

Texas Bail Manual



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This manual is designed to help support public defense lawyers in Texas working to improve pretrial practices in the state through zealous, effective, and informed advocacy on behalf of those persons accused of criminal offenses. Meaningful pretrial advocacy helps protect individuals from a bail system that 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.



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“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



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Introduction

“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)

Texas’ founding documents speak to liberty as its highest ideal. Its Declaration of Independence condemns the incarceration of its citizens,¹ and the Texas Constitution promises bail to virtually every person accused of a crime,² but the reality for many is that the promise of liberty is a hollow one. Approximately 74% of Texas’ jail population are pretrial detainees,³ many of whom are simply unable to pay their bond. Bail amounts set based on the charges brought – without considering the circumstances of the individual accused – create inequities that detain the poor and release the rich. Rather than decisions driven by ensuring appearances in court and securing the needs and safety of the community, release decisions are made on an ad hoc basis.

The inequities in early detention decisions distort all aspects of the criminal justice system that follow. Research repeatedly shows that individuals who are detained pretrial fare worse across every measure of the criminal justice system than their similarly situated peers who are released pending the disposition of their cases.⁴

Those detained are:

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

It is easy to understand why these outcomes occur. Individuals held in jail for even a few days face the loss of their job, their housing, and their children; they suffer disruptions to education, training, and medical and mental health services; and their incarceration places added pressures on family relationships and disconnects them from their community.

For many, pleading guilty becomes the most accessible, most 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

¹ Texas Judicial Council, [Criminal Justice Committee Report & Recommendations: Pretrial Decision-Making Practices](#) (Oct. 2016), at 2. (TJC 2016)

² TEXAS CONSTITUTION Article I, sections [11](#), [11a](#), [11b](#) and [11c](#).

³ Levin, M., and Haugen, M., [Open Roads and Overflowing Jails: Addressing High Rates of Rural Pretrial Incarceration](#), Center for Effective Justice, Texas Public Policy Foundation (May 2018)

⁴ Laura and John Arnold Foundation, [Research Summary: Pretrial Criminal Justice Research](#) (Nov. 2013). (LJAF Pretrial Criminal Justice Research)

to serve on a jury. And many will face fines, fees, and costs that, like their bail, they are unable to pay, thus remaining tethered to the criminal legal system.

Even those who spend just two or three days in pretrial detention face challenges, including being at increased risk of missing future court dates or being re-arrested, thus elevating the chances they will return to pretrial detention, and again face the added pressures and consequences that detention brings.

It is for these reasons that prompt, effective advocacy at magistration is vital. What happens in these first few hours after arrest shapes the course of an individual's case, influences the stability of their family, and impacts the financial and public safety of an entire community. Avoiding unnecessary pretrial detention should be among a criminal justice system's highest priorities and defense counsel's staunchest efforts.

This manual is designed to be a tool to aid defense attorneys in their efforts to share their client's story and effect their release. It includes relevant state and federal law; advice on how to gather information and how to utilize that information to advocate for a client's release; 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 insights into issues relating to racial disparity and over-conditioning.

Why Pretrial Matters

“Pretrial decisions determine mostly everything.”

– Professor Caleb Foote, John Jay College of Criminal Justice and Graduate Center,
City University of New York

Research repeatedly confirms that an individual’s pretrial status shapes virtually every aspect of their case.⁵ Both detention throughout the pretrial process, and detention of even a few days, can have profound impacts on case outcomes.⁶ As a result, the decisions made in the hours following someone’s arrest are among the most crucial.

Those released within the first 24 hours of detention not only have a higher likelihood of their case being dismissed and of being provided deferred adjudication opportunities, but they also face a lesser likelihood of being incarcerated and shorter sentences than peers with similar charges and prior history if they are sent to jail or prison. Moreover, those released in the first 24 hours are less likely to miss a court appearance, less likely to be arrested for a new offense while pending trial, and are less likely to be arrested again in the 2 years after their case concludes.⁷

Case Outcomes

Compared to those who are released at some point during the pretrial period, those detained continuously prior to trial face⁸:

Jail	<ul style="list-style-type: none">• 4x greater likelihood of being sentenced to jail• 3x longer jail sentence
Prison	<ul style="list-style-type: none">• 3x greater likelihood of being sentenced to prison• 2x longer prison sentence

⁵ LJAF [Pretrial Criminal Justice Research](#).

⁶ [TJC 2016](#), at 2.

⁷ LJAF [Pretrial Criminal Justice Research](#).

⁸ LJAF [Pretrial Criminal Justice Research](#).

An examination of case outcomes in Wichita County, Texas⁹ revealed that, as compared to similarly situated defendants who remained detained, those released pretrial had a:

- 333% better chance of receiving a deferred adjudication;
- 30% better chance of having their case dismissed;
- 24% lesser likelihood of being found guilty; and
- 54% shorter jail sentence.

Similar results were found in a 2016 study of defendants in Philadelphia, Pennsylvania, and Miami-Dade County, Florida.¹⁰

Short Periods of Incarceration, Big Impacts

Even brief periods of incarceration can have major impacts. Research reveals that incarceration for as few as two to three days can negatively impact whether an accused person misses a later court date, is arrested for a new offense, or has a higher recidivism rate. In just a few days, the circumstances that make an individual low-risk can begin to crumble. Those held in custody just a few days face the loss of their job and stable income. Lost employment can quickly become lost housing, food insecurity, impacted childcare, and interrupted medical and mental health care, placing those detained at greater risk 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 these individuals to re-arrest, revocation of bond, and return to incarceration.

