

154. VA. CODE ANN. § 18.2-308.1:4(B).

155. VA. CODE ANN. §§ 16.1-253.1, 16.1-279.1.

they can face criminal charges for contacting the complaining witness:

- By trying to communicate with them through a friend, family member or other third party.
- By calling them from the jail (even though the complaining witness decided to accept the call).
- By visiting the home (unless they have the court's permission to do so) even if they know the complaining witness is not there.
- Even if the complaining witness says they are withdrawing the protective order or that they won't report the violation, the defendant still faces criminal charges as well as a potential revocation of their bond terms, by violating any part of the EPO or PPO.

B. SUBSTANTIAL RISK ORDERS ("RED FLAG" ORDERS)

Depending on your jurisdiction, your client may have been served with an Emergency Substantial Risk Order (ESRO) under the "Red Flag Law."[156] These orders prohibit your client from purchasing, possessing, or transporting firearms during the duration of the order. Violation of the order is a Class 1 misdemeanor.[157] Counsel should discuss whether the client has any firearms and how to voluntarily relinquish the firearms to law-enforcement. Law enforcement can also get a search warrant to obtain the firearms if they are not relinquished, and there may be reasons to avoid unnecessary law enforcement entry into a home.

The circuit court must hold a hearing within 14 days after the ESRO is issues to determine if a final Substantial Risk Order (SRO) should issue.[158] These hearings will almost always relate to the facts of the case, and counsel should advise the client of his right to remain silent at that hearing, the ability to ask to continue the SRO hearing until the criminal case is over,[159] or risks and benefits of agreeing to the SRO. If the client is served with an ESRO, counsel should consider obtaining the petition for the ESRO, which will contain an affidavit with facts supporting the ESRO which may relate to the case.

C. DRIVING UNDER THE INFLUENCE CASES

If an individual charged with driving under the influence has a BAC of .08 or higher, or if they refuse to submit to testing, there is an automatic administrative suspension of their driving privileges. During this administrative suspension, they are not eligible for a restricted license.[160]

- 1st Offense: suspension for 7 days.
- 2nd Offense: suspension for 60 days, or until the trial date, whichever is sooner.
- 3rd or Subsequent Offense: suspension until trial.

D. SEXUAL OFFENSES

To the extent possible, take all steps to ensure information regarding the client's pending charge is not revealed in a setting in which other incarcerated individuals may be made

156. VA. CODE ANN. § 19.2-152.13.

157. VA. CODE ANN. § 18.2-308.1:6

158. VA. CODE ANN. § 19.2-152.14.

159. Circuit courts are often willing to continue the ESRO until an SRO hearing can occur after criminal case is adjudicated. Counsel can point out the issue of a client having a right to be heard at the SRO hearing and needing to protect their right to remain silent in the criminal case.

160. VA. CODE ANN. § 46.2-391.2.

aware of that information. Whenever practical, arrange to have these cases heard at the end of the docket, with all other incarcerated persons removed from the area. While efforts should always be made to minimize the risk of other persons in custody knowing the nature and details of a client's case, for the safety of the client, it is especially important for those charged with sexual offenses.

For those facing charges that involve online conduct, be prepared to address any conditions that may limit their access to the internet. While courts can place reasonable limits on access those limits must be "narrowly tailored to effectuate either a rehabilitative or public-safety purpose."[161] In addressing these potential conditions with the client, be sure to obtain information as to how any restrictions may impact their employment, access to transportation, their ability to manage their finances, their ability to schedule medical and mental health appointments, etc. For example, most companies monitor the computer use of their employees; therefore, clients should be able to use computers at work for work purposes without accessing illegal materials. In most cases, the client's phones, computers, and other devices were seized as evidence, so it will take time for the client to have a new phone and number.

There are additional considerations for clients who are currently charged with **failure to register offenses** and those who have prior charges that have placed them on the sex offense registry. In considering whether to provide the court with information about the client's current and prior address(es) and employment, consider whether this information may later be used against the client to support charges relating to their registry obligations.

E. CLIENTS WITH MENTAL HEALTH ISSUES AND/OR DISABILITIES

In addition to raising a plea of not guilty by reason of insanity, recent amendments to the law in Virginia now allow the admission of evidence of intellectual disabilities, developmental disabilities (which include autism spectrum disorders), and mental illness to negate the element of intent. One of the requirements to admit such evidence is that the defendant must "establish the underlying mental condition . . . existed at the time of the offense."[162] To help develop evidence in support of such a defense, attorneys should take special care to document any behaviors that may be indicative of the client having a disability and/or experiencing mental illness.

