

# **NAPSA STANDARDS ON PRETRIAL RELEASE**

## **INTRODUCTION**

This Third Edition of the NAPSA Standards on Pretrial Release is the product of a thorough review of the two previous editions of NAPSA Release Standards, undertaken in light of the many changes in law, practice, and technology that have taken place in the years since the First Edition Standards were published in 1978. The Standards are intended to provide guidance to pretrial services program directors and staff and to others involved in the formulation and implementation of laws, policies, and practices concerning the pretrial release/detention decision-making process and the monitoring and supervision of persons released from custody while awaiting disposition of criminal charges.

When the original Standards were published, the bail reform movement was in its second decade. The Manhattan Bail Project, undertaken in New York City during the early 1960s, had dramatized the inequities of the money bail system and demonstrated that courts could safely release many defendants on their own recognizance if judges were given verified information about the defendant's living situation, employment, and roots in the community. Subsequent initiatives in other communities had shown that pretrial services agencies could successfully supervise defendants released under specific conditions aimed at assuring their appearance for court proceedings and minimizing the risk that they posed to community safety. By the mid-1970s, pretrial services agencies had been established in a number of large urban jurisdictions in the United States, several national conferences had focused on pretrial release issues, and the National Association of Pretrial Services Agencies (NAPSA) had been formed.

The publication in 1978 of NAPSA's *Performance Standards and Goals for Pretrial Release* was a major contribution to the emerging field of pretrial services and to the larger criminal justice community. The 1978 Standards articulated clear goals for pretrial release/detention decision-making and provided guidance for pretrial services program personnel, judges, and other practitioners in developing fair and effective pretrial processes. They also provided a sound framework for organizing pretrial release programs and for conducting basic operations including gathering information about detained persons, monitoring released defendants' compliance with release conditions, and responding to violations of conditions.

During the quarter century since the 1978 Standards were published, a great deal of experience has been gained in the administration of pretrial release programs, and some aspects of pretrial decision-making have changed significantly. Of particular note, there has been a growing recognition that risk of danger to public safety is a factor to be taken into account by judicial officers at the initial stages of a criminal case, along with the risk of nonappearance by the defendant. The need for timely and reliable information to assist judicial officers in making sound decisions is clear, and pretrial services agencies and programs are increasingly being recognized as critically important providers of

essential information. In many jurisdictions, jail crowding problems have led to the creation of a pretrial services program or function where none previously existed. New technologies have made it possible to make major improvements in the capacity to gather information relevant to release/detention decision-making and in the ability of pretrial services programs to supervise released defendants. New issues have emerged, notably in the ways that jurisdictions handle cases involving female defendants, substance abusing defendants, mentally ill persons charged with relatively minor offenses, and juveniles charged with offenses that mean their cases will be heard in adult courts.

Pretrial services programs are now integral components of criminal justice systems not only in a great many urban areas, but also in many suburban and rural areas. However, many of the circumstances that led to the bail reform movement that began over forty years ago—most notably, the persistence of a money bail system in which compensated sureties play a major role—still exist in many jurisdictions. These Standards necessarily address many of the same issues faced by the drafters of the First Edition of the Standards, and they have the same basic thrust—toward a more rational and better-informed pretrial release/detention decision-making process, one that is open and accountable and that does not discriminate among defendants on the basis of their financial circumstances.

This Edition of the Standards builds upon the 1978 Standards (which were re-issued by NAPSA, with minimal editing, as a Second Edition of the Release Standards in 1998), while taking into account the emergence of new issues and developments in practices, technology, case law, and pretrial services program capabilities that have taken place over more than two decades. The committee of NAPSA practitioners responsible for the development of this edition of the Standards reviewed all of the original Standards with a view to updating them and, where necessary, making changes or additions. Major changes in the way these Standards address specific issues, by comparison to the 1978 Standards, include the following:

- Unlike the 1978 Standards, these Standards do not cover the use of citations and summonses in lieu of arrest. The omission reflects a deliberate decision to focus these Standards explicitly on cases in which a defendant has been arrested and held in detention to await a court hearing. These are the cases in which a pretrial services agency is most likely to be involved. The omission by no means implies a retreat by NAPSA from its strong support for the use of citations and summonses in appropriate cases.
- In contrast to the 1978 Standards, these Standards do not call for the complete elimination of financial conditions of release. However, recognizing that the ability of a defendant to meet financial conditions has no relation to the risk that the defendant may pose to public safety, they restrict the use of financial conditions to situations where there is a risk of nonappearance for scheduled court dates and provide that financial conditions can be used only when no other conditions will reasonably assure the defendant's appearance. The Standards require that financial conditions be set at an amount that is within the financial

ability of the defendant to post, call for the abolition of compensated sureties, provide that financial conditions should never be set simply by reference to a “bail schedule” that establishes money bail amounts based on the nature of the charge, and state flatly that financial conditions should never be used in order to detain the defendant. Financial conditions are never to be used in order to protect against future criminal conduct or to protect the safety of the community or any person. If a bond is to be posted, this can be done only by uncompensated sureties.

- The 1978 Standards contained no mention of victims of crime. These Standards provide guidelines for jurisdictions to follow in order to ensure that victims are kept informed of the case. In particular, they call for victims of violent crime to be informed if a defendant who has been charged with the crime is to be released from custody, advised of the conditions of release, and given information about persons to contact for assistance while the case is pending.
- Recognizing the revolution that has taken place in information technology over the past quarter century, these Standards provide much more detailed guidance for pretrial services agencies and programs concerning development of policies to protect the confidentiality of information acquired during the course of investigations and supervisory work.

The Standards are intended to be aspirational—to provide a framework for a well-functioning system of pretrial decision-making and for effective monitoring and supervision of defendants on pretrial release. Because American court systems vary widely in structure and operational practices, policymakers and practitioners will need to consider how the Standards can best be adapted for use in their own jurisdictions. For example, in a “two-tier” system for handling felony charge cases, issues related to the defendant’s custody status are typically addressed first in a limited jurisdiction court (at the defendant’s first appearance following arrest) and again at the formal arraignment on a felony indictment or information in the general jurisdiction court. The basic principles applicable to release/detention decision-making are the same, however, with respect to the processes that take place in each court. The commentary accompanying specific Standards addresses unique issues that may arise in circumstances such as these.

The format of these Standards is considerably different from the format of the 1978 Standards, and closely resembles the format used in the American Bar Association’s Criminal Justice Standards. The Third Edition of the ABA’s *Standards on Pretrial Release*, approved by the ABA’s House of Delegates in 2002, served as an organizing framework for major parts of these new NAPSA Standards. The NAPSA Standards have a somewhat different structure, however, and cover some topics that are omitted or covered in much less depth in the ABA Standards. Much of the “black letter” language in these Standards is drawn directly from the wording of the new ABA Standards—an approach adopted by the NAPSA committee that drafted these Standards for two reasons: (1) a sense that the ABA Standards are fundamentally sound, though they do not cover every topic relevant to pretrial services agencies and program operations; and (2) a belief

that consistency across the two sets of Standards will strengthen the likelihood that they will help shape policy and practice in constructive ways. However, because a primary purpose of these Standards is to provide guidance to pretrial services program directors and staff, they address the organization and operation of pretrial services agencies and programs in much greater depth than do the ABA Standards.

The Standards are organized into four Parts. Part I begins with a statement of the purposes of the pretrial release decision: providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, minimizing the unnecessary use of detention, and protecting victims, witnesses, and the community from threat, danger, or interference (Standard 1.1). It then sets forth general principles that should govern the pretrial process and, in particular, the making of the pretrial release/detention decision. Key principles include the following:

- A presumption in favor of release on a simple promise to appear (release on the defendant's personal recognizance) applicable to all persons arrested and charged with a crime.
- When release on personal recognizance is not appropriate, use of the least restrictive conditions of release that will reasonably assure the defendant's appearance for court proceedings and protect the safety of members of the community.
- The use of secure detention only in very limited circumstances, and only when stringent criteria are met and specific procedures are followed, as outlined in detail in Part II of the Standards.
- The establishment, in every jurisdiction, of a pretrial services agency or program that will provide information to assist the court in making release/detention decisions, provide monitoring and supervisory services, and perform other functions related to pretrial release.
- Use of release on financial conditions only when no other conditions will reasonably assure the defendant's appearance, and at an amount that is within the ability of the defendant to post.
- Abolition of compensated sureties.
- Provision of adequate informational and supervisory resources, to enable supervision of large numbers of defendants in the community while their cases are pending.
- Use of procedures that enable victims of crime to be kept informed about the case and, in cases where a defendant has been charged with a violent crime and subsequently released from custody, advising the victim of the conditions of release and of actions that can be taken to enforce the release conditions.

Part II of the Standards focuses explicitly on what should happen before, at, and immediately after the defendant's first appearance in court following an arrest. Of particular note, the Standards call for the prompt appearance of the defendant before a judicial officer (within a maximum of 24 hours), for a pretrial investigation to be conducted by the pretrial services agency or program prior to the first appearance, and for a written report to be provided to the court, the prosecutor, and counsel for the defendant prior to the court session. Standards 2.3-2.5 provide detailed guidance with respect to deciding upon release on personal recognizance, setting conditions of release, or imposing financial conditions. Standard 2.5 makes it clear that financial conditions should be used only when no other conditions will reasonably assure the defendant's appearance in court, should never be used in an effort to prevent future criminal conduct or to protect the safety of the community or any person, and should be set in light of the defendant's particular financial circumstances and the risk that the defendant might fail to appear for court proceedings. Standard 2.6 provides guidelines for court orders concerning release: they should be in writing, should provide clear instructions to the defendant concerning future court dates and the conditions to which the release is subject, should set forth any authority that the pretrial services agency or program may have to modify the initially established conditions of release, and should advise the released person of the consequences of violating a condition of release.

Standards 2.7 – 2.10 set out detailed procedures to be followed in cases where there may be grounds for ordering pretrial detention of the defendant. Basically, the Standards restrict the use of detention to relatively serious cases and to any case where there is a substantial risk that a defendant will obstruct or attempt to obstruct justice or threaten, injure, or intimidate a prospective witness or juror. At a pretrial detention hearing, the prosecutor bears the burden of establishing by clear and convincing evidence that no conditions of release will reasonably assure the defendant's appearance in court and protect the safety of the community or any person.

Part III of the Standards deals with the role, purposes, and functions of pretrial services agencies and programs. Standard 3.1 describes the core functions of these agencies and programs: assisting the court in making prompt, fair, and effective release/detention decisions and supervising released defendants to minimize risks of failure to appear and risks to the safety of the community and to individual persons. Standards 3.2-3.4 outline the essential functions to be performed in connection with the defendant's first court appearance, describe what should be done in conducting interviews of defendants prior to first appearance, and provide guidance with respect to preparation of a written report for the court that contains essential information, presents an assessment of risks posed by release of the defendant, and sets forth possible ways of responding to the risks through appropriate use of conditions of release. Standard 3.5 provides guidance with respect to monitoring and supervision of released defendants. Standard 3.6 calls on the pretrial services agency or program to monitor the status of detained defendants on an ongoing basis, and to provide the court with any information that might be relevant to reconsideration of the original release/detention decision and possible conditional release of these persons.

Standard 3.7 addresses the organization and operations of pretrial services agencies and programs. It emphasizes the need for a sound governance structure, for appropriate personnel and staff compensation policies, and for the development of goals, policies and procedures that will enable it to function as an effective institution in its jurisdiction's criminal justice system. This Standard focuses attention on a number of key features of effective pretrial programs, including:

- Operational goals.
- Regularly updated strategic plans.
- Up-to-date written policies and procedures to guide staff in the performance of their functions.
- An accurate management information system to support defendant identification, information collection and presentation, risk assessment, identification of appropriate release conditions, compliance monitoring, and detention review.
- Procedures for measuring performance in relation to the goals that have been set.
- Capacity to assist persons who cannot communicate in written or spoken English.
- Regular meetings with community representatives, to ensure that program practices meet the needs of the community served.
- Development, in collaboration with other justice system entities and community groups, of appropriate policies for managing services needed to respond to the risks posed by released defendants, including strategies for use of substance abuse treatment programs, health and mental health services, and employment services.

Standard 3.8 provides detailed guidelines for pretrial services agencies and programs to use in developing their own policies concerning access to information in their files. The basic approach is to provide that information obtained during the course of the pretrial investigation and post-release monitoring should remain confidential and not be subject to disclosure except in very limited circumstances that are set forth in the Standards.

Part IV of the Standards covers the management and oversight of the pretrial process following initial decisions concerning release or detention. Standard 4.1 provides guidance about re-examination of the release/detention decision in certain circumstances. Standards 4.2 and 4.3 deal with actions that can be taken in the event that a defendant

fails to comply with conditions of release. Of particular note, Standard 4.3 provides that, in considering what actions to recommend to the court in cases where the defendant has failed to comply with conditions of release, the pretrial services agency or program should take account of the seriousness of the violation, whether it appears to have been willful, and the extent to which the defendant's actions resulted in impairing the effective administration of court operations or caused an increased risk to public safety.

Members of the committee and of the NAPSA Board recognize that there are some aspects of these Standards—for example the provisions for use of pretrial detention in circumstances where the defendant's release would pose an unacceptable risk of danger to the community or individual persons, the abolition of compensated sureties, and the provisions calling for an extensive system of supervised release—that may be inconsistent with the current laws and practices of some states. Other provisions may call for the development of program services that are beyond the near-term financial ability of some jurisdictions to provide. However, all of the provisions of the Standards are ones that have been shown to work—and work effectively—in at least some jurisdictions in the United States. They are aspirational, to be sure, but they are not unrealistic. They point the way toward criminal justice processes that are fairer, more rational, more open, more accountable, and more effective.



# NAPSA RELEASE STANDARDS AND COMMENTARY

## PART I.

### GENERAL PRINCIPLES GOVERNING THE PRETRIAL PROCESS

#### Standard 1.1      Purposes of the pretrial release decision

The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, minimizing the unnecessary use of secure detention, and protecting victims, witnesses and the community from threat, danger or interference. The judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.

#### *Related Standards*

NAPSA (1978), Standards I and VII.

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.1

#### *Commentary*

The decision of a court concerning a defendant's pretrial status—whether the person is to be released pending adjudication or held in secure detention until the trial or other resolution of the case—is a crucially important part of the process in any criminal case. There is a considerable amount of empirical data showing that pretrial status is correlated with case outcomes: released defendants tend to fare far better than those who are held in detention.<sup>1</sup> This Standard, in introducing the general principles that underlie

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<sup>1</sup> Successive research projects conducted over the past half century have shown that defendants who are held in pretrial detention tend to plead guilty more often and are more likely to be convicted, more likely to be sentenced to terms of incarceration, and more likely to receive longer prison terms than are defendants who are released prior to trial. See, e.g., Caleb Foote, "Compelling Appearance in Court: Administration of Bail in Philadelphia," 102 *University of Pennsylvania Law Review* 1031 (1954) at 1048-1049; Anne Rankin, "The Effect of Pretrial Detention," 39 *New York University Law Review* 641 (1964); Stevens H. Clarke and Susan T. Kurtz, "The Importance of Interim Decisions to Felony Trial Court Dispositions," 74 *Journal of Criminal Law and Criminology* (1983); Michael R. Gottfredson and Donald

all of the Standards, emphasizes the importance of the initial custody/release decision. It focuses on the purposes of the pretrial release decision, outlines the options available to the judicial officer in making the decision, and sets forth compelling reasons why pretrial detention should be used sparingly. The Standard emphasizes that pretrial detention should be used only in limited circumstances and only when procedural safeguards—set forth in Part II (see especially Standards 2.8 – 2.10)—are in place and are followed. This approach is consistent with a substantial body of law that favors release of defendants pending adjudication of the charges against them.<sup>2</sup>

By including “protecting victims, witnesses, and the community from threat, danger, or interference” as one of the purposes of the release decision, this Standard makes it clear that public safety considerations are integral to this decision. Rather than allow public safety concerns to be addressed covertly through the setting of high bail, the Standards establish a set of prioritized options for the judicial officer to consider if the defendant is not to be released on personal recognizance or unsecured appearance bond. The first option is release under conditions set by the judicial officer, which may vary considerably depending on the nature of the risk posed by the defendant’s release. The second option to be considered is detention, of two types: (a) temporary detention, which can be ordered in certain circumstances, pending a full-scale pretrial detention hearing to be held promptly; or (b) detention pending adjudication of the charges, provided that specified criteria are met. Standards in Part II set forth criteria and procedures to be followed with respect to each of these options.

As subsequent standards make clear, these Standards are designed to (a) minimize the use of secure detention for defendants awaiting trial, utilizing detention space only when clearly necessary; and (b) provide for the use of mechanisms that, to the extent reasonably possible, will assure that released defendants will make required court appearances and will not pose an undue risk to the safety of the community and of individual persons. The effect, in jurisdictions where the basic approach outlined in these Standards is adopted, should be to substantially lessen the use of jail space for defendants who pose no significant risk of flight or dangerousness, but who are held in detention simply because of inability to post the amount of money bail that would be set under a traditional bail system.

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M. Gottfredson, *Decision Making in Criminal Justice: Toward a Rational Exercise of Discretion* (New York: Plenum Press, 1988).

<sup>2</sup> The body of law generally favoring release of accused persons prior to trial has deep roots in the United States. The Judiciary Act of 1789, passed by the first U.S. Congress, provided that bail had to be admitted for all non-capital offenses (I Stat. 91, sec 33). The Eighth Amendment of the U.S. Constitution, adopted as part of the Bill of Rights in 1789, provides that “Excessive bail shall not be required”. While jurists and scholars have differed in their interpretation of the scope and extent of the Eighth Amendment’s prohibition against excessive bail, at a minimum it implies a rebuttable presumption in favor of pretrial release of the accused, with appropriate safeguards when necessary. See, e.g., *Stack v. Boyle*, 341 U.S. 1 (1951) at 4-5; *United States v. Salerno*, 481 U.S. 739 (1987) at 755. As discussed in the commentary to Standard 1.2 *infra*, a number of states have enacted presumptions in favor of release into law.

**Standard 1.2      Presumption of release under least restrictive conditions and other alternative release options**

In deciding pretrial release, a presumption in favor of pretrial release on a simple promise to appear (i.e., release on “personal recognizance”) should apply to all persons arrested and charged with a crime. When release on personal recognizance is deemed inappropriate, the judicial officer should assign the least restrictive condition(s) of release that will provide reasonable assurance that the defendant will appear for court proceedings and will protect the safety of the community, victims, and witnesses pending trial. The court should have a wide array of programs or options available for use in assigning such conditions, and should have the capacity to develop release options appropriate to the risks and special needs posed by defendants who are released to the community. When no conditions of release are sufficient to accomplish the aims of pretrial release, defendants may be detained through specific procedures set forth in Part II of these Standards.

***Related Standards***

NAPSA (1978), Standards I, II, III.C, VII

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.2

***Commentary***

Presumptions in favor of pretrial release under the least restrictive conditions that will reasonably assure both the defendant’s appearance in court and the protection of public safety are a part of federal law and the laws of a number of states and the District of Columbia.<sup>3</sup> The presumption reflects both a policy judgment that restrictions on liberty should be limited to circumstances in which they are clearly needed and a practical recognition that unnecessary detention imposes major financial burdens on society. In addition to the costs of jail construction and operation, tax revenue is lost

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<sup>3</sup> The federal government, the District of Columbia, and at least thirteen states have established a statutory presumption that defendants charged with bailable categories of offenses should be released on their own recognizance or on unsecured bond, unless the judicial officer making the release/detention decision determines that the defendant poses a risk that warrants more restrictive conditions or detention. See, e.g., 18 U.S.C. Section 3142 (c) (1) (B); D.C. Code Ann. Sec. 23-1321 (c) (B); Alaska Stat. Sec. 12.30.020; DE Code Ann. Tit.11 Sec 2105; IA Code Sec. 811.2; KY Rev Stat 431.520; MA Gen. Laws Ann. Ch. 276, Sec 58A; ME Rev. Stat. Tit 58 Sec 1026; NE Stat. 29-901; NC Gen Stat. Sec. 15A-534 (a) and (b); OR Rev. Stat. Sec. 135.245 (3); SC Code Ann. Sec. 17-15-10; SD Comp Laws Ann. Sec. 23A-43-2; TN Code Ann. Tit. 13 Sec. 7554; WI Stat. 961.01. An additional six states have established a similar presumption by court rule. See AZ Rule of Crim. Proc. 7.2 (a); MN Rule of Crim. Proc. 6.01; ND Rule of Crim. Proc. 46 (a); NM Rule of Crim. Proc. 22 (a); WA Superior Court Crim. Rule 3.2; WY Rule of Crim. Proc. 8 (c) (1). For review and discussion of such statutes and rules, see John S. Goldkamp, “Danger and Detention: A Second Generation of Bail Reform,” 76 *Journal of Criminal Law and Criminology* 1 (1985) at 11-14.

when employed defendants are detained and welfare costs may increase to support the families of incarcerated defendants.

In many cases, it will be feasible to release the defendant on a simple promise to appear in court on the next date that the case will be on the court's calendar. Often, however, it will be appropriate to impose some conditions on the release, in order to help assure the defendant's return to court and help minimize possible risks of danger to public safety. Importantly, this Standard emphasizes that any such conditions should be the *least restrictive* necessary to achieve the goals of assuring appearance and protecting the safety of the community, victims, and witnesses during the pretrial period.

The presumption in favor of release implies detention of as few defendants as possible. As Chief Justice Rehnquist observed in his opinion for the Supreme Court in *United States v. Salerno*, "In our society liberty is the norm and detention prior to trial is the carefully limited exception."<sup>4</sup> This Standard provides that in limited circumstances the presumption in favor of release may be overcome through a showing that there are no conditions that will sufficiently minimize the risk of flight or the risk of danger to the community or individual persons (see Standards 2.7-2.10, *infra*). Under those circumstances, and following procedures outlined in detail in Part II of the Standards, a defendant may be ordered held in detention pending adjudication of the case.

The drafters of these Standards recognize that a number of states have policies that do not provide for consideration of dangerousness in setting bail or other conditions of pretrial release. However, the position taken in these Standards, consistent with the position initially taken in the First Edition of the NAPSA Standards<sup>5</sup> and in the ABA Standards on Pretrial Release that were adopted in 2002,<sup>6</sup> is that the release/detention issues related to public safety should be addressed forthrightly, using procedures that protect the due process rights of defendants while also taking account of legitimate concerns about public safety. The result should be to enable the pretrial detention of defendants who pose serious risks to public safety that cannot be overcome by imposing conditions on release, while at the same time reducing the number of defendants who are held in secure detention.

As a practical matter, in order to have a viable system that uses pretrial detention only in limited circumstances, jurisdictions will have to develop a broad array of programs and options that can be used by a judicial officer in setting conditions of release. Standard 2.4, *infra*, provides guidance about the range of conditions that may

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<sup>4</sup> *United States v. Salerno*, 481 U.S. 739 (1987) at 755.