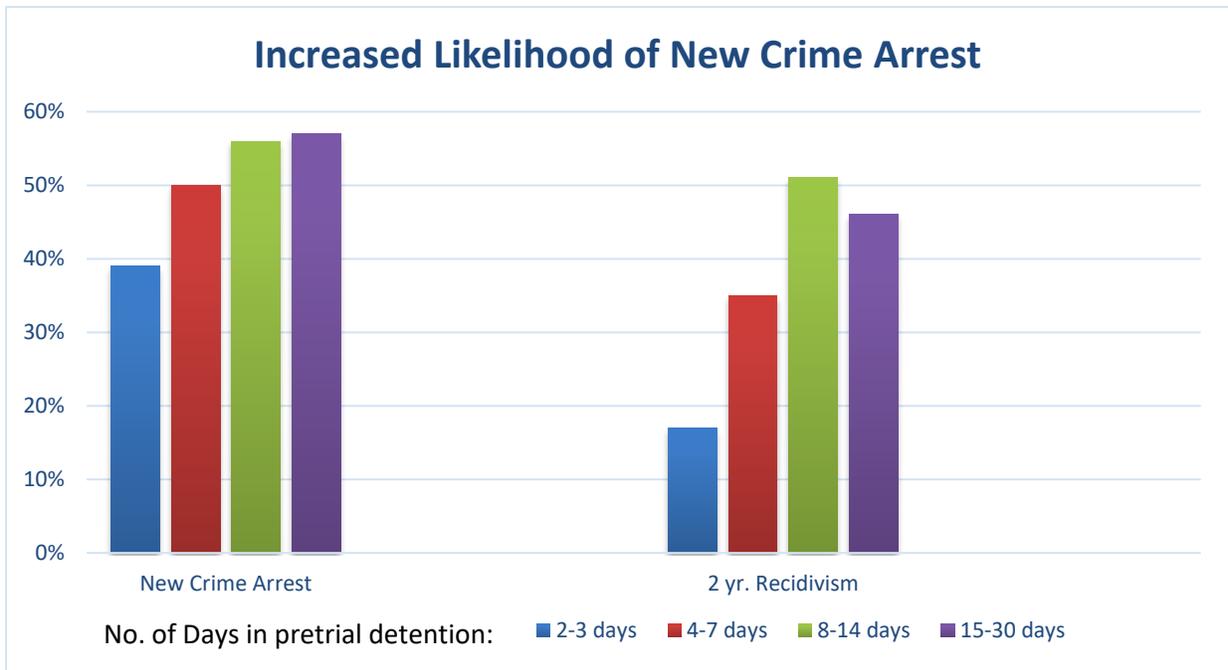
According to one study, low-risk defendants held in custody for brief periods were at greater risk for being arrested for a new criminal charge than peers released within the first 24 hours of arrest.¹¹ Similar impact was found relating to rates of failing to appear for court hearings, with those detained just two to three days becoming 22% more likely to miss a court date than peers released within the first 24 hours following arrest. Those held 15 to 30 days were 41% more likely to fail to appear for a subsequent court hearing.¹²

⁹ Public Policy Research Institute, Texas A&M University, [Wichita County Public Defender Office: An Evaluation of Case Processing, Client Outcomes, and Costs](#) (October 2012), at 54-59. Cited with approval, Texas Appleseed, [Bail & Pretrial Release: Summary of Recent Research on What Works](#) (May 2015).

¹⁰ Dobbie, W., Golden, J., and Yang, C., [The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges](#) (July 2016).

¹¹ Lowenkamp, C., VanNostrand, M. and Holsinger, A., [The Hidden Costs of Pretrial Detention](#), Laura and John Arnold Foundation (November 2013), at 8-9.

¹² Lowenkamp, C., VanNostrand, M. and Holsinger, A., [The Hidden Costs of Pretrial Detention](#), Laura and John Arnold Foundation (November 2013), at 8-9.



New Crime Arrest during pretrial period:¹³

- **2-3 days detention:** 39%
- **4-7 days detention:** 50%
- **8-14 days detention:** 56%
- **15-30 days detention:** 57%

New Crime Arrest in 2 years following case conclusion:

- **2-3 days detention:** 17%
- **4-7 days detention:** 35%
- **8-14 days detention:** 51%
- **15-30 days detention:** 46%

¹³ Lowenkamp, C., VanNostrand, M. and Holsinger, A., [The Hidden Costs of Pretrial Detention](#), Laura and John Arnold Foundation (November 2013), at 8-9.

How Bail Works

Key Terminology

Bond is a promise to come back to court. A bond can be secured by an upfront payment (“bail”) or can be unsecured by money (“personal bond”).

Bail is the “security given by the accused that he will appear and answer . . . the accusation brought against him.”¹⁴ Because bail is a financial “security,” a specific amount of money must be set. However, this does *not* mean that the accused must pay the total amount in order to effect their release.

Bail Bonds require the posting of money upfront in order to be released. There are two general ways to post bail bonds—by cash or by surety:

- **Cash Bonds** are posted by providing 100% of the bail amount to the registry of the court. If the individual subsequently makes all court appearances, 100% of the bail (less a fee of 5% of the bail amount or \$50, whichever is less¹⁵) is returned.
- **Surety Bonds** involve the payment of a premium (typically 10% of the bail amount) to a commercial bail company (bail bondsman). The bondsman pledges to pay the total bail amount if the accused fails to appear for court.¹⁶ Unlike the cash bond, the accused does not have their premium refunded if they appear for all their hearing dates. This is true even if the charges are later dismissed or the accused is found not guilty. In order to act as a surety, the bonding company must be approved by the county’s Bail Bond Board.

Personal Bonds allow an individual to be released without paying any money up front but promising to pay the stated amount if they fail to appear for court. This type of bond is sometimes referred to as an “unsecured” bond because there is no payment made to secure the accused’s promise to appear. There may be administrative fees associated with *obtaining* a personal bond when that bond is obtained via the “recommendation of a personal bond office.”¹⁷

Personal Recognizance Bonds allow release without any payment required, either upfront or if the accused fails to appear for court.

Bond Conditions are additional terms of release, which may require the accused to, for example, avoid certain activities or report to the court on their whereabouts while waiting for trial. If a bond is not “secured” by money, appearance in court can be insured by nonfinancial conditions.

¹⁴ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.01](#).

¹⁵ TEXAS LOCAL GOVERNMENT CODE [117.055](#).

¹⁶ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.11](#).

¹⁷ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.42](#). The fee is \$20.00 or 3% of the bail amount, whichever is greater.

Problems with Money Bail

Over the past three decades the use of monetary bail has steadily increased.¹⁸ This change has occurred despite the fact that there is no empirical evidence that the imposition of monetary bail reduces the likelihood that an individual will be arrested during the pretrial period or increases the likelihood they will appear in court.

In general, the use of cash bail ties release to resources rather than to risk. Bail amounts that are tied to charge type (such as a bail schedule) do not consider individual resources, allowing those with access to resources to purchase their freedom, while those without such resources are forced to remain in detention.

