

## Appendix 5E

### Training Memo: Bail Setting, Conditional Release and Enforcement

Bail is the amount of money defendants must post to be released from custody until their trial. It is not punishment; rather, it is intended to ensure that defendants appear for trial and any hearings for which they must be present.<sup>1</sup> Nearly every state has a presumption in favor of releasing all but a specified few defendants before trial.<sup>2</sup>

#### *Setting Bail*

Courts must decide the amount of bail by factors set forth in state law, such as risk of flight, type of crime alleged, the defendant's dangerousness, and community safety. A court may also:

- Release a defendant on his or her own recognizance (without a payment of money) on the promise to appear for all hearings and for trial. A court may consider this when presented with information that a defendant has steady employment, roots in the community, and other personal circumstances indicating flight is unlikely.<sup>3</sup>
- Condition bail on requirements of the defendant, or on limits on the defendant's behavior or activities, such as no contact with the victim.
- Under certain circumstances, detain a defendant before trial. Circumstances in which release can be denied are violent crimes, sex crimes, when the victim is a child or family member, or if the defendant has

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<sup>1</sup> See, e.g., *How Courts Work*, THE AMERICAN BAR ASSOCIATION, 2015, [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail.html](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail.html).

<sup>2</sup> Forty states have such a provision in the state constitution. Where the constitution is silent on this, eight states have created a statutory presumption. *Pretrial Release Eligibility*, NATIONAL CONFERENCE OF STATE LEGISLATURES, 2015, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx>.

<sup>3</sup> *How Courts Work*, THE AMERICAN BAR ASSOCIATION, 2015, [http://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/bail.html](http://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/bail.html).

previous convictions for certain serious offenses. Before ordering detention, a court must make particular findings,<sup>4</sup> typically after a hearing.

### ***Evaluating Appropriateness of Bail and Conditions of Release***

As alluded to above, state laws draw heightened attention to domestic violence in the context of determining bail and any conditions. The time between arrest and trial – when bail and conditions are determined – is dangerous for domestic violence victims. Trial delays experienced in most jurisdictions allow ample opportunity for defendants to intimidate victims of and witnesses to their violence.<sup>5</sup> Criminal justice literature has consistently indicated over the years that many if not most abusers try to intimidate or coerce their victims from seeking help from or cooperating with the criminal justice system, or retaliate against victims who have already sought help or begun cooperating.<sup>6</sup> Further, victims

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<sup>4</sup> For example, state law may require findings related to the strength of evidence, to a determination that no conditions can reasonably assure the defendant's appearance, or to whether the defendant is a danger to himself/herself or the community. For more information, see *50 State Chart: Pretrial Release Eligibility*, NATIONAL CONFERENCE OF STATE LEGISLATURES, 2015, <http://www.ncsl.org/research/civil-and-criminal-justice/pretrial-release-eligibility.aspx>.

<sup>5</sup> Kerry Healey, "Victim and Witness Intimidation," *Research in Action*, NATIONAL INSTITUTE OF JUSTICE, 1995.

<sup>6</sup> E.g., Duluth, Minnesota is known for its power and control conceptualization of the dynamics of battering (the *Power and Control Wheel*). In 1984, Duluth's Domestic Abuse Intervention Project asked women who had been battered to describe the specific behaviors of the men who battered them. The tactics chosen for the *Power and Control Wheel* were those most universally experienced by battered women, including "using coercion and threats," "making her drop charges," and "using intimidation." *What is the Duluth Model*, Domestic Abuse Intervention Programs, 2011, <http://theduluthmodel.org/about/faqs.html#wheels>.

Witness intimidation is most associated with organized crime and domestic violence. Kerry Healey, "Victim and Witness Intimidation," *Research in Action*, NATIONAL INSTITUTE OF JUSTICE, 1995; and also Kelly Dedel, *Witness Intimidation*, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, 2006.

