

A View from the Bench: Bail—A Bone of Contention

By Hon. Jonah Triebwasser

With bail and alternatives to incarceration much in the news of late, your Criminal Justice Section thought that a review of the bail alternatives available in New York courts would be of timely assistance to our members. These procedures are utilized when ROR—release on recognizance—is not ordered by the court.

ROR is defined in CPL 500.10(2) as follows:

“Release on own recognizance.” A court releases a principal on his own recognizance when, having acquired control over his person, it permits him to be at liberty during the pendency of the criminal action or proceeding involved upon condition that he will appear thereat whenever his attendance may be required and will at all times render himself amenable to the orders and processes of the court.

Forms of Bail

The Criminal Procedure Law 520.10(1) offers nine possible forms of bail:

- (a) Cash bail
- (b) An insurance company bail bond
- (c) A secured surety bond
- (d) A secured appearance bond
- (e) A partially secured surety bond
- (f) A partially secured appearance bond
- (g) An unsecured surety bond
- (h) An unsecured appearance bond
- (i) Credit card or similar device

Courts are guided in the determination of bail by CPL § 520.10(2):

2. The methods of fixing bail are as follows: (a) A court may designate the amount of the bail without designating the form or forms in which it may be posted. In such case, the bail may be posted in either of the forms specified in paragraphs (g) and (h) of subdivision one; (b) The court may direct that the bail be posted in any one of two or more of the forms specified in subdivision one, designated in the alternative, and may designate different amounts varying with the forms;

The usual practice is for courts to direct that bail be in the forms of cash, insurance company bond or secured surety bond. It is rare that a court accepts the other possibilities. To expand the possibility of using these alternatives, let us explore together what these are.

- (a) Cash bail speaks for itself. Someone posts bail using United States currency. Most courts will not accept a personal check, although some will accept a bank teller check, bank certified check or a postal money order. (See generally CPL § 520.15).
- (b) An insurance company bail bond is defined in CPL § 500.10(16) as a surety bond, executed in the form prescribed by the superintendent of financial services, in which the surety-obligor is a corporation licensed by the superintendent of financial services to engage in the business of executing bail bonds. These are the bail bonds issued by the bail bondmen and bondswomen who usually have offices with large signs just across the street from the entrance to the county jail.
- (c) A secured surety bond is defined in CPL § 500.10(17) as a bail bond secured by either: (a) personal property which is not exempt from execution and which, over and above all liabilities and encumbrances, has a value equal to or greater than the total amount of the undertaking; or (b) real property having a value of at least twice the total amount of the undertaking. For purposes of this paragraph, the value of real property is determined by either: (i) dividing the last assessed value of such property by the last given equalization rate or in a special assessing unit, as defined in article 18 of the real property tax law, the appropriate class ratio established pursuant to section 1202 of such law of the assessing municipality wherein the property is situated and by deducting from the resulting figure the total amount of any liens or other encumbrances upon such property; or (ii) the value of the property as indicated in a certified appraisal report submitted by a state certified general real estate appraiser duly licensed by the department

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of state as provided in section 160-j of the executive law, and by deducting from the appraised value the total amount of any liens or other encumbrances upon such property. A lien report issued by a title insurance company licensed under article 64 of the insurance law, that guarantees the correctness of a lien search conducted by it, shall be presumptive proof of liens upon the property.

(d) A secured appearance bond, as defined by CPL § 500.10(14) and (17) means a bail bond in which the only obligor is the principal (defendant) which is secured as in paragraph (c), supra.

(e) A partially secured surety bond is defined in CPL § 500.10(18) as a bail bond secured only by a deposit of a sum of money not exceeding 10 percent of the total amount of the undertaking.

As the only purpose of bail is to assure the appearance of the defendant at future court proceedings, if a court is reluctant to release a defendant on his or her own recognizance, based upon the court's belief that defendant's roots in the community are not sufficient to outweigh a temptation to flee, one can understand a court's reluctance to use this form of bail as it gives only minimal incentive for a defendant to return or, as they say in golf, "not enough skin in the game."

(f) A partially secured appearance bond is the same as (e), supra, but with the defendant as the only obligor.