Although courts who set monetary bail amounts *can* permit the accused to be released without having to post any funds (i.e., utilize an “unsecured” or personal bond), often courts require the bail be posted in order to be released. These secured or bail bonds place those with means in a position to quickly effect their release, while those without languish in jail. Rarely are individuals able to post the full amount of their secured bond (the median felony bail amount is approximately \$11,700¹⁹), causing them to rely upon the commercial bail industry.



40% of Americans say they would have trouble covering a \$400 emergency.²⁰
58% of Americans have less than \$1,000 in savings.
26% of Americans have no savings.²¹

Legal Standards for Setting Bail

Relevant Texas Law

With few exceptions, all individuals arrested in Texas are entitled to bail. Unlike the Federal Constitution, the Texas Constitution expressly provides a right to bail in [Article I, section 11](#):

BAIL: All prisoners shall beailable by sufficient sureties, unless for capital offenses, when the proof is evident; but this provision shall not be so construed

¹⁸ Subramanian, R., Delaney, R., Roberts, S., Fishman, N., McGarry, P., [Incarceration's Front Door: The Misuse of Jails in America](#), Vera Institute of Justice (July 2015) at 30.

¹⁹ Liu, P., Nunn, R., Shambaugh, J., [The Economics of Bail and Pretrial Detention](#), Economic Analysis, The Hamilton Project (Dec. 2018).

²⁰ Board of Governors of the Federal Reserve System, [Report on the Economic Well-Being of U.S. Households in 2017](#) (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).

²¹ Based upon survey by GOBankingRates, results found at: <https://www.gobankingrates.com/saving-money/savings-advice/americans-have-less-than-1000-in-savings/>. Other surveys show similar patterns.

as to prevent bail after indictment found upon examination of the evidence, in such manner as may be prescribed by law.

In addition to the mandatory carve out in section 11 for capital offenses the Texas Constitution includes three other provisions where courts *may* deny bail: sections [11a](#), [11b](#), and [11c](#). However, before bail can be denied, each provision has specific procedural safeguards that must be met.

- Section 11a²²
 - Applies to the following circumstances:
 - **Person is charged with any felony and one of the following circumstances exists**
 - Individual has 2 prior felony convictions and the second conviction and offense occurred subsequent to the first.
 - Individual was on bail at the time of the new offense for a prior felony for which an indictment exists.
 - The current offense involves the use of a deadly weapon AND the individual has at least 1 prior felony conviction.
 - **Person is charged with a “violent offense” or “sexual offense” while under supervision of a state or local criminal justice agency** (e.g., while on parole)
 - “Violent offense”: murder, aggravated assault with a deadly weapon, aggravated kidnapping, aggravated robbery.
 - “Sexual offense”: aggravated sexual assault, sexual assault, indecent liberties with a child.
 - Is Constitutionally entitled to the following protections:
 - The decision to deny bail must be made by a district judge.
 - The court must find evidence substantially showing the guilt of the accused of the pending offense.
 - The order denying bail must issue within 7 calendar days of detention.
 - Trial must occur within 60 days (the failure to meet the 60-day requirement results in the setting aside of the order denying bail).
 - There is a right to appeal the denial of bail to the Court of Criminal Appeals.
- Section 11b²³
 - Applies to the following circumstances:
 - The person was **released on bail**
 - For a **felony**; or
 - **Any offense involving family violence**
 - Their bail was subsequently revoked or forfeited

²² TEXAS CONSTITUTION [Article 1, section 11a](#).

²³ TEXAS CONSTITUTION [Article 1, section 11b](#).

- Is Constitutionally entitled to the following protections:
 - At the hearing to set or reinstate bail, the court must find:
 - The person violated a condition of release relating to
 - The safety of the victim of the alleged offense; or
 - The safety of the community.
 - That the condition of release was violated by a preponderance of the evidence.
- Section 11c²⁴
 - Applies to the following circumstances:
 - The person violated an order for emergency protection issued by a judge or magistrate after an arrest for an offense involving family violence;
 - The person violated an active protection order rendered by a court in a family violence case;
 - This includes temporary *ex parte* orders if served on the person arrested
 - The person engages in conduct that constitutes an offense involving a violation of such an order.
 - Is Constitutionally entitled to the following protections:
 - A judge or magistrate must find the person violated the order or engaged in the conduct constituting the offense by a preponderance of the evidence.

Magistration

Magistration is a defendant's first appearance before a judge after arrest, and is the hearing when bail is determined. Although the phrase "magistration" is commonly used, the term itself is not found in any of the relevant Texas statutes or constitutional provisions. The process referred to is defined by [Article 15.17 of the Texas Code of Criminal Procedure](#) and related case law, and refers to a series of duties that are to be undertaken following an individual's arrest.

- Probable Cause Finding:
 - The magistrate must make a finding of probable cause. The information presented must be more than a recitation of the elements of the offense and must provide sufficient facts to allow the judicial officer to make an independent review and determination of whether there is probable cause to believe the arrestee committed a crime.²⁵

²⁴ TEXAS CONSTITUTION [Article 1, section 11c](#).

²⁵ [Sanders v. City of Houston](#), 543 F. Supp. 694 (S.D. Tex. 1982), [affirmed](#) 741 F.2d 1379 (5th Cir. 1984).

- *Note:* if the individual is arrested on a warrant, the magistrate may rely on the prior probable cause determination that permitted the issuance of the warrant.
- **Provide Warnings and Advise of Rights:** The magistrate is to advise the arrestee of the following information:
 - The accusation(s) against them, and of any affidavit filed
 - Their right to:
 - Counsel, including the right to have counsel appointed if they cannot afford an attorney
 - Remain silent, and that anything stated may be used against them
 - To have an attorney present during any interviews with peace officers or attorneys representing the state
 - To terminate the interview at any time
 - To have an examining trial
- **Set Bail:** Including determining:
 - If the arrestee is eligible to have bail set
 - If the arrestee is eligible for a personal bond
 - The financial situation of the arrestee and whether they can make bail
 - The amount of bail (if one is set) and whether such bail is a personal bond or a surety bond
 - Any conditions of release that accompany the bail

All bail setting must begin with the premise that the bail amount, the conditions of release, and the form in which bail must be posted are *no greater than reasonably necessary to assure compliance.*

Magistrates must consider 5 statutory factors in setting the bail amount:²⁶

- The amount is sufficiently high to give reasonable assurances that the undertaking will be complied with
- The amount is not used to make bail an instrument of oppression
- The nature of the offense and the circumstances under which it was committed
- The arrestee's ability to make bail (proof may be taken on this point)
- The future safety of a victim of the alleged offense and the community

²⁶ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.15](#).