19% of 178 DV victims were harmed again by assailants after arrest but before the case closed, suggesting defendants deliberately deter victims from cooperating with prosecution. R. Fleury-Steiner, D. Bybee, C. Sullivan, J. Belknap, and H. Melton, *Contextual Factors Impacting Battered Women's Intentions to Reuse the Criminal Legal System*, JOURNAL OF COMMUNITY PSYCHOLOGY, Vol. 34, No. 3, 2006.

In addition to doing harm or threatening to do harm to victims, researchers discovered after listening to recordings of incarcerated abusers' calls to victims who subsequently recanted their initial reports of domestic violence that the abusers also used emotional appeals designed to minimize their actions and gain the victim's sympathy. A. Bonomi, R. Gangamma, C. Locke, H. Katafiasz, & D. Martin, *Meet Me at the Hill Where We Used to Park*, SOCIAL SCIENCE & MEDICINE, 73:1054-1061, 2011.

who try to separate from their abuser are at increased risk of being assaulted.<sup>7</sup> Property damage, stalking and further abuse often continue after separation and may escalate in frequency or severity. Abusers will often intensify controlling behaviors when they feel their power and control is threatened. Being arrested poses just such a threat to an abuser's power and control.

The determination of bail and any conditions are therefore an important point in the criminal justice process to reduce danger to domestic violence victims and to provide mechanisms to hold offenders accountable for further attempts at abuse.

Depending on the jurisdiction, bail and conditions may be evaluated and recommended by a prosecutor, or by specialized positions such as a bail evaluator<sup>8</sup> or pretrial release officer. Given this important point at the criminal justice processing of domestic violence cases, it is also important for the practitioner overseeing it to operate under a common philosophy with the rest of the criminal justice system partners – a common philosophy about danger presented by abusers, and safety for victims. The Blueprint for Safety provides just such a common philosophy – a set of principles<sup>9</sup> that guide the practices of each criminal justice actor in processing domestic violence cases:

- Adhere to an interagency approach and collective intervention goals
- Build attention to the context and severity of abuse into each intervention
- Recognize that most domestic violence is a patterned crime requiring continuing engagement with victims and offenders
- Ensure sure and swift consequences for continued abuse

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<sup>7</sup> See, e.g., risk or danger assessment instruments commonly used in domestic violence cases, such as:

the ***Danger Assessment*** (<https://www.dangerassessment.org/>);

the ***Domestic Violence Screening Instrument***, or ***DVSI*** (“The Family Violence Risk Assessment Project and its Domestic Violence Screening Instrument (DVSI-R),” *Sanctions Updates*, State of Connecticut Judicial Branch, Court Support Services Division, Spring 2006); and

the ***Spousal Assault Risk Assessment***, or ***SARA*** (P. Kropp, S. Hart, C. Webster & D. Eaves, *SARA Spousal Assault Risk Assessment Guide*, Multi-health Systems, 1999).

<sup>8</sup> E.g., in Hennepin County, Minnesota, bail evaluators collect criminal history, gather information from the victim, interview the suspect, and make bail recommendations for arraignment court or weekend judicial reviews. K. Lizdas, C. Sponsler, and S. Lee, *Case Processing of Misdemeanor Domestic Violence Cases: Initial Police Response through Arraignment*, BATTERED WOMEN'S JUSTICE PROJECT: MINNEAPOLIS, MN, 2000.

<sup>9</sup> Chapter 1, “Foundations of Effective Intervention,” *The Blueprint for Safety: An Interagency Response to Domestic Violence Crimes*, PRAXIS INTERNATIONAL: ST. PAUL, MN, 2010

- Use the power of the criminal justice system to send messages of help and accountability
- Act in ways that reduce unintended consequences and disparity of impact on victims and offenders

Applying these principles to pre-trial release practice in domestic violence cases **requires** attention to safety and the continuing risk of harm to the victim **in addition to** the traditional criteria of ensuring the defendant's future court appearances. Bail evaluators and prosecutors should have access to and use all information gathered by 911 Computer Assisted Dispatch (CAD), law enforcement reports that include risk questions and the existence of any protection orders, any follow-up investigation including prior criminal history and non-arrest reports, as well as any additional information gathered by evaluators' or prosecutors' own offices through contact with victims and advocates, to increase knowledge about the history and context of violence in each case.