<sup>5</sup> National Association of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release* (Washington, D.C.: National Association of Pretrial Services Agencies, 1978) (hereafter cited as "1978 NAPSA Standards"), Standard VII and Commentary, pp. 35-49. The 1978 NAPSA Standards were re-issued in 1998, with a new Foreword and some minimal editing but with no substantive changes in the wording of the Standards or the Commentary, as the Second Edition of NAPSA's Release Standards. Because the 1978 NAPSA Standards have not been previously revised, references in this Commentary are to those original Standards.

<sup>6</sup> American Bar Association Standards for Criminal Justice *Standards on Pretrial Release, Third Edition* (approved February 2002) (hereafter cited as ABA Third Edition Pretrial Release Standards), Standards 1.2, 5.7-5.10.

appropriately be imposed by the judicial officer, taking into account information about the defendant and the nature of the risks that may be posed by release of the defendant from detention. A number of jurisdictions already utilize a wide range of mechanisms to provide needed monitoring, supervision, and supportive services for released defendants. The availability of such programs and options makes it feasible to release substantially more defendants. This Standard emphasizes the importance of jurisdictions developing a broad range of practical and enforceable conditions of release, suitable for meeting the needs of defendants whose risks and needs vary widely, so that the presumption of release can be realized in practice.

### **Standard 1.3              Pretrial services agency or program**

**(a) Every jurisdiction should have the services of a pretrial services agency or program to help ensure equal, timely, and just administration of the laws governing pretrial release. The pretrial services agency or program should provide information to assist the court in making release/detention decisions, provide monitoring and supervisory services in cases involving released defendants, and perform other functions as set forth in these Standards.**

**(b) Jurisdictions should provide by statute or rule that information about individual defendants acquired by the pretrial services agency or program should be treated as confidential. Such information should not be subject to use by the prosecution in a current or substantially related case to establish guilt, and should not be subject to disclosure by the pretrial services agency except for limited purposes as set forth in Standards 2.2 (a) and 3.8.**

#### ***Related Standards***

NAPSA (1978) Standards VII, X, and XI.

ABA Standards on Pretrial Release, Third Edition (2002), Standards 10-1.10 and 4.2 (b).

#### ***Commentary***

Pretrial services agencies and programs have been in operation in the United States for over forty years, going back to the original Manhattan Bail Project started in New York City in 1961.<sup>7</sup> More than 300 pretrial services programs are in operation as of 2004, ranging in size from a single staff member in some rural areas to over 200 staff members in some large urban jurisdictions.<sup>8</sup> These agencies and programs perform key

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<sup>7</sup> For discussion of the Manhattan Bail Project and the early years of the bail reform movement in the U.S., see, *inter alia*, Charles E. Ares, Anne Rankin, and Herbert J. Sturz, "The Manhattan Bail Project: An Interim Report on the Use of Pretrial Parole," 38 *New York University Law Review* 67-77 (1963); *Proceedings and Interim Report of the [1964] National Conference on Bail and Criminal Justice* (Washington, D.C.: U.S. Department of Justice and the Vera Foundation, Inc., 1965); Wayne H. Thomas, Jr., *Bail Reform in America* (Berkeley: University of California Press, 1976), esp. pp. 3-27; Wayne H. Thomas et al., *Pretrial Release Programs* (Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, April 1977).

<sup>8</sup> See John Clark and D. Alan Henry, *Pretrial Services Programming at the Start of the 21st Century: A Survey of Pretrial Services Programs* (Washington, D.C.: Bureau of Justice Assistance, 2003)

functions that enable decisions concerning the release and detention to be made more fairly and effectively than would otherwise be possible. Perhaps most importantly, they furnish the judicial officer presiding at the defendant's first court appearance following arrest with information about the defendant that can be very valuable in making the crucial release/detention decision. While practices vary across jurisdictions, they generally also make recommendations about the release decision and conditions that may be appropriate in light of the risks posed by release of the defendant, provide direct monitoring and supervisory services aimed at minimizing the risks of nonappearance and pretrial crime, and report to the court on the defendant's compliance with the conditions that are set.<sup>9</sup> Standard 1.3 (a) calls for every jurisdiction to have the services of an agency or program that can assist the court in release/detention decision-making and in monitoring and supervising released defendants other than those released on commercial surety bond.<sup>10</sup>

Pretrial services agencies and programs function under a variety of different organizational arrangements. They may, for example, operate as an arm of the court, as a unit of the local corrections or probation department, or as an independent non-profit organization. Importantly, these Standards contemplate that, regardless of the organizational arrangements, the pretrial services agency or program will help support the release/detention decision-making process.<sup>11</sup> Thus, for example, although a pretrial services program may be organizationally housed within a probation department, sheriff's office, or local corrections department, it should function as an independent entity in providing information to the court and in monitoring and supervising defendants released on nonfinancial conditions. The host agency should recognize and support the unique mission and role of pretrial services, which in some instances may not be congruent with the mission of the host entity. The leadership and staff of the pretrial services agency or program should be committed to minimizing unnecessary detention, assisting judicial officers in making fair and effective decisions concerning the release of defendants, and providing essential monitoring and supervisory services. Their role in obtaining information about the backgrounds, community ties, and other characteristics

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(hereafter cited as "2003 *Pretrial Services Survey Report*"), pp. 5, 12. Clark and Henry found a total of 322 pretrial services programs in operation. *Id.* at p. 2.

<sup>9</sup> The functions of pretrial services agencies and programs are the subject of standards in Part III, *infra*. For descriptions of the organization and operations of pretrial services programs in different jurisdictions, see Barry Mahoney et al., *Pretrial Services Programs: Responsibilities and Potential* (Washington, D.C.: National Institute of Justice, 2001) (hereafter cited as "NIJ 2001 Report"); also Evie Lotze et al., *The Pretrial Services Reference Book* (Washington, D.C.: Pretrial Services Resource Center, 1999).

<sup>10</sup> As used in Standard 1.3 (a) and elsewhere in these Standards, the term "released defendants" means defendants released on personal recognizance, on other nonfinancial conditions, or on financial conditions such as deposit bail that do not involve a compensated surety. For discussion of the policy reasons for this usage, see Standard 1.4 (g) and accompanying commentary, *infra*.

<sup>11</sup> For purposes of these Standards, a pretrial services agency or program is considered to be any organization or individual whose purposes include providing information to the court to assist in pretrial release/detention decision-making and/or monitoring and supervising defendants released on nonfinancial conditions. See Standard 3.1 and accompanying commentary, *infra*.

of arrested defendants is especially important. Lack of reliable information about defendants can lead to either of two undesirable outcomes: the unnecessary detention of defendants who pose no significant risk of nonappearance or dangerousness or, conversely, the release—without appropriate conditions—of defendants who do pose such risks.

These Standards emphasize the role of pretrial services agencies or programs in effective decision-making concerning the pretrial release/detention process and, more broadly, in the effective functioning of state and local criminal justice systems. Pretrial programs are a vitally important part of these systems and processes, because they perform functions that, in their absence, are often performed inadequately or not at all. Part III, in particular, describes the full range of functions performed by pretrial services agencies and programs, and also addresses issues involving their organization and governance.

Standard 1.3 (b) calls for jurisdictions to provide for limited confidentiality protections that would preclude use by the prosecution of information about a defendant that is contained in the files of a pretrial services agency or program. Under this Standard, as in the federal courts and the District of Columbia, the prosecution would be barred from using such information in its case in chief for the purpose of establishing guilt in the current or a substantially related criminal proceeding.<sup>12</sup> Such confidentiality is essential for pretrial services agencies to function effectively and avoid being perceived by defendants as an arm of the prosecutor's office. The interview information obtained by pretrial services is extremely valuable for release/detention decision-making by the judicial officer, and defendants should be encouraged to provide accurate information. In order to obtain useful information it is important for the pretrial services staff to be able to assure the defendant that information provided during the pretrial interview will not subsequently be used in the prosecution to establish guilt.

#### **Standard 1.4              Conditions of release**

**(a) Consistent with these Standards, each jurisdiction should adopt procedures designed to promote the release of defendants on personal recognizance. Additional conditions should be imposed on release only when the facts of the individual case demonstrate that such conditions are needed to provide reasonable assurance that the defendant will appear at court proceedings and/or that such conditions are needed in order to protect the community, victims, witnesses or any other person, and to maintain the integrity of the judicial process. Methods for**

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<sup>12</sup> See 18 U.S.C. Section 3153 (c); D.C. Code Ann Section 23-1303 (d). The District of Columbia statute provides that information in the agency's report to the court or in its files "shall not be admissible on the issues of guilt in any criminal proceeding." There are, however, some exceptions, including use of such information in proceedings arising out of the defendant's willful failure to appear for scheduled court proceedings and in perjury proceedings. The provision clearly bars the prosecution from using such information in its case in chief, but has been interpreted to permit use of it for purposes of impeachment if the defendant gives trial testimony that is inconsistent with a statement made to the pretrial services agency. See, e.g., D.C. Code Ann. Sections *Herbert v. United States*, 340 A.2d 802 (D.C. App, 1976); *Anderson v. United States*, 353 A.2d 392 (D.C. App, 1976). Minnesota's Rules of Criminal Procedure provide that "Any information obtained from the defendant during the course of the [pre-release] investigation and any evidence derived from such information shall not be used against the defendant at trial." MN Rules of Crim. Proc. Rule 6.02 subd 3.

**providing the appropriate judicial officer with reliable information relevant to the release decision should be developed, preferably through a pretrial services agency or function as described in Standards 3.2 through 3.4.**

**(b) When release on personal recognizance is not appropriate to assure the defendant's appearance at court and prevent the commission of criminal offenses that threaten the safety of the community or any person, non-financial conditions of release should be employed consistent with Standard 2.4.**

**(c) Release on financial conditions should be used only when no other conditions will provide reasonable assurance that the defendant will appear for court proceedings. Financial conditions should never be used in order to detain the defendant. When financial conditions are imposed, the court should first consider releasing the defendant on an unsecured bond. If unsecured bond is not deemed a sufficient condition of release, and the court still seeks to impose monetary conditions, bail should be set at the lowest level necessary to provide reasonable assurance that the defendant will appear for court proceedings and with regard to the defendant's financial ability to post the bail. When financial bail is imposed, the defendant should be released on the deposit of cash or securities with the court of not more than ten percent of the amount of the bail, to be returned at the conclusion of the case.**

**(d) Financial conditions should not be employed to respond to concerns for public safety.**

**(e) The judicial officer should not impose a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant's inability to pay.**

**(f) Consistent with the processes provided in these Standards, compensated sureties should be abolished.**

**(g) Pending abolition of compensated sureties, jurisdictions should ensure that responsibility for supervision of defendants released on bond posted by a compensated surety lies with the surety. A judicial officer should not direct a pretrial services agency to provide supervision or other services for a defendant released on surety bond. No defendant released under conditions providing for supervision by the pretrial services agency should be required to have bail posted by a compensated surety.**

#### ***Related Standards***

NAPSA (1978) Standards IV and V

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.4

#### ***Commentary***

##### ***Standards 1.4 (a) and (b)***

Under sections (a) and (b) of this Standard, jurisdictions should make sure that their laws and practices orient judicial officers toward the use of nonfinancial conditions of release. In making the pretrial release/detention decision, a judicial officer should first

consider whether the defendant can be released on his or her own recognizance—i.e., on the basis of a simple promise to appear at all future proceedings in the case (Standard 1.4 (a)). If such outright release is not considered to be appropriate, release on nonfinancial conditions should next be considered (Standard 1.4 (b)). To use nonfinancial conditions effectively, of course, judicial officers need to have reliable information about the defendant, in order to determine what conditions are likely to be appropriate and effective in assuring appearance and minimizing the risk of future crime. Further, the jurisdiction must have mechanisms to monitor the conditions and provide or arrange for appropriate supervision. Pretrial services agencies and programs should be able to both provide the essential information and do the necessary monitoring and supervision.

*Standards 1.4 (c), (d), (e), and (f)*

These sections of Standard 1.4 set forth principles concerning the use of financial conditions. They are intended to sharply restrict the use of financial conditions, though not completely eliminate their use. Section (c) provides for financial conditions to be used only when nonfinancial conditions will not be sufficient to provide reasonable assurance that the defendant will make required court appearances, and never to be used as a mechanism for holding the defendant in detention. It also establishes priorities to be followed when financial conditions are imposed, with the first choice to be release of the defendant on unsecured bond (e.g., the defendant's promise to pay a certain amount of money in the event of nonappearance). If unsecured bond is not sufficient, then bail should be set at the lowest feasible level taking account of the defendant's ability to post bail. If monetary bail is set, a deposit bail system should be used, with the defendant depositing cash or securities equal to ten percent of the amount of the bail with the court. The deposit should be returned to the defendant at the conclusion of the case, provided that the condition of returning for court appearances has been met.<sup>13</sup>

Standard 1.4 (d) is intended to reinforce the principle that money bail should not be used to keep the defendant in detention for any reason other than to respond to a risk of possible flight. It is simply a statement of the core principle that financial conditions should not be used to respond to concerns about public safety, as has historically been done in many jurisdictions by setting very high bail in cases where the defendant is seen as posing a risk of dangerousness.

Standard 1.4 (e) sets forth the principle that financial conditions should never be set at an amount that is beyond the financial ability of the defendant to meet. Similar provisions are found in federal law and in the law of the District of Columbia.<sup>14</sup> Thus, it is permissible to set bail at an amount that is high enough to deter the defendant from fleeing the jurisdiction (or to provide a strong incentive for a defendant who lives in another jurisdiction to return for required court appearances), but not so high as to make it utterly impossible for the defendant to post the bond.

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<sup>13</sup> For illustrative legislation providing for the use of deposit bail, see the statutes in Illinois (IL Stat Ch 725/110-7), Kentucky (KY Rev Stat 431.530) or Oregon (OR Rev Stat 135.265).

<sup>14</sup> See 18 USC Section 3142 (c) (2): “the judicial officer may not impose a financial condition that results in the preventive detention of the person”; also D.C. Code 23-1321 (c) (3), which has similar language.

Standard 1.4 (f) is a flat statement that compensated sureties should be abolished. This is a position that NAPSA has maintained since its inception in 1973, and that has been held by the American Bar Association since it first adopted standards on pretrial release in 1968.<sup>15</sup> The reasons are clear: First, under the compensated surety system, the ability of a defendant to post money bail using the services of a bondsman is unrelated to the risk that the defendant may commit a future crime and the bondsman is under no obligation to take steps to help prevent the commission of future criminal offenses by the defendant. Second, in a surety bail system, the actual decision as to which defendants will be released and which ones will remain in detention moves from the judicial officer to bondsmen, who make private and unreviewable decisions regarding release of the defendants on bail. Third, the system discriminates unfairly against poor and middle-class persons who cannot afford the non-refundable (and often very high) fees that the bondsman requires as a condition of posting the bond. These persons remain in jail even though they may pose no significant risk of flight or risk to public safety.<sup>16</sup>

The drafters of these Standards recognize that bail bonding for profit is deeply embedded in the laws, cultures, and practices of many jurisdictions. They also recognize, however, that in many jurisdictions there has been a significant movement away from reliance on the money bail system. Indeed, some states have abolished the use of

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<sup>15</sup> See 1978 NAPSA Standards, Standard V (calling for the use of financial conditions to be eliminated, though the commentary to this standard generally approves the use of deposit bail set at an amount that is within the ability of the defendant to pay); ABA *Standards Relating to Pretrial Release, First Edition* (New York: American Bar Association Project on Minimum Standards for Criminal Justice, 1968), Standard 5.4 (providing that “No person should be allowed to act as a surety for compensation”). The ABA standards relating to compensated sureties have been re-worded in successive editions, but the policy favoring abolition of compensated sureties has remained constant. The commentary to Standard 5.4 of the original 1968 ABA Standards concluded with the observation that “The professional bondsman is an anachronism in the criminal justice process. Close analysis of his role indicates that he serves no major purpose that could not be better served by public officers at less cost in economic and human terms”.

<sup>16</sup> There is an extensive literature documenting the abuses of the compensated surety system. See, e.g., Roscoe Pound and Felix Frankfurter, eds., *Criminal Justice in Cleveland: Reports of the Cleveland Foundation Survey of the Administration of Criminal Justice in Cleveland, Ohio* (Cleveland: The Cleveland Foundation, 1922; reprinted, Montclair, NJ: Patterson Smith, 1968), pp. 290-292; Arthur L. Beeley, *The Bail System in Chicago* (Chicago: University of Chicago Press, 1927); Foote, *supra* note 1; Note, “A Study of the Administration of Bail in New York City,” 106 *University of Pennsylvania Law Review* 693 (1958); Daniel J. Freed and Patricia M. Wald, *Bail in the United States: 1964* (Washington, D.C.: U.S. Department of Justice and The Vera Foundation, Inc., 1964); Ronald Goldfarb, *Ransom: A Critique of the American Bail System* (New York: John Wiley and Sons, 1968); Paul Wice, *Freedom for Sale: A National Study of Pretrial Release* (Lexington, MA: D.C. Heath and Co., 1974); John Goldkamp, *Two Classes of Accused: A Study of Bail and Detention in American Justice* (Cambridge, MA: Ballinger, 1979). Author F.E. Devine has observed that many countries with a common law tradition have acted to prevent the development of a commercial bail system:

“In short, whereas only the Philippines has adopted a U.S. style commercial bail system, the rest of the common law heritage countries not only reject it, but many take steps to defend against its emergence. Whether they employ criminal or only civil remedies to obstruct its development, the underlying view is the same. Bail that is compensated in whole or in part is seen as perverting the course of justice.” (F.E. Devine, *Commercial Bail Bonding: A Comparison of Common Law Alternatives* [New York: Praeger, 1991], p. 201).

compensated sureties and in their place have authorized the use of deposit bail.<sup>17</sup> Courts in these states make effective use of pretrial services agencies to provide information and recommendations needed for sound release decisions and to provide monitoring and supervision of released defendants. The experience of these states makes it clear that the elimination of compensated sureties and their replacement with effective pretrial services agencies can produce pretrial processes that are fairer and more effective than the traditional money bail system.

*Standard 1.4 (g)*

This Standard directly addresses a practice followed in some jurisdictions of imposing both money bail (to be provided through a compensated surety) and conditions that include supervision of the defendant by the jurisdiction's pretrial services agency. The effect is to make the pretrial services agency a kind of guarantor for the bail bondsman, in effect subsidizing the commercial bail industry by helping to reduce the risk that a defendant released on money bail will not return for scheduled court appearances.

Other provisions of the Standards emphasize that financial bail should be used only if other conditions are insufficient to minimize the risk of nonappearance, and that, if financial conditions are imposed, the bail amount should be posted with the court under procedures that allow for the return of the amount of the bond if the defendant makes required court appearances. There is no reason to require defendants to support bail bondsmen in order to obtain release (and to pay the bondsman a fee that is not refundable even if they are ultimately cleared of the charges), and the practice of providing for supervision by the pretrial services agency simply encourages perpetuation of the undesirable practices associated with commercial bail bonding. It also drains supervisory resources from often understaffed and overworked pretrial services agencies, making it more difficult to supervise the defendants for whom they properly have responsibility.

**Standard 1.5              Detention as an exception to policy favoring release**

**These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings. They establish specific criteria and procedures for effecting the pretrial detention of certain defendants after the court determines that these defendants pose a substantial risk of nonappearance at scheduled court proceedings, or threat to the safety of the community, victims, or witnesses or to the integrity of the justice process. The status of detained defendants should be monitored and their eligibility for release should be reviewed throughout the adjudication period. The cases of detained defendants should be given priority in scheduling for trial.**

***Related Standards***

NAPSA (1978) Standard VII

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.6

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<sup>17</sup> Both Kentucky and Wisconsin have prohibited the use of compensated sureties (see KY Rev. Stat. 431.510; WI Stat. 969.12). Illinois and Oregon simply do not authorize release on surety bail, but do provide for deposit bail (see statutory citations in note 8, *supra*). All four states authorize the use of release on nonfinancial conditions if simple release on personal recognizance is determined to be inappropriate.

### ***Commentary***

If courts apply the presumption in favor of release on a promise to appear and use release on appropriate conditions when necessary to mitigate risks of nonappearance or dangerousness, and if the use of money bail is eliminated, a high proportion of defendants should be released pretrial. However, there will be a small number of defendants who pose a substantial threat of nonappearance or danger to the community no matter what conditions might be set. Under the traditional money bail system, a judicial officer faced with defendants who appear to pose such threats would be likely to set bail at an amount that would be so high that the defendant could not possibly post it. Thus, a bail amount may be set by a judicial officer exercising unbridled discretion, without procedural safeguards for the defendant, without a full evidentiary hearing, and without giving the defendant any real opportunity to challenge the grounds for setting the bail at an amount virtually certain to result in detention. The same practices are used, routinely, to set bail in cases where the risks of flight and dangerousness are far less severe. Setting bail amounts that make it impossible for defendants to obtain pretrial release amounts to a form of *sub rosa* preventive detention.

The main principle articulated in this Standard is that the decision to detain a defendant prior to trial can be made only through an open process that provides ample due process protection to defendants. In Part II, Standards 2.7 – 2.10 set forth in detail a set of criteria and procedures to be followed in cases where there is thought to be a significant risk of flight or public safety that can only be addressed effectively by keeping the defendant in detention until the conclusion of the case. Detention is the most restrictive pretrial option, and should be used only when no other options are available. Corollary principles incorporated in this Standard (and developed in detail in subsequent Standards) are that pretrial detention should be (a) limited in duration; and (b) subject to periodic review by a judicial officer. Thus, for example, Standard 2.10 (g) (iii) provides for *de novo* review of the detention decision within a period that should ordinarily not be longer than 60 days. Standard 4.1 sets forth requirements concerning periodic monitoring of the status of cases of detained defendants and the submission of reports to the court.