For clients with mental illness, it is important as well to obtain information regarding medications and other services the client may be utilizing and to work to ensure they have access to such medications and/or services if they are incarcerated.

In addition, if a client has a disability, attorneys should discuss with the client (and when appropriate their support network) any accommodations the client may need. Under the Americans with Disabilities Act[163] courts, attorneys and jails are required to provide reasonable accommodations to individuals

161. Fazili v. Commonwealth, 71 Va. App. 239, 252 (2017). This case dealt with probation conditions after convictions, so, in theory, the court would have less ability to restrict liberty in the pretrial context. The case is useful to show that there are limitations on what the court can do in a sex offense case even after conviction.

162. VA. CODE ANN. § 19.2-271.6

163. 42 U.S.C. §§ 12131-12134.

with disabilities.[164] All jails and courts[165] should have an ADA coordinator that can be contacted to discuss the specific needs of the client. As with any personal and confidential information, the attorney should first obtain the client's permission to share this information.

164. *See*, for additional information: *Detention and Correctional Facilities Fact Sheet*, ADA NAT'L NETWORK (2019), https://adata.org/factsheet/corrections; *Inmate Rights Under the Americans with Disabilities Act: A Brief Overview*, Disability Rights Pa. (last visited Feb. 21, 2024), https://www.disabilityrightspa.org/wp-content/uploads/2018/04/ADA-2E-Inmste-Rights-ADA.pdf; Persons with Disabilities and the Legal System, NACDL (last visited Feb. 21, 2024), https://www.nacdl.org/Landing/Persons-with-Disabilities-and-the-Legal-System; *Persons with Disabilities and the Legal System*, NACDL: STRENGTHENINGTHESIXTH.ORG (last visited Feb. 21, 2024), https://strengthenthesixth.org/focus/Persons-with-Disabilities-and-the-Legal-System.

165. For a current list of court ADA coordinators visit: *Americans with Disabilities Act (ADA)*, VIRGINIA'S JUDICIAL SYSTEM (last visited Feb. 21, 2024), https://www.vacourts.gov/courts/ada/home.html.

Part VII:

Additional Early Representation Activities

Beyond the initial appearance and bail advocacy, there are several critical actions attorneys can take to help the client have a positive case outcome. When a lawyer is promptly identified, assigned, and engaged with their client they can help a defendant gather the information needed to corroborate a legal or factual defense, undermine the credibility of a government witness or theory, lessen the degree of the offense or minimize his role, or mitigate his sentence. Attorneys can fill a critical gap, facilitate communications with family members and support networks and provide information about court procedures and legal proceedings, reducing the anxiety and stress that can arise when there is a lack of knowledge. Early and active engagement by counsel can also help individuals protect their legal rights and connect them to needed services.

A. COLLECT EVIDENCE AND BEGIN A PROMPT INVESTIGATION

One of the most critical steps in early representation is collecting and preserving evidence. In many instances if prompt action is not taken this critical information may be lost forever, preventing the client from fully presenting their defense.

> ***"Even if the judge released the defendant from custody and stays all actions in the case—that is, even if the case procedure remains static while the defendant is . . . waiting [for counsel]—the condition of the evidence is not static. Each day's delay in the investigation for the defendant and preserving of evidence accrues to the defendant's detriment."***[166]
>
> - David v. Missouri

Examples include:

- Documenting bruises, abrasions, and other injuries before they heal to corroborate self-defense claims.
- Capturing critical, but transient features of relevant locations, such as foliage on trees or dimmed street lamp that may have limited a witness's view or the badly faded "No Trespassing" sign posted on a fence.
- Locate and interview witnesses before their memories fade or they change jobs or addresses.

166. David v. Missouri, No. 20AC-CC00093, at 1 (Cir. Ct. Cole Cty, Mo. Feb. 18, 2021) (class action lawsuit challenging Missouri's use of waiting lists because of shortages of public defense lawyers to take eligible cases.) (*aff'd* by final order Feb. 6, 2023), https://www.macarthurjustice.org/wp-content/uploads/2020/02/David_Judgement.pdf.