Many bail evaluation and pretrial release programs use standardized assessment tools for guidance in defining and determining what weight to assign statutory factors when assessing the degree of risk a defendant poses to public safety and non-appearance in court and when setting bond conditions to mitigate that risk.<sup>10</sup> However, these tools are limited when evaluating risk in domestic violence cases. Additional risk factors should be considered that specifically mark heightened risk in domestic violence cases.<sup>11</sup> After considering these additional risk factors, the additional information obtained should be included in the review and evaluation

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<sup>10</sup> These tools generally consist of questions related to ties to the community (owning versus renting a home, having a phone, employment, family or marital status, etc.) and past misconduct indicative of the potential for pretrial misconduct (current or previous probation or parole supervision and any violations, substance abuse, mental health issues, previous failures to appear in court, etc.)

<sup>11</sup> See the following, which consist of questions specific to domestic violence such as has the perpetrator attempted to strangle the victim, has the perpetrator threatened to kill the victim, is there now or has there been a protection order against the perpetrator, etc.:

Chapter 1 "Practitioner's Guide to Risk and Danger in Domestic Violence Cases," *The Blueprint for Safety: An Interagency Response to Domestic Violence Crimes*, PRAXIS INTERNATIONAL: ST. PAUL, MN, 2010; and

"Domestic Violence Risk Assessment Bench Guide," prepared by the Gender Fairness Implementation Committee, Minnesota State Supreme Court, 2006.

conducted prior to recommending bail amounts and/or conditions of release in domestic violence cases. These domestic violence-specific risk factors and the domestic violence-specific information they elicit are an additional instrument<sup>12</sup> in differentiating cases presenting high risk from those presenting less risk so bail and pretrial release recommendations can be tailored to risk and danger in each case.

If the information as a whole suggests a higher risk than is revealed by the assessment tool, the recommendation regarding bail and release and bail should be adjusted to impose greater restrictions and closer monitoring during the pretrial period.<sup>13</sup>

### ***Common Conditions of Release***

Conditions of bail that – alone or in combination, depending on the evaluation of risk – are commonly ordered in domestic violence cases:

- No contact or limited contact with the victim or witnesses. Courts in many jurisdictions spell this out specifically by stating “no contact” means no contact in person, via third parties, by phone, in writing, or through social media. Courts may further specify that the defendant is not to go to places where the victim is, such as the victim’s home, school, place of employment, etc. Regarding limited contact, courts may fashion a type of limited contact based on the victim’s needs and the existence of other

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<sup>12</sup> For more information, see attached *Domestic Violence Risk Assessment Tools: A Chart for Bridging Perspectives*, compiled by PRAXIS INTERNATIONAL: ST. PAUL, MN, 2015.

<sup>13</sup> E.g., Sonoma County, California’s pretrial release guidelines indicate that defendants charged with domestic violence offenses may have enhancements that increase the recommended level of supervision. Enhancements are described as children present during the current domestic violence incident, battery causing injury to the victim of the current domestic violence incident, one or more violations of a domestic violence restraining or stay-away order in the past seven years, and two or more domestic violence convictions in the past seven years. Enhanced supervision is described as: “The defendant is under pretrial supervision administered by the Probation Department. The defendant automatically receives telephone reminder calls regarding upcoming court hearing dates and times. Defendant-staff contacts take place in the office or field. There is a minimum of one face-to-face contact per week, beginning with the sign-up intake. Supervision includes address verification. Supervision also includes placement on electronic monitoring when court-ordered, chemical testing when court-ordered, referral to needed services when court-ordered or on a voluntary basis, verification of enrollment in court-required services, and appropriate responses to defendant’s performance during supervision, such as violations of release conditions, and client-identified problems.” “Sonoma County Pretrial Release and Detention Guidelines 2014,” posted on the *2015 California Courts Pretrial Summit* page of the website of CALIFORNIA COURTS: THE JUDICIAL BRANCH OF CALIFORNIA at <http://www.courts.ca.gov/pretrial.htm>.

court orders or legal relationships; e.g., “No contact except for the purposes of exchanging the children for visitation at 5 p.m. each Friday and again at 5 p.m. each Sunday.”