#### **Standard 1.6              Consideration of the nature of the charge in making decisions concerning pretrial release**

**Although the charge itself may be a predicate to pretrial detention proceedings, the judicial officer should exercise care not to give inordinate weight to the nature of the present charge in evaluating factors for the pretrial release decision except when, coupled with other specified factors, the charge itself may cause the initiation of a pretrial detention hearing pursuant to the provisions of Standard 2.9.**

#### ***Related Standards***

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.7

## **Commentary**

There are two main reasons for this Standard's caution against giving inordinate weight to the nature of the charge against the defendant in making the pretrial release/detention decision. First, in many jurisdictions, there is a long history of setting money bail on the basis of the charge alone in many cases, with progressively higher money bail amounts being set as the seriousness of the charges increased. The effect is to make it impossible for some low-risk defendants to obtain pretrial release because the bail amount is too high and other factors relevant to returning to court for required appearances and remaining crime-free are not considered by the judicial officer. Second, there is no evidence that relatively high rates of failure-to-appear and offenses committed while on pretrial release are more likely to be associated with defendants who are facing relatively serious charges, and some basis for believing that the contrary is true.<sup>18</sup>

While the judicial officer should not give inordinate weight to the nature of the charge, the nature of the charge—when coupled with other factors brought to the attention of the judicial officer at the time of first appearance—may nonetheless be relevant to making the release/detention decision. Thus, for example, if a defendant is arrested for possession of a small amount of illegal drugs and his prior record shows prior convictions on similar charges, the judicial officer may consider setting conditions of release that include drug testing. The main thrust of this Standard is to encourage judicial officers to move beyond consideration of the charge alone and give consideration to a broad range of factors affecting possible risks of nonappearance and dangerousness in making the release/detention decision. Additionally, the Standard flags the provisions in Standard 2.9 that authorize the judicial officer to order a pretrial detention hearing on motion of the prosecutor in certain cases that the jurisdiction defines as involving a crime of violence, dangerous crime, or serious crime.

## **Standard 1.7                  Implications of policy favoring release for supervision in the community**

**The policy favoring pretrial release and selective use of pretrial detention is inextricably tied to explicit recognition of the need to supervise large numbers of defendants in the community pending adjudication of their cases, in order to protect against risks of nonappearance and risks of danger to the safety of the community or to individual persons. Jurisdictions should provide adequate informational and supervisory resources to the pretrial services agency or program and to other justice system entities involved in pretrial decision-making, monitoring, and supervision.**

## **Related Standards**

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.9

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<sup>18</sup> See John S. Goldkamp et al., *Personal Liberty and Community Safety: Pretrial Release in the Criminal Court* (New York: Plenum Press, 1995), pp. 185-187. Goldkamp and his colleagues note that, even though their data on pretrial practices in three large urban jurisdictions indicates that charge seriousness alone is a poor yardstick of likely flight or crime, judges in a traditional money bail system may use the severity of the charge as a rough gauge of the “stakes” or costs of potential mistakes in making release/detention decisions.

## **Commentary**

This Standard flags an important set of policy and budgetary issues that must be faced by every jurisdiction. How does the jurisdiction wish to allocate resources for managing the population of persons accused of criminal offenses during the period before the charges have been adjudicated? The overall thrust of these Standards is toward limited and focused use of secure detention, with the great majority of arrested persons released pending resolution of their cases. In order to make such a system work, jurisdictions will have to reallocate resources—away from expansion and operation of jail facilities and toward substantially expanded use of mental health services, drug treatment services, and community supervision of released defendants. The result should be to reduce the use of pretrial confinement, greatly alleviate problems of jail crowding, and reserve secure detention for defendants who pose serious risks of dangerousness or nonappearance that cannot be met through community supervision.

Informational resources—in particular, the capacity to rapidly obtain and effectively use information about individual defendants, both to make sound release detention decisions and to monitor released defendants' compliance with conditions—will be essential for this approach to work successfully. Jurisdictions will also need to provide for the involvement of prosecutors and defense attorneys at (and before) first appearance (see Standard 2.2 *infra*) if they do not already do so. Additionally, jurisdictions will need to have personnel skilled in community supervision of persons whose risks and needs cover a wide spectrum. The development of full-scale pretrial services programs and agencies is one obvious way that jurisdictions can meet the needs for informational and supervisory resources. In jurisdictions that already have pretrial services, it may be desirable to consider how to expand the scope of their operations.

For many jurisdictions, developing the type of system called for by these Standards will require expenditures in new information technology and in the personnel needed to support effective pretrial proceedings and community supervision. However, jurisdictions that follow this approach should realize substantial savings through better “up-front” decision-making and the avoided costs of jail expansion and operation. While there are real costs involved in the supervision of large numbers of released defendants, over the long term these costs will be substantially less than the costs of continuing to operate a system that relies on unnecessary use of secure detention.

### **Standard 1.8              Notice to Victims**

**Consistent with these standards, each jurisdiction should provide procedures designed to ensure that victims of crime are kept informed of the case in a proper and timely manner. At a minimum, jurisdictions should seek to ensure that victims of violent crime are informed promptly if a defendant who has been charged with the crime is to be released from custody. When release has been ordered in these circumstances, the jurisdiction should provide for victims to be advised of the conditions of release imposed on the defendant. The jurisdiction should ensure that victims are provided with information about persons to contact**

while the case is pending and with information about methods of seeking enforcement of release conditions.

*Related Standards*

ABA Pretrial Release Standards, Third Edition (2002), Standard 10-6.1

*Commentary*

This Standard is new and reflects the increased awareness of the needs and concerns of victims that has developed in communities across the nation over the past quarter century. It is consistent with Standard 1.1, which sets forth as one of the purposes of the pretrial release decision “protecting victims, witnesses, and the community from threat, danger, or interference.” Victim safety will be enhanced, and the anxiety of victims is likely to be reduced, if victims of an offense are kept informed about the progress of the case in a timely fashion. The Standard focuses particularly on the importance of jurisdictions establishing procedures to notify victims of a violent crime if a person charged with the crime is to be released from custody.

The Standard does not designate a single agency to be responsible for the notification, recognizing that this can be done in a variety of different ways. In jurisdictions where the prosecutor’s office has a victim services unit, that unit is probably the most appropriate agency to carry out the notification function and to keep the victim apprised of developments in the case on an on-going basis. However, the pretrial services program will generally be a primary source of information about conditions imposed on defendants.

**Standard 1.9              Delegated authority to release defendants prior to first appearance**

**The authority to release a defendant who has been arrested and charged with a crime resides with the court. The court should not delegate this authority to a pretrial services agency, program, or officer without specific guidelines, consistent with the laws and rules concerning judicial authority in the jurisdiction that govern the exercise of delegated authority. Such guidelines should at a minimum:**

- (a) limit the delegated authority to cases involving relatively minor charges; and**
- (b) require that the defendant produce satisfactory identification, have no outstanding warrants, have no pending cases, pose no obvious threat to the community or any person, and pose no obvious risk of failure to appear.**

*Related Standards*

NAPSA (1978) Standard II.C

### **Commentary**

This Standard emphasizes that, once a defendant has been arrested and charged with a crime, decisions concerning the pretrial custody status of the defendant are the responsibility of the court. While responsibility for releasing a defendant can be delegated to a pretrial services agency or program, the delegation should be made within the framework provided by this Standard. The Standard calls for the development by the court of specific guidelines that set forth the circumstances under which a pretrial services agency or program can release a defendant. The delegated release authority should extend only to relatively minor crimes. It should be exercised only when the defendant has satisfactory identification, checks have been run to make sure that the defendant has no pending cases or outstanding warrants, and there are no indications of a risk of dangerousness or nonappearance.

It should be emphasized that while this Standard places limitations on the use of delegated authority in situations where a defendant has been arrested and charged, it is not intended to restrict the use of field citations by law enforcement officers. These Standards do not address the use of such citations, and—as emphasized in the original NAPSA Release Standards—there are strong arguments to be made for the use of citations in lieu of arrest in cases involving minor offenses.<sup>19</sup> Logically, the same types of considerations that are relevant to exercise of delegated release authority would also be applicable to the use of citations—i.e., (1) accurate information on the identity and address of the person being released on citation; (2) workable criteria for making the release/detention decision; (3) a qualified decision-maker, such as a trained police officer; and (4) capacity for prompt follow-up in the event of nonappearance in court.<sup>20</sup>

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<sup>19</sup> See 1978 NAPSA Standards, Standard II and accompanying commentary; ABA Third Edition Pretrial Release Standards, Standards 10-2.1–10-2.3; Debra Whitcomb et al, *Citation Release* (Washington, D.C.: National Institute of Justice, 1984); ABA Third Edition Pretrial Release Standards, Standards 10-2.1–10-2.4..

<sup>20</sup> See *NIJ 2001 Report*, *supra* note 9, pp 61-63.

## **PART II**

### **NATURE OF FIRST APPEARANCE AND RELEASE/DETENTION DECISION**

#### **Standard 2.1              Prompt first appearance**

**Unless the defendant is released on citation or in some other lawful manner, a defendant who has been arrested should be taken before a judicial officer as expeditiously as possible and should in no instance be held in custody longer than 24 hours without appearing before a judicial officer. Judicial officers should be readily available to conduct first appearances within the time limits established by this Standard. A defendant who is not promptly presented should be entitled to immediate release under appropriate conditions unless pretrial detention is ordered as provided in Standards 2.8 through 2.10.**

#### ***Related Standards***

NAPSA (1978), Standard III.A

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-4.1

#### ***Commentary***

In a high proportion of criminal cases, the defendant's first court appearance following arrest is a vitally important stage of the case. It is at this point that the defendant is first formally informed of the charges, and it is at this stage that the first—and sometimes only—determination is made about the defendant's custody status pending adjudication of the charges.

This Standard calls for jurisdictions to ensure that an arrested defendant is brought promptly before a judicial officer for the first appearance proceeding. In no event should the defendant be held in custody by the police for longer than 24 hours before being brought before a judicial officer, regardless of whether the arrest has been made during the week or over a weekend. In some jurisdictions, this would mean that court hours—or at least the hours that judicial officers are available—would have to change from the typical pattern of functioning only during daytime hours on Mondays through Fridays.

As set forth in Standards 2.2 through 2.5, a great deal is expected to happen at the first appearance, and it will be essential to obtain a great deal of information relevant to the release/detention decision during the period between the defendant's arrest and the first appearance. Thus, it is not only the judicial officers who will have to be available to conduct first appearances; pretrial services personnel, prosecutors, and defense counsel will also have to be available and engaged in obtaining essential information prior to the conduct of the first appearance proceeding.

The drafters of the Standards recognize that it will be logistically (and probably financially) difficult for many jurisdictions, especially those in rural areas, to comply with this Standard in the short term. It should be noted that the United States Supreme Court has accepted a 48-hour time period following the defendant's arrest, inclusive of weekends, as a constitutionally permissible period within which to make a probable cause determination, which is often (though not always) made by a judicial officer before or in conjunction with the defendant's first court appearance.<sup>21</sup> While the 24-hour period may be ambitious for many places at the time these standards are adopted, it is in fact already being met in some jurisdictions.<sup>22</sup> A well-functioning criminal justice system should seek to make prompt and meaningful initial appearance a reality in all cases, as part of a process of continuing improvement.

## **Standard 2.2                  Nature of first appearance**

**(a) Prior to the first appearance, a pretrial investigation should be conducted by the pretrial services agency or program in accordance with Standards 3.2 through 3.4. A written report on the investigation should be provided to the court, the prosecutor, and counsel for the defendant prior to the first appearance.**

**(b) During the period between arrest and first appearance, the defendant should be provided an opportunity to communicate with family or friends for the purposes of facilitating pretrial release or obtaining counsel.**

**(c) The first appearance before a judicial officer should take place in such physical surroundings as are appropriate to the administration of justice. Each case should receive individual treatment, and decisions should be based on the particular facts of the case and information relevant to the purposes of the pretrial release decision as established by law and court procedure. The proceedings should be conducted in clear and easily understandable language calculated to advise defendants effectively of their rights and the actions to be taken against them. The first appearance should be conducted in such a way that other interested persons**

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<sup>21</sup> See *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). In this case, the practice in Riverside County was to hold a probable cause hearing in conjunction with the defendant's first appearance. The Supreme Court decision focused on the timing of the probable cause determination, rather than the timing of the first appearance.

<sup>22</sup> See, for example, the descriptions of the operations of the Kentucky Pretrial Services Program, the District of Columbia Pretrial Services Agency, the Monroe County (FL) pretrial services program, and the Philadelphia (PA) pretrial services program in *NIJ 2001 Report*, *supra* note 9, pp. 11-17. Maryland requires by court rule that the first appearance [presentment] take place "without unnecessary delay and in no event later than 24 hours after arrest" (MD Rule 4-212). In New York, the State's highest court has held that the provision in the Code of Criminal Procedure that an arrested person is to be arraigned "without unnecessary delay" should be interpreted as meaning that a delay of arraignment of more than 24 hours is presumptively unnecessary. *People ex rel Maxian v. Brown*, 77 N.Y.2d 422 (1991). The American Law Institute's Model Code of Pre-Arraignment Procedure (1975) provides in Section 310.1 that the first appearance of an accused person should take place within a maximum period of 24 hours after the arrest.

may attend or observe the proceedings. A record should be made of the proceedings at first appearance.

(d) At the defendant's first appearance, he or she should be represented by counsel. If the defendant does not have his or her own counsel at this stage, the judicial officer should appoint counsel for purposes of the first appearance proceedings, and should ensure that counsel has adequate opportunity to consult with the defendant prior to the first appearance. The judicial officer should provide the defendant with a copy of the charging document and inform the defendant of the charge and the maximum possible penalty on conviction, including any mandatory minimum or enhanced sentence provision that may apply. The judicial officer should advise the defendant that the defendant:

- (i) is not required to say anything, and that anything the defendant says may be used against him or her;
- (ii) if represented by counsel who is present, may communicate with his or her attorney at the time of the hearing;
- (iii) has a right to counsel in future proceedings, and that if the defendant cannot afford a lawyer, one will be appointed;
- (iv) if not a citizen of the United States, has a right to have the court contact the embassy or consulate of the nation of which the defendant is a citizen;
- (v) if not a citizen, may be adversely affected by collateral consequences of the current charge, such as deportation;
- (vi) if a juvenile being treated as an adult, has the right to the presence of a parent or guardian;
- (vii) if necessary, has the right to an interpreter to be present at proceedings; and
- (viii) where applicable, has a right to a preliminary examination or hearing.

(e) The defendant also should be advised of the nature and schedule of all further proceedings to be taken in the case.

(f) The judicial officer should determine whether, on the basis of the allegations made in the charging instrument and any supporting documents or other materials, there is probable cause to believe that the defendant committed the crime charged. If the judicial officer determines that there is probable cause, the judicial

**officer should decide pretrial release or detention in accordance with these Standards.**

**(g) If, at the first appearance, the prosecutor requests the pretrial detention of a defendant under Standards 2.8 through 2.10, a judicial officer should be authorized, after a finding of probable cause to believe that a defendant has committed an offense as alleged in the charging document, to order temporary detention following procedures under Standard 2.7 or to conduct a pretrial detention hearing under Standard 2.10.**

#### ***Related Standards***

NAPSA (1978), Standards III. B and III.C

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-4.3

ABA Providing Defense Services Standards, Standard 5-6.1

#### ***Commentary***

The defendant's first appearance in court following arrest is the start of a judicial process that is important for both the individual and the society. It is a point at which two of the principal goals of government—protection of individual liberty and protection of the safety of society—collide. What happens at this stage is crucially important for the future of the case and for the future of the defendant and others who may be involved. For individual defendants, the most critical decision is whether they will continue to be kept in detention or released pending adjudication of the charges or other resolution of the case. As one scholar has observed, the initial release/detention decision divides defendants into two classes of criminally accused: those who will face charges while in confinement and those who will remain at liberty in the community.<sup>23</sup>

This Standard provides a framework for conducting first appearance proceedings that will meet or exceed constitutional standards and will help enable achievement of the purposes set forth in Standard 1.1

#### ***Standard 2.2 (a)***

Standard 2.2 (a) provides for one of the essential components of an effective first appearance proceeding: the conduct of a pretrial investigation by the jurisdiction's pretrial services agency or program. The investigation should lead to the preparation of a written report that can be used—by the judicial officer, the prosecutor, and the defense counsel—in the process of arriving at a decision concerning pretrial release or detention of the defendant. Details of what should be done by the pretrial services agency in conducting the investigation and preparing the report—including interviewing the defendant, verifying information acquired during the interview, making an assessment of risks and needs, and preparing recommendations for consideration in the decision-making process—are covered in Standards 3.2 through 3.5. The time frame for conducting the

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<sup>23</sup> John S. Goldkamp, *Two Classes of Accused* (Cambridge, MA: Ballinger, 1979).

interview, verifying the information, and preparing the report is narrow—less than 24 hours, since the work can only begin after the arrest and must be completed and distributed to courtroom users in advance of the first appearance proceeding—and a great deal must be accomplished during this period.

*Standard 2.2 (b)*

Standard 2.2 (b) specifies that the defendant should be afforded an opportunity to contact family and friends during the period between arrest and first appearance. When family or friends know that a defendant has been arrested they may be able to help obtain counsel to represent the defendant at first appearance. Additionally, they may be able to assist in providing appropriate living arrangements for a defendant who is released. Access to a telephone should be available to the defendant for the purpose of such communications, though the arrangements must provide for appropriate security.

*Standard 2.2 (c)*

Standard 2.2 (c) calls for the first appearance to be held in physical surroundings that are appropriate to the administration of justice and conducted with the dignity and decorum that a court should convey. Far too many initial appearance courtrooms fall far short of this standard, sometimes more closely resembling the ‘assembly line’ descriptions found in some of the literature about American criminal courts.<sup>24</sup> Each case should be treated individually, with appropriate attention given to the information about the case that has been developed by the prosecutor, defense counsel, and pretrial services personnel.

Because many of the defendants at first appearance proceedings are likely to be in an anxious, confused, or physically or mentally unwell state (especially if they have been abusing drugs or alcohol, or have been involved in a physical altercation), it is especially important for the judicial officers and others who interact with them to make sure that they understand what is happening. Thus, Standard 2.2 (c) calls for the proceedings to be conducted in “clear and understandable language calculated to advise defendants effectively of their rights and the action to be taken against them”. This may be especially difficult if the defendant does not speak or understand English. In these circumstances, the courts should seek to have a qualified interpreter available. The pretrial services report should identify cases in which particular types of communications difficulties or other disabilities relevant to the conduct of the proceeding are likely to exist, and should alert court officials to the need to make arrangements for interpreters or other types of assistance that will enable defendants to understand what is happening.

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<sup>24</sup> See, e.g., Edward L. Barrett, Jr., “Criminal Justice: The Problem of Mass Production” in Harry W. Jones, ed., *The Courts, the Public, and the Law Explosion* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1965, pp. 85, 111-115.; President’s Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, D.C.: U.S. Government Printing Office, 1967), p. 128; Paul Hoffman, *Courthouse* (New York: Hawthorne Books, Inc., 1979), pp. 5-7.

Most states have laws providing for the proceedings in criminal cases to be open to the public, and U.S. Supreme Court decisions strongly reinforce the presumption of openness.<sup>25</sup> Standard 2.2 (c) is consistent with this body of law, specifying that the first appearance should be conducted in such a way that interested persons (e.g., family or friends of the defendant or the victim, or the actual victim) may attend or observe the proceedings. This can be done through courtroom seating or, if necessary, by providing opportunity to view and hear the proceedings via closed circuit television or in some other fashion. The last sentence of Standard 2.2 (c) provides for a record to be made of the proceedings at first appearance. Having such a record—optimally in written form, but at a minimum on audio or video tape—enables review of the initial release/detention decision during subsequent proceedings or on appeal.

#### *Standard 2.2 (d)*

Standard 2.2 (d) focuses on the substance of what should be done at the first appearance, beginning with the clear statement that the defendant should be represented by counsel. The presence of counsel at this stage, while not required by U.S. Supreme Court decisions, was an integral part of NAPSA's 1978 Standards and is a key part of the ABA Standards on Providing Indigent Defense Services.<sup>26</sup> If the defendant is not already represented by counsel at this stage, the judicial officer should appoint counsel for purposes of the first appearance proceeding, and counsel should have an adequate opportunity to consult with the defendant before the proceeding commences.

The committee that drafted the Standards recognizes that, as of the time of their adoption in 2004, many jurisdictions do not routinely provide for the appointment of counsel to represent defendants at first appearance. However, if the first appearance is to be fair and meaningful, it is vitally important to ensure that defendants are represented effectively at this proceeding.<sup>27</sup> Attorneys who understand the importance of the decisions made at first appearance, are familiar with the contents of pretrial services reports and with available release options, and are able to advocate effectively for their clients—on the basis of consultation with the defendant and even very brief contact with family members or friends of the defendant—can make the difference between liberty and confinement for defendants during the pretrial period.

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<sup>25</sup> See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *El Vocero de P.R. v. Puerto Rico*, 508 U.S. 147 (1993).

<sup>26</sup> NAPSA 1978 Standards, Standard III.B; American Bar Association Standards for Criminal Justice, *Providing Defense Services Standards* (Third Edition, 1992), Standard 5-6.1.

<sup>27</sup> This NAPSA Standard takes a position similar to that in the ABA *Providing Defense Services Standards*, calling for the appointment of counsel to take place before the first appearance proceeding actually commences. If an appointment of counsel has not been made prior to the commencement of the proceeding, it should certainly be made before the judicial officer considers possible release on conditions that involve a significant restraint of liberty or orders a detention hearing in accordance with Standards 2.8-2.10. See also *Lavallee v. Justices in the Hampden Superior Court*, 442 Mass 228 (2004), where the Massachusetts Supreme Judicial Court ruled that “Neither a bail hearing nor a preventive detention hearing may proceed unless and until a defendant is represented by counsel.”

In order to adequately represent the defendant at the first appearance, the defense counsel needs to have some knowledge of the defendant's background, roots in the community, prior record, and other factors that could have a bearing on the release/detention issue, and—especially if there is a possibility that the case may be resolved during the first appearance proceeding—the defendant's position with respect to the current charge. Thus, first appearances should be scheduled so as to enable counsel to review the pretrial services report and speak with the defendant prior to the first appearance proceeding. Jurisdictions should seek to have appropriate space available in the courthouse so that there can be meaningful confidential communication between the defendant and the defense counsel prior to the first appearance.

In addition to ensuring that the defendant is represented by counsel, the judicial officer presiding at first appearance should make sure that the defendant knows the charges and the potential consequences of a conviction, and should advise the defendant of the basic rights enumerated in subparagraphs (i) through (viii) of this Standard.<sup>28</sup>

*Standard 2.2 (e)*

Standard 2.2 (e) emphasizes the importance of making sure that the defendant knows what events are likely to take place in the future with respect to the case, and of the approximate schedule of events to the extent that the schedule is known at the time of first appearance. The judicial officer should orally inform the defendant about future events (at a minimum, the date and nature of the next event) during the first appearance proceeding, probably after announcing any decision concerning the defendant's release. Additionally, for defendants released from custody on personal recognizance or on conditions that call for them to be supervised by the pretrial services agency, the pretrial services staff should provide written information and supplementary explanations and directions that will help achieve compliance with the directives of the court.