- Recover video surveillance footage from stores, home security systems, red light cameras, and automated license plate readers before retention policies call for their erasure.[167]
- Capture social media posts, preserve text messages, and document other digital content before it is deleted.[168]

Early representation will allow attorneys to identify and develop investigation plans and, where appropriate, quickly engage the services of an investigator to protect the client and their case.

B. ACCESS SERVICES

Case outcomes can often hinge on connecting clients with needed mental health and substance abuse treatment. Accessing these services can improve opportunities for case deferrals, dismissals, or other favorable resolutions. But delays in getting evaluated and enrolled in treatment can mean delays in cases being concluded and expose at risk clients to bond revocations or further engagement with the legal system as a result of untreated addiction or mental health conditions.

Additionally, prompt engagement of counsel can help identify a lack of organized thinking, paranoid statements, delusional beliefs, and racing thoughts that may be the indicia of serious mental illness. Early identification of mental illness can provide corroboration for a plea of not guilty by reason of insanity or other mental health-based defenses as well as minimize risks of significant deterioration that cause lengthy restoration of competency efforts.

C. FILE MOTIONS AND OBTAIN INFORMATION

Unless there are sound strategic reasons not to, counsel should act to formally or informally obtain discovery. Practices of how discovery is requested and provided vary from jurisdiction to jurisdiction, so it is important that counsel be familiar with local procedures. In addition to Rule based discovery, counsel should work to identify and timely file requests for exculpatory evidence, including information that tends to mitigate guilt, reduce punishment, or impeach a witness.[169]

In addition, counsel should identify records and documents that may be informative. When obtaining records, whenever possible, counsel should pursue avenues that limit disclosure only to counsel to help maintain client

167. Because of volume businesses regularly purge surveillance video content. This is especially true for cameras which record 24/7. *See, e.g.*, Sean Peek, *How Much Video Surveillance Storage Does My Business Need?*, Business News Daily (Oct. 27, 2023), https://www.businessnewsdaily.com/9067-choosing-a-surveillance-system.html, (recommending most small and mid-size businesses retain video footage for 30 days). Similarly, state laws or local police policies may require regular destruction of footage from red light cameras and automated license plate readers believed to be of no known evidentiary value. *See, e.g., Automated License Plate Readers: State Statutes*, NAT'L CONF. STATE LEGISLATURES (Feb. 3, 2022), https://www.ncsl.org/technology-and-communication/automated-license-plate-readers-state-statutes.

168. Whether intentionally deleted to prevent discovery or removed because of ignorance as to its evidentiary value, social media posts, text messages, and other digital content can quickly become beyond the reach of the defense, making it critical to photograph, download, or otherwise preserve this information. Major cell phone providers, for example, may retain call detail records (date, time, and number contacted) for several months, but retain the ***content*** of the communication for days. Joseph B. Evans, *Cell Phone Forensics: Powerful Tool Wielded by Federal Investigators*, FORDHAM J. CORP. & FIN. L., blog post (June 2, 2016), https://news.law.fordham.edu/jcfl/2016/06/02/cell-phone-forensics-powerful-tools-wielded-by-federal-investigators/.

169. Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. U.S., 405 U.S. 150 (1972); U.S. v. Bagley, 473 U.S. 667 (1985).

confidentiality as well as protecting the client against information that may be inculpatory or otherwise harmful to their case. This can include having the client (or, if appropriate other family member or witness) execute privacy releases for personal medical, mental health, and educational records.

Other records to obtain and review include prior court files for the client, as well as those for any known witnesses, complainants, and co-defendants.

Attorneys should consult with their client and consider the risks before utilizing other tools, such as a subpoena duces tecum, that can compel the production of records, but simultaneously makes the records available to the prosecution.

D. COMMUNICATE WITH THE CLIENT'S SUPPORT NETWORK

One of the biggest challenges faced by clients, their families, and their support networks is a lack of knowledge. Some of the most stressful aspects of the legal process can be not understanding as to what is occurring and not knowing what may happen in the future. While in the early days of a case, an attorney won't be able to eliminate all uncertainty or have all the explanations, knowing there is someone to help can go a long way to lessening that anxiety.

Attorneys should always be sure to have the client's permission before sharing case information with others, but even if you lack permission *to give* information, attorneys can still *receive* information from family, friends, employers, and community organizations. Learning about a client's needs, especially those involving mental health and disabilities, can help improve client communication and engagement.