- No contact with children or pets, if the domestic violence incident involved harm to children or pets. Several jurisdictions have begun programs at shelters to temporarily care for pets while abuse victims are in shelter or looking for a place to live away from the abuser.
- No consumption of alcohol or other intoxicants. While the consumption of alcohol or other intoxicants does not **cause** domestic violence, it many times is a **companion** to abusive behavior and provides an excuse for or a release of inhibition from committing domestic violence. Some jurisdictions also restrict the possession of alcohol or the frequenting of bars and similar establishments in the business of selling alcohol. Many jurisdictions also order the defendant to submit to random urinalysis or breathalyzer tests.
- No possession of firearms. A growing number of jurisdictions no longer take the word of the defendant that he/she will not possess firearms while on bail, but rather have created policies and protocols for confiscating and storing firearms to ensure compliance with this condition of bail. Courts in some jurisdictions also order no possession of other weapons, such as knives.
- Submit to the wearing of a device, such as a GPS monitor or alarm, that will alert authorities or the victim as to one’s whereabouts.
- Refrain from the use of particular technology or social media. In recent years, the use of electronic surveillance, texting, and social media in harassing, threatening, or intimidating victims has grown; conditions of bail have had to adapt.
- Keep the court apprised of any change of address or phone number. Some courts also proscribe the method of keeping the court apprised; e.g., reporting in person to a criminal justice agency once a week to confirm one is still at the same address versus merely reporting by letter or phone only when an address has changed.
- Do not leave the jurisdiction of the court without prior approval. This typically means the defendant cannot leave the state (on vacation, to look for work elsewhere, etc.) without first obtaining the court’s permission. When considering such permission, a court may require information about the where the defendant will be staying, at what number the defendant can be reached, etc. Subsequently, when giving permission, the court may

add as a condition of bail that while out of the jurisdiction on a particular date or dates, the defendant must stay that place, be reachable for a check-in call at that phone number, and so on.

This is not an exclusive list of conditions; courts may fashion new conditions when presented with new or unique circumstances. Additionally, some defendants may request a particular condition be ordered (e.g., attending a weekly Alcoholics Anonymous group or engaging in mental health counseling) in hopes of more favorable treatment when the case is disposed of.

### ***Caveats***

Just as the above list of common conditions is not exclusive, neither are the risk factors mentioned and footnoted above. The **presence** of specific domestic violence risk factors can indicate a heightened level of risk. The **absence** of these factors, however, is not necessarily evidence of the absence of risk of lethality.

- **Obtain information on these factors through all appropriate and available sources**
  - Potential sources include police, victim witness staff, prosecutors, defense attorneys, court administrators, bail evaluators, pre-sentence investigators, probation, custody evaluators, community advocates (with permission of the victim), the parties and the attorneys
- **Do not elicit safety or risk information from victims in court or other public settings**
  - Safety concerns can affect the victim's ability to provide accurate information
  - Soliciting information from victims in a private setting (by someone other than the judge) improves the accuracy of information and also serves as an opportunity to provide information and resources to the victim

- **Communicate to practitioners the importance of complete and timely information on these factors**
  - This ensures that risk information is both sought for and provided at each stage of the process and that risk assessment processes are institutionalized
  - Review report forms and practices of others in the legal system to ensure that the risk assessment is as comprehensive as possible
  
- **Craft clear specifically-worded recommendations of bail conditions**
  - This ensures that the court is better able to adopt recommendations that result in clear, specifically-worded court orders
  - Clear, specifically-worded conditions of bail and release are more readily enforceable. Vaguely worded conditions are not. For example, “No contact except for reasonable communication about the child in common” is not readily enforceable by a law enforcement officer who receives a complaint that a defendant is using the child as an excuse to contact the victim about non-child matters.
  