*Standard 2.2 (f)*

Standard 2.2 (f) provides for the judicial officer presiding at first appearance to make a determination of whether there is probable cause to believe that the defendant committed the crime charged, and thus whether there is any legal basis for a prosecution and for holding the defendant in detention or imposing conditions of release. Under relevant U.S. Supreme Court rulings, the determination can be made without an adversary hearing on the merits of the charge (for example, by the judicial officer's review of allegations in a complaint, to determine whether they set forth a *prima facie*

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<sup>28</sup> The provisions of subparagraphs (iv), (v), and (vii) are of particular relevance to pretrial services agencies because information about a defendant's citizenship status and language capabilities may be developed during the pretrial investigation process. For information about requirements concerning advice to arrested foreign nationals and the notification of consular officials, see the booklet published (and periodically updated by) the U.S. Department of State entitled *Consular Notification Instructions for Federal, State, and Local Law Enforcement Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*. The advice and notification requirements are generally called for by international treaties to which the United States is a signatory nation.

case against the defendant), but must be made promptly as a predicate to any significant restraint on liberty other than a promise that the defendant appear for trial.<sup>29</sup> The second sentence of this Standard simply provides for the judicial officer to make the decision about release or detention in accordance with the Standards.

**Standard 2.2 (g)**

Standard 2.2 (g) provides specific guidance for cases in which detention is sought by the prosecutor. Under this Standard, the judicial officer considering possible pretrial detention on the request of the prosecutor must first make a finding of probable cause to believe that the defendant committed the charged offense(s). The judicial officer may then order temporary detention (if the defendant is already on release in another case and the other requirements of Standard 2.7 are met) or proceed directly to a detention hearing (if the criteria in Standard 2.9 that make a defendant eligible for detention are met). The procedures to be followed in a detention hearing are set forth in Standard 2.10.

**Standard 2.3              Release on personal recognizance**

**(a) It should be presumed that every defendant is entitled to release on personal recognizance on condition that the defendant attend all required court proceedings and not commit any criminal offense. This presumption may be rebutted by evidence that there is a substantial risk of nonappearance or need for additional conditions as provided in Standard 2.4, or by evidence that the defendant should be detained under Standards 2.8, 2.9, and 2.10.**

**(b) In determining whether there is a substantial risk of nonappearance or threat to the community or any person or to the integrity of the judicial process if the defendant is released, the judicial officer should consider the pretrial services assessment of the defendant's risk of willful failure to appear in court or risk of threat to the safety of the community or any person, victim or witness. Factors to be considered may include:**

**(i) the defendant's age, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol**

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<sup>29</sup> The U.S. Supreme Court has held that the type of probable cause determination required by the Fourth Amendment for determining whether there is probable cause for imposing “any significant pretrial restraint of liberty” must be made promptly and by an impartial magistrate, though it can be made without an adversary hearing. *Gerstein v. Pugh*, 420 U.S. 103, 120-125 (1975). Arguably, not every condition of release is a “significant restraint of liberty” within the meaning of the Gerstein decision, but some of the conditions that could be imposed in accordance with these Standards would surely be construed as significant restraints. See Standard 2.4 and accompanying commentary. With respect to the timing of the probable cause determination, the Supreme Court held in *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), that the promptness requirement of the *Gerstein* case should be interpreted to place a maximum limit of 48 hours from arrest on the time that a person can be held in custody before a probable cause determination is made by a judicial officer.

abuse, criminal history, and record concerning appearance at court proceedings;

(ii) whether at the time of the current offense or arrest, the person was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense;

(iii) availability of persons who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;

(iv) any facts justifying a concern that the defendant will violate the law if released without restrictions;

(v) the nature and circumstances of the offense in relation to the risk of the defendant's non-appearance or risk to public safety; and

(vi) whether there are specific factors that may make the defendant an appropriate subject for conditional release and supervision options, including participation in available medical, drug, mental health or other treatment, diversion or alternative adjudication release options.

(c) In the event the judicial officer determines that release on personal recognizance is unwarranted, the officer should include in the record a statement, written or oral, of the reasons for this decision.

### ***Related Standards***

NAPSA (1978) Standards I, III.E, III.F

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.1

### ***Commentary***

The presumption that an accused person should be released on a simple promise to appear for future court proceedings is one of the bedrock principles of these Standards.<sup>30</sup> It is linked closely to the principle that an accused person is presumed innocent until proven guilty and to a basic notion of due process: a decision to restrict liberty should only be made after a fair hearing before a judicial officer, and must be supported by evidence and nonarbitrary conclusions. The personal liberty of an accused during the pretrial period should not be restricted unless there are grounds to believe that release on a promise to appear will not be sufficient to ensure the defendant's return for scheduled court appearances and protect public safety. Standard 2.3 (a) articulates the presumption of release on personal recognizance. It also provides that the presumption may be rebutted by evidence showing a substantial risk of nonappearance or danger to public safety that calls for the imposition of additional conditions (as under Standard 2.4) or secure detention (using the criteria and procedures set forth in Standards 2.8-2.10)

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<sup>30</sup> See Standard 1.2, *supra*, and accompanying commentary.

Standard 2.3 (b) provides guidance to the judicial officer in determining whether there are risks that require additional conditions or may warrant detention. Most importantly, it calls for the judicial officer to consider the assessment of the risks posed by the defendant that is prepared by the pretrial services agency or program, taking account of the factors listed in subparagraphs (b) (i) through (b) (vi). The list of potentially relevant factors, which is similar to the list in the federal Bail Reform Act,<sup>31</sup> reflects the types of information that would typically be collected by a pretrial services agency or program during the period between arrest and first appearance.

Particular attention should be paid to subsection (b) (v), which provides for “the nature and circumstances of the offense in relation to the risk of the defendant’s non-appearance or risk to public safety” to be considered by the judicial officer. Under traditional money bail practices, the severity of the charge against the defendant has often been the sole determinative factor in setting the bail amount, with more serious charges leading to higher bail amounts and greater difficulty for the defendant to gain release from detention. The practice of using charge severity as the sole determinant of bail amount or ease of release has been the subject of substantial criticism, and is emphatically rejected by these Standards.<sup>32</sup> Making bail amounts or release conditions dependant only upon the seriousness of the charges makes it impossible for judicial officers to make individualized decisions that take account of the host of potentially relevant factors listed in the other subsections of standard 2.3 (b), and—since charges can be changed greatly during the adjudication process—can contribute to over-charging and unnecessary detention. Certainly, however, the nature and circumstances of the alleged offense are factors that may be relevant to a determination of whether release on a simple promise to appear is appropriate. If, for example, the defendant is charged with drug possession, the judicial officer might consider release on conditions that provide for drug testing. If a defendant is charged with an assault involving a spouse or family member, the judicial officer might consider release conditions that include a stay-away order and provision for separate living arrangements.

While the factors listed in Standard 2.3 (b) provide a general framework for the judicial officer to assess the possible need for conditions or detention, they provide no “bright line” test, and inevitably leave room for the exercise of judicial discretion. Standard 2.3 (c), which requires the judicial officer to provide reasons orally or in writing for a decision that release on the defendant’s own recognizance is not warranted, provides a basis for subsequent review of the judicial officer’s exercise of discretion and a mechanism for accountability in decision-making at this key stage of the proceedings.

#### **Standard 2.4                  Setting conditions of release**

**(a) If a defendant is not qualified for release on personal recognizance, the court should consider imposing conditions of release. The court should impose**

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<sup>31</sup> See 18 U.S.C. Section 3142 (g).

<sup>32</sup> See Standards 1.6, *supra*, and 2.5 (f), *infra*.

**the least restrictive release conditions reasonably necessary to assure the defendant's appearance in court, to protect the safety of the community or any person, and to prevent intimidation of witnesses or interference with the orderly administration of justice.**

**(b) In setting conditions of release, the court should take account of information provided in the report of the pretrial services agency or program, and of other information that may be provided by the prosecutor, defense counsel, or other sources. The conditions should be reasonably related to any risks of nonappearance or danger to public safety that have been identified as being posed by the individual defendant.**

**(c) When conditions are imposed, the court should direct the pretrial services agency or program to monitor the defendant's compliance with the non-financial conditions and to make reports to the court concerning the defendant's compliance with the conditions, as set forth in Standard 3.5.**

**(d) After reasonable notice to the defendant and a hearing, the judicial officer may at any time amend the order to impose additional or different conditions of release.**

#### ***Related Standards***

NAPSA (1978), Standard IV

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.2

#### ***Commentary***

This Standard provides guidance to the judicial officer in deciding upon conditions of release once a determination is made that the defendant should not be released on personal recognizance. Although there is a strong presumption that defendants should be released on their own recognizance, the presumption does not create an absolute "right" to release. In order to overcome the presumption, however, there should be a finding by a judicial officer that more restrictive conditions or—in cases where risks of nonappearance or dangerousness cannot be met through the use of restrictive conditions of release—secure detention is required. Any condition imposed on a defendant will be a restriction, to some extent, on the person's personal liberty, and the thrust of the Standard is toward keeping the restrictions to a minimum while still reducing the risk of nonappearance and danger to public safety.<sup>33</sup>

Establishing the appropriate conditions necessarily requires the judicial officer to consider the nature of the risk(s) involved in release, and to set conditions that are directly related to the risks posed by the individual defendant but no more restrictive than necessary. If no conditions are found sufficient to meet the risks that are identified, then the judicial officer can provide for detention following the procedures set forth in

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<sup>33</sup> See 1978NAPSA Standards, Standard III.A and accompanying commentary.

Standards 2.8-2.10. However, the Standards contemplate that detention will be a last resort, making it incumbent on the judicial officer to craft conditions that are appropriate to respond to the risks that are identified.

In determining what conditions to impose, the judicial officer should draw upon the information, risk assessment, and recommendations provided by the jurisdiction's pretrial services agency or program (see Standards 2.3 (b) and 3.4)), but may also consider information from other sources. Additional (and sometimes differing) materials and recommendations may be provided by the prosecutor and/or defense counsel. Both the prosecutor and the defense attorney should have copies of the pretrial services report provided to the judicial officer. Additionally, the prosecutor is likely to have additional information about the offense and the defense attorney may have additional relevant information acquired through contacts with the defendant and family members or friends of the defendant..

The most commonly used condition, in jurisdictions that have a functioning pretrial services program, is likely to be that the defendant report to or be supervised by a pretrial services agency or program. Often, the simple requirement of reporting into the program will be sufficient to reduce the risks of both nonappearance and pretrial crime, since it makes the defendant aware of the agency's monitoring function and failure to report will trigger responsive action by agency staff. Sometimes, however, there are specific factors present that suggest the use of other types of conditions. Depending on the circumstances and the risks that are identified, conditions of release could include, for example:

- Restrictions on the defendant's activities, movements, associations, and/or residences, including curfew orders, "stay away" orders, and prohibitions against going to specific geographic areas or premises.
- A prohibition against possessing any dangerous weapons.
- A prohibition against the use of intoxicating liquors or certain drugs.
- A requirement that the defendant be evaluated for substance abuse treatment, undergo regular drug testing, and/or be screened for eligibility for a drug court or other drug treatment program.
- A requirement that the defendant undergo mental health or physical health screening for treatment.
- A requirement that the defendant participate in an appropriate treatment or supervision program
- Electronic monitoring.
- House arrest.

- In cases where there is a risk of nonappearance, the use of financial conditions in accordance with the provisions of Standard 2.5

Conditions of release can be imposed in combination if necessary, but judicial officers should take care to avoid imposing conditions that are not clearly necessary in light of risks that would be posed by release of the defendant. The provision for use of *least restrictive* conditions is intended to limit the restrictions on liberty that are imposed during the pretrial period. Standard 2.4 (b) emphasizes that the conditions of release should be reasonably related to any risks of the defendant's failure to appear or dangerousness that have been identified in the report of the pretrial services agency or by other sources. Standard 3.5, *infra*, calls on pretrial services agencies to assemble information relevant to the release decision, present an assessment of the risks posed by the defendant, and recommend ways of responding to the risks. The agency's report, supplemented by input from the prosecutor and the defense counsel, should provide a basis for informed consideration of appropriate conditions by the judicial officer.

Standard 2.4 (c) provides for monitoring, by the pretrial services agency or program, of the defendant's compliance with the conditions that are imposed, with reports on the defendant's compliance to be made to the court. The monitoring and reporting function, covered in more detail in Standard 3.5, is a key element of the pretrial release system contemplated by these Standards, since it provides for accountability by both the released defendant and the pretrial services agency. This provision should be read in conjunction with Standard 1.4 (g), which provides explicitly that pretrial services agencies should not provide supervision for defendants who are released on bond posted by a compensated surety.

Standard 2.4 (d), which provides for amendment of a release order to impose additional or different conditions, reflects the reality that circumstances related to a defendant's pretrial release may change during the course of the pretrial process. For example, drug test results that indicate use of prohibited substances may lead to requirements of additional drug testing, more stringent requirements for participation in a drug treatment program, imposition of a curfew, or even detention after a hearing. Conversely, reports of "clean" drug tests may lead the judicial officer to relax drug testing or other restrictions pending the adjudication of the case.

## **Standard 2.5              Release on financial conditions**

**(a) Financial conditions should be imposed only when no other conditions of release will provide reasonable assurance that the defendant will appear for court proceedings.**

**(b) The judicial officer should not impose a financial condition that results in the pretrial detention of the defendant solely due to an inability to pay.**

(c) Financial conditions of release should not be set to prevent future criminal conduct during the pretrial period or to protect the safety of the community or any person.

(d) On finding that a financial condition of release should be set, the judicial officer should require the first of the following alternatives thought sufficient to provide reasonable assurance of the defendant's reappearance:

(i) the execution of an unsecured bond in an amount specified by the judicial officer, either signed by other persons or not;

(ii) the execution of an unsecured bond in an amount specified by the judicial officer, accompanied by the deposit of cash or securities equal to ten percent of the face amount of the bond; or

(iii) the execution of a bond secured by the deposit of the full amount in cash or other property or by the obligation of qualified, uncompensated third parties.

(e) When cash or securities are deposited with the court as provided in this Standard, defendants should be entitled to the return of the amount deposited at the conclusion of the case.

(f) Financial conditions should be the result of an individualized decision taking into account the special circumstances of each defendant, the defendant's ability to meet the financial conditions and the risk of the defendant's failure to appear for court proceedings, and should never be set by reference to a predetermined schedule of amounts based solely on the nature of the charge.

(g) Financial conditions should be distinguished from the practice of allowing a defendant charged with a traffic or other minor offense to post a sum of money to be forfeited in lieu of any court appearance.

#### ***Related Standards***

NAPSA (1978), Standard V

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.3

#### ***Commentary***

The policy considerations that support the approach taken in this Standard and militate against reliance on the traditional money bail system have been discussed in the commentary accompanying Standards 1.4 (f) and 2.3. In summary, they include the money bail system's inherent discrimination against the poor, the removal of the decision about actual release from custody from the court to profit-motivated bondsmen, and the lack of any relationship between the ability of a defendant to post a monetary bond and

the risk that release of the defendant may pose to the safety of the community or any persons.

Standard 2.5 (a) sets forth a fundamental policy of restricting the use of financial conditions to the relatively limited circumstances in which no other conditions will provide reasonable assurance of the defendant's appearance in court. Standard 2.5 (b) is a corollary to this policy, emphasizing that judicial officers should not impose a financial condition that results in the pretrial detention of a defendant who must remain in confinement because of inability to pay. Standard 2.5 (c) provides explicitly that financial conditions should not be used to deal with concerns that release of a defendant would pose a risk to public safety or the safety of any person. Read together, these provisions reinforce the basic approach of these Standards: concerns about possible dangerousness of a defendant should be dealt with through special release conditions or, if necessary, through detention ordered after a hearing with fair procedures, and not *sub rosa* through the setting of high money bail that is beyond the ability of the defendant to post.

Standard 2.5 (d) lays out a set of priorities for the imposition of financial conditions in the limited circumstances where they may be appropriate in order to assure the defendant's appearance for court proceedings. The first option is unsecured bond, which is simply the defendant's promise to pay the amount of the bond in the event of nonappearance for court proceedings. The second option is "ten percent deposit bail", which requires the defendant to deposit ten percent of the bond amount with the court. The third option is to require execution of a bond that is secured by deposit of the full amount of the bond with the court in cash or other property or by "the obligation of qualified, uncompensated sureties". Such "third party bail" is typically posted by family members, church or civic groups, or other organizations that fit the description "uncompensated sureties". For example, a parent or relative may be allowed to post the bond amount or pledge assets that would be necessary to pay the full amount of the bond if the defendant failed to appear. A judicial officer could feel confident that this person would assure the appearance of the defendant at court proceedings, both because of the personal relationship and because of the risk of losing the posted amount or pledged assets in the event of nonappearance.

Standard 2.5 (e) provides for a key component of the deposit bail approach: the return of the deposit at the conclusion of the case if the defendant makes the required court appearances. Some jurisdictions provide for retention of a small percentage of the deposit to cover the administrative costs of handling the deposit bail transactions, but the amount of such a service charge is very nominal compared to the typical bondsman's fee.

All three of the options for use of financial conditions outlined in this Standard contain incentives that should motivate the defendant to return for court dates. Although the defendant can gain release on unsecured bond without having to pay anything, failure to appear may result in having to pay the full amount of the bond. The ten percent deposit option carries the risk of being liable for the full amount as well as losing the deposit in the event of failure to appear. It also, however, carries the incentive of a return

of the deposit (possibly reduced by the amount of a service charge) for defendants who make required court dates. The full cash bail option exposes the defendant (or the “qualified uncompensated surety”) to possible loss of the full amount that is posted in the event of nonappearance, but provides for return of the full amount (possibly reduced by the amount of a service charge) if court appearances are made as scheduled.<sup>34</sup>

Standard 2.5 (f) emphasizes the importance of setting financial conditions in light of the financial circumstances of the individual defendant and the extent of the risk that the defendant might fail to appear for court dates. The Standard is emphatic in rejecting the setting of bail amounts simply on the basis of charge seriousness. Some jurisdictions have historically used a “bail schedule” that establishes set bond amounts for various charge categories and excludes consideration of other factors that may be far more relevant to the risk of nonappearance. The practice of using a bail schedule easily leads to detention for those too poor to post the bail amount and to the release of others for whom the amount is relatively nominal and thus creates no incentive to return to court.

Many jurisdictions utilize the practice of allowing defendants in cases involving relatively minor traffic offenses and ordinance violations to post a sum of money roughly equal to the amount of a fine for the offense, as security in the event that they do not return for the court appearance date. The practice amounts to advance payment of a fine, subject to withdrawal if the defendant chooses to contest the charges, and is mainly a convenience for persons charged with such offenses. Standard 2.5 (g) distinguishes this practice from the use of financial conditions as a condition of pretrial release in criminal cases, and makes it clear that nothing in these Standards is meant to end the practice.

#### **Standard 2.6                  Court order concerning release**

**Every judicial decision setting or modifying conditions should be in writing and should be provided to the defendant. The release order should:**

- (a) indicate the time, place, and event for which the defendant should next appear in court;**
- (b) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the defendant’s conduct;**
- (c) set forth any authority that the pretrial services agency or program may have, consistent with the laws and rules governing the exercise of judicial authority in the jurisdiction, to modify the initially established conditions of release; and**

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<sup>34</sup> The practice of imposing a small service charge on the amount of the deposit was upheld by the U.S. Supreme Court in *Schilb v. Kuebel*, 404 U.S. 357 (1971), where the amount of the administrative charge was equal to 10 percent of the deposit (or 1 percent of the total bail amount imposed under the Illinois law providing for use of deposit bail). These Standards take no position on the desirability of imposing a service charge on deposit bail amounts. Practices in the states that provide for deposit bail vary, with some providing for a service charge and others imposing no charge at all.

- (d) advise the person of:
- (i) the consequences of violating a condition of release, including the immediate issuance of a warrant for the defendant's arrest and possible criminal penalties;
  - (ii) the prohibitions against threats, force, or intimidation of witnesses, jurors and officers of the court, obstruction of criminal investigations and retaliation against a witness, victim or informant; and
  - (iii) the prohibition against any criminal conduct during pretrial release.

*Related Standards*

NAPSA (1978), Standard IV.D

ABA Pretrial Release Standards, Third Edition (2002), Standard 10-5.4

*Commentary*

This Standard emphasizes that it is important for the court to provide every released defendant with a written copy of any release order, to ensure that the defendant has a document that provides clear information about the next court appearance and about the conditions of release and the potential consequences of violating a condition. The written order should serve to reinforce the judicial officer's oral communications, in court, about the conditions of release and the consequences of non-compliance.

A primary purpose of the written order is to avoid mis-communication about what is expected of the defendant during the pretrial period and heighten the likelihood of compliance with the conditions. In some instances, however, a defendant may not be able to read or comprehend English. The court (with the help of the pretrial services agency where possible) should be alert to possible problems with reading comprehension and when necessary should seek to locate a person who can reliably interpret the contents of the order for the defendant. Some courts and pretrial services agencies have developed forms and instructions in other languages, to facilitate communications in these situations.

No matter what language is used for the written order and related materials provided to the defendant, these materials should include information about who to contact in connection with any questions about the conditions of release or in the event of an emergency.

**Standard 2.7              Basis for temporary pretrial detention for defendants on release in another case**

- (a) The judicial officer may order the temporary detention of a defendant released in another case upon a showing of probable cause that the defendant has

**committed a new offense as alleged in the charging document if the judicial officer determines that the defendant:**

- (i) **is and was at the time the alleged offense was committed:**
    - (A) **on release pending trial for a serious offense;**
    - (B) **on release pending imposition or execution of sentence, appeal of sentence or conviction, for any offense; or**
    - (C) **on probation or parole for any offense; and**
  - (ii) **may flee or pose a danger to the community or to any person.**
- (b) **Unless a continuance is requested by the defense attorney, the judicial officer may order the detention of the defendant for a period of not more than [three calendar days], and direct the attorney for the government to notify the appropriate court, probation or parole official, or Federal, State or local law enforcement official to determine whether revocation proceedings on the first offense should be initiated or a detainer lodged.**
- (c) **At the end of the period of temporary detention, the defendant should have a hearing on the release or detention of the defendant on the new charged offense.**

#### ***Related Standards***

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.7

#### ***Commentary***

This Standard focuses on the treatment, at first appearance, of defendants who are arrested on new charges while already on court-ordered release, probation, or parole in connection with another case. Standard 2.7 (a) provides that, rather than operating under a presumption of release on the defendant's promise to appear and a second option of some type of conditional release, a judicial officer conducting a first appearance proceeding involving a defendant already on release may sometimes order temporary detention in these circumstances. During the period of temporary detention (which is short—a maximum of [three calendar days]), the court or agency that originally released the defendant can decide whether to initiate revocation proceedings or lodge a detainer before the jurisdiction in which the new arrest took place makes a release/detention decision affecting the defendant's custody status with respect to the new arrest charges.

The use of temporary detention in these circumstances is not automatic or *pro forma*. Rather, for temporary detention to be ordered there must be a showing of probable cause that the defendant committed the new offense and a determination by the

judicial officer that the defendant may flee the jurisdiction or pose a danger to the community or to any person. Additionally, if the defendant was on pretrial release (as opposed to release while awaiting sentence or while awaiting the outcome of an appeal or while on probation or parole), the charge in the original case must have been one involving a serious offense.