Additionally, case law has recognized other factors that may be considered:²⁷

- Regarding the offense:
 - The potential punishment
 - Any aggravating circumstances

- Regarding the arrestee:
 - Work record
 - Family and community ties
 - Citizenship status
 - Length of residency
 - Prior criminal record
 - Prior conformity with bond conditions
 - The existence of any other outstanding bonds

Although Texas law allows the use of bail schedules, bail determinations must still be individualized. This includes consideration of the financial resources of the defendant. The importance of conducting individualized bail hearings has been reinforced by numerous court decisions across the country.²⁸

While this does not mean all bail must be “affordable,” **the decision to impose bail that is beyond an accused’s ability to pay *must only occur when*:**

- (1) the accusation involves a dangerous felony;
- (2) it has been determined no alternative to secured bail can reasonably assure the defendant’s appearance or public safety; and
- (3) there has been appropriate due process.²⁹

If those conditions do not apply, and an accused cannot afford a bail amount, the magistrate may give a personal bond.³⁰

²⁷ [Ex parte Melartin](#), 464 S.W.3d 789, 792 (Tex. App. 2015); [Ex parte Castellanos](#), 420 S.W.3d 878, 882 (Tex. App. 2014); [Ex Parte Scott](#), 122 S.W.3d 866 (App. 2 Dist. 2003); and [Brown v. State](#), 11 S.W.3d 501 (App. 14 Dist. 2000).

²⁸ [Daves v. Dallas County](#) 3:18-cv-00154-N (filed January 2018, N.D. Tex.); [In re Kenneth Humphrey](#), 417 P.3d 769 (Cal. 2018); and [Pierce v. City of Velda City](#) 4:15-cv-00570 (E.D. Mo.) (settled in 2015, suit alleged city failed to provide individualized considerations in setting bail).

²⁹ [O'Donnell v. Harris County, Texas](#), 251 F.Supp.3d 1052, 1167 (S.D. Tex. 2017). [O'Donnell v. Harris County, Texas](#), 892 F.3d 147, 152 (5th Cir. 2018); see also [O'Donnell v. Harris County, Texas](#), 251 F.Supp.3d 1052, 1147 (S.D. Tex. 2017) (providing a comprehensive review of the district court’s factual findings), [aff'd as modified](#), 882 F.3d 528 (5th Cir. 2018), and [aff'd as modified sub nom., O'Donnell v. Harris County, Texas](#), 892 F.3d 147 (5th Cir. 2018).

³⁰ Note on Out of Jurisdiction Cases: if an individual is appearing before a magistrate for a charge arising from another jurisdiction, they may not set a personal bond for certain enumerated, serious offenses or if the individual either refuses to submit to testing for the presence of controlled substances in the defendant’s body when requested by the magistrate or the test shows the presence of a controlled substance. TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.03](#).

Counsel should obtain specific, individual information from each arrestee, including financial information, to ensure bail decisions are tailored to the facts and circumstances of the case and the individual.

Relevant Texas Bail Litigation

The past five years have seen a number of systemic challenges to local bail practices.³¹

In Texas, three major cases have arisen regarding the state's bail practices which can be used to shape and inform the bail process: [O'Donnell v. Harris County](#), [Daves v. Dallas County](#), and [Booth v. Galveston County](#).

[O'Donnell v. Harris County](#): filed in 2016, this class action suit raised due process and equal protection challenges to Harris County's misdemeanor bail practices. While the suit focused on misdemeanor cases, the analysis of the constitutional minimum requirements for bail setting practices resonates with felony cases as well.

The findings made in connection with the preliminary injunction included determinations that practices that regularly set bail in amounts which result in detention violate the due process clause, and practices which treat otherwise similarly situated arrestees differently solely based on their relative wealth violate the Equal Protection Clause. The rulings made clear that magistrates must make individualized, case-specific decisions in setting bail.

In the fall of 2019, a [Consent Decree](#) was entered which set forth a series of specific findings of fact and bail policies. Among those policies was the provision of counsel at all bail hearings, as well as processes to establish a court date reminder system, case scheduling practices, and providing for monitoring of compliance.

[Daves v. Dallas County](#):³² filed in 2018, the federal suit challenged Dallas' practice of setting bail at predetermined amounts without individualized considerations of an accused's ability to pay. The case was certified as a class action and the court issued a preliminary injunction requiring all arrestees be permitted to complete an affidavit with the amount of bail they could reasonably pay, and that the courts utilize that information in setting bail. The district court denied the preliminary injunction relating to challenges that the county's bail practices also violated due process. The case is currently on appeal to the 5th Circuit regarding the court's rulings on the preliminary injunction. [Oral argument](#) was held in November 2019.

³¹ See e.g.: [Dixon v. City of St. Louis](#) (E.D. Mo. 2019); [In Re: Kenneth Humphrey](#), 417 P.3d 769 (Cal. 2018); [Walker v. City of Calhoun, GA](#) 901 F.3d 1245 (11th Cir. 2018), [cert. denied](#), 139 S.Ct. 1446 (2019); [Pierce v. City of Velda](#) (E.D. Mo. 2015) (settlement agreement entered); [Varden v. City of Clanton](#) (M.D. Ala. 2015) (settlement agreement entered). As well, in 2018 the Department of Justice entered a [Resolution Agreement with Jefferson County, AL](#), to avoid potential litigation regarding the county's bail practices.

³² [Daves v. Dallas County](#), 341 F. Supp. 3d 688 (N.D. Tex. 2018).