- **Expect consistent and coordinated responses to domestic violence**
  - Communities whose practitioners enforce court orders, work in concert to hold perpetrators accountable and provide support to victims are the most successful in preventing serious injuries and domestic homicides
  
- **Provide victims information on risk assessment factors and connect them with confidential advocates**
  - Information and access to advocates improves victim safety and the quality of victims’ risk assessments
  
- **Note these risk factors are not an exclusive list**
  - Mentioned factors are the ones most commonly present when the risk of serious harm or death exists
  - Additional factors exist which assist in prediction of re-assault
  - Victims may face and fear other risks such as homelessness, poverty, criminal charges, loss of children or family supports



- **Remember that the level and type of risk can change over time**
  - The most dangerous time period is the days to months after the perpetrator discovers that the victim
    - might attempt to separate from the perpetrator or to terminate the relationship
    - has disclosed or is attempting to disclose the abuse to others, especially in the legal system
  - Risk factors in an individual case due to changing circumstances, such as a defendant being served with a protective order, may indicate a higher and more immediate risk as time passes, the situation changes and the case progresses in the system.
  - Pretrial release practitioners having contact with defendants and victims during this uncertain pre-trial period need to periodically assess risk and not assume that the level of risk and danger in any particular case is static.

### ***Enforcement***

Placing controls on a defendant's behavior early in the process is critical for enhancing victim safety. Ensuring that sure and swift consequences are imposed when defendants violate conditions is crucial in order to hold defendants accountable for their behavior. The effectiveness of a pretrial program is dependent on the ability to enforce the conditions of release. If conditions of release are not enforced this only further reinforces the abuser's assertion to the victim that the system can't stop me and the victim's skepticism that she will be protected.

Effective enforcement is based on collaboration and linkages among the pretrial program and interagency partners including, prosecution, law enforcement, advocates and the court. Not every violation of a pretrial condition necessarily requires forfeiture of bail or a return to court; however, every violation does require a response. Sure and swift consequences mean that even if the sanction is not severe it is certain and timely. Sanctions for violations should be tailored to the actions of the defendant and whether those actions pose a risk to the victim.

Defendant's behavior that increases risk should receive immediate severe sanctions while behavior that is a violation but does not implicate safety should receive a lower level of sanctions. Defendants in domestic violence cases typically push whatever boundary is set. Failure to respond to violations will be viewed as an advantage by the defendant and permission to continue and escalate noncompliant behavior. Victims should be notified of the conditions of release, the process for reporting violations and any court actions.

If a defendant's location is not known, compliance with pretrial conditions is uncertain and thus the victim's safety may be in question. In those cases where the defendant's location is unknown and thus the status of compliance with pretrial conditions is unknown, pretrial programs should consider requesting a warrant.

Requests for warrants necessitate that pretrial release agencies have a collaborative relationship with interagency partners. A process should be developed to expedite warrant service and enforcement for domestic violence defendants in appropriate cases where there is a heightened risk of harm. Victims should be notified of the issuance and enforcement of a warrant and whether the custody status of the defendant has changed.

### ***Conclusion***

The time period between arrest and case disposition poses significant risk for victims of domestic violence. Careful analysis of the risk posed by individual defendants is necessary to effective intervention during this period. Bail and pretrial release conditions should be based on not only the charge itself but also the risk and danger posed by the defendant. Most cases coming into the criminal justice system are cases of battering. Even if this particular incident is charged as a misdemeanor, the charge may not adequately reflect the seriousness of violence between the victim and defendant. In many cases it may be the first time the violence was reported to the police but it may not be the first incident of abusive behavior. A defendant who poses higher risk should have higher bail, more pretrial constraints on his/her behavior, closer scrutiny and more active

monitoring and reporting than a defendant considered lower risk. Admittedly, decisions as to the intensity of monitoring and level of contact will be influenced by the availability of resources. However, by differentiating risk, pretrial release recommendations regarding the amount of bail and type and number of conditions can be tailored to the potential risk presented in each case. Likewise, intervening quickly and with certainty when the defendant violates bail or bond conditions can reduce the capacity for further harm.