Standard 2.7 (b) authorizes a [three day] detention period when the criteria for temporary detention are met. It also provides for the judicial officer to direct the prosecutor to notify the appropriate court or other entity about the new case and to determine what action (if any) will be taken in connection with the original case. Standard 2.7 (c) provides that, at the end of the period of temporary detention, a hearing should be held on the release or detention of the defendant in connection with the new case.

#### **Standard 2.8                  Grounds for pretrial detention**

**(a) If, in cases meeting the eligibility criteria specified in Standard 2.9 below, after a hearing and the presentment of an indictment or a showing of probable cause in the charged offense, the government proves by clear and convincing evidence that no condition or combination of conditions of release will provide reasonable assurance that the defendant will appear for court proceedings or protect the safety of the community or any person, the judicial officer should order the detention of the defendant before trial.**

**(b) In considering whether there are any conditions or combinations of conditions that would provide reasonable assurance that the defendant will appear for court proceedings and protect the safety of the community and of any person, the judicial officer should take into account such factors as:**

**(i) the nature and circumstances of the offense charged;**

**(ii) the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release;**

**(iii) the weight of the evidence;**

**(iv) the person's age, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, including the likelihood that the defendant would leave the jurisdiction, community ties, history relating to drug or alcohol abuse, criminal history, and record of appearance at court proceedings;**

**(v) whether at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense;**

(vi) the availability of appropriate third party custodians who agree to assist the defendant in attending court at the proper time and other information relevant to successful supervision in the community;

(vii) any facts justifying a concern that a defendant will present a serious risk of flight or of obstructions, or of danger to the community or the safety of any person.

(c) In cases charging capital crimes or offenses punishable by life imprisonment without parole, where probable cause has been found, there should be a rebuttable presumption that the defendant should be detained on the ground that no condition or combination of conditions of release will provide reasonable assurance of the safety of the community or any person or of the defendant's appearance in court. In the event the defendant presents information by proffer or otherwise to rebut the presumption, the grounds for detention must be found to exist by clear and convincing evidence.

#### ***Related Standards***

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.8

#### ***Commentary***

This Standard provides for pretrial detention of a defendant under limited circumstances and should be read together with Standards 2.9 and 2.10.

Standard 2.8 (a) indicates the circumstances under which pretrial detention of a defendant may be ordered by a judicial officer:

- The case must meet eligibility criteria set forth in Standard 2.9;
- There must be a hearing, the procedures for which are set forth in Standard 2.10;
- As provided in Standard 2.2 (f), there must be a showing of probable cause to believe that the defendant has committed an offense as alleged in the charging document; and
- The government must show, by clear and convincing evidence, that no condition or combination of conditions will provide reasonable assurance of the defendant's appearance in court or protect the safety of the community.

The requirement of "clear and convincing evidence that no condition or combination of conditions will provide reasonable assurance that the defendant will appear for court proceedings or protect the safety of the community or any person" is—deliberately—a high standard. It reflects the high value placed on individual liberty in the American legal system and is identical to the standard adopted by the American Bar Association in its Third Edition *Pretrial Release Standards*.<sup>35</sup>.

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<sup>35</sup> ABA Third Edition Pretrial Release Standards (2002), Standard 10-5.8.

Standard 2.8 (b) lists a number of factors that the judicial officer should take into account in determining whether there are any conditions or combinations of conditions that can reasonably assure the defendant's court appearance or protect the safety of the community or any person. The factors are similar to those listed under Standard 3.4 as ones to be taken into account by the pretrial services agency or program in conducting an investigation and preparing a report with recommendations prior to the defendant's first appearance and also listed under Standard 2.3 (b) as factors to guide the judicial officer in considering release on personal recognizance, but with two important differences. First, Standard 2.8 (b) (ii) calls on the judicial officer to consider "the nature and seriousness of the danger to any person or the community, if any, that would be posed by the defendant's release", thus requiring a focus on the specific threat that would be created by releasing the defendant from secure detention and the possible availability of conditions that would eliminate or minimize the threat. Second, Standard 2.8 (b) (iii) provides for the judicial officer to consider "the weight of the evidence" as a factor in deciding whether to order detention.

The weight of the evidence is a factor that cannot be assessed by the pretrial services agency staff member who conducts the investigation of the defendant's background prior to first appearance, but it may nevertheless be relevant to the judicial officer's determination concerning release or detention. In undertaking such a weighing, the judicial officer can be informed by evidence and arguments presented by both the prosecutor and defense counsel, in accordance with procedures outlined in Standard 2.10. The drafters of these Standards recognize that, at the initial stages of a criminal proceeding, it is very often not possible to weigh the strength of the evidence indicating the defendant's guilt of the charged offense (since the only available information may be what is in the criminal complaint), and that it may not be desirable to undertake such a weighing. However, in light of the requirement that the government show by "clear and convincing evidence" that the defendant should be held in detention, it is appropriate to require that the prosecution show—through documents or testimony—that there is a sound basis for the charges against the defendant.

Standard 2.8 (c) provides for a limited category of cases—those involving charges that involve capital offenses or are punishable by a sentence of life without parole—in which there is a rebuttable presumption that the defendant should be detained. In these cases, the burden is on defendants to show why they should be released. If they present information "by proffer or otherwise" to rebut the presumption of detention, then the burden shifts back to the prosecutor to show by clear and convincing evidence that no condition or combination of conditions can provide satisfactory assurance of the safety of public safety or appearance of the defendant in court.

**Standard 2.9              Eligibility for pretrial detention and initiation of the detention hearing**

**(a)        The judicial officer should hold a hearing to determine whether any condition or combination of conditions will provide reasonable assurance that the defendant will appear in court and will protect the safety of the community or any**

**person. The judicial officer may not order the detention of a defendant before trial except:**

**(i) upon motion of the prosecutor in a case that involves:**

**(A) a crime of violence or dangerous crime; or**

**(B) a defendant charged with a serious offense on release pending trial for a serious offense, or on release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence; or on probation or parole for a serious offense involving a crime of violence, a dangerous crime; or**

**(ii) upon motion of the prosecutor or the judicial officer's own initiative, in a case that involves:**

**(A) a substantial risk that a defendant charged with a serious offense will fail to appear in court or flee the jurisdiction; or**

**(B) a substantial risk that a defendant charged in any case will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate a prospective witness or juror.**

**(b) If the judicial officer finds that probable cause exists, except for a defendant held under temporary detention, the hearing should be held immediately upon the defendant's first appearance before the judicial officer unless the defendant or the prosecutor seeks a continuance. Except for good cause shown, a continuance on motion of the defendant or the prosecutor should not exceed [five working days]. Pending the hearing, the defendant may be detained.**

**(c) A motion to initiate pretrial detention proceedings may be filed at any time regardless of a defendant's pretrial release status.**

### ***Related Standards***

NAPSA (1978), Standard VII.A

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.9

### ***Commentary***

This Standard focuses on the categories of cases in which defendants are “eligible” for pretrial detention, thus narrowing the universe of arrested defendants who can be detained to categories where there are sound policy reasons for considering detention. It also provides guidelines concerning the timing of a detention hearing and the initiation of detention proceedings.

Standard 2.9 (a) lists four categories of cases in which defendants can be detained, the first two of which call for consideration of detention to be triggered by a motion of the prosecutor. For cases in the third and fourth categories, detention can be considered either on motion of the prosecutor or on the judicial officer's own motion.

Standard 2.9 (a) (i) (A) provides for consideration of detention in a case that involves "a crime of violence or dangerous crime". The drafters deliberately refrained from providing a specific definition of violent or dangerous crimes, leaving this determination to be made on a jurisdiction-by-jurisdiction basis. Standard 2.9 (a) (i) (B) provides for consideration of detention for defendants who are charged with a serious crime in the current case and are already on release in another case, but generally only if the prior release was in connection with a serious crime. Again, the definition of what constitutes a "serious" offense is left to the individual jurisdiction to determine.

The third category, described in Standard 2.9 (a) (ii) (A), deals with the use of detention when there is a substantial risk that a defendant charged with a serious offense will fail to appear or flee the jurisdiction. Examples would include cases involving charges of major criminal fraud or drug trafficking, where the defendant may have access to large amounts of cash as well as a motivation to flee the jurisdiction. The posting (and loss) of financial bail would simply be a business cost to the defendant, and there are no other conditions that would provide good assurance of the defendant's return to court.

Standard 2.9 (a) (ii) (B) deals with the use of detention when there is a substantial risk that the defendant in any case (not necessarily a "serious" case or one involving a violent or dangerous crime) will seek to obstruct justice in some specific way or will threaten, intimidate or injure a juror or prospective witness. If the prosecution could show that the defendant had threatened a prospective witness or that there are other factual grounds for believing that there is a risk witnesses would be injured or intimidated if the defendant were released, this could be grounds for pretrial detention.

The "substantial risk" criterion in Standard 2.9 (a) (ii) (A) and (B) is meant to require a showing of facts showing a high or substantial likelihood of the defendant's likely behavior if released (e.g., fleeing the jurisdiction or committing specific acts to interfere with the administration of justice), not a general level of risk. A finding of substantial risk should be based on facts, which may be found in the pretrial services risk assessment or furnished independently by the government.

Standard 2.9 (b) addresses the timing of the detention hearing. If the judicial officer finds that there has been a showing of probable cause to believe that the defendant committed the charged offense, then the detention hearing should be held immediately—as part of the first appearance proceeding—unless either the prosecutor or the defense counsel requests a continuance. If a continuance is requested, it should not exceed [five working days] unless good cause is shown for a longer period. The defendant may be detained pending the detention hearing, but the fact that the defendant's liberty is being denied during this period means that the "good cause" showing must be very strong. The

provision for continuance of the detentions hearing should not be used as mechanism for lengthy detention without a hearing.

Standard 2.9 (c) reflects the reality that circumstances often change during the pretrial period in a criminal case, as new facts come to the attention of counsel or the court. It provides that a hearing on pretrial detention may be initiated at any time during the pretrial process. For example, if a prosecutor received information that a defendant who was conditionally released at the outset of the case had been harassing prospective witnesses in the case, the prosecutor could file a motion to initiate detention proceedings.

**Standard 2.10                  Procedures governing pretrial detention hearings; judicial orders for detention and appellate review**

**(a)        At any pretrial detention hearing, defendants should have the right to:**

- (i)        be present and be represented by counsel and, if financially unable to obtain counsel, to have counsel appointed;**
- (ii)      testify and present witnesses on his or her own behalf;**
- (iii)     confront and cross-examine prosecution witnesses; and,**
- (iv)      present information by proffer or otherwise.**

**(b)        The defendant may be detained pending completion of the pretrial detention hearing.**

**(c)        The duty of the prosecution to release to the defense exculpatory evidence reasonably within its custody or control should apply at the pretrial detention hearing.**

**(d)        At any pretrial detention hearing, the rules governing admissibility of evidence in criminal trials should not apply. The court should receive all relevant evidence. All evidence should be recorded. The testimony of a defendant should not be admissible in any other criminal proceedings against the defendant in the case in chief, other than a prosecution for perjury based upon that testimony or for the purpose of impeachment in any subsequent proceedings.**

**(e)        In pretrial detention proceedings under Standard 2.9 or 2.10, where there is no indictment, the prosecutor should establish probable cause to believe that the defendant committed the predicate offense.**

**(f)        In pretrial detention proceedings, the prosecutor should bear the burden of establishing by clear and convincing evidence that no condition or combination of conditions of release will provide reasonable assurance of the defendant's appearance in court and will protect the safety of the community or any person.**

(g) A judicial order for pretrial detention should be subject to the following limitations and requirements:

(i) Unless the defendant consents, no order for pretrial detention should be entered by the court except on the conclusion of a full pretrial detention hearing as provided for within these Standards.

(ii) If, on conclusion of a pretrial detention hearing, the court determines by clear and convincing evidence that no condition or combination of conditions will provide reasonable assurance that the defendant will appear for court proceedings as required, and/or will adequately protect the safety of any other person and the community pursuant to the criteria established within these Standards, the judicial officer should state the reasons for pretrial detention on the record at the conclusion of the hearing or in written findings of fact within [three days]. The order should be based solely upon evidence provided for the pretrial detention hearing. The court's statement on the record or in written findings of fact should include the reasons for concluding that the safety of the community or of any person, the integrity of the judicial process, and the presence of the defendant cannot be reasonably assured by setting any conditions of release or by accelerating the date of trial.

(iii) The court's order for pretrial detention should include the date by which the detention must be considered *de novo*, in most cases not exceeding 60 days. A defendant may not be detained after that date without a pretrial detention hearing to consider extending pretrial detention an additional 30 days following procedures under Standards 2.8, 2.9, and this Standard. If a pretrial detention hearing to consider extending detention of the defendant is not held on or before that date, the defendant who is held beyond the time of the detention order should be released immediately under reasonable conditions that best minimize the risk of flight and danger to the community.

(iv) Nothing in these Standards should be construed as modifying or limiting the presumption of innocence.

(h) A pretrial detention order should be immediately appealable by either the prosecution or the defense and should receive expedited appellate review. If the detention decision is made by a judicial officer other than a trial court judge, the appeals should be *de novo*. Appeals from decisions of trial court judges to appellate judges should be reviewed under an abuse of discretion standard.

(i) Release should not be denied solely because the defendant has refused the pretrial services interview.

## ***Related Standards***

NAPSA (1978) Standard VII.B

ABA Pretrial Release Standards, Third Edition (2002), Standard 10-5.10

## ***Commentary***

This Standard is drawn principally from Federal and District of Columbia statutes governing the conduct of pretrial detention hearings and appellate review of detention orders. The main thrust is toward ensuring that a decision to deprive a defendant of liberty during the pretrial stages of a criminal case can be made only after a fair hearing is held and the prosecution has produced evidence that there is no other feasible way of assuring that the defendant will appear in court and that the safety of the community or specific persons will be protected. The basic approach has been upheld as constitutional by the U.S. Supreme Court.<sup>36</sup>

Standard 2.10 (a) sets forth basic rights of the defendant at a pretrial detention hearing—to be present; to be represented by counsel (with counsel to be appointed if the defendant cannot retain counsel); to testify and present witnesses; to confront and cross-examine prosecution witnesses; and to “present information by proffer or otherwise”. All of these rights are also contained in the Federal and D.C. statutes and have proven workable in those contexts. The provision in subparagraph (a) (iv), which allows presentation of information “by proffer or otherwise” is intended to emphasize the admissibility, for purposes of the detention hearing, of materials supporting the defendant’s release that might not be available under conventional rules of evidence.

Standard 2.10 (b), consistent with Standard 2.9 (b), allows for detention of the defendant pending completion of the pretrial detention hearing. It should be emphasized, however, that this provision is not intended to enable avoidance of the requirement of a prompt first appearance (Standard 2.1) and prompt conduct of the detention hearing (Standards 2.2 (g) and 2.9 (b)) or to enable avoidance of the procedures concerning temporary detention of a defendant arrested on a new charge after having previously been released in another case that are set forth in Standard 2.7.

Standard 2.10 (c) requires prosecutors to provide exculpatory evidence in their possession at the time of the pretrial detention hearing to the defense. This is not a full-scale disclosure requirement, and the pretrial detention hearing is not intended to be a forum for litigation of disclosure issues. Rather, this provision refers to evidence in the hands of prosecutors that could heighten the likelihood of defendant’s release.

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<sup>36</sup> *United States v. Salerno*, 481 U.S. 739 (1987). Chief Justice Rehnquist’s opinion for the majority in the *Salerno* case emphasized the due process protections afforded to defendants, the high standard for ordering detention (“clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person”), the requirement for written findings of fact and reasons for ordering detention, the availability of immediate appellate review, and fact that the maximum length of pretrial detention is limited by provisions of the Federal Speedy Trial Act. 481 U.S. 739 at 742-43 and 751-52.

Standard 2.10 (d) makes it clear that the rules of evidence should not apply at the pretrial detention hearing, and that the court should receive all evidence that may be relevant to the release/detention decision. This enables consideration of information acquired by the pretrial services agency or program in its investigation prior to first appearance, much of which could otherwise be subject to exclusion as hearsay. The provision for recording all evidence is intended to provide a foundation for review of the release detention decision.

The provision in Standard 2.10 (d) that limits subsequent use of a defendant's testimony at a pretrial detention hearing reflects the view that such testimony at this stage is solely for the purpose of the pretrial release/detention determination. Often, such testimony will simply confirm what the defendant told the pretrial services officer during the interview conducted as part of the investigation prior to first appearance

Standard 2.10 (e) deals with the common situation where a defendant is arrested without an indictment having previously been filed. Consistent with Standard 2.8 (a), this Standard requires the prosecutor to establish probable cause to believe that the defendant committed the offense as a predicate for a detention order...

Standard 2.10 (f), consistent with Standard 2.8 (a), requires the prosecutor to prove by clear and convincing evidence that no condition or combination of conditions of release will suffice to adequately assure the defendant's appearance in court and protect the safety of the community or specific persons. The "clear and convincing evidence" criterion is intended to emphasize that the standard for holding a defendant in secure detention is high, and that detention should be sought (and imposed) only in cases where it is clearly necessary.

Standard 2.10 (g) imposes certain limitations and requirements on a judicial order for pretrial detention:

- such an order should be made only after a full hearing (unless the defendant consents to waiver of the hearing);
- the judicial officer making the order should state the reasons for detention on the record at the conclusion of the hearing or in written findings made within [three days], and in doing so should include the reasons for concluding that the specific risks identified cannot be met through use of conditions of release or an accelerated trial date;
- the order should be based solely on evidence provided at the detention hearing; and
- the order should indicate the date by which detention must be considered at a *de novo* pretrial detention hearing, ordinarily to be held within [90 days].

Under subparagraph (g) (iii), if a new pretrial hearing is not held on or before the date for the hearing that is established by the original detention order, the defendant should be released under conditions that best minimize the risk of flight and danger to the community. The objective of this provision is to ensure continuing attention to cases

involving defendants in secure detention and protect the defendant's right to a speedy trial.

Because of the importance of a detention decision, it should be subject to prompt review at the initiative of either the defense or the prosecution. Standard 2.10 (h) provides that if the detention decision is made by a judicial officer other than a trial court judge, the appeal should be *de novo*, generally to a trial court judge. If the decision was made by a trial court judge, the appeal should be to an appellate court, which should consider whether the decision amounted to an abuse of discretion. The provisions of these Standards that require a record of the first appearance and detention hearing proceedings and call for the judicial officer to state reasons for a detention order should facilitate the appellate review.

## **PART III**

### **PURPOSES, ROLES, AND FUNCTIONS OF PRETRIAL SERVICES AGENCIES**

#### **Standard 3.1.      Purposes of pretrial services agencies and programs**

Pretrial services agencies and programs perform functions that are critical to the effective operation of local criminal justice systems by assisting the court in making prompt, fair, and effective release/detention decisions, and by monitoring and supervising released defendants to minimize risks of nonappearance at court proceedings and risks to the safety of the community and to individual persons. In doing so, the agency or program also contributes to the fair and efficient use of detention facilities. In pursuit of these purposes, the agency or program collects and presents information needed for the court's release/detention decision prior to first appearance, makes assessments of risks posed by the defendant, develops strategies that can be used for supervision of released defendants, makes recommendations to the court concerning release options and/or conditions in individual cases, and provides monitoring and supervision of released defendants in accordance with conditions set by the court. When defendants are held in detention after first appearance, the agency or program periodically reviews their status to determine possible eligibility for conditional release and provides relevant information to the court. When released defendants fail to comply with conditions set by the court, the pretrial services agency or program takes prompt action to respond, including notifying the court of the nature of the noncompliance.

#### ***Related Standards***

NAPSA (1978), Standard VIII.A and B

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.10

#### ***Commentary***

This Standard provides a general overview of the purposes of pretrial services agencies and programs, and of the role that they play in local criminal justice systems across the United States. The purposes described are ones that are integral to the effective functioning of courts and criminal justice systems. They are essential to the achievement of the central goal of a fair and effective pretrial release/detention policy: to minimize unnecessary detention by releasing as many defendants as possible who are likely to appear for scheduled court dates and refrain from criminal behavior while on release.

The phrase "agency or program" is used because the drafters recognize that the functions described in these Standards are often performed by staff who are administratively housed in an agency or organization that is also responsible for other

functions not involving pretrial release. While some pretrial services agencies are independent entities, it is not uncommon for them to be an arm of the court or to be located in a probation department, sheriff's office or jail.<sup>37</sup> A pretrial services agency or program (the terms are sometimes used interchangeably in this commentary) is considered to be any organization or individual whose purposes include providing information to assist a court in making pretrial release/detention decisions and/or monitoring and supervising released defendants prior to trial.<sup>38</sup> The Standards are intended to be applicable to the organization and operation of all pretrial services agencies or programs, regardless of their size or administrative location.

Not all pretrial services agencies or programs perform all of the functions described in this Standard, though some agencies and programs meet this description. The Standard is meant to serve as a general guide or "mission statement" outlining what should be accomplished by pretrial services agencies or programs in all jurisdictions.

**Standard 3.2                    Essential functions to be performed in connection with the defendant's first court appearance**

**Prior to the first appearance in court of persons who have been arrested and charged with a crime, the pretrial services agency or program should:**

- (a) collect, verify, and document information about the defendant's background and current circumstances that are pertinent to the court's decision concerning release or detention of the defendant;**
- (b) present written, accurate information to the judicial officer relating to the risk a defendant may pose of failing to appear in court or of threatening the safety of the community or any other person, and recommend conditions that could be imposed to respond to the risk;**
- (c) identify members of special populations that may be in need of additional screening and specialized services;**
- (d) provide staff representatives in court to answer questions concerning the pretrial services investigation report, to explain conditions of release and**

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<sup>37</sup> 2003 *Pretrial Services Survey Report*, *supra*, note 8, pp. 6 and 56 (Appendix, Table A-2). For discussion of the relative advantages of locating a pretrial services program in an independent agency vis-à-vis a probation department, see Betsy Kushlan Wanger, "Limiting Preventive Detention Through Conditional Release: The Unfulfilled Promise of the 1982 Pretrial Services Act," 97 *Yale Law Journal* 320 (December 1987) at 331-335.

<sup>38</sup> A similar definition was used in the original NAPSA Standards. See NAPSA 1978 Standards, Commentary accompanying Standard VIII.B. p. 51. As discussed in the commentary to Standards 1.3 (a) and 1.4 (g), *supra*, in referring to "released defendants," these Standards contemplate monitoring and supervision of defendants released on personal recognizance, on nonfinancial conditions, or on financial conditions other than commercial surety bond.