E. EXPLORE POTENTIAL COOPERATION AGREEMENTS

In some situations, clients may have opportunities to cooperate with law enforcement or the prosecution. These can be highly time sensitive. Multiple co-defendants may be racing to be the first to strike a deal, or the client may be unable to provide assistance once it is known they have been arrested and detained, or they may have time sensitive information about ongoing activities that will soon be rendered moot. In these instances, it is vital that defense counsel promptly discuss the opportunities and risks with the client so they can make an informed and timely decision.[170]

170. ABA DEF. STDS., *supra* note 9, 4-3.7(e) ("Defense counsel should consider whether an opportunity to benefit from cooperation with the prosecution will be lost if not pursued quickly, and if so, promptly discuss with the client and decide whether such cooperation is in the client's interest. Counsel should timely act in accordance with such decision.").

Part VIII:

Conclusion

Early representation and bail determinations play a pivotal role in shaping the trajectory of a case and of a client's future. In addition to addressing bail and release conditions, attorneys have a responsibility to provide guidance and information, gather and preserve evidence, and protect people's rights. Effective and engaged advocates serve as a beacon, helping clients navigate the complexities of the court process and in doing so, helping move our legal system a little closer to equal justice.

APPENDIX A:

Sample Interview Information

PERSONAL INFORMATION

- Name: What do you prefer to be called? What do you prefer to go by?
- Age/date of birth.
- Where were you born?
  - » If in the US: Where else have you lived?
  - » If outside US: follow up on status, including if any immigration proceedings pending.

LIVING SITUATION

- What is your current living situation?
  - » How long have you lived at this address?
  - » Who else lives there?
  - » What responsibilities do you have to the people you live with?
  - » Who owns the home/who is on the lease/who pays the rent?
- If not at current address very long: where else have you lived recently? How long were you at that address? Why did you move?
- If currently experiencing homelessness:
  - » Where to you usually sleep/stay? Where to you keep your belongings?
  - » Do you have regular appointments/time-based obligations you keep? (To help demonstrate client is reliable/likely to appear in court)
- If charged with family violence offense:
  - » Do you and the complaining witness live together? If so, where else can you stay if the court requires you stay away from that home?
  - » Do you have property at the home that you need to get? (If so, ask the court for permission to retrieve personal property.)

WORK EXPERIENCE

- Were you working at the time of your arrest? If so:
  - » Where do you work? Who is your supervisor?
  - » How long have you worked there?
  - » What are your job responsibilities?
    - Does your job require out-of-state or out of country travel?

- Have you received any promotions or raises? (demonstrates reliability).
- Is your employer aware of your arrest? (If not, do you want them contacted?)
- When are you next scheduled to work?

- If not employed (or if just recently employed), seek information about prior employment, including reason they stopped working at last job, any current challenges finding work.

MILITARY HISTORY

- Were you (are you) in the military? If so:
  - What branch.
  - Dates of service/length of service.
  - Type of discharge and rank at separation.
  - Awards, recognitions, and promotions during service.
  - Combat/overseas deployments.
  - Service-related injuries, illness, and/or treatment (including medical and mental health)? Currently or previously receiving any VA benefits?

EDUCATION BACKGROUND AND SITUATION

- Are you currently in school? If so, obtain details regarding where they attend school, course work, and expected graduation date.
- If not in school, what is highest grade completed/degree earned, where did they attend school (ties to area), and year last attended.
- While in school did you receive any: special services or assistance including additional time or assistance taking tests, smaller class sizes,1-on-1 assistance, have an IEP, etc.

FAMILY CIRCUMSTANCES AND RESPONSIBILITIES

- Tell me about your family circumstances including:
  - Current status (married, divorced, widowed, single, in long-term relationship).
  - Do you have any children? If so:
    - What are their ages?
    - Do they have any special needs (even if not minors)?
    - If minors/dependent:
      - Where are they currently staying (and can they remain there?)
      - Who is currently taking care of them?
    - What responsibilities do you typically have for your children? (care, financial, etc.)
  - What other family responsibilities do you have? (financial, provide care for others, etc.)
  - What other family do you have in the area?