[Booth v. Galveston County](#): filed in 2018, the federal suit challenges Galveston County’s practices of setting high minimum bail amounts and failing to provide counsel at initial hearings for felony arrestees. In 2019, the Southern District of Texas certified the case as a class action and [granted a preliminary injunction](#), finding the initial hearing was a critical stage of the proceedings and thus felony arrestees had a Sixth Amendment right to counsel. The injunction required the county to make counsel available to all indigent felony arrestees. The court declined to make further rulings regarding the bail practices, noting the county had begun making reforms to its bail process since the suit had been filed. The case is currently on appeal to the 5th Circuit.

Relevant Federal Constitutional Provisions

The Eighth Amendment prohibits “excessive bail”; however, the U.S. Supreme Court in [Salerno](#) held this **does not create a right to bail**. Rather, the Constitution provides that where it is proper to grant bail, that bail should not be excessive.³³

In *Salerno*, the Court upheld the provisions of the federal [Bail Reform Act of 1984](#), which permitted courts to detain an individual without bail if the government demonstrated by clear and convincing evidence in an adversarial hearing that no release conditions could “reasonably assure . . . the safety of any other person and the community.”³⁴

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 with rights “implicit in the concept of ordered liberty.”³⁵
- **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 Bail Reform Act violated the Fourteenth Amendment. 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* the intent of the statute was to punish the defendant. The Court, however, found it was permissible to use pretrial detention to prevent danger to the community. Although unsuccessful for *Salerno*, practitioners

³³ [U.S. v Salerno](#), 481 U.S. 739, 752 (1987) (“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.”)

³⁴ [U.S. v Salerno](#), 481 U.S. 739, 741 (1987).

³⁵ [Rochin v. California](#), 342 U.S. 165, 169, 172 (1952).

should keep in mind substantive due process claims may exist when pretrial detention is punitive rather than preventative.

Salerno also challenged the procedural due process aspects of the Act. In upholding the 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 Court included:

- The right to counsel at the detention hearing;
- The right to testify on their 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;
- That the judicial officer making the detention decision is 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; and
- That the judicial officer must make written findings of fact and articulate their reasons for any decision to detain.³⁶

These Fourteenth Amendment protections have served as the basis for many of the systemic-oriented lawsuits filed in Texas and many other state courts.³⁷

The Fourteenth Amendment Equal Protection Clause prohibits states from denying any person the equal protection of the laws. This has been utilized in the bail context to address the disparate treatment of persons based on their financial resources.

The 5th Circuit in *O'Donnell* held that Harris County's existing bail practices violated equal protection because indigent arrestees who could not afford bail were incarcerated whereas similarly situated, wealthy arrestees who could post bail were released. The Court recognized that the government has a compelling interest in assuring individuals appear for court and engage in lawful behavior, but the current bail setting policies are not sufficiently tailored to meet those interests as there was no sufficient evidence that demonstrated a positive link between financial conditions of release and appearance at trial or law-abiding behavior.³⁸

³⁶ *U.S. v. Salerno*, 481 U.S. 739, 754 (1987).

³⁷ Examples include: *Allison v. Allen* 19-cv-1126 (M.D. N.C.) (filed Nov. 2019); *Friend v. City of Stamford* (D. Conn.) (filed June 2019); *Ross v. Blount* (E.D. Mich.) (filed April 2019); *Dixon v. City of St. Louis*, (E.D. Mo.) (filed January 2019, currently pending before 8th Cir.); *Philadelphia Community Bail Fund v. Arraignment Court Magistrates* (Pa. 2019) (filed March 2019); *Caliste v. Cantrell* (New Orleans, LA) 937 F.3d 525 (5th Cir. 2019) (see also [Consent Decree](#) entered June 2019).

³⁸ *O'Donnell v. Harris County, Texas*, 892 F.3d 147, 162-63 (5th Cir. 2018)

The Role of Counsel at Bail Setting

Relevant Ethical and Performance Standards

The [Texas Disciplinary Rules of Professional Responsibility](#) applies to representation at magistration. In representing each individual arrestee (client) during the magistration process it is incumbent upon the lawyer to “act with competence, commitment and dedication to the interest of the client and with zeal in advocacy upon the client’s behalf.”³⁹ Attorneys should work with each individual client to identify their objectives and the general methods to achieve those objectives. This includes discussing with their clients the potential communication of confidential information during the magistration process.⁴⁰ (“A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁴¹)

“**Confidential information**” includes both privileged and unprivileged information. “*Privileged information*” is information of a client protected by the lawyer-client privilege ([Texas Rules of Criminal Evidence 503](#)). “*Unprivileged information*” is all information relating to a client or furnished by the client, other than privileged information, acquired during the course of or by reason of the representation. The attorney may not reveal confidential information to anyone the client has instructed not receive the information (including the court) and may only reveal confidential information when “expressly authorized to do so in order to carry out the representation” or when, after consultation, the client consents.⁴²

For example, during the interview a client may share with their attorney information about a medical condition. Before disclosing that information to the prosecutor and/or magistrate, the attorney should discuss with the client whether they agree to the disclosure of this information. The attorney advises the client whether they believe such disclosure will be helpful (or harmful) to the client’s interests in release and, to the extent the attorney can assess it, in the overall case. The client’s directives regarding the disclosure of this confidential information shall govern (unless such disclosure is mandated by another Rule).

The attorney should utilize their professional, independent judgement in giving clients realistic, candid advice. In formulating that advice, the attorney should consider not only the legal aspects of the case, but also may refer to moral and ethical considerations.⁴³ Ultimately, it is the attorney’s responsibility to determine how to best achieve the client’s objectives, including making decisions on the technical and legal tactics to be employed.⁴⁴

³⁹ TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, [Rule 1.01, Comment 6](#).

⁴⁰ TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, [Rule 1.05\(b\)](#).

⁴¹ TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, [Rule 1.03\(b\)](#).

⁴² TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, [Rule 1.05\(a\) and \(b\)](#). Note: an exception to this Rule exists if the attorney reasonably believes disclosure is necessary to comply with a court order or Disciplinary Rule of Professional Conduct.

⁴³ TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, [Rule 2.01, Comments 1 and 2](#).

⁴⁴ TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT, [Rule 1.02\(a\)\(1\) and Comment 1](#).

Performance Guidelines

State and national performance guidelines reinforce the importance of representation at the initial hearing. The [State Bar of Texas Performance Guidelines for Non-Capital Criminal Defense Representation](#) (Guideline 3.1) as well as standards from 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 utilize the least restrictive provisions.