**sanctions for non-compliance to the defendant, and to facilitate the speedy release of defendants whose release has been ordered by the court; and**

**(e) develop supervision strategies that respond appropriately to the risks and needs posed by released defendants.**

### ***Related Standards***

NAPSA (1978), Standards III.D, X.A, XI

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-4.2

### ***Commentary***

This Standard sets forth the basic functions that pretrial services agencies should perform—with respect to all persons arrested and charged with a criminal offense—prior to the accused person’s first appearance in court, in order to assist judicial officers in making informed decisions about the defendant’s pretrial status.

Because of what is often a very short period of time between arrest and the first court appearance of the defendant, a great deal must be accomplished very rapidly by pretrial services personnel. In addition to interviewing the defendant to obtain information about his or her background and current living and employment situation (see Standard 3.3, *infra*), the pretrial program staff should typically perform a number of other key tasks, including:

- checking the defendant’s prior criminal record (through contacts with agencies that maintain local, state, and national criminal history data bases);
- ascertaining whether the defendant has any pending cases in this or another court, or is on probation or parole;
- verifying information obtained from the defendant (for example, through a phone call to someone that the defendant suggests during the interview or through a search of records or other materials accessible via the internet);
- learning about the defendant’s record of court attendance and compliance with other conditions in pending or recent cases;
- developing information about any special needs of the defendant that may require attention during the pretrial period (e.g., drug or alcohol abuse, mental illness);
- identifying options for monitoring and supervision that will respond appropriately to risks and needs that would be posed by the defendant’s release; and
- preparing a report for submission to the judicial officer who will preside at the defendant’s first appearance in court.

As discussed in more detail in Standard 3.4 and the accompanying commentary, preparation of the report submitted to the judicial officer (copies of which should be provided to the prosecutor and defense counsel), can be a demanding task. The report should be accurate, should indicate the nature and extent of any perceived risk of nonappearance or danger to public safety, and should recommend conditions that would

respond appropriately to the risk. The pretrial investigation and report preparation process should address the factors identified elsewhere in these Standards (except for “weight of the evidence”) as ones that should be considered by the judicial officer in connection with the release/detention decision and thus addressed in the report (see Standards 2.3 (b), 2.8 (b), and 3.4). The final report should be written in a neutral fashion, and should include information about positive factors in the defendant’s background and current situation as well as information about possible risks and needs.

The provision in Standard 3.2 (c) calling on pretrial services programs to help identify members of special populations that may be in need of additional screening and specialized services is intended to highlight the key role that pretrial services officers can play in helping to address the needs of persons with a range of possible issues. These might include, for example, difficulties with speaking and understanding English, and the possible need for an interpreter; deafness or blindness; other physical disabilities; drug or alcohol abuse problems; and mental illness. Female defendants are likely to have special needs (including child care and shelter), especially if they have been in a home situation where there has been violence. Juveniles who are charged with crimes that may result in prosecution as adults are also likely to have special needs that require attention in crafting conditions of release, and pretrial program staff should be alert to these needs, too. In identifying defendants who have special needs, pretrial services program staff serve as a kind of “preliminary filter”, flagging cases in which special conditions may be appropriate and which may sometimes be appropriate for referral to a diversion program or for an alternative disposition option.

Standard 3.2 (d) calls for staff members of the pretrial services program to be present in court at the time of the defendant’s first appearance, and identifies three key functions performed by the in-court representative:

- Respond to any questions about the report submitted to the court that might be asked by the judicial officer, the prosecutor, or defense counsel.
- If the defendant’s release is ordered by the judicial officer, explain any conditions of release and sanctions for noncompliance to the defendant (and, in doing so, make sure that the defendant knows of the next court date and other requirements).
- Help facilitate the release of defendants whose release is ordered by the judicial officer by, for example, explaining any conditions of release to the defendant, making sure that the jail receives the release order, and contacting any persons or organizations that may have a role in providing supervision of the defendant upon release.

Standard 3.2 (e) provides for the pretrial services agency or program to develop supervision strategies that respond appropriately to the risks and needs posed by released defendants. As a practical matter, the development of such strategies is an organizational planning function. Through its planning process, the pretrial services agency should develop a full range of strategies for addressing the risks and needs most often found in the jurisdiction’s defendant population and should arrange for the provision—either

directly or by referral—of the services needed to implement those strategies. For individual cases the pretrial services agency or program should draw on the planning work that has been done, and staff members' knowledge about what release options are likely to be appropriate for the types of risks and needs posed by the defendant, in preparing the report and recommendations to be submitted to the court. Since the assessment of risks and needs is necessarily done in a very compressed time period, it is important for the agency or program to have well-developed general strategies that can provide a foundation for specific recommendations that will enable an effective response to the identified risks and needs.

**Standard 3.3              Interview of the defendant prior to first appearance**

(a) In all cases in which a defendant is in custody and charged with a criminal offense, an investigation about the defendant's background and current circumstances should be conducted by the pretrial services agency or program prior to a defendant's first appearance in order to provide information relevant to decisions concerning pretrial release that will be made by the judicial officer presiding at the first appearance.

(b) The representative of the pretrial services agency or program who conducts the interview of the defendant should inform the defendant of his or her name and affiliation with the agency or program, and should advise the defendant:

(i) that the interview is voluntary;

(ii) that the pretrial services interview is intended to assist in determining an appropriate pretrial release decision for the defendant; and

(iii) of any other purposes for which the information may be used.

(c) The pretrial services interview should seek to develop information about the defendant's background and current living and employment situation, including the identity of persons who could verify information provided by the defendant. It should focus on questions directly relevant to the judicial officer's decision concerning release or detention as set forth in Standards 2.3, 2.8, and 3.4. The interview should not include questions relating to the details of the current charge or the arrest.

(d) Following the interview of the defendant, the pretrial services agency or program should seek to verify essential information provided by the defendant.

***Related Standards***

NAPSA (1978) Standards III.D, XI, XII

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-4.2

## **Commentary**

Standard 3.3 (a) makes a strong statement about the breadth of the pretrial services function in the period prior to first appearance: an investigation about the defendant's background and current circumstances should be conducted in **all** cases in which a defendant is in custody and charged with a criminal offense, regardless of their apparent "seriousness". With good information "up front", a judicial officer will be better able to make a release/detention decision that responds to the possible risks of nonappearance and pretrial crime and to the needs of the defendant.

There may be some situations where an interview of a person who has been arrested may not need to be conducted—as, for example, if a defendant has been arrested on a warrant issued by another jurisdiction or for violation of parole and there is no charge against the defendant in the jurisdiction where the arrest was made. If the court to which the pretrial services program submits its reports does not have jurisdiction over the offense that led to the arrest, then an interview may not be necessary unless the court or executive branch agency that has jurisdiction over the defendant requests that one be conducted.

Standard 3.3 (b) provides guidance for pretrial officers in conducting the interview of an arrested defendant. Before the interview starts, the pretrial services officer should tell the defendant his or her name and affiliation with the pretrial services agency or program. The officer should advise the defendant in some detail about the nature of the interview (in particular that it is voluntary and is intended to assist in the making of an appropriate pretrial release decision) and about possible uses of the information provided in the interview. Two key points are especially important with respect to uses of the information:

- If there are other possible uses (in addition to assisting in the release/detention determination) to which the information provided in the interview can be used, these should be communicated to the defendant. For example, the information could be provided to a diversion program or to the probation department in connection with a presentence investigation.
- If the jurisdiction has policies that preclude the use of information provided in the pretrial services interview for the purpose of establishing guilt in the current or substantially related case, the defendant should be so advised. Additionally, however, if responses to interview questions can be used in a prosecution for perjury or for purposes of impeachment if the defendant takes the witness stand at trial, then the defendant should be told of that possibility, too.<sup>39</sup>

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<sup>39</sup> Some jurisdictions have developed formal written policies or regulations to ensure appropriate confidentiality and put limits on disclosure of information acquired through the pretrial services agency's interview of the defendant. See, e.g., Kentucky Criminal Rule 4.06 . Issues of confidentiality and limitations on disclosure of information about individual defendants are addressed in Standard 3.8, *infra*.

In addition to providing the information listed in this Standard, the pretrial officer may also simply let the defendant know what will be covered in the interview—e.g., that it will include questions on the defendant’s living situation, family, employment, possible drug or alcohol problems, prior criminal history, and other subjects covered in the interview protocol. Some pretrial agencies provide defendants with a written copy of the advisement, ask them to sign it, and include the signed copy in the defendant’s file. If possible, the interview should be conducted in a location that enables communications between the defendant and the interviewer that cannot be heard or observed by detention center personnel, police officers, prosecutors or other defendants. Defendants should be encouraged to provide accurate information in response to interview questions. As called for in Standard 1.3 (b), jurisdictions should provide for the confidentiality of information obtained during the pretrial services interview.

Standard 3.3 (c) provides general guidance concerning the substance of the interview, referring to the provisions of other standards that list factors to be included in the pretrial report and considered by the judicial officer at first appearance. Of particular note, this Standard emphasizes that pretrial services interviewers should not ask the defendant questions relating to details of the current charge or the arrest. It will be up to the prosecutor and defense counsel to present information concerning the charged offense to the judicial officer. Having information about what the defendant said concerning the charge may impede the agency’s ability to conduct an impartial investigation and present recommendations about appropriate release options, and may also lead to the possibility of agency staff being called to testify at a trial concerning the defendant’s statements. Interview questions should be limited to information relevant to the release/detention decision and interviewers should be trained to discourage defendants from discussing anything about the charged offense or the arrest.<sup>40</sup>

Standard 3.3 (d) calls for pretrial services program staff to verify essential information obtained in the interview with the defendant. Strategies for verifying the information vary considerably, but typically involve telephone contact with a friend, spouse, other family member, co-worker, or employer of the defendant. A training supplement published by the Pretrial Services Resource Center (PSRC) recommends that, after completing the interview, the pretrial officer should ask the defendant to provide the names of at least three potential references, along with the relationship of each reference to the defendant and a telephone number at which the reference can be reached..<sup>41</sup> Key items of personal information provided by the defendant for which verification should be sought include, at a minimum, the defendant’s name, address, date of birth, employment status/means of support, family status, and length of residence in the city or county. Additionally, depending on the circumstances of the case, it may be desirable for agency

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<sup>40</sup> For discussion of practices concerning the conduct of interviews with defendants, see Spurgeon Kennedy et al., *Pretrial Release and Supervision Program Training Supplement* (Washington, D.C.: Pretrial Services Resource Center, 1996); also NIJ 2001 Report, supra note 9, pp. 26, 28-29.

<sup>41</sup> Kennedy et al., *Pretrial Release and Supervision Training Supplement*, supra note 40, pp. 23-26.

staff to seek to verify other information relevant to an assessment of the defendant's risks and needs.

**Standard 3.4              Presentation of information and recommendations to the judicial officer concerning the release/detention decision**

(a) The pretrial services agency or program should assemble reliable and objective information relevant to the court's determination concerning pretrial release or detention, drawing upon information obtained through the interview of the defendant and other information obtained through its investigation. It should prepare a written report that organizes the information, presents an assessment of risks posed by the defendant and recommends ways of responding to the risks through use of appropriate conditions of release. The assessment and recommendations should be based on an explicit, objective, and consistent policy for evaluating risks and identifying appropriate release options. The information gathered in the pretrial services investigation should be demonstrably related to the purposes of the pretrial release decision and should include factors shown to be related to the risk of nonappearance or of threat to the safety of any person or the community and to selection of appropriate release conditions. The report may include information on factors such as:

- (i) the defendant's age, physical and mental condition, family ties, employment status and history, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings;
- (ii) whether at the time of the current offense or arrest, the defendant was on probation, parole, or other release pending trial, sentencing, appeal, or completion of sentence for an offense;
- (iii) availability of persons who could verify information and who agree to assist the defendant in attending court at the proper time;
- (iv) other information relevant to successful supervision in the community;
- (v) facts justifying a concern that the defendant will violate the law if released without restrictions;
- (vi) the nature and circumstances of the offense when relevant to determining release conditions; and
- (vii) whether there are specific factors that may make the defendant an appropriate subject for conditional release and supervision options,

**including participation in available medical, drug, mental health or other treatment, diversion or alternative adjudication release options.**

**(b) The presentation of the pretrial services information and the recommendations made to the judicial officer should link assessments of the risk of flight and of public safety to appropriate release options designed to respond to the specific risk and supervision needs identified. The identification of release options and the recommendations made by pretrial services for the consideration of the judicial officer should be based on detailed agency or program policies developed in consultation with the judiciary. Suggested release options or conditions should be supported by objective, consistently applied criteria set forth in these policies, and should be the least restrictive conditions necessary to assure the defendant's appearance for scheduled court events and protect the safety of the community and individual persons. The results of the pretrial services investigation, including information relevant to alternative release options, conditional release treatment and supervision programs, or eligibility for pretrial detention, should be presented to relevant first appearance participants before the hearing so that appropriate actions may be taken in a timely fashion.**

#### ***Related Standards***

NAPSA (1978), Standard XI

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-4.2 (g) and (h)

#### ***Commentary***

This Standard provides a framework for organizing and presenting the information developed through the pretrial investigation undertaken prior to the defendant's first appearance. It emphasizes the principle that pretrial agencies and programs should link the information and risk assessments to the identification of release options and the formulation of specific recommendations concerning release conditions.

#### ***Standard 3.4 (a)***

In preparing a report and recommendations for the judicial officer, staff of the pretrial services agency should draw on information obtained not only through the interview of the defendant and subsequent verification efforts, but also from a variety of other sources. These commonly include the criminal history data bases maintained by local law enforcement agencies, state criminal history repositories, and the FBI's National Crime Information Center (NCIC); records of probation and community corrections agencies; and the agency's own files.<sup>42</sup> The Standard calls for a "written" report, which could be transmitted either electronically or on paper.

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<sup>42</sup> Depending on the circumstances of the case, it may be desirable to contact a number of other sources of information potentially relevant to the release/detention decision. These include the state motor vehicle department, which can provide information about the defendant's driving record and may also have

The first task in preparing the report is to “assemble reliable and objective information” relevant to the court’s release/detention determination. Assembling such information in the limited time available before first appearance can present a formidable challenge, but there is no doubt that the availability of good information can enable the judicial officer to make better decisions. In some situations, information relevant to the release decision (and to the agency’s recommendations) will be unavailable despite the best efforts of agency staff. And, even if some basic information about the defendant’s living situation and community ties has been obtained, it may not have been possible to verify the information. In assembling the information, the staff should indicate what relevant information was unavailable and what essential information about the defendant has not been verified.

The second task in preparing the report may be even more challenging than the first: to review the available information, assess the risks posed by the defendant, and recommend ways of responding to the risks through use of appropriate conditions of release. The limited time period between arrest and first appearance means detailed (and time-consuming) risk assessments may not be able to be conducted on a routine basis. Sometimes—especially when there is incomplete information about the defendant’s background—it may be necessary to make a conditional recommendation, together with an indication of the limitations on the assessment and the recommendations.

Standard 3.4 (a) makes it clear that the assessment and recommendations should not be developed in an ad hoc fashion or on the basis of a staff member’s subjective exercise of discretion. Rather, they should be developed on the basis of explicit and objective policies, followed consistently in cases involving similar sets of circumstances.

Some pretrial services programs have developed risk assessment instruments that are used to gauge the extent of the risks of nonappearance and threat to public safety that would be posed by release of the defendant, but this is an area in which it is clear that further work is needed.<sup>43</sup> In recent years there has been a considerable amount of research on risk assessment and the development of appropriate monitoring and supervision strategies for persons on probation and parole,<sup>44</sup> and it should be possible for

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relevant descriptive and address information about the defendant; family members; and the defendant’s present or former employers. See *NIJ 2001 Report*, *supra* note 9, pp.28-30.

<sup>43</sup> Data from a survey of pretrial services programs conducted in 2001 indicates that only about 25 percent of the programs that responded to the survey had developed their own risk assessment instruments. See *2003 Pretrial Services Survey Report*, *supra* note 8, p. 15. For examples of reports on the validation of risk assessment instruments, see, e.g., Steven Jay Cuvelier and Dennis W. Potts, *A Reassessment of the Bail Classification Instrument and Pretrial Release Practices in Harris County, Texas* (Houston: Harris County Pretrial Services Agency, 1997); also Marie VanNostrand, *Assessing Risk Among Pretrial Defendants in Virginia* (Richmond: Virginia Department of Criminal Justice Services, April 2003). The Harris County and Virginia studies both address risk of pretrial misconduct, without differentiating between risk of nonappearance and risk of danger to the community or specific persons.

<sup>44</sup> See, e.g., Edward J. LaTessa, “Best Practices of Classification and Assessment,” *Journal of Community Corrections*, Winter 2003-2004, pp. 4-6, 27-30; Alex M. Holsinger, Arthur J. Lurigio, and

researchers focused on pretrial release issues to draw on that body of work. However, risk assessment in the pretrial context poses unique challenges. Compounding the problems of predicting future conduct is the fact that in the case of newly arrested persons there is only a very short period of time before the first appearance during which relevant information can be obtained and analyzed. Additionally, for purposes of release/detention decision-making, it is desirable to identify the nature of the risks and needs of a defendant with some specificity. In order to shape recommendations that will be useful to a judicial officer at first appearance, the pretrial services agency or program must be able to assess the nature and severity of the risks posed and be able to suggest nonfinancial release conditions that will be appropriate and no more restrictive than necessary.<sup>45</sup>

Subparagraphs (i) through (vii) of Standard 3.4 (a) list factors that may be appropriate for the pretrial services agency to examine in preparing the report and recommendations. The factors listed here are similar to those identified in Standards 2.3 and 2.8 as relevant for the judicial officer to consider in connection with the release/detention decision, with the notable omission of “the weight of the evidence.”

Although the report should not attempt to weigh the evidence against the defendant, information gathered by the pretrial services agency may be relevant to the judicial officer’s consideration of the “dangerousness” issue and the possible crafting of appropriate release conditions. Of particular note, subparagraph (vi) provides that the report may include information on the nature and circumstances of the offense “when relevant to determining release conditions.” This provision should be read in conjunction with the caution in Standard 3.3 (c) against asking the defendant any questions relating to the details of the current charge. While statements of the defendant should not be used as a basis for information in the report concerning the nature and circumstances of the offense, there are some circumstances in which the nature of the charge may be highly relevant to the formulation of release conditions. For example, if the defendant is charged with assault arising out of a domestic altercation, it would be important to take

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Edward J. LaTessa, “Practitioners’ Guide to Understanding the Basis of Offender Risk,” 63 *Federal Probation* 46-50 (June 2001); James Bonta, “Offender Risk Assessment: Guidelines for Selection and Use”, 29 *Criminal Justice and Behavior* 355-379 (August 2002). The general thrust of this research is toward emphasizing strategies that focus supervision resources primarily on relatively high risk individuals. Two studies of supervision in the context of conditional pretrial release point in the same direction. See Stevens H Clarke, Jean L. Freeman, and Gary G. Koch, “Bail Risk: A Multivariate Analysis, 5 *Journal of Legal Studies* 341 (1976); James Austin, Barry Krisberg, and Paul Litsky, “The Effectiveness of Supervised Release,” 31 *Crime and Delinquency* 519 (1985).

<sup>45</sup> For discussion of use of a risk assessment instrument in the context of pretrial release guidelines, see John S. Goldkamp, M. Kay Harris, and Michael White, *Pretrial Release and Detention During the First Year of Pretrial Release Guidelines in Philadelphia—Review and Recommendations* (Philadelphia: Crime and Justice Research Institute, 1997), pp. 7-18; also *NIJ 2001 Report, supra* note 9, pp. 31-33 and Appendix E. For a study focused solely on assessing the risk that a defendant will fail to appear for scheduled court events, see Qudsia Siddiqi, *Prediction of Pretrial Failure to Appear and an Alternative Pretrial Release Risk-Assessment Scheme in New York City: A Reassessment* (New York: New York City Criminal Justice Agency, 2002).

account of the charge in identifying release options and formulating recommendations concerning possible living arrangements for the defendant (separate from the complainant) if the defendant is ordered released.<sup>46</sup> Similarly, if a defendant is charged with drug possession, the nature of the charge might be relevant to the development of recommendations concerning possible drug testing as a condition of release.

*Standard 3.4 (b)*

Standard 3.4 (b) emphasizes that it is important for the pretrial services agency to have a set of policies—developed in consultation with the judiciary—concerning the presentation of information and the formulation or recommendations that are based on sound assessment of the risks that would be posed by release of the defendant. That is, the recommendations should be grounded in a solid understanding of what types of release options make sense—in terms of assuring appearance for court events and protecting against danger to the community or any person—for the specific types of risks posed by individual defendants.

The provision calling for development of agency policies concerning release options and recommendations to be done in consultation with the judiciary is based on recognition of the agency’s primary role as a provider of essential information concerning the judicial officer’s release/detention decision. Regardless of where the pretrial services agency or program is administratively located, the provision of objective and unbiased information to the judicial officer is a primary function. For pretrial services reports and recommendations to have credibility and value for judicial officers, it is essential that there be a shared base of knowledge about the nature of the risks considered, the options that are available, and the practices that the agency follows in making its assessments and formulating recommendations.

The provision in Standard 3.4 (b) for presenting the results of the pretrial services investigation to “relevant first appearance participants” is designed to help make the first appearance a meaningful proceeding. With the pretrial services report and recommendations in hand, both the prosecutor and the defense counsel have a basis for making informed arguments about possible release conditions. Additionally, either the prosecution or the defense may be able to present additional information that would supplement or contradict information in the pretrial report. The end result should be a decision by the judicial officer that is far better informed—and much more likely to further the public interests in assuring court appearances and protecting public safety—than is possible under the traditional money bail system.

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<sup>46</sup> Examples of approaches to developing information related to the circumstances of the charge in order to shape appropriate recommendations concerning possible conditional release in cases involving charges of domestic violence are discussed in the *NIJ 2001 Report*, *supra* note 9, pp. 23-24. An example of one pretrial services program’s approach to obtaining relevant information in cases involving domestic violence charges may be found in Kentucky Administrative Office of the Courts, *Kentucky Pretrial Services Manual* (Lexington, KY: Kentucky Administrative Office of the Courts, 1998), pp. 10-12.

**Standard 3.5****Monitoring and supervision of released defendants**

(a) Pretrial services agencies and programs should establish appropriate policies and procedures to enable the effective supervision of defendants who are released prior to trial under conditions set by the court. The agency or program should:

(i) monitor the compliance of released defendants with assigned release conditions;

(ii) promptly inform the court of facts concerning compliance or noncompliance that may warrant modification of release conditions and of any arrest of a person released pending trial;

(iii) recommend modifications of release conditions, consistent with court policy, when appropriate;

(iv) maintain a record of the defendant's compliance with conditions of release;

(v) assist defendants released prior to trial in securing employment and in obtaining any necessary medical services, drug or mental health treatment, legal services, or other social services that would increase the chances of successful compliance with conditions of pretrial release;

(vi) notify released defendants of their court dates and when necessary assist them in attending court; and

(vii) facilitate the return to court of defendants who fail to appear for their scheduled court dates.

