

**This Guide assumes that the discussion will take about 1 1/2 hours**

**Discussion Guide – Bail Reform - revised 1/25/19**

**Discussion Leader – Introduction**

At its June 2017 State Convention, LWV of Maryland adopted a study of corrections and bail. The League has studied and adopted positions on various aspects of the administration of justice system. However, we have never looked at the pretrial system. The bail study was adopted because of developments over the past few years that could greatly change the current system as well as increased public interest in the subject. The study looked at the entire pretrial system since it's impossible to separate bail from the other components of the system

Resource person will give us an overview of the Pretrial process. After that, we'll be discussing each of the consensus questions in order.

*Allow about 1 hour for the following discussion through consensus questions 1, 2 and 3.*

**Resource Person –**

In our judicial system, a person accused of a crime is considered to be innocent until proven guilty so there's a presumption that a defendant should be at liberty before trial. When it's necessary to ensure the person's appearance at trial and/or protect the safety of the individual or the public, pretrial conditions such as bail and/or monitoring, drug treatment or other services or conditions may be imposed as well as bail.

In all but the most serious cases, the individual appears before a District Court Commissioner. Commissioners are appointed by the judges of the court and are not required to be lawyers though they must have a college degree. Based on information provided by the prosecution and defense lawyers, the Commissioner determines whether there was probable cause for the arrest and whether the individual should be released on his or her own recognizance, with some kind of conditions, including bail, or whether he or she should be incarcerated. The decision is based on such factors as the nature and severity of the crime, the defendant's employment status, criminal history and financial resources. Serious felony crimes are reviewed by a Circuit Court judge .

So what is bail? It's a sum of money or property that is pledged to the court by the defendant or others to insure that he/she will be present at trial. In some cases, a bail bondsman acts surety (guarantor) that the defendant will appear for trial. Bail bondsmen charge a premium, typically set at 10% of the bail amount. Assets pledged to the court are returned unless the defendant doesn't appear for trial. Premiums paid to bail bondsmen are not refunded.

Excessive bail is unreasonably high bail given the offense and the probability that the defendant will appear for trial. A bail commissioner orders a defendant to be held in detention only when no conditions of release are deemed sufficient to protect public safety and ensure the defendant's appearance in court. In Maryland, a defendant who is denied pretrial release must be granted a bail review hearing before a District Court judge immediately if court is in session or at the next session of the court.

The United States and the Philippines are the only countries in the world that impose bail.

Discussion Leader: Thank you. Are there any questions or comments?

Our resource person will now tell us about the status of the pretrial judicial system in Maryland in the past few years.

Resource:

While bail theoretically satisfies the system's preference for pretrial liberty, a lack of standards and consistent application has resulted in racial and economic inequities and an increasing number of pretrial detainees. In recent years, there has been a rising chorus calling for reform. In a study performed by the Maryland Public Defenders office, it was found that a quarter of all the people incarcerated in Maryland were awaiting trial. The study found that there was a disproportionate impact on racial minorities and low income individuals. Of the \$256 million in nonrefundable bail cost to defendants in the past 5 years, \$75 million was paid in cases where there was no finding of guilt. In addition, the study found that people held in jail frequently lost their jobs, their support systems and even their families whether they were guilty or not. And, of course, detention causes increased costs to the taxpayer.

In October 2016, The Attorney General of Maryland urged the Court of Appeals to amend Rule 4-216 which provides the criteria and standards for judicial officers to apply during pretrial hearings. He opined that application was often inconsistent with state and federal law, disproportionately burdensome to communities of color and ineffective in its use of state and federal resources. He said that the current system also harms defendants by unnecessarily depriving them of employment and resulted in unnecessary separation of families. He issued an opinion that setting bail without individual consideration of a defendant's financial resources violated the 14<sup>th</sup> Amendment of the US Constitution and Article 25 of the Maryland Declaration of Rights. In the Spring of 2017, the Court of Appeals heard many hours of testimony both in favor of and opposed to amending Rule 216. The amended rules do not eliminate bail but require judges to consider the individual consequences of the defendant, especially financial. No bail may be imposed that results in detention of the defendant solely because of inability to pay. The rule change went into effect on July 1, 2017.

**HAND OUT GRAPHS**

Information provided by the Administrative Office of the Courts compare various statistics before and after the implementation of the amended Rule 216, As you can see unsecured releases have increased, the number of defendants assigned bail has decreased and, interestingly, the number held without bail has increased significantly. It is believed that judges are detaining defendants who, prior to the Rule change, may have been released with a high bail.

**Discussion Leader** Any questions? Or discussion?

Who opposed the Rule change and advocated continued reliance on bail?

Needless to say, the bail bond industry has been a leader in opposition to bail reform. Their arguments are basically that there is a danger to the public if too many people are released without bond and that bondsmen are a more cost effective way of monitoring defendants and assuring that they will appear for trial. The Maryland Police Chief's Association and the Maryland Sheriff's Association jointly believe that, by releasing defendants, the courts are not holding miscreants responsible for their actions. They also express concern that there are not enough pretrial services in place and fear that the job of monitoring released defendants will fall on our already overworked police and sheriff's departments.