MEDICAL AND MENTAL HEALTH HISTORY AND SITUATION

- Do you have any immediate medical/mental health needs?
  - » Are they being met?
- Do you have any medication you are supposed to be taking?
  - » How frequently are you supposed to be taking the medication?
  - » When is the last time you took your medication? (And when should you next take it.)
  - » Are you currently being provided your medication?\
- If not, do you know why you are not receiving your medication?
- Do you have other medically related needs (glasses, hearing aids, CPAP, cane, brace, etc.)
- General Medical
  - » Details regarding any medical conditions that currently receive/should receive care for (condition, what care receiving/need, medical providers, medications, etc.)
- General Mental Health
  - » Details regarding any mental health conditions that currently receive/should receive care for (condition, what care receiving/need, medical providers, medications, etc.)
- Do you have any other conditions that may be impacted if you were in jail?

OTHER COMMUNITY TIES AND ENGAGEMENT

- Do you belong to any community groups/participate in any community activities? (examples: religious organizations, youth sports programs, school organizations, volunteer groups, etc.)

IMMIGRATION INFORMATION

- Where were you born?
  - » If born outside U.S.: Are you a citizen? If so, when and how did you gain citizenship?
    - – If not a U.S. citizen: When did you enter the U.S.? What is your current status? Do you have any immigration proceedings or status adjustments pending?

CRIMINAL HISTORY

- Are you currently on probation, parole, bond?
- Do you have to go to court for anything else?
  - » If so, where do you have court? When is your next court date? What is that case about (criminal, civil, etc.)? Do you have a lawyer for that case? (if so, who is the lawyer).
- Identify prior successful completions of probation, pre-trial supervision, etc.
- Review any prior arrests and convictions.
  - » Were you released on bond in any of your prior cases?
  - » Did you appear for court those prior cases?

- » What was the sentence/outcome of the case?
- Identify any prior failure to appear charges including dates and circumstances.
  - » Were you convicted of failing to appear?
  - » How many court dates did you have for the case that you did appear for?
  - » If applicable, what supports could help you avoid that happening again? What is different now that will help make sure you will appear for court in the future?

FINANCIAL INFORMATION RELATING TO BOND

- If the court requires a secured bond, what amount do you believe you could afford?
- *Who will post the bond (including contact info)?*
  - » *Does that person know you have been arrested?*

RELEASE PLANS

- Where will you be staying?
- How will you get to court and to any other condition of release obligations?
- If appropriate, what plans to you have to address specific needs (mental health services, substance use, employment, housing, etc.)?
- Discuss any potential release conditions the court may require including costs and what will be required for compliance. If the client may have financial hardships associated with the costs of the conditions, consider asking the court for waivers or reductions in such costs.

CASE INFORMATION (ONLY ASK CASE RELATED INFORMATION IF IN A CONFIDENTIAL SETTING)

- Briefly describe the charges as you understand them.
  - » Identify the location of the offense.
  - » Identify any info relating to alibi defense including location/witnesses/corroboration.
- Have you been questioned by the police about the case?
- Did the police search your home, car, property, cell phone, computer?
- Are you aware of anyone else being charged (co-defendants)?
- Name/contact info for complaining witness (if known).
- Names/information about any witnesses we should interview.
- Any injuries to client, etc. that should be documented ASAP.

OTHER INFORMATION

- Is there anything else you would want the judge to know about you, your family, and your situation that might help in getting you released?

APPENDIX B:

Risk Assessment Tools

VPRAI FACTORS

- **Active Supervision (2pts)**
  - Includes: state or local probation, pretrial, parole, ASAP, drug court.
  - Does *not* include: unsupervised probation, good behavior, or release on bail without pretrial supervision.
- **Charge Type (3pts)**
  - Points assessed if charge is *felony* drug, theft, or fraud offense.
  - No points for any other felony or misdemeanor charge.
- **Pending Charges (2pts)**
  - Includes: criminal charges for which there is the possibility of incarceration, offense date must precede current charge's offense date.
  - Does *not* include deferred findings, non-jailable offenses. (*Note:* if the current arrest is *only* for a failure to appear, the underlying charge related to the failure to appear does not constitute a pending charge).
- **Criminal History (2pts)**
  - Includes convictions for a felony or misdemeanor offense that carry the possibility of incarceration.
  - Does *not* include deferred findings, any prior marijuana related misdemeanors eligible for automatic expungement.
- **Two or More Failures to Appear as an Adult (1pt)**
  - Failure to appear means a prior failure to appear for a criminal charge that carries the possibility of incarceration AND for which the court issued a capias.
  - FTA is scored regardless of the outcome of the FTA charge.
  - The number of FTAs is based on the number of missed court appearances, not the number of cases.
  - The FTA *is not counted* if there is confirmation the defendant was in custody when the FTA occurred.
  - It does *not* include any prior marijuana related misdemeanors eligible for automatic expungement.
- **Two or More Convictions for a Crime of Violence as an Adult (1pt)**
  - Act of Violence includes:

- Any crime listed in §19.2-297.1.
- Misdemeanor charges of Assault, Assault and Battery.
- Violation of a Protective Order.
- Being an accessory before the fact to any such charge.