(b) In cases in which the court's release order has authorized the pretrial services agency or program to modify conditions initially set by the judicial officer pursuant to Standard 2.6, the agency or program may modify conditions within the range set by the court order and in accordance with the jurisdiction's laws and rules governing the exercise of judicial authority. The court, the prosecutor, and the defendant's attorney should be notified promptly of any such modifications and of the reason(s) for them. The pretrial services agency or program should keep a record of any such modifications.

(c) The pretrial services agency or program should coordinate the services of other agencies, organizations, or individuals that serve as third party custodians for released defendants, and advise the court as to their appropriateness, availability, reliability, and capacity according to approved court policy relating to pretrial release conditions.

**(d) The pretrial services agency or program should assist other jurisdictions by providing courtesy supervision for released defendants who reside in its jurisdiction.**

### ***Related Standards***

NAPSA (1978) Standards VI and X..A

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.10

### ***Commentary***

The monitoring and supervision of released defendants is a crucially important part of any pretrial release system. If arrested defendants are to be released before trial, judicial officers—and the community, particularly including victims of crime—must have confidence that the release order includes any conditions reasonably needed to guard against risks of nonappearance and dangerousness. This Standard provides a framework for organizing the monitoring and supervision functions, covering both services provided directly by the pretrial services agency and functions with respect to which it has more of a coordinating and/or monitoring role.

#### ***Standard 3.5 (a)***

Standard 3.5 (a) calls on pretrial services agencies to take responsibility for establishing policies and procedures that will enable the effective supervision of defendants who are on conditional release pending disposition of the charges against them. Such policy development necessarily requires a substantial amount of consultation and collaboration with the judiciary and with a wide range of other agencies and organizations that may be involved in the processes of monitoring and supervising released defendants.

The *monitoring* function (Standard 3.5 (a) (i)) is a crucial one, whether the supervision of a conditionally released defendant is being done by the pretrial services agency itself or by another agency or program. Monitoring means periodically checking on the defendant's compliance with the conditions imposed by the judicial officer. For example, if the release order requires the defendant to report to the pretrial services agency once a week, the monitoring would simply involve recording the visit or non-appearance. In the case of a defendant released on conditions that required participation in a drug treatment program, the monitoring might involve a phone call or e-mail communication with the drug treatment program staff to ascertain the defendant's status in the program.

The *supervision* function involves pro-active engagement with the defendant, often to act upon information acquired through monitoring activities. For example, if the defendant failed to participate in a required drug treatment program, supervision might involve calling the defendant to come into the program office, inquiring into the reasons for the failure to comply with conditions, helping to deal with any impediments to the

defendant's full participation in the treatment program, and developing a supervision plan aimed at ensuring that the defendant would begin regularly attending treatment program sessions.

There will inevitably be occasions when the program's monitoring and supervision results in learning that a defendant has failed to comply with release conditions, and the staff feels that a change in release conditions—or even revocation of release—is warranted. Standard 3.5 (a) (ii) provides for the pretrial services agency to inform the court, promptly, of facts concerning the defendant's compliance or noncompliance with release conditions that might warrant modification of the conditions, as well as of any arrest of a defendant who has been released. The wording of this provision reflects the view that it is neither necessary nor desirable for the court to become involved in handling every violation of a release condition. It is often more effective for the program or agency to handle a violation of conditions administratively, though any action taken by the agency should be consistent with policies developed in conjunction with the court. For example, the defendant's failure to report in person to the agency on a specific day could be the result of an illness, emergency, or simple forgetfulness, and would not necessarily be a serious violation. However, repeated failure to check in might be a violation that warranted modification of release conditions. Standard 3.5 (a) (iii) provides for the agency to recommend modification of release conditions. It should be read in conjunction with Standard 3.5 (b), discussed below, which provides for the agency itself to modify the conditions of release under some limited circumstances. It should be noted that modifications need not involve revocation or imposition of more stringent conditions. Sometimes, a defendant's record of consistent compliance with conditions may lead to relaxation of some requirements.

Standard 3.5 (a) (iv) emphasizes the importance of record-keeping in connection with monitoring activities. If a court (or the agency itself) is to consider modifying the conditions of release that were established initially, there should be an adequate basis—reflected in written records—for making any such modifications. Thus, for example, there should be a notation made on the defendant's file of every check-in visit or phone call and of every time the defendant fails to check in on schedule.

As Standard 3.5 (a) (v) suggests, pretrial services agencies can strengthen the likelihood of successful pretrial releases by helping released defendants get jobs and receive needed treatment and social services. Indeed, many judicial officers commonly release defendants on condition that they obtain (or maintain) employment and participate in drug or mental health treatment programs that will address underlying problems. Pretrial services agencies should be familiar with the full range of relevant social services agencies, for at least two purposes: to identify appropriate release options for the court to use in formulating release conditions and to facilitate direct connection of released defendants with the relevant service organizations.

Standard 3.5 (a) (vi) concerns one of the core functions of most pretrial services agencies: notifying released defendants about their court dates and providing any necessary assistance in making sure that they appear in court when scheduled. There are

at least two important notification tasks. First, immediately following the initial release decision, agency staff should provide the defendant with information—ideally, both orally and in writing—about the time and place of the next court event, about the other release conditions, and about what the defendant must do in order to be in compliance with the release order. Second, in order to help assure appearance, the agency should institute some type of reminder system such as a written notice (perhaps generated by computer) or telephone call prior to each scheduled court appearance of the defendant.

When a defendant fails to appear for a scheduled court date, it is important for the pretrial services agency to take prompt action to facilitate the defendant's return, as called for by Standard 3.5 (a) (vii). Sometimes, the failure to appear is inadvertent—due, for example, to a miscommunication about the exact time or location of the court event—and can be remedied quickly by a phone call to the defendant that will result in the defendant's appearance the same day. While some courts immediately issue a bench warrant whenever a defendant fails to appear, others will wait for a short time in order to enable the pretrial agency to make follow up contacts and avoid the additional paperwork and procedures that go along with issuance of a warrant. Regardless of the approach taken, rapid follow-up by the pretrial services agency is important.

The scope of supervision provided by a pretrial services agency should not be overstated. It is not possible for agency or program staff to provide around-the-clock supervision of the activities of every released defendant. The scope of any supervision activities will necessarily be limited by the availability of resources. In order to enable the effective use of available resources, it is essential that pretrial services programs produce sound risk assessments and that both program staff and judicial officers utilize the options and tools that are appropriate for individual defendants.

#### *Standard 3.5 (b)*

This Standard establishes ground rules to be followed by pretrial services agencies in those cases where, pursuant to established law and practice, the agency is authorized to modify conditions initially set in the court's release order. It emphasizes that any modification of conditions must be within the range permitted by the court order and consistent with policy guidelines established by the court concerning the exercise of delegated release authority.<sup>47</sup> The Standard includes a requirement that the court, the prosecutor, and the defendant's attorney be notified of any such modification and of the reasons for the modifications. If the case involves a defendant charged with a violent offense, it may also be desirable to notify a representative of the victims' services agency or other group that can let the victim know of the changes in the conditions.

#### *Standard 3.5 (c)*

This Standard focuses on the coordination function that pretrial services agencies are increasingly being called upon to perform. Pretrial services agencies are not likely to have the resources needed to supervise all released defendants themselves, and in some

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<sup>47</sup> See Standards 1.9 and 2.6 (c), *supra*, and accompanying commentary.

instances—for example, when a released defendant has a drug or mental health problem (or both)—it may be especially appropriate for an agency or organization with specialized expertise in treatment of persons with such problems to have primary responsibility for supervising the defendant. Staff of the pretrial services agency should be knowledgeable about the capabilities of the agencies and organizations that may be called upon to provide such services.

The coordination function has several aspects, including acquisition of information about the agencies and organizations that provide relevant services, making contacts to learn about the availability of slots for individual defendants who could be released under conditions that include participation in a program conducted by such an agency or organization, and—when defendants are released under conditions that include participation in such a program—actively monitoring the defendant's compliance with the conditions through periodic contacts with the agency or organization providing the services. The pretrial services agency should develop aggregate data on the effectiveness of these programs in supervising or providing other supportive services to released defendants.

*Standard 3.5 (d)*

Many defendants are arrested for offenses that were committed in a jurisdiction other than the one in which they live. Judicial officers will be much more likely to release such defendants on nonfinancial conditions if they have some assurance that appropriate arrangements can be made for supervision of the defendant by a pretrial services agency in the jurisdiction where the defendant resides. A jurisdiction's capacity to provide supervision for a defendant who is on release from another jurisdiction is, of course, contingent on the availability of resources. When a pretrial services agency provides courtesy supervision, it is desirable to have a memorandum of understanding with the “releasing” jurisdiction that covers at least the nature and scope of the supervision, the provision of background information concerning the defendant, any reporting requirements, and reimbursement of associated costs.

**Standard 3.6                      Responsibility for ongoing review of the status of detained defendants**

**The pretrial services agency or program should review the status of detained defendants on an ongoing basis to determine if there are any changes in eligibility for release options or other circumstances that might enable the conditional release of the defendants. The program or agency should take such actions as may be necessary to provide the court with needed information and to facilitate the release of defendants under appropriate conditions.**

***Related Standards***

NAPSA (1978), Standard VII.C, X.A

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-1.10 (b)

## ***Commentary***

When a judicial officer sets financial conditions for a defendant's release or orders that a defendant be released subject to conditions such as participation in an appropriate treatment program, the pretrial services agency has a continuing responsibility to make sure that the defendant is in fact released. In particular, as emphasized in Standards 1.4 (c) and 2.5, if financial conditions are set by the court, they should be achievable. If the defendant cannot meet them, the pretrial services program should inform the court and should seek to craft recommendations for conditions that would meet concerns about nonappearance.<sup>48</sup>

When a defendant has been ordered detained pursuant to Standards 2.8-2.10, the pretrial services agency or program should periodically review the status of the detained defendant with a view to determining whether there are any circumstances that may enable the detainee's release. For example, additional positive information about the defendant's background may be obtained, or the agency may learn of the availability of a drug treatment program slot for which the defendant would be eligible. Other changed circumstances could include the dropping of some charges against the defendant or the willingness of a reliable relative of the defendant—not reachable prior to the initial release/detention proceeding—to take responsibility for assuring the defendant's return to court and law-abiding behavior during the pretrial period. If a defendant detained pursuant to Standards 2.8-2.10 has been held in detention for more than 60 days, the pretrial services agency should file an appropriate report with the court as called for in Standard 4.1 (c).

In states that have a “two-tier” system for handling felony cases, conducting an ongoing review of the status of detained defendants presents special challenges. In these states, the first appearance of a defendant arrested on felony charges typically takes place in a municipal court or other limited jurisdiction court. If a felony indictment or information is filed, the case then moves to a general jurisdiction trial court, generally before a different judge and often with a different prosecutor and defense attorney involved. Sometimes a different pretrial services agency or program may also be involved. In these circumstances, the importance of providing accurate and reliable information—including any updates of information initially acquired during the period prior to the first appearance in the limited jurisdiction court—is especially important. If anything, the passage of time since the first appearance in the limited jurisdiction court should enable the pretrial services agency or program that works with the general jurisdiction trial court to have more complete (and verified) information about the defendant and about possible release options than was available at the first appearance following defendant's arrest.

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<sup>48</sup> See Standard 4.1 (b) *infra*. The continued detention of defendants who remain in custody after a financial bond has been set should be a particular focus of attention for pretrial services programs, since—under these Standards—the sole purpose of financial conditions is to assure the defendant's appearance at scheduled court proceedings, and financial conditions are supposed to be set at an amount that is within the financial reach of the defendant.

Because the time between arrest and first appearance is short, it is entirely possible that some favorable information may not come to light in the course of preparing a report for the judicial officer prior to the defendant's first court appearance. This Standard emphasizes the importance of on-going review of the circumstances of detained defendants. The pretrial services agency should have a record of court dates on which a review of the defendant's status is scheduled (see Standard 2.10 (g) (iii)); should ensure that the agency's staff review the detainee's status on a regular basis and makes a record of any change that may be relevant to possible change in status; and should provide the court with information and recommendations needed for the judicial officer's review of the defendant's detention status.

**Standard 3.7                  Organization and management of the pretrial services agency or program**

(a) The pretrial services agency or program should have a governance structure that provides for appropriate guidance and oversight of the agency's staff in the development of operational policies and procedures and for effective internal administration of the agency or program. The governance structure should enable effective interaction of the program with the court and with other criminal justice agencies, and with representatives of the community served by the program. To enable the performance of its functions in a neutral fashion, the agency should be structured to ensure substantial independence in the performance of its core functions.

(b) The pretrial services agency or program should develop and implement appropriate policies and procedures for the recruitment and selection of staff, and for the compensation, management, training, and career advancement of staff members.

(c) The pretrial services program should have policies and procedures that enable it to function as an effective institution in its jurisdiction's criminal justice system. In particular, the program or agency should:

(i) establish goals for effectively assisting in pretrial release decision-making and supervision of defendants on pretrial release in the jurisdiction and for the operations of the pretrial services agency or program;

(ii) develop and regularly update strategic plans designed to enable accomplishment of the goals that are established;

(iii) develop and regularly update written policies and procedures describing the performance of key functions;

(iv) develop and maintain financial management systems that enable the program to account for all receipts and expenditures, prepare and monitor its operating budget, and provide the financial information needed to support its operations and requests for funding to support future operations;

(v) develop and operate an accurate management information system to support the prompt identification of defendants, and the information collection and presentation, risk assessment, identification of appropriate release conditions, compliance monitoring, and detention review functions essential to an effective pretrial release agency or program;

(vi) establish procedures for regularly measuring the performance of the jurisdiction and of the pretrial services agency or program in relation to the goals that have been set;

(vii) have the means to assist persons with disabilities and persons who have difficulty communicating in written or spoken English;

(viii) meet regularly with community representatives to ensure that program practices meet the needs of the community served; and

(ix) develop, in collaboration with the court, other justice system entities, and community groups, appropriate policies for the delivery and management of services needed to respond to the risks posed by released defendants, including strategies for use of substance abuse treatment programs, health and mental health services, employment services, other social services, and half-way houses.

#### ***Related Standards***

NAPSA (1978), Standards VIII.A and IX

#### ***Commentary***

This Standard provides a general framework for the organization and operation of a pretrial services agency or program. The basic principles and guidelines set forth in the Standard should be applicable regardless of the size or organizational location of the agency or program.

No matter where it is housed for administrative or budgetary purposes, it is important for a pretrial services agency or program to function as a neutral component of the jurisdiction's criminal justice system, conveying reliable and unbiased information to the court, and providing copies of relevant reports and recommendations to the prosecutor and defense counsel.

*Standard 3.7 (a)*

This Standard calls for a governance structure that will provide guidance and support for the achievement of agency goals. No specific governance structure is suggested, reflecting the fact that the circumstances will differ considerably across jurisdictions. The key point is to have a governance structure that will help to ensure the requisite neutrality, will support the adoption and implementation of appropriate staffing policies and operational procedures, and will assist the agency or program in its work with the court, other criminal justice agencies, and the community.

*Standard 3.7 (b)*

Because the circumstances and needs of different jurisdictions vary widely, these Standards contain no specific provisions concerning the qualifications of staff of a pretrial services agency or program. Rather, Standard 3.7 (b) calls for each agency or program to develop its own policies and procedures for staff recruitment, selection, compensation, management, training, and career advancement. In some instances, policies and procedures concerning these matters will be set within the framework of human resources management by a larger organizational entity such as a probation department, sheriff's office, or court. Regardless of the organizational location, however, the functions of recruitment, selection, training, and career advancement should be oriented to the basic principles of nonfinancial release and the unique mission of pretrial services agencies and programs.

*Standard 3.7 (c)*

This Standard provides a basic checklist of organizational characteristics and activities that should enable the pretrial services agency or program to function effectively within the criminal justice system in its jurisdiction. Subparagraphs (i) through (iv) focus on aspects of operations that should be found in any well-functioning organization, in particular:

- Organizational goals – especially goals that relate directly to the functions of assisting in release/detention decision-making by judicial officers, the effective monitoring and supervision of released defendants, and the agency's own operations.
- Strategic plans aimed at organizing resources to help achieve the goals that are set.
- Operational policies and procedures, in written form, to be used to guide staff in day-to-day work in interviewing defendants and monitoring and supervising released defendants with conditions.<sup>49</sup>

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<sup>49</sup> For examples of operations manuals and directives concerning specific operational procedures, see, e.g., the *Kentucky Pretrial Services Manual*, *supra* note 46; also New York City Criminal Justice

- Financial management systems that enable the program to manage its resources, account for expenditures and receipts, stay within budget, and support requests for funding of future operations.

Subparagraphs (v) through (ix) of Standard 3.7 (c) focus on aspects of agency or program operations that relate specifically to its core functions, including:

- Developing and using a management information system that will help agency staff perform its core functions of providing information to judicial officers about newly arrested defendants, making risk assessments, crafting recommendations concerning appropriate conditions, and tracking released defendants' compliance with release conditions.
- Developing procedures for measuring the agency's own performance in relation to the goals that it has set and—more ambitiously—measuring the performance of the jurisdiction in relation to goals concerning pretrial release.<sup>50</sup>
- Providing assistance to persons with disabilities (for example, defendants with visual or hearing impairments, or mental illness) and persons who cannot read, speak, or understand English.<sup>51</sup>
- Meeting with community representatives to obtain feedback and suggestions about the work of the agency or program.
- Working collaboratively with the court, other justice system entities, and community groups to develop policies for the delivery and management of services needed by released defendants.

The collaborative policy development called for in subparagraph (ix) is especially important for successful implementation of the basic approach called for by these Standards, which provides for detention of defendants in jail only under very limited

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Agency publications entitled *Completing the ROR Interview and Verification Calls* (New York: NYC Criminal Justice Agency, June 2003).

<sup>50</sup> For a useful outline of a performance measurement system, see Appendix C of the 1978 NAPSA Standards. Suggestions concerning data collection and evaluation designs may also be found in Barry Mahoney et al., *An Evaluation of Policy Related Research on the Effectiveness of Pretrial release Programs* (Denver: National Center for State Courts, 1975), pp. 90-102 (Appendix A).

<sup>51</sup> There are a variety of ways in which such assistance can be provided, including establishing linkages with persons who have the requisite knowledge and skills to provide the needed assistance (e.g., qualified interpreters, mental health specialists) and, in jurisdictions where there are significant populations of persons who cannot read or understand English, use of forms and instructions in the language commonly used by those persons. For discussion of the role of pretrial services agencies in interviewing and developing recommendations concerning cases involving mentally ill persons, see, e.g., Council of State Governments, *Criminal Justice/Mental Health Consensus Project* (Lexington, KY: Council of State Governments, 2002), pp. 90-100.

circumstances. If many defendants formerly held in secure detention are to be conditionally released during the pretrial period, a broad range of supervision strategies will have to be developed to respond to needs and risks posed by factors such as substance abuse, mental illness, physical ailments, homelessness, poor job skills, and illiteracy. The pretrial services agency or program will almost surely not be able to supervise and provide needed services for all of these defendants itself, though it should have a role in coordinating the supervision and direct services provided by other agencies and organizations. To function effectively and meet the needs of released defendants, it will be important to have sound policies that are developed on a jurisdiction-wide basis, involving a broad range of agencies and organizations.

**Standard 3.8              Information about individuals: limits on sharing of information and provisions for protecting confidentiality**

(a) The written investigation report prepared by a pretrial services agency or program prior to a defendant's first appearance in court, and any subsequent reports prepared for the purpose of assisting the court in making decisions concerning release or detention of a defendant, should be provided to the court. Copies of the report should be provided to the prosecutor and to the attorney for the defendant.

(b) Pretrial services agencies and programs should have written policy guidelines regarding access to information about defendants that is contained in their files. In general, the policy guidelines should provide for information obtained during the course of the pretrial investigation and during post-release monitoring and supervision of the defendant to remain confidential and not subject to disclosure except in limited circumstances set forth in the policy and in these Standards. Subject to applicable limitations on disclosure of information, the policy guidelines should provide for disclosure as follows:

(i) to the court, the prosecutor, and the defendant's attorney for the purposes of judicial proceedings concerning release or detention, setting conditions of release, reviewing compliance with conditions in connection with possible modification, and sentencing of the defendant;

(ii) to other agencies or programs to which the defendant has been referred by the court or by the pretrial services agency or program;

(iii) to a local corrections department or jail for use in classification of defendants who are in custody;

(iv) to law enforcement agencies upon a reasonable belief that such information is necessary to assist in apprehending an individual for whom a warrant has been issued for failure to appear or for commission of a crime;

(v) to a probation department or other criminal justice supervisory agency for use in a court-ordered investigation or in supervision of a defendant on probation;

- (vi) to individuals or agencies designated by the defendant, upon specific written authorization of the defendant.
- (c) The defendant or the attorney for the defendant should ordinarily have access to information in the file of the defendant upon request, but the pretrial services agency or program may provide for appropriate exceptions to such disclosure including denial of access to information which has been secured upon a promise of confidentiality or information which, if disclosed, could endanger the life or safety of any person or would constitute an unwarranted invasion of privacy.
- (d) The jurisdiction should provide by law, and the pretrial services agency or program should provide by policy guideline and by provisions in contractual agreements with agencies or individuals to whom information is disclosed, that information received from the pretrial services agency or program may not be re-disclosed except as is necessary to achieve the purpose for which such information was disclosed by the pretrial services agency or program.
- (e) Information in the files of pretrial services agencies or programs may be made available for research purposes to qualified personnel pursuant to a written research agreement that sets forth the terms and conditions of the research and addresses at least the following matters:
- (i) the purpose of the research;
  - (ii) the characteristics of the cases on which information is sought and the manner in which cases will be selected for inclusion in the research project;
  - (iii) the specific types of information that is sought to be extracted from the files; and
  - (iv) the procedures to be used by the researchers to protect the security and confidentiality of all personally identifiable research data.
- (f) Any research agreement concerning access to information in the files of a pretrial services agency or program should ensure that the identity of any defendant is not revealed in research publications, reports, or any materials distributed to anyone who is not a member of the research team. The agreement should describe the procedures to be used by the researchers to protect the security and confidentiality of all personally identifiable data.