Both 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. Be mindful that this is a stressful time for clients and their supporters, which can make it difficult to fully process and understand information. Helping to minimize confusion and misunderstandings can increase a client's pretrial success.

Strategies attorneys can use to help include:

- ✧ Use plain language to explain bond conditions to clients and their supporters.
- ✧ Use a highlighter to mark key dates, addresses, phone numbers and obligations.
- ✧ Write down important information on a separate sheet of paper.
- ✧ Create a basic form that can summarize key information in plain language and a visually easy to read format (such as spacing, lists, and 14 point or larger font).⁴⁵

Information Gathering

Client Interview

A thorough knowledge about the client and their background is a key tool in advocating for release. A meaningful initial interview serves as more than a catalyst to gain this information; it also builds client confidence, improves the overall attorney-client relationship, and helps ease client stress. The challenge in the magistration setting is balancing the need for a meaningful interview with the compressed time frame and space available. Attorneys must do all they can to conduct appropriate initial interviews. This can be accomplished by targeting key information that can be used to advocate for release, while at the same time providing a measure of humanity and compassion to the client during difficult moments.

The court will have some of the background information, such as the client's criminal history, but it is only the attorney who can bring the client's situation and story to life by sharing information about the client's ties to the community, their family obligations, their work history, and their needs.

To the extent possible, defense counsel should strive to conduct all client meetings in a private, confidential space. 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.

⁴⁵ Center for Plain Language, [Five Steps to Plain Language](#) Guidelines.

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. To the extent possible, before meeting with the client, attorneys should:

- ★ Be familiar with the charge(s) the client is currently facing (including reviewing any charging documents, probable cause statements, and police reports).
- ★ Review the client’s criminal history, including any prior failure to appear and probation (or parole) violations.
- ★ Obtain information about any other holds (probation, immigration, other jurisdictions).
- ★ Know the client’s risk assessment score (if applicable) and understand its meaning.

The Interview: There are two aspects of information sharing during the attorney-client meeting—getting information *from* the client and giving information *to* the client.

Information from the Client: Using the factors the magistrate is to consider in setting bond as a guide, focus on developing information that can help tell the client’s story to facilitate their release. This includes information focusing on:

- Ties to the Community (including family, residence, community engagement, and employment)
- Release Plans (including where the client will stay, how the client will post bail, plans for transportation to court, and other obligations)
- Financial Resources and Obligations (including who relies on their income, what resources they have to post bail, and whether they receive any public benefits)
- Physical and Mental Health (including medications, treatment services, and conditions)

A more complete list of suggested topics and questions are included in [Appendix A](#).

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.

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?
Can you post a \$1,000 bond?	How much do you believe you could pay for bail?

Information to the Client: Some of the information can be relayed to the entire group at the start of the interview process. 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.

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

- Introduce yourself: including your name and role of representing them.
 - Confidentiality: Advise the clients that your communication is confidential, explaining that you will not share their information with anyone else unless the client gives you permission to do so.
 - Limited representation: If your representation is limited to only representing them for the magistration process, 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 need it and are eligible.
- Explain your goal: to get them out so they can come back to fight their case.
- 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 not to make any statements during the hearing.

Examples of logistical information:

- What order the cases are called by the court
- Where the client will go when they hear their name
- Where the judge, DA, and defense lawyer will be
- How each person will be called to meet with one of the attorneys
- Where the meetings will happen
- What your goals are for that meeting

A sample description of substantive information:

The DA will read a summary of the police report. 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. We will have the opportunity to tell the judge about you and why you should be released. This can include our asking for a personal bond or getting a low secured bond. This will be our chance to help the judge learn about your circumstances, so it is important when we meet with each of you shortly, that you help us understand as much about you as possible so we can make the best case for your release to the judge.

Check for Understanding

It is important to take all steps possible to ensure the client understands the information you are providing to them. In making sure the client understands, the attorney must do more than simply ask the client if they understand or tell the client to ask questions if they do not understand. There are many reasons a person may not indicate they are having problems including: not realizing they are misunderstanding the information (having a mistaken understanding of the information); fear, shame, or embarrassment about their challenges (this can be especially true for individuals with mild intellectual or developmental disabilities who work to keep them hidden); situational inability to process the information (such as 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). As well, the power dynamic of the attorney-client relationship may not lend itself to the client feeling comfortable asking questions.

It is incumbent upon the attorney to take affirmative steps to ensure client understanding of key concepts or processes. This can include asking the client to explain in their own words what the next step will be, what their choices are, or why they are making a particular decision.

When asking a client to explain a decision they are making or paraphrase a concept you discussed, it is helpful to let the client 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.

Potential ways to approach the process:

“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 your 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.”

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.
- Smiling or other inappropriate facial expressions.

- Inappropriate laughter or other emotions.
- Sensitivity to light, touch, or sounds.
- Awkward social spacing/distance in conversations.
- Repetitive physical behaviors or rocking (also known as self-stimulating).
- Repetitive statements, phrases, or verbal behaviors.
- Inappropriate content in response to questions.
- Focus or concern on an issue that seems inappropriate under the circumstances.
- Indications of difficulty reading, writing, or comprehension.
- Difficulty with motor skills (both fine and gross).
- Difficulty speaking.

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 waiver 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.

Advocating for Release

There are only 3 legally recognized purposes for bail and bail conditions:

- (1) To secure an individual's presence for court proceedings.
- (2) To maximize public safety based on whether the individual may commit a crime while the case is pending.
- (3) To prevent an individual from obstructing the criminal justice process.

In advocating for the client, the attorney should pursue release under the least onerous terms needed to meet these 3 purposes, keeping in mind the client's preferences and priorities. It is important to ensure the amount, type of bail, and conditions of release are appropriate to the client's individual facts and circumstances.

During the Hearing

Although brief in duration, advocacy for the client's release at magistration may be one of the most important moments in the case. 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.

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. Address specific risk factors identified by providing individualized details, such as the individual client's specific reason for a prior failure to appear and their current plans to mitigate against that risk.