» Does *not* include being an accessory after the fact.

- **Not Employed at the Time of Arrest (1pt)**
  - » Points assessed if the individual is not employed, a student, primary caregiver, or retired at the time of their arrest.
  - » *Employed:* Working regularly at least 20 hours/week
  - » *Student:* enrolled in high school or attending college full-time (including online classes at an accredited school).
  - » *Primary Care Giver:* responsible and consistently caring for at least one dependent child (under 18) or a disabled or elderly family member living with the defendant at the time of arrest.
  - » *Retired* means: receiving retirement benefits or retirement savings.
- **History of Drug Abuse (2pts)**
  - » Drug Abuse: persistent use and chronic abuse of any illegal substance or use of prescription drug if used chronically and illegally.
  - » Does *not* include alcohol or marijuana use.
  - » Sources of information for scoring include information from the defendant, criminal history, supervision records, or information provided by references.
    - In determining if a defendant has a history of drug abuse, a criminal history with more than one drug related conviction (*excluding* possession with intent to distribute and drug distribution) should be considered indicative of a history of abuse.

VPRAI SCORING

The total score will range between 0 and 14pts.

Defendants are assigned to one of 6 risk levels based on their total score:

- Level 1: 0-2pts
- Level 2: 3 -4 pts
- Level 3: 5-6 pts
- Level 4: 7-8 pts
- Level 5: 9-10 pts
- Level 6: 11-14 pts

The level is overlayed onto a matrix that provides recommendations regarding release or detention and level of supervision based on the score plus the type of pending

charge. Charge categories are based on the most serious charge at arrest (if the arrest charge is only an FTA, utilize the underlying charge):

- Violent Felony/Firearm
- Violent Misdemeanor
- Non-Violent Felony
- DUI (felony or misdemeanor)
- Non-Violent Misdemeanor

The Matrix only makes recommendations of whether to detain or release an individual, whether to place them on pretrial supervision (and if so, the level of supervision to be used). It does not make any recommendations regarding bond type or bond amount.

VPRAI DECISION MATRIX (PRAXIS)

	Charge Category					
Risk Level	**Recommendation**	**Non-Violent Misdemeanor**	**DUI**	**Non-Violent Felony**	**Violent Misdemeanor**	**Violent Felony or Firearm**
1	Bail Status	**Release**	**Release**	**Release**	**Release**	**Release**
	Pretrial Sup.	**No**	**No**	**No**	**No**	**Level II**
	Special Cond.	No	No	No	No	As Needed
2	Bail Status	**Release**	**Release**	**Release**	**Release**	**Release**
	Pretrial Sup.	**No**	**Monitor**	**Monitor**	**Monitor**	**Level III**
	Special Cond.	No	No	No	No	As Needed
3	Bail Status	**Release**	**Release**	**Release**	**Release**	**Detain**
	Pretrial Sup.	**Monitor**	**Monitor**	**Level I**	**Level I**	**No**
	Special Cond.	No	No	No	As Needed	N/A
4	Bail Status	**Release**	**Release**	**Release**	**Release**	**Detain**
	Pretrial Sup.	**Level I**	**Level I**	**Level II**	**Level II**	**No**
	Special Cond.	No	As Needed	As Needed	As Needed	N/A
5	Bail Status	**Release**	**Release**	**Release**	**Detain**	**Detain**
	Pretrial Sup.	**Level II**	**Level II**	**Level III**	**No**	**No**
	Special Cond.	As Needed	As Needed	As Needed	N/A	N/A
6	Bail Status	**Detain**	**Detain**	**Detain**	**Detain**	**Detain**
	Pretrial Sup.	**No**	**No**	**No**	**No**	**No**
	Special Cond.	N/A	N/A	N/A	N/A	N/A