#### ***Related Standards***

NAPSA (1978), Standard XII

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-4.2 (b)

#### ***Commentary***

This Standard provides a framework for pretrial services agencies and programs to address difficult issues concerning the confidentiality of information in agency files. The Standard builds on the basic approach of the 1978 NAPSA Standards, which called for a general policy of confidentiality with respect to information concerning individual defendants, with exceptions to be made only in limited circumstances. The wording of

the Standard draws heavily on provisions of New York State standards concerning the confidentiality of information obtained in the course of a pretrial release investigation and during post-release supervision.<sup>52</sup> Because the information gathered by pretrial services agencies can be valuable to other justice system agencies for a variety of purposes, there are strong arguments for encouraging some sharing of information. However, because much of the information about the defendant's employment, living situation, substance abuse history, physical and mental health problems, and prior criminal history is personal and of a highly sensitive nature, it is important to build in safeguards against misuse. Additionally, since much of the information is collected initially from defendants who are emotionally distraught and have had no contact with a lawyer prior to the interview, and since many defendants would probably be uncooperative if they knew that the information would be readily available to others, it is important for pretrial services agencies and programs to develop realistic policies that will ensure appropriate confidentiality and establish limits on information sharing.

*Standard 3.8 (a)*

This Standard simply makes it clear that any report prepared by the pretrial services agency or program for the purpose of assisting the court in making decisions concerning the release or detention of the defendant should be provided to the court, with copies to the prosecutor, and defense counsel.

*Standard 3.8 (b)*

Standard 3.8 (b) calls for each pretrial services agency or program to put in place written policy guidelines concerning access to information about defendants that they have in their files, including both written and automated files. Optimally, there will be statutes that provide for confidentiality of information in the agency's files, as is the case with respect to information in the files of pretrial services agencies in the federal system and the District of Columbia.<sup>53</sup> Even in the absence of statutory support, however, the development of agency guidelines concerning confidentiality is highly desirable, in order to provide practical guidance to agency staff. The basic approach suggested for these guidelines is to provide that all information obtained through the pretrial investigation and while the defendant is on release is to remain confidential, subject to disclosure only under very limited circumstances. Subparagraphs (i) through (vi) set forth the exceptional circumstances in which disclosure should be permissible unless prohibited by federal, state, or local law or regulation.<sup>54</sup>

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<sup>52</sup> See New York State Division of Probation and Correctional Alternatives, *Pretrial Release Services Standards* (November 2003), especially Section VI, which deals with the confidentiality of information in the files of pretrial services agencies; also KY Criminal Rule 4.08, providing for confidentiality of information obtained through interview of defendants, subject to limited disclosure.

<sup>53</sup> See 18 USC Section 3153 (c); D.C. Code Ann. Section 23-1303 (d); also Standard 1.3 (b) *supra* and accompanying commentary.

<sup>54</sup> For example, federal regulations place limitations on the disclosure of criminal history information obtained through the National Crime Information Center (see 28 CFR Part 20, esp. Sections 20.21 and 20.33) and on disclosure of alcohol and drug abuse patient record (see 42 CFR Part 2) and medical and mental health patient records (see, e.g., 42 CFR Part 51). State laws or regulations may

The court will most likely be the principal user of the information. Usually the relevant information is contained in the written report provided to the court, but there may be situations when the judicial officer wants to know additional information available to the agency's staff but not included in the report. As indicated in subparagraph (i), the information acquired by pretrial services agency or program staff may be very relevant to sentencing decisions—including, in some cases, decisions made at the time of the defendant's first court appearance—as well as to release/detention decisions. For defendants who are on pretrial release for an extended period prior to sentencing for an offense, their record of compliance with conditions—maintained by the pretrial services agency or program—can be helpful to the judge in determining what sentence to impose. In cases where the probation department does not prepare a presentence investigation report (which is often the case with respect to misdemeanor convictions), the pretrial services agency can provide valuable information not available to the sentencing judge from any other source.

Diversion programs and social service providers (e.g., drug treatment programs, mental health providers) will often find the information gathered by pretrial services programs useful in making decisions about program eligibility and in designing programs that will address the needs and risks posed by defendants referred to them. For example, information provided by the defendant or references may flag particular types of substance abuse or other medical problems that need attention if the defendant is released.

At some point relatively early in the arrest-to-first appearance process, the local corrections department or sheriff's office will conduct a risk assessment or classification of defendants who are admitted to the jail following arrest. The process generally involves collecting much of the same information typically collected by staff of the pretrial services program, including identification data (name, address, date of birth), prior record information, language(s) spoken, employment information, and information about possible need for medical services. It makes sense for the pretrial services program and local jail staff to share information developed during initial contacts, to avoid duplication of effort and speed the delivery of services (especially detoxification or medical services) that may be needed during the period prior to the first court appearance.

Law enforcement agencies will often be interested in the information in the files of pretrial services agencies and programs—not only information provided in defendant interviews but also information acquired through contacting references and other sources. The Standard calls for limiting disclosure to law enforcement agencies to situations in which their access to the information is needed in order to help apprehend someone for whom a warrant has been issued for failure to appear or for commission of a crime. This is an especially difficult area because, while information in the files of the pretrial program might be useful to law enforcement agencies for a wide range of investigative and data base development purposes, making the information readily available would be likely to undermine the pretrial services agency's ability to obtain useful information from defendants and from persons contacted for purposes of verification.

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impose additional limitations. Pretrial services programs should be familiar with laws and regulations that may affect their operations, including the acquisition and sharing of information.

Two types of information collected by pretrial services agencies can be useful to probation departments. First, basic information that is collected in connection with the initial release/detention decision—e.g., information about the defendant's residence, family situation, employment, physical and mental condition, use of drugs and/or alcohol, and prior criminal record—is the same information typically collected by probation departments in preparing presentence investigation reports and developing plans for supervision of defendants placed on probation. While the probation department staff may need to update the information and contact additional sources, the information initially gathered by the pretrial services program can provide a foundation for the presentence report and for supervision planning. Second, information about the defendant's performance while on pretrial release—e.g., record in making required court appearance and in complying with conditions of release such as participation in a drug treatment program—should be useful in the probation department staff's preparation of a report and recommendations to the sentencing judge and in developing and implementing plans for supervision of defendants placed on probation by the court.

As provided in subparagraph (vi), information about an individual defendant that is in the files of the pretrial services agency or program should ordinarily be available to any agency or individual or agency designated by the defendant. This Standard provides, however, that specific written authorization of the defendant should be required for such disclosure.

Because of the importance of confidentiality policies and practices, pretrial services agencies should make sure that agency staff members are familiar with the policy guidelines. The written guidelines should be distributed to staff and should be covered in staff training sessions. Additionally, it may be desirable for agencies to utilize committees or other mechanisms to review periodically the types of information requests being received by the agency, and the agency's responses, in light of the policy guidelines.

*Standard 3.8 (c)*

This Standard provides for a general policy of allowing a defendant or the defendant's attorney to have access to information in the file of the defendant upon request, but with exceptions to be made in situations where such disclosure would breach a promise of confidentiality made to the provider of the information or where there is a risk that the disclosure would endanger the life or safety of an individual or constitute an unwarranted invasion of privacy. The exceptions to the general policy of full disclosure to the defendant are intended to protect against possible retribution against a person who provided information concerning the defendant in the course of the pretrial program's initial interviewing or post-release monitoring and supervision.

*Standard 3.8 (d)*

This Standard calls for jurisdictions and pretrial programs to seek—through laws, policies, and provisions in contractual agreements—to prohibit “re-disclosure” of information received from the pretrial services agency or program. Re-disclosure is permitted when necessary to achieve the purpose for which the information was originally disclosed (for example, if the law enforcement agency to which the information was initially disclosed in connection with execution of an arrest warrant for

commission of a crime needed to contact another agency in order to actually make the arrest), but not otherwise. In particular, re-disclosure should not become a vehicle for development of data bases unrelated to the purposes of the disclosure of information.

*Standards 3.8 (e) and (f)*

These two Standards deal with the use of information in the files of a pretrial services agency or program for purposes of research. The Standards favor the use of such information for legitimate research purposes, but provide for safeguards that are intended to ensure that the purposes of the research are clear, that the agency knows how the research will be conducted and what types of information will be collected, and that appropriate procedure will be used to protect the security and confidentiality of any data that could identify individual persons.

## PART IV.

### MANAGEMENT AND OVERSIGHT OF PRETRIAL PROCESSES FOLLOWING INITIAL DECISIONS CONCERNING RELEASE OR DETENTION

**Standard 4.1**      Re-examination of the release or detention decision; status reports regarding pretrial detainees.

(a) Upon motion by the defense or prosecution or by request of the pretrial services agency supervising released defendants alleging changed or additional circumstances, the court should promptly reexamine its release decision including any conditions placed upon release or its decision authorizing pretrial detention under Standards 2.8 through 2.10. The judicial officer may, after notice and hearing when appropriate, at any time add or remove restrictive conditions of release, short of ordering pretrial detention, to ensure court attendance and prevent criminal law violations by the defendant.

(b) The pretrial services agency, prosecutor, jail staff or other appropriate justice agency should be required to report to the court as to each defendant, other than one detained under Standards 2.8, 2.9 and 2.10, who has failed to obtain release within [24 hours] after entry of a release order made pursuant to Standards 2.4 - 2.6 and to advise the court of the status of the case and of the reasons why a defendant has not been released.

(c) For pretrial detainees subject to pretrial detention orders, the prosecutor, pretrial services agency, defense attorney, jail staff, or other appropriate agency should file a report with the court regarding the status of the defendant's case and detention regarding the confinement of defendants who have been held more than [60 days] without a court order in violation of Standards 2.10(g)(iii) and 4.4.

#### *Related Standards*

NAPSA (1978), Standards VII.C and X.A

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.12

#### *Commentary*

This Standard provides guidance for justice system personnel in dealing with a key reality of the pretrial process: circumstances change during this period. For example, new or different charges may be filed against the defendant. In a "two-tier" system, if the case involves felony charges, the filing of an indictment or information may cause the case to move from a limited jurisdiction court to the general jurisdiction court for arraignment before a judge who has had no previous contact with the case (and

sometimes with a different prosecutor's office and defense counsel involved in the case), thus requiring fresh consideration of the defendant's custody status. Even if the case remains in the same court, a defendant on conditional release may fail to comply with conditions. The pretrial services agency may develop new information about the background of a defendant, or learn about newly available drug treatment slots or other supervisory options that were not known or available at the time an initial decision to detain the defendant was made.

Standard 4.1 (a) focuses on changes in the circumstances of defendants who have been ordered released from custody. It provides for a prompt process of judicial review of the initial release decision in response to a motion made by either the prosecution or the defense or upon request by the pretrial services agency. If appropriate, the judicial officer can revise the conditions initially set in order to address concerns about nonappearance or pretrial crime.

Standard 4.1 (b) deals with the problem of defendants who remain in detention even though the court has made an order providing for release, whether on a simple promise to appear or on conditions set pursuant to Standard 2.4 or 2.5. Such continued detention could take place if, for example, the defendant was ordered released on conditions that included participation in a drug treatment program but a treatment "slot" was not available. Similarly, if financial conditions were imposed to respond to a perceived risk of nonappearance, the defendant might remain in detention because of inability to raise the necessary funds. In either case, the fact of continuing detention should be brought to the court's attention promptly (within [24 hours] under this Standard), so that the problem can be addressed. In the case of the unavailability of a treatment program slot, there may be other ways of dealing with risks of recurring drug abuse. In the case of inability to meet financial conditions, the court can inquire more fully into the defendant's financial circumstances and lower the bail amount required in order to enable the defendant's release.

The two entities in the best position to obtain information concerning non-release of defendants for whom release has been ordered are likely to be the jail and the pretrial services agency. There should be good communications between the two, so that information about defendants remaining in detention—and the reasons for the non-release—are brought to the attention of the court, the prosecutor, and the defense counsel very promptly.<sup>55</sup>

Standard 4.1 (c) focuses on defendants who have been ordered held in detention pursuant to Standards 2.8-2.10 of these Standards. It calls for a designated entity—the prosecutor, pretrial services agency, defense counsel, jail staff, or another agency—to file a report with the court concerning the status of the case of any defendant held in detention for more than [60 days]. The report should indicate the status of the case and

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<sup>55</sup> See Standard 3.6 *supra* and accompanying commentary. That Standard emphasizes the pretrial services agency's responsibility for ongoing review of the status of detained defendants to determine if there are any changes in eligibility for release options or other circumstances that might enable the conditional release of defendants.

the reason(s) for the continuing detention. This Standard is consistent with Standard 2.10 (g) (iii) which provides for *de novo* consideration of the defendant's pretrial detention at or before 60 days after the initial detention order. It is also relevant to implementation of Standard 4.4, *infra*, which provides for accelerated trial in cases involving detained defendants.

#### **Standard 4.2 Willful failure to appear or to comply with conditions**

**The judicial officer may order a prosecution for contempt if the person has willfully failed to appear in court or otherwise willfully violated a condition of pretrial release.**

#### ***Related Standards***

NAPSA (1978), Standard VI.C

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.5

#### ***Commentary***

This Standard provides for judicial officers to use the sanction of criminal contempt of court when defendants "willfully"—i.e., intentionally and without legal excuse—fail to appear in court or violate other conditions of release. The Standard should be read in conjunction with Standard 4.3, *below*, which sets forth a number of possible sanctions for violation of release conditions, and in conjunction with other provisions of these Standards that deal with the violation of release conditions. The overall approach of the Standards is to provide for instituting court proceedings in response to violation of conditions only when the defendant's non-compliant behavior raises risks of nonappearance or dangerousness that cannot be handled administratively by the pretrial services agency or program, and thus warrant judicial intervention and modification of release conditions. See especially Standards 2.6, 3.5 (a) (ii), and 3.5 (b)

#### **Standard 4.3 Sanctions for violations of conditions of release, including revocation of release**

(a) A person who has been released on conditions and who has violated a condition of release, including willfully failing to appear in court, should be subject to a warrant for arrest, modification of release conditions, revocation of release, or an order of detention, or prosecution on available criminal charges. In considering what actions to recommend to the court in cases in which the defendant has apparently failed to comply with conditions of release, pretrial services programs and agencies should take account of the seriousness of the violation, whether it appears to have been willful, and the extent to which the defendant's actions resulted in impairing the effective administration of court operations or cause an increased risk to public safety.

(b) A proceeding for revocation of a release order may be initiated by a judicial officer, the prosecutor, or a representative of the pretrial services agency. A judicial officer may issue a warrant for the arrest of a person charged with violating

a release condition. Once apprehended, the person should be brought before a judicial officer. To the extent practicable, a defendant charged with willfully violating the condition of release should be brought before the judicial officer whose order is alleged to have been violated. The judicial officer should review the conditions of release previously ordered and set new or additional conditions. Alternatively, the judicial officer may enter an order of revocation and detention, if, after notice and a hearing, the judicial officer finds that there is:

- (i) probable cause to believe that the person has committed a new crime while on release; or
  - (ii) clear and convincing evidence that the person has violated any other conditions of release; and
  - (iii) clear and convincing evidence, under the factors set forth in Standard 2.9, that there is no condition or combinations of conditions that the defendant is likely to abide by that would provide reasonable assurance that the defendant will appear for court proceedings and will protect the safety of the community or any person.
- (c) When a defendant has been charged with a new offense or violations of any conditions of release, he may be temporarily detained pending hearing after notice of the charges for a period of not more than [three calendar days] under this Standard.
- (d) In any court proceeding involving possible modification or revocation of conditions of release, the defendant should be represented by counsel.

#### ***Related Standards***

NAPSA (1978), Standard VII.C

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.6

#### ***Commentary***

This Standard provides guidelines for justice system practitioners in handling cases where defendants, after having been conditionally released, violate a condition of release. The range of potential sanctions is broad, including possible prosecution for contempt of court as well as the sanctions set forth in the first sentence of Standard 4.3 (a). As the second sentence of Standard 4.3 (a) indicates, the selection of an appropriate sanction for violation of conditions should take account of the seriousness of the violation, whether it was "willful", and whether what the defendant did (or failed to do) actually impaired the administration of the court or heightened a risk to public safety. In many instances, the violation of conditions can be handled administratively by the pretrial services agency, without the necessity of initiating revocation proceedings, consistent with policies established in accordance with standards 2.6 and 3.5.

Standards 4.3 (b) through (d) outline the procedures to be followed when a proceeding for revocation has been initiated. Standard 4.3 (b) provides that the defendant, once apprehended (whether for failure to appear or for allegedly committing a new offense or committing a serious but non-criminal violation of the release conditions) should be brought promptly before a judicial officer. If feasible, the revocation proceeding should take place before the same judicial officer who first set the release conditions and has thus had some prior familiarity with the case. The pretrial services agency or program should provide the same information gathering and recommendation functions as with respect to the first appearance of newly arrested defendants.

At the revocation proceeding, the judicial officer, after reviewing the conditions of release previously ordered and any evidence concerning the alleged violation of conditions, has two main options. The first is to continue the defendant on pretrial release, possibly modifying the previously set conditions to address the issues raised by the violation. The second option is detention, but it is available as an option only in limited circumstances and following criteria that are similar to those set forth in Standards 2.8-2.10 with respect to newly arrested defendants. The judicial officer must find either that there is probable cause to believe that the defendant has committed a new crime or that there is clear and convincing evidence that the person has violated other conditions of release. Additionally, the judicial officer must also find that—as with respect to the initial release/detention decision—there is clear and convincing evidence that no condition or combination of conditions will provide reasonable assurance that the defendant will appear for court when scheduled and protect community safety.

Standard 4.3 (c) provides for temporary detention of the defendant for a maximum of [three] calendar days while the revocation proceeding is pending. The [three day] period is the same as is provided under Standard 2.7 (b), which authorizes temporary detention for that period when a newly arrested defendant has previously been released in another case. The period should allow sufficient time for notification of defense counsel, the prosecutor, and any witnesses needed for the hearing. If a hearing is not held within that period, the defendant should be released, though still remaining subject to prosecution on any new criminal charges. Standard 4.3 (d) provides that the defendant should be represented by counsel at any revocation proceeding.

#### **Standard 4.4              Requirement for accelerated trial for detained defendants**

**Every jurisdiction should establish, by statute or court rule, accelerated time limitations within which detained defendants should be tried consistent with the sound administration of justice. These accelerated time limitations should be shorter than current speedy trial time limitations applicable to defendants on pretrial release. The failure to try a detained defendant within such accelerated time limitations should result in the defendant's immediate release from detention under reasonable conditions that best minimize the risk of flight and danger to the community pending trial, unless the delay is attributable to or agreed to by the defendant.**

### ***Related Standards***

NAPSA (1978), Standard VII.E

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.11

### ***Commentary***

Most American states have some type of speedy trial rule or statute, and it is common for speedy trial statutes and rules to include provisions that require speedier case processing for defendants who are detained than for those who are on pretrial release. American Bar Association Standards concerning speedy trial have similar provisions. The reasons are clear: detention is a significant deprivation of liberty, and in the absence of an adjudication of guilt such deprivation of liberty should be sharply limited in duration. When a defendant is held in detention before trial, it should be incumbent upon the prosecutor to resolve the case rapidly, either through trial or through a negotiated disposition of the charges.

These Standards do not prescribe a specific time period for a speedy trial statute or rule, but they should be read as consistent with the ABA Standards that recommend a period of [90] days from arrest as a presumptive speedy trial time limit period for defendants in detention.<sup>56</sup> The sanction for failure to bring a detained defendant to trial or otherwise resolve the case within the time period should be release of the defendant from detention under conditions that minimize the risks of nonappearance and dangerousness.<sup>57</sup>

### **Standard 4.5              Credit for pre-adjudication detention**

**Every convicted defendant should be given credit, against both a maximum and minimum term or a determinate sentence, for all the time spent in pretrial detention as a result of a criminal charge that results in a conviction for which a sentence of imprisonment is imposed.**

### ***Related Standards***

NAPSA (1978), Standard VII.G

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.14

### ***Commentary***

This Standard is consistent with provisions in federal law, laws of the District of Columbia and many states, and with ABA Standards and the 1978 NAPSA Standards. It

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<sup>56</sup> ABA Standards on Speedy Trial and Timely Resolution of Criminal Cases (August 2004), Standard 12-2.1 (b). The same ABA standard provides for a presumptive limit of [180] days for persons on pretrial release. It should be noted that other provisions of these standards provide for some extensions and exclusions of time in computing the allowable periods of time under some circumstances.

<sup>57</sup> *Id.*, Standard 12-2.7. Under this ABA standard, the consequence for failing to bring a defendant to trial within the time allowed under the speedy trial rule or statute is dismissal of the charges with prejudice.

provides that, as a simple matter of fair administration of justice, a defendant held in detention during the pretrial period should receive credit for the time spent in detention against any minimum and maximum term imposed upon conviction.

**Standard 4.6      Temporary release of a detained defendant for compelling necessity**

**Upon a showing by defense counsel of compelling necessity, including for matters related to preparation of the defendant's case, a judicial officer who entered an order of pretrial detention under Standards 2.8 through 2.10 may permit the temporary release of a pretrial detained person to the custody of a law enforcement or other court officer, subject to appropriate conditions of temporary release.**

***Related Standards***

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.15

***Commentary***

This Standard provides a mechanism for ameliorating the impact of pretrial detention on the defendant under limited circumstances. If the defendant's counsel can make a showing of "compelling necessity", the judicial officer who ordered the defendant detained may permit temporary release of the defendant. The burden is clearly on the defense to prove the need for such release, which may be for matters relating to preparation of the defendant's case (for example, a site visit to a particular location, providing an opportunity to review the scene with counsel) or for other reasons such as a funeral or family medical emergency.

**Standard 4.7      Circumstances of confinement of defendants detained pending adjudication**

**The rights and privileges of defendants detained pending adjudication should not be more restricted than those of convicted defendants who are imprisoned. Detained defendants should be provided with adequate means to assist in their own defense. This requirement includes but is not limited to reasonable telephone rates and unmonitored telephone access to their attorneys, a law library, and a place where they can have unmonitored meetings with their attorneys and review discovery.**

***Related Standards***

NAPSA (1978), Standard VII.F

ABA Standards on Pretrial Release, Third Edition (2002), Standard 10-5.16

***Commentary***

The management of inmates in a jail or other detention facility is a difficult and demanding task, and these Standards do not attempt to delineate specific rights of

detainees.<sup>58</sup> Indeed, recognizing the problems inherent in appropriate classification of inmates and management of a secure detention facility, the Standards do not even call for pretrial detainees to be housed separately from convicted persons. It seems clear, however, that regardless of the inmate classification procedures and other management approaches adopted by those responsible for the facility, pretrial detainees should have at least the same rights and privileges as those convicted of crimes. Additionally, it is essential that they be able to assist in the preparation of their own defense. At a minimum, this means reasonable access to a telephone, telephone service available at reasonable rates, access to a law library, and unmonitored telephone and in-person meetings with their attorneys.

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<sup>58</sup> Standards and guidelines for the management and treatment of detainees have been developed by professional groups concerned with the effective administration of detention facilities. See, e.g., American Correctional Association, *Performance-Based Standards for Adult Local Detention Facilities* (Lanham, MD: American Correctional Association, 2004), esp. Part VI; William Collins, *Jail and Prison Legal Issues: Administrators' Guide* (Hagerstown, MD: American Jail Association, 2004).