Best Practices in Bond Setting: Colorado's New Pretrial Bail Law (Revised)[1]

On May 11, 2013, Colorado Governor John Hickenlooper signed into law H.B. 13-1236, which substantially alters the way judges are to administer bail in Colorado. It is the first major overhaul of the pretrial bail statute since 1972, and incorporates three recommendations passed by the Colorado Commission on Criminal and Juvenile Justice (CCJJ). Those three recommendations are: (1) "Implement Evidence Based Decision Making Practices and Standardized Bail Release Decision Making Guidelines" (including the use of empirically developed risk assessment instruments); (2) "Discourage the Use of Financial Bond for Pretrial Detainees and Reduce the Use of Bonding Schedules; and (3) "Expand and Improve Pretrial Approaches and Opportunities in Colorado."

The legislative history of the new law, which includes the CCJJ's recommendations and rationales as well as testimony and legislative floor statements, reveals that the General Assembly was primarily concerned with reducing unnecessary pretrial detention by limiting the use of secured financial conditions of release, with an overall strategy of using research-driven best practices in the administration of bail. The new law was drafted so as not to diminish existing judicial discretion at bail, and many of the substantive changes are optional; nevertheless, like the prior law, the new statute contains important mandatory provisions that judges and others should note. Significant statutory provisions, including clarifying provisions passed in 2014 through S.B. 14-212, include:

16 C.R.S. § 1-104 – Definition of Bail
This section changes the definition of bail from "the amount of money" to "a security, which may include a bond with or without monetary conditions." The term "security" is used broadly, as in a pledge, and does not itself mean money. The definition is important because it represents the intent of the General Assembly to place the use of money on par with all other non-monetary conditions of pretrial release that must be individually assessed for legality and effectiveness. To further emphasize this intention, all references to judges "setting the amount of bail and type of bond" have been changed to "setting the type of bond and conditions of release."

16 C.R.S. § 4-101 – Eligibility/Bailable Offenses
This section, which mostly mirrors Article II, Section 19 of the Colorado Constitution concerning the right to bail, remains the same with one important exception. On the House floor, a fifth category of offenses for which bail may be denied was added to the statute. This new Section, 16-4-101 (1) (b) (V), along with Section 16-4-101 (1) (b) (IV) from prior law, has no counterpart in the Colorado Constitution and has thus been appropriately described by the Colorado Attorney General's Office as "constitutionally suspect."

16 C.R.S. § 4-103 – Setting and Selection of Bond/Criteria
This section is substantially different from prior law, and contains the language meant primarily to implement the three CCJJ recommendations as well as housing various parts of prior Section 16-4-105 concerning criteria for setting bond conditions. Readers should note the important interaction between provisions mandating action through the use of "shall" or "must," and those that are merely permissive. Overall, this section *requires* (1) the court to determine the type of bond and conditions of release; (2) review of bond and conditions fixed upon return of an indictment or filing of an information or complaint (including on warrants issued after the filing of charging documents); (3) a presumption of release under least-restrictive conditions unless the defendant is unbailable pursuant to the constitutional preventive detention provisions; (4) individualization of conditions of release (including in "bond schedules") and express mandatory consideration of a defendant's financial condition or situation; (5) "reasonable" financial conditions, and non-statutory conditions to be "tailored to address a specific concern;" and (6) consideration of ways (including new bond types in statute) to avoid unnecessary pretrial detention. In making the individualized bail determination, it *strongly encourages* using an empirically developed risk assessment instrument, and it *allows* consideration of the bail-setting criteria previously mandated in Section 16-4-105 (1) (a) – (k). It should be noted that although the statute does not define "least restrictive" conditions, the ABA best-practice standards, considered by the CCJJ, describe secured monetary conditions (e.g., cash or surety bonds) as more restrictive than unsecured bonds (e.g., personal recognizance bonds).

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16 C.R.S. § 4-104 – Types of Bond
While the prior statute technically listed two bond types – unsecured (or "personal recognizance") and secured – secured bonds were more colloquially named based on how they used money as a condition of release (e.g., "cash" or "surety"). The new statute now lists four bond types, each more appropriately defined by its restrictive nature. Subsection (a) bonds are unsecured personal recognizance bonds with only statutorily mandated conditions. Subsection (b) bonds are unsecured personal recognizance bonds with additional non-monetary conditions necessary for public safety or court appearance. Subsection (c) bonds are secured money bonds when the secured financial condition is "reasonable and necessary to ensure" court appearance or public safety. Subsection (d) bonds are secured by real estate to be ordered only when release on personal recognizance without monetary conditions will not assure court appearance or public safety. Under prior law, district attorneys could withhold their consent to a personal recognizance bond in certain situations, forcing judges to set secured money amounts. Under the new statute, district attorneys may only withhold consent to a Subsection (a) bond, thereby allowing judges to still set a Subsection (b) unsecured personal recognizance bond with additional non-monetary conditions. When subsection (c) secured bonds are ordered, defendants may select which statutorily enumerated method they wish to use to pay the secured money conditions, although payment with stocks and bonds has been eliminated. Judges are expressly allowed to order payment through a single method, however, such as through a "cash-only" bond, so long as those judges make factual findings on the record that paying the condition through a particular method is necessary to ensure public safety or court appearance.

16 C.R.S. § 4-105 – Conditions of Release
This new section contains all discretionary and nondiscretionary conditions of release. The mandatory statutory conditions from prior law are the same, but provisions setting presumptive monetary conditions for certain charges have been eliminated. Additionally, a separate section was added for secured monetary conditions to reinforce the notion that secured money at bail should not be automatic. Finally, the conditions of pretrial release previously embedded in the subsection creating pretrial services programs have been included in this section.

16 C.R.S. § 4-106 – Pretrial Services Programs
This section houses all the substantive provisions dealing with pretrial services programs, and expressly encourages chief judges and counties to consult with each other to develop pretrial services programs. It also requires programs, in conjunction with the community advisory board, to "make all reasonable efforts" to implement an empirically developed risk assessment instrument and a structured decision-making design based on risk.

16 C.R.S. § 4-107 – Hearing After Setting of Monetary Conditions of Bond
Seven days after a secured bond is ordered, defendants may file a motion for relief presenting evidence "not fully considered" by the bail setting judge. Judges may summarily deny the motion, but must do so within 14 days and only after considering "the results of any empirically developed risk assessment instrument."

Important Provisions Concerning Secured Money Conditions
Before a judge sets any secured financial condition, the judge shall: presume that the defendant is "eligible for release on bond with the appropriate and least restrictive conditions" (§ 16-4-103 (4) (a)); determine the sufficiency of the financial condition to ensure court appearance and public safety, "taking into consideration the individual characteristics of each person in custody, including the person's financial condition" (§ 16-4-103 (3) (a)); find that the condition is "reasonable and necessary to ensure the appearance of the person in court or the safety of any person or persons in the community" (§ § 16-4-104 (1) (c), 16-4-105 (7)); "consider all methods of bond and conditions of release to avoid unnecessary pretrial incarceration" (§ 16-4-103 (4) (c)).

Other Pretrial Bills Signed Into Law in 2013
H.B. 1242 changes the violation of bail bond conditions section to avoid mandatory sentencing for technical bail bond violations; H.B. 1210 corrects statutory provisions contrary to the United States Supreme Court's opinion in *Rothgery v. Gillespie County*, and provides appropriations to implement procedures concerning indigent representation at first appearances; and H.B. 1156 allows district attorneys to use state moneys for diversion programs set up pursuant to a scheme based on best practices for adult pretrial diversion.