The issues for a court concerning this device are the same as in the partially secured surety bond. The monetary incentive for the defendant not to flee is minimal.

(g) An unsecured surety bond as defined in CPL § 500.10(19) means a bail bond, other than an insurance company bail bond, not secured by any deposit of or lien upon property.

Any court that would accept this might as well ROR the defendant; the court has little recourse other than a bench warrant if the defendant fails to appear.

(h) An unsecured appearance bond—same as (g) above with the difference being that the only obligor is the defendant and not friends or family.

Again, this is of dubious value and a defendant who qualifies for this might as well be granted ROR.

(i) Credit card or similar device—the functional equivalent of cash bail, provided that the credit card is accepted by the credit card company.

Beware defendants who will offer a credit card for bail and then contest the charge the next day with the credit card company. As long as you have a signed credit card slip, the company will honor the charge.

Ability to Pay

In *People ex rel. Kunkeli v. Adrian Butch Anderson, Dutchess County Sheriff*, 2018 N.Y. Slip Op. 28036, New York State Supreme Court Justice Maria Rosa issued a decision from her chambers in Poughkeepsie, Dutchess County, ordering that when bail is imposed the court must consider the defendant's ability to pay and whether there is any less restrictive means to achieve the state's interest in protecting individuals and the public and to reasonably assure the accused returns to court. See *Pugh v. Rainwater*, 572 F.2d 1053, 1057 (5th Cir. 1978).

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Defendant Kunkeli was arraigned on a charge of petit larceny for allegedly stealing a vacuum cleaner from a local department store. He was committed to the Dutchess County Jail on \$5,000 cash bail over a \$10,000 secured bond. Defendant had a record of not appearing in court and had a history of past bench warrants. Judge Rosa held

[i]t is clear to this court that a lack of consideration of a defendant's ability to pay the bail being set at an arraignment is a violation of the equal protection and due process clause of the Fourteenth Amendment and of the New York State Constitution. Clearly, \$5,000 bail to someone earning \$10,000 per year, like the petitioner, without significant assets, is much more of an impediment to freedom than \$5,000 bail would be to a defendant earning substantially more and/or with significant assets. Setting that sum as to both such individuals would not be equal treatment. Yet, the Fourteenth Amendment and the New York State Constitution both require that individuals under such circumstances be treated equally. "No person shall be denied the equal protection of the laws...because of race, color, creed or religion ..." (New York State Constitution Article 1 Section 11). Perhaps it needs to be said that discrimination on any basis, including on the basis of how much money someone has, is a violation of the equal protection clauses and due process clauses of the New York State and United States Constitutions. Freedom should

not depend on an individual's economic status. *Bearden v. Georgia*, 461 U.S. 660 (1983); *People ex rel. Wayburn v. Schupf*, 39 N.Y.2d 682 (1976).

RUS and EM as Alternatives

Two of the less restrictive means of ensuring the return of a defendant to court who was not a good risk for ROR that I have utilized in my court have been release to supervision of probation (RUS), where the defendant is ordered to report to probation at least once a week to be sure that he or she remains in the area and is staying out of trouble, or electronic monitoring by Probation by the use of an ankle bracelet.

The ankle bracelet, refereed to also as electronic monitoring (EM), involves a defendant being required to wear a non-removable device so that his or her movements can be monitored. The use of electronic monitoring has increased dramatically in recent years. From 2000 through 2014, there was a 32 percent rise in the use of electronic monitoring. One article from the *International*

Business Times reported that around 100,000 people in the United States were under electronic monitoring. The number of people being monitored is still steadily increasing, so this number could be much higher today.

EM requires a land-line telephone be installed in the home of the defendant so that the ankle bracelet can be linked to Probation's monitoring system. This arrangement can pose a financial cost on homes where the land-line has been removed in favor of cell phones.

Assuring That the Defendant Appears

Our courts are being asked to relieve overcrowded jails and honor the presumption of innocence by placing defendants awaiting trial in the least restrictive pre-trial status possible. Release on recognizance and the various forms of bail and the alternatives to bail discussed are all available to our courts. And if the defendant does not appear after being given the benefit of these alternatives, there is always use of the bench warrant to compel compliance with the terms of release.

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