Advocate to the Court

Defense attorneys should be mindful of individual judges' proclivities and tailor arguments to address the 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:

- ✳ There is no indication secured bail has any direct correlation to appearance rates or avoidance of new arrests.⁴⁶
- ✳ Incarceration of even a few days can have devastating impacts.
- ✳ Even the most "high-risk" individuals succeed on pretrial more often than not.
- ✳ The Constitution favors pretrial liberty. ("Liberty is the norm, and detention prior to trial . . . the carefully limited exception."⁴⁷)
- ✳ The individual before the court is presumed innocent.

Defense attorneys should 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.

Advocate for the Appropriate Bail for the Individual Client

During the bail hearing counsel should put into evidence the amount of bail, if any, an arrestee can post. This is vital as courts must make individualized bail determinations that include consideration of the financial resources of the arrestee and their ability to post bond.

In addressing the client's resources, defense counsel should not simply rely upon the fact that an individual qualified for court appointed counsel. Doing so detracts from efforts to make the court engage in an individualized, specifically tailored determination of the appropriate release conditions, and undercuts efforts to present each client as an individual, with their own circumstances and situation to be considered.

⁴⁶ [O'Donnell v. Harris County, Texas](#) 892 F.3d 147, 162-63 (5th Cir. 2018)

⁴⁷ [U.S. v. Salerno](#), 481 U.S. 739, 755 (1987)

The failure to put into evidence the amount of bond an arrestee can post may also negatively impact later efforts to challenge the bail amount set. (In [Holliman v. State](#) the Court of Criminal Appeals held a habeas corpus petitioner who failed to show what bond he could have made was not entitled to a reduction of bail set after indictment because the amount was not, on its face, unreasonable.⁴⁸)

As appropriate, remind the court that requiring secured bail has a number of negative impacts and 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 pay other household expenses.



The average cost for a single day in jail in Texas is \$52.46/inmate.⁴⁹

Utilize Effective Advocacy Tools

Although magistration hearings are brief and the issues before the court are limited, they are, nonetheless, advocacy events. Even in these constrained circumstances, defense lawyers should utilize the qualities of effective advocacy. This includes having a clear theme and theory that tells the story of why this individual client should be released. Narration techniques such as trilogies⁵⁰ and parallel structure⁵¹ 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,⁵² so that the first and last points made in the argument are the most powerful and compelling.

⁴⁸ [Holliman v. State](#), 485 S.W.2d 912, 914 (Tex. Crim App. 1972).

⁴⁹ Texas Comptroller Report, [Texas State Jails](#) (published Aug. 2019). Additional, county level data for some counties can be found on the [Texas Criminal Justice Collaborative](#) website.

⁵⁰ 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.”

⁵¹ 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.”

⁵² Primacy and recency refers to the fact that we [best learn and remember](#) the first and last things we hear.

Attorneys must walk a fine line between being a zealous advocate and alienating the judicial officer, but for many clients, the initial appearance represents the first time they see their attorney “in action,” creating a lasting impression.⁵³

Procedural Considerations

The rules of evidence (except for the rules governing privilege) do *not apply* in **bail proceedings** to set, reduce, or reconsider bail, but they *do apply* in **bail hearings** to deny, revoke, or increase bail.⁵⁴

Special Considerations

Family Violence and Protective Orders

When clients face charges of family violence⁵⁵ (and in some other cases such as assault, terroristic threats, and burglary of a habitation) where there may be a claimed threat to a distinct person, a Magistrate’s Order of Emergency Protection (MOEP) may be issued. If the person is charged with aggravated family violence (involving serious bodily injury or the use/display of a deadly weapon) the MOEP is mandatory; in all other cases it is discretionary.⁵⁶

In such instances, the court will place restrictions on behavior (no threatening or harassing communications or in some instances a bar to all communication, except through counsel) as well as geography (must remain at least 200 feet away from their residence and workplace). It is important to discuss with the client the potential for these restrictions and their implications. 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.

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.
- Where and with whom can the client stay if the MOEP will prevent 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?

⁵³ 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.

⁵⁴ TEXAS RULES OF EVIDENCE [Rule 101\(c\), \(d\), and \(e\)](#); *Ex Parte Graves* 853 S.W.2d 701, 703-04 (Tex. App. 1993).

⁵⁵ TEXAS PENAL CODE [Section 1.07\(a\)\(8\)](#).

⁵⁶ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.291-293](#).

- 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 to avoid such contact, 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 MOEP, or did not feel any pain.

If a MOEP is issued be sure to review with the client all the terms and restrictions, including that the complaining witness cannot give permission for the client to violate or ignore the MOEP terms. Once issued, the MOEP can only be modified by a court.

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 arrestees may be made aware of that information. Whenever practical, arrange to have these cases heard at the end of the docket, with the other arrestees 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.

Registration Related Issues

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.

Clients with Mental Health Issues

Texas Code of Criminal Procedure [Article 17.032](#) provides that when a mental health provider screens a defendant and finds them mentally ill or intellectually disabled, the magistrate shall release them on a personal bond (PB) with conditions for out-patient treatment.⁵⁷ The only exceptions to this requirement are:

- If the client is charged with or has been previously convicted of a violent offense, and/or
- If the client is found to be incompetent.

If a client may meet the criteria for a PB, it is important for the attorney to review the specific terms of the Article to best facilitate the client's release under this provision.

⁵⁷ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.032\(b\)](#).

Fees for Personal Bonds

If a county establishes a personal bond office, any person who is released on a PB at the recommendation of the personal bond office can be assessed a fee.⁵⁸ The fee is the *greater of \$20.00 or 3% of the bail amount*. For good cause, the court can waive the fee or assess a lower fee.

If the accused has qualified for court-appointed counsel, the attorney should advocate for a waiver of any PB fee in light of their indigency. In the alternative, the defense lawyer should seek to have the payment of the fee deferred until the case concludes.

In instances where a client faces the imposition of such fees, it is important for the attorney to be mindful and advocate for as low of a PB amount as possible to minimize the fees for the client.

Substance Use

If there is a “reasonable belief” by the arresting agent or the magistrate that the arrestee has a controlled substance in their body or there is a finding of substance abuse (including alcohol) related to the offense, the magistrate shall require the accused submit to testing and participate in a treatment or education program *if* such program would reasonably serve to assure the arrestee’s appearance for trial.⁵⁹

In such instances, the results of any testing conducted cannot be used by the state for any proceeding arising out of the charged offense. The accused can be assessed the costs of such testing either as a court cost or a condition of bond.

