

The Pretrial Reform Committee of the WSBA Council on Public Defense (CPD) recently created a new tool for defenders to use at bail/release hearings. The tool, **The Defender Resource Packet: Defender Advocacy for Pretrial Release**, contains information and resources attorneys can use to successfully argue for the pretrial release of their clients. The full resource packet is available on line [here](#). This packet contains (1) a sample client interview form, (2) a defender advocacy sheet, (3) a sample release order, and (4) the **CrR(LJ) 3.2 Bench Card** prepared for Washington judges and distributed in May 2018.

**The pretrial detention decision is one of the most important decisions made in a case.** Litigating pretrial release is important both in the short term and the long term for the client. Detained clients are much more likely to plead guilty to get out of jail to avoid negative consequences, such as the loss of a job, housing, child custody, or lack of access to medications or services. Detained clients are also more likely to face longer sentences. Gathering comprehensive information about the client and her background is the most important tool an attorney can use when litigating a client's pretrial release.

**Racial disparities are significant in the pretrial detention population.** Bail reform is an important step toward systemic criminal justice reform. Studies demonstrate that people of color are disproportionately detained in jail before trial and often assigned higher bail amount than white clients.<sup>1</sup> Judges and prosecutors should embrace the WSBA CPD's recommendations for systemic improvements.

**Presumption of Release:** In Washington, release of a person accused of a crime before trial without financial conditions is presumed. CrR/CrRLJ 3.2(a). Money bail may only be imposed as a last resort after a court finds no less restrictive conditions will assure court appearance, prevent the likely commission of future crime, and prevent interference with the administration of justice.

**The Court Must Consider Relevant Factors:** The rules require the court to consider a number of important factors when determining whether to set bail or release, not just the charge, criminal history and the history of FTA. CrR/CrRLJ 3.2(c), 3.2(e). Many of these rule based factors are mitigating and support release of the client. The prosecutor bears the burden to overcome the presumption of release.

**The accused's ability to pay:** The court must consider the individual's financial resources and ability to pay when setting any bail amount. See CrR/CrRLJ 3.2(b), 3.2 (d)(6).

**Least Restrictive Alternatives:** Before setting any amount of bail, the court must consider whether imposing conditions instead of bail will assure the individual's appearance in court and/or the safety of the community. CrR/CrRLJ 3.2(b), 3.2 (d)(6).

## **Pretrial Release Advocacy: Arguments Defenders Should Present When Applicable:**

### **I. The client is not a flight risk.** Possible supporting factors include:

- Client has a history of response to legal process or court orders to appear;
- Client has ties to the community: length of residence, client's family ties/relationships, employment status/history, enrollment in school, job training, volunteer work or cultural activities, client is receiving medical/mental health care;
- Community members are willing to vouch for the client's reliability and/or will assist the client get to court or to comply with conditions of release;
- Client's criminal history is non-existent, limited, old or not relevant (not similar).

### **II. There is no evidence of substantial danger that the client will interfere with witnesses or commit violent crimes.** Possible arguments include:

- The client's reputation, character and mental condition do not support a finding that the client poses a risk of danger;
- Community members are willing to vouch for the client's reliability and/or will assist the client get to court or to comply with conditions of release;
- The nature of charge does not support a finding that the client poses a risk (if nonviolent);
- Client's criminal history is non-existent, limited, old or not relevant (not similar).

### **III. Alternatives to bail will secure the client's appearance and/or reduce the risk of danger that the client will commit a violent crime, seek to intimidate a witness or otherwise interfere with the administration of justice.** Possible arguments include:

- Client agrees to report regularly and remain under supervision of officer of the court, other person, or agency;
- Client agrees to remain in custody at night or to remain on GPS/SCRAM;
- Client agrees not to possess dangerous weapons/firearms;
- Client agrees to restrictions on travel, association or residence or to have no contact and/or to stay at least 1000 feet away from person, groups or a location;
- Client agrees to maintain law abiding behavior;
- Client agrees to not consume alcohol or non-prescribed drugs;
- Client agrees to any other condition deemed reasonably necessary to assure appearance.

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<sup>1</sup> See the Pretrial Justice Institute, Why We Need Pretrial Reform, found at <https://www.pretrial.org/get-involved/learn-more/why-we-need-pretrial-reform/>