DIFFERENTIAL SUPERVISION LEVEL OF THE PRAXIS

LEVEL	SUPERVISION STRATEGY
MONITOR	▪ Court date reminder for every court date. ▪ Criminal history check before court date.
Level I	▪ Court date reminder for every court date. ▪ Criminal history check before court date. ▪ Face-to-face contact once a month. ▪ Special condition compliance verification.
Level II	▪ Court date reminder for every court date. ▪ Criminal history check before court date. ▪ Face-to-face contact every other week. ▪ Special condition compliance verification
Level III	▪ Court date reminder for every court date. ▪ Criminal history check before court date. ▪ Face-to-face contact every week. ▪ Special condition compliance verification

PSA FACTORS

- **Age at current arrest.**
  - » This factor is based on *age at arrest*, not age at time of the offense.
  - » Is only scored for NCA (under **23 yrs. old**) or, if the *current charge involves violence*, additional points are added if they are also **under 21** years old at the time of their arrest.
- **Current arrest is for a violent offense.**
  - » The determination of what offenses are violent is made by the implementing locality.
- **Pending charges at time of arrest.**
  - » Includes: criminal charges for which there is the possibility of incarceration, offense date must precede current charge's offense date.
  - » Also includes deferred findings. (*Note:* if the current arrest is *only* for a failure to appear, the underlying charge related to the failure to appear *is* considered a pending charge)

- **Prior *conviction* (felony or misdemeanor).**
  - Does *not* include juvenile charges, traffic offenses, or local ordinance violations.
  - Does *not* include deferred findings.
  - Depending on category, points will either be assessed for *any* prior conviction (FTA, NVCA) or separate points assessed for prior misdemeanors *and* prior felonies (NCA).
- **Prior violent offense *conviction*.**
  - Does *not* include juvenile charges, traffic offenses, or local ordinance violations.
  - State or locality implementing PSA determines what offenses are "violent."
  - Count reflects the number of prior adult convictions. Each conviction is counted separately, even if they arise out of the same event or have the same offense date.
- **Failure to appear in past 2 years.**
  - Does *not* include juvenile, traffic, or local ordinance violations.
  - Does *not* include failures to appear associated with probation violations,
  - The number of FTAs is based on the number of missed court appearances, not the number of cases.
  - FTA is scored regardless of the outcome of the FTA charge.
  - The number of FTAs is based on the number of missed court appearances, not the number of cases.
  - The FTA *is not counted* if there is confirmation the defendant was in custody when the FTA occurred or if the bench warrant was withdrawn the same day it was issued.
- **Failure to appear more than 2 years ago.**
  - Defined the same was as Failure to Appear in the past 2 years.
- **Previously sentenced to incarceration .**
  - Sentence must be *14 days or more* for an adult charge.
    - *Only active time* is counted. Suspended time is not counted.
    - The 14 days must be for a single sentence. Do not aggregate multiple sentences even if they are from a single case.
    - Includes time from a probation violation if the time was imposed by a court.
    - "Time Served" counts if the person was detained at least 14 days.

PSA SCORING

Factor	FTA	NCA	NVCA
Age at Arrest		Less than 23yrs = 2 pts	
Current Charge is Violent Offense			Yes = 2 pts
			And less than 21 yoa at current arrest = + 1 pt
Pending Charge at time of arrest	Yes = 1 pt	Yes = 3 pts	Yes = 1 pt
Prior Conviction	MD or F = 1pt	MD = 1 pt	MD or F = 1 pt
		F = +1 pt	
Prior Conviction for Violent Offense		1-2 priors = 1 pt	1-2 priors = 1 pt
		3 or more = 2 pts	3 or more = 2 pts
FTA Conviction in past 2 yrs.	1 prior = 2 pts	1 prior = 1 pt	
	2 or more = 4 pts	2 or more = 2 pts	
FTA Conviction more than 2 yrs. ago	Yes = 1 pt		
Previously sentence to incarceration		Yes = 2 pts	

SCORING MATRIX

Failure to Appear		New Crime Arrest		New Crime of Violence Arrest Flag	
Raw Score	**Scaled Score**	**Raw Score**	**Scaled Score**	**Raw Score**	**NCVA FLAG**
0	1	**0**	**1**	**0-3**	**NO FLAG**
1	2	**1-2**	**2**	**4-7**	**FLAG**
2	3	**3-4**	**3**		
3-4	4	**5-6**	**4**		
5-6	5	**7-8**	**5**		
7	6	**9-13**	**6**		

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