Release Conditions

In general, a magistrate may require as condition of release on a personal bond, that a defendant submit to a home curfew and electronic monitoring under the supervision of an agency designated by the magistrate.⁶⁰ The court can also impose other conditions of release including drug testing.⁶¹

Additionally, certain charges carry additional conditions of release.

DWI offenses

Those charged with a subsequent DWI offense,⁶² intoxication assault,⁶³ or intoxication manslaughter⁶⁴ must have an ignition interlock device installed (unless the magistrate finds that requiring the device is not in the best interest of justice).

⁵⁸ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.42](#).

⁵⁹ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.03](#).

⁶⁰ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.43\(a\)](#).

⁶¹ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.44](#).

⁶² TEXAS PENAL CODE [Section 49.04](#).

⁶³ TEXAS PENAL CODE [Section 49.07](#).

⁶⁴ TEXAS PENAL CODE [Section 49.08](#).

Family violence offenses

Delayed release: Those arrested or held without a warrant for “prevention of family violence” can be held for up to 4 hours *after bond has been posted* if the magistrate finds probable cause to believe violence will continue if the person is immediately released.⁶⁵ This can be extended for an additional period not to exceed 48 hours if the magistrate makes certain additional findings in writing.⁶⁶

GPS monitoring: the magistrate can order the use of a GPS device and that the alleged victim receive information about the defendant’s whereabouts. The fee for the device can be assessed on a sliding scale.⁶⁷

Emergency Protective Orders: the magistrate may issue an order for emergency protection at the request of the alleged victim, their guardian, a peace officer, or the prosecutor. In many instances this MOEP is mandatory.⁶⁸

Mental health issues

Persons accused of non-violent offenses who are found to be mentally ill and released on a PB under Texas CCP Art. 17.032, are required to participate in outpatient or inpatient mental health treatment.⁶⁹

Stalking, sexual offenses and assaultive offenses

Those charged with stalking,⁷⁰ certain sexual offenses,⁷¹ and certain assaultive offenses⁷² can be required to cease all communications with the purported victim and be prohibited from going within a specified distance from their home, work, or school.⁷³ In some instances these conditions may conflict with existing court orders relating to child custody or visitation. In these instances, the conditions of release set by the magistrate cannot exceed 90 days.⁷⁴ The magistrate may also grant supervised access to the alleged victim.

⁶⁵ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.291](#).

⁶⁶ To extend the hold the magistrate must conclude that (1) the violence would continue if the person is released and, if the period exceeds 24 hours, and (2) that there is probable cause to believe that the person committed the instant offense and, during the 10 year period preceding the instant offense that person has been arrested (a) on more than one occasion for an offense involving family violence or (b) for any other offense if a deadly weapon (as defined by TEXAS PENAL CODE [Section 1.07](#)) was used or exhibited during the current offense or immediate flight after the current offense. TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.291](#).

⁶⁷ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.49](#).

⁶⁸ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.292](#).

⁶⁹ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.032](#).

⁷⁰ TEXAS PENAL CODE [Section 42.072](#).

⁷¹ TEXAS PENAL CODE [Sections 25.02](#), [43.25](#), and [Section 21.01](#) et seq.

⁷² TEXAS PENAL CODE [Section 22.01](#) et seq.

⁷³ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.46](#).

⁷⁴ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.41](#).

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 is harmful.⁷⁵ 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.⁷⁶

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 over-burdens 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.⁷⁷ 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.

⁷⁵ [Evidence-Based Decision Making: A Guide for Pretrial Executives](#), Center for Effective Public Policy, National Institute of Corrections (June 2017).

⁷⁶ TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.43\(b\)](#). Note, the failure to pay the costs of monitoring or drug testing, if ordered as a condition of bond and the magistrate determines the defendant is not indigent and able to make the payments, can be a basis to revoke the bond and have the defendant arrested. TEXAS CODE OF CRIMINAL PROCEDURE [Article 17.44](#).

⁷⁷ VanNostrand, M., Rose, K, and Weibrecht, K., [State of the Science of Pretrial Release Recommendations and Supervision](#), Pretrial Justice Institute (June 2011).

APPENDIX A

Interview Information

Personal Information

- Name: What do you prefer to be called; Age and date of birth.

Living Situation

- What is your current living situation – including length of time at address, who else lives there, and responsibilities you have to the people you live with?
- If not at current address very long: Obtain information about prior residences.
- If currently experiencing homelessness: Obtain information about where client currently sleeps, has their belongings, regular appointments/time-based obligations they have and keep (demonstrates client is reliable and thus is likely to appear for court). May want to ask if there is anything that contributed to their current situation.
- If charged with family violence offense: Determine if they live with the complaining witness and, if so, identify an alternative place to live in the event that the judge issues a Magistrate's Order of Emergency Protection requiring they stay away from that residence.

Work Experience and Situation

- Were you working at the time of your arrest?
- If so, obtain information about current employment, including duration, type of job responsibilities, any promotions/raises (demonstrates reliability), and if employer is aware of current arrest (and, if not, whether client wants them contacted).
- If not employed at time of arrest, seek information about prior employment, including the reason they stopped working at their last job and if there are any current challenges to finding work.

Military History

- Were you (are you) in the military?
- If so, obtain information on branch, length/dates of service, rank at separation, promotions/awards during enlistment, and type of discharge.

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)
 - Children: if so, ages, who do they typically stay with, where are they currently staying (and can they remain there), what responsibilities do you typically have for your children (care/support, financial, etc.)
 - What family responsibilities do you have? (financial, provide care, etc.)

Medical and Mental Health History and Situation

- Do you have any immediate medical/mental health needs? Are they being met?
- 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)

Immigration Information

- Where were you born?
- If born outside the U.S.: Are you a U.S. 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?

Criminal History

- Are you currently on probation, parole, bond? Have to go to court for anything else?
- Review any prior arrests and convictions
- Identify prior successful completions of probation, pre-trial supervision, etc.
- Identify any prior failure to appear charges including dates and circumstances
- If applicable, what supports could help you avoid that happening again?

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); do they know client arrested?*

Release Plans

- Where will you be staying?
- How will you get to court and to any other condition of release obligations?

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?