Former Solicitor General of the United States Paul Clements argued that 'there is no constitutional right to affordable bail' and that there is a difference between excessive bail and affordable bail. Attorneys representing crime victims and child victims were concerned about their safety and said that the most dangerous time for victims is right after the defendant has been released from jail. Generally opponents expressed concern for public safety and the cost and effort to follow up on released defendants. Under the system that has been in place, bail bondsmen act as an ally in following up on defendants.

**Discussion Leader.** Any questions? Comments? Ask resource person to briefly discuss pretrial hearings and risk assessment.

### **Resource**

Rule 4-216 lays out specific criteria to be used at a bail hearing. They include the nature of the crime, defendant's prior record of appearances at trial, family situation, employment status, financial resources, etc.

A risk assessment scoring system can be used to help judicial officers decide whether to detain defendants or impose conditions of release based on the criteria in Rule 4-216. Although judicial officials retain the discretion to determine the pretrial disposition of defendants, the scoring system offers guidance and helps to provide a level of consistency. Six counties in Maryland use a form of risk assessment. Only Montgomery and St. Mary's use an empirically validated risk assessment tool that uses statistical data to eliminate factors such as race, gender and socioeconomic status.

By pretrial services, we are really talking about two things – services for people who are awaiting trial – for example, monitoring, drug and alcohol treatment, job training, etc. – and pretrial diversion – programs where defendants have pleaded guilty and receive court "sentences" to various kinds of services. In 2017, 13 counties provided some form of pretrial services while 11 did not. In the recent legislative session, a Pretrial Services Program Grant Fund bill was passed and funded with \$1 million/year through 2023. Its goal is to provide funds for counties to either establish pretrial services or improve existing services.

**Discussion Leader: Now we're going to discuss and seek consensus on Consensus Discussion Numbers 1, 2 and 3. We'll take each section separately for discussion and questions**

*Some questions contain multiple options which may be combined or selected individually. I will read each question through before answering and discuss as a whole.*

- 1) A person accused of a crime should be released awaiting trial **without bail** if:
- a. a risk assessment tool indicates that the defendant is likely to appear in court;

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

- b. the defendant does not pose a threat to victims, others or the community;

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

- c. the jurisdiction has pretrial services to monitor and/or treat the defendant.

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

Comments

- 2) Conditions for pretrial release should be determined based on:

- a. a validated, evidence-based, race-neutral risk scoring instrument;

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

- b. information presented at the initial appearance and bail review hearing;

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

- c. an in-person assessment of the defendant whenever possible;

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

- d. judicial discretion. Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

- 3) Bail should be abolished.

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

***Even if you said, "Yes" to question 3 above, please answer question 4.***

- 4) If bail continues to be authorized by law, it should be imposed:

1. if there is a risk that the defendant will not appear in court for trial;
2. with consideration of the defendant's ability to pay bail;
3. if all alternatives have been considered and rejected.

## Resource

Pretrial diversion, another form of pretrial services, is overseen and supported by the state level Office of Problem Solving Courts. Such courts include drug courts, mental health courts, truancy reduction courts and veterans courts. The aim is to help people who plead guilty to misdemeanors and who problems such as alcoholism, drug dependency etc. The defendant must plead guilty in order to participate in these programs. If the program is successfully completed, the record of arrest may be expunged. 21 of Maryland's 24 counties have at least one pretrial diversion program. The Office of Problem Courts administers some grants to counties to adopt or enhance their problem solving courts.

**Discussion Leader:** Now let's discuss consensus question #5.

5) Pretrial services should:

a. be required in all jurisdictions;

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

b. provide supervision and use automated means of ensuring court appearance, when possible;

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

c. include a range of services including treatment programs, when possible;

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

Comments:

6) Funding for pretrial services should be:

a. partially funded by the state, with the balance funded by the counties

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

b. fully funded by the state

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

c. based exclusively from savings realized through reduced prison populations;

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

d. approved without regard to savings realized through reduced prison populations;

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

e. partially funded by financial contribution from defendant, when appropriate

Agree \_\_\_\_\_ Disagree \_\_\_\_\_ Abstain \_\_\_\_\_

Comments:

**Discussion Leader** Let's talk about the bail bond industry.

**Resource:** Currently, bail bondsmen are licensed by the Maryland Department of Insurance. In order to obtain a license, a person must have worked in the bail bond field for at least a year, pass an examination and post a surety bond. To maintain their license, bail bondmen must take continuing education courses. Bail bond agents perform the duties that law enforcement would in monitoring defendants during pretrial release, ensuring their presence at trial and tracking them down if they fail to appear. There have been allegations of abuse of their authority, including intimidation of defendants, extortion and worse. In addition, the bond premium, interest and additional fees that agents charge defendants can cause long-term financial hardship, regardless of whether the defendant is found guilty or innocent.

7) Should the use of bail bond agents be disallowed?

*Even if you said, "yes" on question 7, please answer question 8.*

8) Bail bond agents should be:

a. closely regulated and monitored;

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

b. subject to recourse for abuse;

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

c. utilized to supervise released defendants and track down any who fail to appear.

Agree\_\_\_\_\_ Disagree\_\_\_\_\_ Abstain\_\_\_\_\_

Comments:

Further comments: