The Importance of First Appearance Hearing – a Guide to Compliance with CR 26 and the Constitutional Right to Bail

Right to Bail under U.S. and Indiana Constitution

Under the U.S. Constitution, "liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[1] Bail should be individualized and set at "an amount reasonably calculated" to assure the accused's return to court.[2] To the extent that individual counties mechanistically apply predetermined bail schedules without regard for the individual arrestee's personal circumstances, this practice violates both the Due Process and Equal Protection Clauses of the U.S. Constitution.[3]

The right to bail is fundamental and deeply embedded in the Indiana Constitution, which affords an even "greater right" than the federal Constitution.[4] Under Article 1, Section 16, "Excessive bail shall not be required." With rare exception, the default position is bail and release: "Offenses, other than murder or treason, shall be bailable by sufficient sureties. Murder or treason shall not be bailable, when the proof is evident, or the presumption strong." Ind. Const. Art. 1, § 17. These two provisions draw a line with murder and treason (prohibiting bail in most cases) and other offenses that are presumably bailable "by sufficient sureties" without requiring "[e]xcessive bail." The language of Section 17 is "unambiguous--its mandate clear."[5] In its landmark opinion on bail (albeit in the context of murder), the Indiana Supreme Court addressed the "link between the presumptive right to bail and the presumption of innocence—something our case law also emphasizes."[6]

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[1] *United States v. Salerno*, 481 U.S. 739, 755 (1987).

[2] *Stack v. Boyle*, 342 U.S. 1 (1951).

[3] *Odonnell v. Harris County*, 892 F.3d 147, 163 (5th Cir. 2018) (opinion on rehearing upholding District Court's preliminary injunction of the Harris County predetermined bail schedule for alleged misdemeanants).

[4] *Ray v. State*, 679 N.E.2d 1364, 1366 (Ind. Ct. App. 1997).

[5] *Id*. at 1366.

[6] *Fry v. State*, 990 N.E.2d 429, 440 (Ind. 2013).

Criminal Rule 26 & Indiana Risk Assessment System - Pretrial Assessment Tool

In 2017, the Indiana Supreme Court adopted Criminal Rule 26, creating a presumption in favor of pretrial release. Its purpose is to maximize public safety, court appearance, and pretrial release.[7] The Rule envisions a prompt and properly focused individualized determination of bail. It advises Indiana courts to "utilize the results of an evidence-based risk assessment" when "determining whether an arrestee presents a substantial risk of flight or danger to self or other persons or to the public."[8] The Supreme Court also encourages courts to release arrestees who do not present a flight or public safety risk without monetary bail or surety "subject to such restrictions and conditions as determined by the court."[9] Release conditions should be individualized based on each accused's risk level and circumstances, and the least restrictive to ensure court appearance and protect public safety. Factors relevant to risk of nonappearance and safety considered by the court can be found at Ind. Code § 35-33-8-4(b). The nature and gravity of the charges and potential penalty faced may be considered, but only insofar as these factors are relevant to the risk of nonappearance.[10] The charges do not automatically mean the individual is dangerous, nor do they preclude advocating for release or for appropriate and least restrictive conditions.

The Indiana Office of Court Services has approved the Indiana Risk Assessment System – Pretrial Assessment Tool (IRAS-PAT) for use to assess risk at the pretrial stage under the Policy adopted by the Board of Directors of the Judicial Conference. The IRAS-PAT is designed to be predictive of both an arrestee's failure-to-appear and risk of violating pretrial supervision by committing a new offense. [11]

Criminal Rule 26 encourages the use of approved risk assessments to assist in release decision-making at the earliest possible time following arrest. However, a risk assessment is not required to be completed in order for an individual to be released. Each court must assess its own resources and practices to ensure that arrestees are not unnecessarily held in jail due to the imposition of high bail. Courts are encouraged to explore funding options available at the state and local levels to fund enhancements to current practices.

Courts may utilize collateral information to assist with release decision-making, including the probable cause affidavit, victim statement(s), domestic violence screeners, substance abuse screeners, mental health screeners and criminal history to assist in making release decisions.

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[7] Ind. EBDM Pretrial Work Group, Pretrial Practices Manual, 4 (2018) (citing Schnacke, T. R. (2014). *Fundamentals of bail: A resource guide for pretrial practitioners and a framework for American pretrial reform.* Retrieved from: https://s3.amazonaws.com/static.nicic.gov/Library/028360.pdf).

[8] Ind. Crim. Rule 26(B).

[9] Crim. R. 26(A).

[10] Ind. Code § 35-33-8-4(b)(7).

[11] Ind. EBDM Pretrial Work Group, Pretrial Practices Manual, 8 (2018).

Importance of Pretrial Release

Research shows that pretrial detainees are more likely to plead guilty, be rearrested for new offenses post adjudication, and suffer collateral consequences of pretrial detention.[12] Pretrial detention has also been linked to the imposition of longer sentences when compared with defendants who were released pretrial.[13] Risk research has demonstrated that detaining low and moderate risk defendants in jail for even short periods of time (2-3 days) can increase the risk for misconduct both short- and long-term. Likewise, imposing unnecessary pretrial supervision of low-risk defendants can lead to this result. Pretrial supervision of moderate- and high-risk defendants, however, resulted in a significant increase in court appearances when compared with unsupervised defendants of the same risk level.[14]

The importance of counsel's early entry into criminal proceedings to seek release is discussed below. The client's freedom on bail is important to counsel's representation of the client during the investigative and preparatory stages of the case. When the accused is not incarcerated, counsel can more easily meet and consult with him or her. There can be timeliness, logistical and other difficulties with counsel's ability to communicate confidentially with an incarcerated client. Counsel should always consider ways to ensure private communication between counsel and an incarcerated client if release cannot be achieved due to the bond amount being too high.

Pretrial detention may have other detrimental effects on clients.[15] It may unduly influence clients with triable cases to plead guilty and may even improperly influence fact-finders adversely (e.g., confined defendants may appear less "presentable" at trial).

Counsel should consider whether some form of supervised pretrial release, which may generate positive information at sentencing if a conviction occurs, would be in the best interests of a particular client, and should discuss that possibility with the client where appropriate.

The Importance of Counsel at First Appearance Hearings

The U.S. Supreme Court has noted that an accused person "requires the guiding hand of counsel at every step in the proceedings against him."[16] The usual practice in Indiana, however, is that indigent persons arrested for criminal offenses are not appointed counsel until their first appearance in court or even the initial hearing itself. Typically, this occurs near the conclusion of the initial hearing. *See* Ind. Code 35-33-7-6. Even where the accused is taken promptly to court and appointed an attorney, she will rarely see her attorney on that same day. As a result, indigent defendants rarely are afforded the same

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[12] Lowenkamp, C.T., VanNostrand, M., & Holsinger, A. (2013). *The Hidden Costs of Pretrial Detention*. Retrieved from: http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_hidden-_costs_FNL.pdf).

[13] Id., citing Lowenkamp, C. T., VanNostrand, M., & Holsinger, A. (2013). *Investigating the impact of pretrial detention on sentencing outcomes.* Retrieved from: http://www.arnoldfoundation.org/wp-content/uploads/2014/02/LJAF_Report_state-sentencing_FNL.pdf).

[14] *Id*., at 4 (citing Lowenkamp, et al., *supra*).

[15] See *Justice Denied: The Harmful and Lasting Effects of Pretrial Detention*, Vera Institute of Justice (April 2019).

[16] *Powell v. Alabama*, 287 U.S. 45, 69 (1932).

protections as defendants with the financial means to retain counsel before the first or initial hearing. Indigent defendants who are in jail lack the guidance of counsel at a particularly vulnerable time, may sit in jail longer before bail is reviewed, may risk losing employment, may lose the benefit of early investigation, and may sit in jail on charges that are ultimately dismissed.[17] There are additional challenges if the accused has children and are unable to provide care. The presence or absence of a lawyer is a crucial factor that makes the difference between release and custody.

Without counsel, the accused's rights are compromised. Incomplete investigation compromises discovery efforts. Bail decisions go unreviewed. The prosecution may obtain evidence in violation of the accused's rights. Evidence is lost, witnesses' memories dim, so their testimony often becomes impeachable. Dispositive defenses (double jeopardy, speedy trial, statute of limitations, lack of jurisdiction, statutory immunities from prosecution, and vindictive prosecution) may languish.[18] Other defenses, which benefit all concerned by their early development (e.g., lack of competency and insanity), are neglected.[19] The accused may also suffer the psychological trauma of isolation. The accused may also plead guilty in a desperate attempt to be released from jail. Deciding to plead guilty pro se at first appearance hearing transforms the hearing into a critical stage and will result in a violation of Ind. Code § 35-33-7-5 and the accused's right to have counsel present.[20]

Guaranteeing counsel at first appearance affects a client's waiting time in jail, largely because of counsel's ability to argue for release or lower bail amounts. Shorter pretrial incarceration periods may provide the client a better chance of acquittal and reduce unnecessary costs the person is required to pay. Importantly, shorter pretrial incarceration helps to guarantee the client can maintain employment, income, housing, and childcare. Research shows that meaningful representation and advocacy at first appearance not only significantly increases the accused's chances for release or reduced bail, but also his or her sense of fairness about the process.[21] In sum, shorter pretrial incarceration helps a client maintain their position in the community.

1) Right to counsel under the Federal Constitution

The United States Supreme Court has repeatedly recognized that the Sixth Amendment right to counsel is implicated when the accused's liberty is jeopardized, which encompasses his or her first appearance in

[17] *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1 (1951); *Flanagan v. U.S.*, 465 U.S. 259 (1970); and *Rothgery v. Gillespie County*, Texas, 554 U.S. 191 (2008).

[18] *Flanagan v. U.S.*, 465 U.S. 259, 104 S. Ct. 1051 (1984).

[19] *Coleman v. Alabama*, 399 U.S. 1, 90 S. Ct. 1999 (1970).

[20] *Rader v. State*, 181 Ind.App. 546, 550, 393 N.E.2d 199, 202 (1979).

[21] KENTUCKY DEPARTMENT OF PUBLIC ADVOCACY, KENTUCKY PRETRIAL RELEASE MANUAL (Jun. 2013) at 6 (citing Douglas L. Colbert et al, Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail, 23 Cardozo L. Rev. 1719 (2002)).

court.[22] Once the right to counsel attaches, the accused is entitled to the presence of appointed counsel during any "critical stage" of the post-attachment proceedings unless a valid waiver of the right is made.

An initial appearance before a judge, where the client learns the charge and their liberty is subject to restriction, is considered a critical stage requiring meaningful representation. This initial hearing triggers attachment of the right to counsel, thus requiring the appointment of counsel within a reasonable time once the request for appointment has been made. [23]

But unless evidence is taken, a guilty plea entered[24], or any factual determination other than the mere review of probable cause for arrest takes place, the initial hearing *itself* is not a critical stage requiring the presence of counsel under the Sixth Amendment.[25] If there is an arraignment during which the judge asks the accused how he or she pleads, the right to counsel attaches.

2) Right to counsel under the Indiana Constitution

Indiana's right to counsel under Art.1, § 13 has a history of being interpreted more broadly than the Sixth Amendment.[26] No case or statute interprets the Indiana Constitution to require representation by counsel at the first appearance or initial hearing. However, the Indiana Supreme Court has held the right to counsel attaches much earlier, at the time of arrest, compared to the federal right, which does not attach until "formal proceedings have been initiated."[27] To date, the Indiana Supreme Court has not addressed whether Art.1, § 13 of the Indiana Constitution requires counsel at an initial hearing. The cases cited in footnote 29 (below) leave open several questions, including whether an accused should be entitled to counsel at the First Appearance hearing where the trial court determines under Criminal Rule 26(B) whether the accused presents a substantial risk of flight or danger to himself or others.

3) National Standards and Indiana Public Defender Council Performance Guidelines

Crim. Rule 26 strongly presumes that a person charged should be released without the payment of a cash bond and without conditions unless the State can prove that a person is a high risk of not appearing as ordered at future hearings or that the person is a high risk to be rearrested while on pretrial release.

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[22] See *Brewer v. Williams*, 430 U.S. 387, 398-99; 97 S.Ct. 1232, 1239 (1977); *Michigan v. Jackson*, 475 U.S. 625, 629, n.3; 106 S. Ct. 1404, 1407, n. 3 (1986); and *Rothgery v. Gillespie County*, 554 U.S. 191, 194; 128 S.Ct. 2578, 2581-82 (2008) (the right to counsel attaches at the time when formal judicial proceedings have begun).

[23] *Rothgery*, supra.

[24] *Iowa v. Tolvar*, 541 U.S. 77, 81, 124 S. Ct. 1379 (2004).

[25] *Gerstein v. Pugh*, 420 U.S. 103, 95 S. Ct. 854 (1975); see also *Farrow v. Lipetzky*, 637 Fed. Appx. 986, 988 (9th Cir. 2016) (finding that initial appearance was not a critical stage because it did not test merits of case, skilled counsel was not necessary to help accused understand proceedings, and there was no risk an uncounseled defendant would permanently forfeit significant rights); *Robinson v. San Bernardino Cty.*, 2019 U.S. Dist. LEXIS 107240, *16-17, 2019 WL 2616941 (arraignment was not itself a critical stage requiring representation by appointed counsel where at the hearing, the judge informed accused of his rights and the charges against him, advised of his constitutional and statutory rights, entered a plea of not guilty to all counts, and set bail; though the accused was advised as to his rights if he were to plead guilty, the judge did not ask for a plea or give the accused any opportunity to enter a plea, but rather entered a "not guilty" plea on his behalf).

[26] *Brunson v. State*, 394 N.E.2d 229 (Ind. Ct. App. 1979).

[27] See *State v. Taylor*, 49 N.E.3d 1019, 1021 (Ind. 2016) and *Taylor v. State*, 689 N.E.2d 699, 703-04 (Ind. 1997) (cleaned up).

Advocating for the pretrial release of defendants at the first appearance hearing is so significant that doing so is a mandated professional standard for criminal defense attorneys nationwide.[28] Prominent public interest groups have also emphasized the necessity for counsel's appointment "as soon as feasible after accused persons are arrested, detained, or request counsel."[29]

Despite the documented importance of legal guidance in these early stages, only a handful of Indiana trial courts require attorneys to be present at initial/first appearance hearings. Thus, appearing for the first time in court without an attorney is a reality for most indigent defendants in Indiana.

First Appearance Hearing

"First appearance" means the first hearing at which an individual appears after an arrest and any subsequent hearing where there is an opportunity to advocate for the person's release pursuant to Ind. Crim. Rule 26. This includes, but is not limited to: an arraignment, advisement of rights, bail hearing, and initial hearing. The purpose of the initial hearing is to prevent defendants from being "unduly detained or held in custody without showing of probable cause"[30] and in violation of Crim. R. 26 requiring the release without cash bond in most cases.

A delay of more than 48 hours between arrest and initial hearing is presumptively unreasonable.[31] Intervening weekends do not qualify as an "extraordinary circumstance" to justify a delay exceeding 48 hours.[32] If the prosecuting attorney states that more time is required to evaluate the case and determine whether a charge should be filed, or if it is necessary to transfer the person to another court, then the court shall recess or continue the initial hearing for up to seventy-two (72) hours, excluding intervening Saturdays, Sundays, and legal holidays.[33] The "normal remedy" for denial of a prompt initial hearing is not dismissal, but rather suppression of evidence obtained during the delay that might be tainted by the defendant's illegal arrest and detention.[34]

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[28] See AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS 4-2.3 (4th ed. 2015), available at: http://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html ("A defense counsel should be made available in person to a criminally-accused person for consultation at or before any appearance before a judicial officer, including the first appearance."); *see also* NLADA Assigned Counsel Standards, Standard 2.5 (counsel should be provided to assist indigent persons accused of crimes at the earliest possible time).

[29] The Constitution Project Nat'l Right to Counsel Comm., *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel*, THE CONSTITUTION PROJECT 1, 197 (2009), *available at* http://www.constitutionproject.org/wp-content/uploads/2012/10/139.pdf.

[30] *May v. State,* 502 N.E.2d 96 (Ind. 1986).

[31] *Powell v. Nevada*, 511 U.S. 79, 83-84 (1994).

[32] *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

[33] Ind. Code § 35-33-7-3(b).

[34] *Denson v. State*, 263 Ind. 315, 330 N.E.2d 734 (1975); *Saunders v. State*, 562 N.E.2d 729 (Ind. Ct. App. 1990), *vacated in part on other grounds, affirmed in part*, 584 N.E.2d 1087.

An accused's first appearance before the court provides formal notice of the charges pending against the accused. During this hearing, pursuant to Ind. Code § 35-33-7-5, the court advises the accused of the charge, rights to assigned counsel and speedy trial, of the amount and condition of bail, of the privilege against self-incrimination, of the nature of charges against him, and that a preliminary plea of not guilty is being entered. The court usually determines eligibility for appointed counsel and engages in release decision-making (see above discussion re: CR 26 and Risk Assessment).

Where a defendant requests assigned counsel, the judicial officer shall make an indigency determination before the completion of the initial hearing. Ind. Code § 35-33-7-6(a). If the defendant is found to be indigent, the magistrate shall assign counsel. Indigency determinations are reviewable at any time during the proceedings. (see **Indigency Determination**, *below*).

Trial courts are encouraged to provide confidential spaces for initial client interviews at first appearance hearings. If first appearances are held electronically or via remote video conferencing, "[t]he facility and equipment provide counsel with the ability to confer privately with an out of court party, or with other counsel, off the record, before, during, and immediately following the hearing or proceeding."[35] Many Indiana counties are now using video conferencing technology to conduct initial hearings with defendants remaining in jail during their court "appearance,"[36] a practice which has been questioned by some defense attorneys.[37] The information discussed at first appearance should focus primarily on information given to the judge for his or her consideration for release or conditional release. Counsel should have the time to familiarize himself or herself with the allegations underlying the charge, as well as time and space to consult with the accused about those allegations generally, and it is equally important to gather information relevant to pretrial release including ties to the community, support within the community, work and education history, physical and mental health, and prior criminal history.

Appointed counsel should promptly attempt to secure the pretrial release of the accused, pursuant to Ind. Crim. Rule 26, under conditions that are the least restrictive and most favorable and acceptable to the client.[38] Where the accused is incarcerated, defense counsel must begin immediately to marshal facts supporting the accused's pretrial release from custody.

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[35] Indiana Administrative Rule 14(c)(1).

[36] *See, e.g.,* 10 *Indiana Court Times* 2 (2001), p.1*,* "Video Conferencing Increases Court Efficiency."

[37] Where appointed or retained before a video-conferenced initial hearing, defense counsel must decide whether to be at the jail with his or her client, or in court with the prosecutor and judge (or have another attorney from counsel's office at the second location). Also, video arraignments may be but a first step in technologically isolating defendants, lessening or destroying "the important personal encounter between defendant and judge." Saundra Terry, "Courtrooms Boost Use of Video Camera Technology," *The Washington Post*, 1993. (Including interview with Dade County (FL) Public Defender Bennett Brummer.) *See also* Patricia Raburn-Remphry, *Due Process Concerns in Video Production of Defendants,* 23 Stetson L. Rev. 805 (1994).

[38] Indiana Public Defender Counsel Performance Guideline 3.1, General Obligations of Counsel Regarding Pretrial Release.

Guilty Pleas at First Appearance Hearings

Guilty pleas at first appearance hearings should be discouraged, especially those taken from pro se defendants without having had the advice and assistance of counsel. Because Ind. Code § 35-33-7-5 requires the trial court to automatically enter a preliminary plea of not guilty for the accused, trial courts should not even present an accused at first appearance with the choice of pleading guilty or not guilty or encouraging uncounseled plea negotiations with the prosecutor. But unfortunately, the Sixth Amendment Center, at the request of an Indiana Public Defender Commission, found that a fundamental flaw in Indiana's criminal justice system is the systematic denial of the right to counsel at initial hearings, where accused persons are encouraged to negotiate plea agreements with prosecutors.[39]

Rushing into a plea of guilty,[40] whether at the behest of the accused, the prosecution or others, may result in a plea taken without the accused's full knowledge and understanding.[41] Before a pro se guilty plea, no one has reviewed the State's evidence against the accused for weaknesses or legal defenses. No one has talked with the accused about the circumstances that led to the offense, such as mental illness or substance abuse. No one has advised the accused of all the consequences of the guilty plea that can persist throughout their life. A pro se guilty plea is quick, as it moves the case through the system, but it does nothing to assure that the ensuing conviction is fair, reliable or individualized to the rehabilitative needs of the person who is being sentenced. Pro se guilty pleas undermine the reliability, fairness and effectiveness of a conviction and sentence. When faced with an uncounseled defendant who is initiating and insisting on pleading guilty, trial courts at a minimum should pause to advise and ensure that the accused understands the disadvantages of pleading guilty without the advice of counsel.

Role of Defense Counsel at First Appearance Hearings

Regardless of when the right to counsel attaches, the Indiana Public Defender Council (IPDC) Performance Guidelines "advocate the provision of zealous and quality legal representation to all clients charged with crime…," not merely the minimum required by the constitution. Whether appointed or retained before the initial hearing or after, counsel should move quickly to protect the client's rights, to meet with the client, and to seek pretrial release of the client under Criminal Rule 26. *See* IPDC Guidelines 3.1 – 3.3, regarding pretrial release advocacy and the initial client interview. As part of its Performance Guidelines, IPCD Guideline 2.1 addresses counsel at First Appearance hearing. This Guideline suggests an "on-duty" attorney appointed at or before the hearing to preserve the accused's rights by:

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[39] The Sixth Amendment Center, *The Right to Counsel in Indiana: Evaluation of Trial Level Indigent Defense Services* (Oct. 2016). The Report can be accessed through the Indiana Public Defender Commission's website, at: http://sixthamendment.org/6ac/6AC_indianareport.pdf.

[40] IPDC Performance Guidelines 6.1 through 6.4 describe counsel's duties during negotiation and entry of a guilty plea.

[41] IPDC Guideline 6.2, See also, Mass Publ. Counsel Ser., *Manual*, Sec. IV, Performance Guidelines, Guideline 2.1(b)(1): "A guilty plea or an admission to sufficient facts at this stage is inadvisable due to the inadequate time to investigate the case. In rare instances, and if the attorney has significant experience and after adequate consultation with the client and investigation, it may be appropriate to take advantage of a disposition that may not be available later. . ."

(1) meeting with the individual to collect any important information needed to advocate for the individual's release pursuant to Ind. Crim. Rule 26;

(2) preparing the client for any interview or assessment that will be conducted before the first appearance by any person who is not counsel;

(3) determining whether any information filed with the court contains sufficient facts to support probable cause to hold the individual. If there is insufficient probable cause to hold the individual, counsel should advocate for the individual's immediate release from custody and challenge any effort to hold the individual in custody without probable cause;

(4) reviewing any assessments or reports created for the purposes of determining release and conditions; and

(5) advocating for the individual's release from custody or the most appropriate and least restrictive release conditions for the individual under Crim. Rule 26; release conditions should be the least restrictive conditions that are tailored to the individual's needs.

In addition to the actions outlined in Guideline 2.1, IPDC Guideline 2.2 governing Initial Hearing provides that counsel who is appointed or retained before the initial hearing on the charges should attend the initial hearing and should preserve the client's rights by:

(1) entering a plea of not guilty in all but the most extraordinary circumstances where a sound tactical reason exists for not doing so;

(2) requesting a trial by jury, if failure to do so may result in the client being precluded from later obtaining a trial by jury;

(3) seeking a determination of whether there is probable cause to support the charges alleged and, if there is not probable cause, see to the client's immediate release from custody; and

(4) requesting an immediate review of bail.

If the court sets conditions of release which require posting a monetary bond or posting real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.[42]

Where the accused is incarcerated and unable to obtain pretrial release, counsel should alert the court and/or facility where the accused is incarcerated to any special medical or psychiatric and security needs of the client and request that the court direct the appropriate officials to take steps to meet such special needs.[43]

Counsel should be knowledgeable on any remedies that may be available should the client not be released appropriately and make an informed decision whether to pursue them.[44]

[42] IPDC Guideline 3.3(b).

[43] IPDC Guideline 3.3(c).

[44] IPDC Guideline 3.3(d).

From material gathered from the client,[45] any report(s) from bail agencies, law enforcement agencies,[46] and other sources,[47] counsel should distill information to support the client's pretrial release under the legal criteria applicable in the jurisdiction.[48] The method (formal motion or informal discussion), form (written or oral), and timing of counsel's presentation of this material to the appropriate judicial officer may vary.

Similarly, the propriety of defense proposals concerning conditions of pretrial release (*e.g.*, continued employment or school attendance, type of supervision [if any]) may vary. Such proposals may be designed to counter specific prosecutorial or judicial concerns, to meet particular wishes of the client, to further trial/sentencing strategy, etc.[49]

Potential conditions of pretrial release are set out in Ind. Code 35-33-8-3.2(a)(3) – (a)(7). Counsel should properly and promptly notify the accused of these conditions and of subsequent court appearances and bail/release requirements.

Other Considerations for First Appearance Hearing

Prosecutor Presence and Role

Indiana Criminal Rule 10.1 provides that, "[e]xcept for the initial hearing where evidence is not presented, the Prosecuting Attorney or a deputy prosecuting attorney shall be present at all felony or misdemeanor proceedings, including the presentation of evidence, sentencing or other final disposition of the case." Arguably, the use of risk assessments, substance abuse/domestic violence screeners and other information to assist judges with release decision-making constitutes "the presentation of evidence" under Crim. Rule 10.1.

Regardless, though not required to do so, prosecuting attorney offices are encouraged to have a prosecutor at first appearance hearings.[50] Prosecutors should recommend bail decisions that facilitate pretrial release rather than detention.[51] In arguing for detention or release conditions, the prosecutor must submit specific and relevant evidence necessary to show a substantial risk of harm to others or the public.

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[45] IPDC Guideline 3.2(b)(2).

[46] IPDC Guideline 3.2(a)(2).

[47] *e.g.*, the client's family.

[48] Guideline 3.2(a)(2)(3). For legal criteria applicable in Indiana check your county's local rules and IC 35-33-8.

[49]. "Advocate for imposition of pretrial probationary conditions if that's what it takes to get the defendant released, *e.g.*, stay away order, surrender of license or passport, report to court clinic. Have the defendant consent to these, if appropriate." Mass CLE, Inc. Effective Criminal Defense Techniques: Tricks of the trade from the Experts (1990), chapter entitled "Issues at Arraignment: Bail and Chapter 123 Examinations," by Kevin Connelly. *See also* IPDC Pre-Trial Manual, Ch. 3, Sec. II.

[50] ABA Prosecution Function Standard 3-5.1: A prosecutor should be present at any first appearance of the accused before a judicial officer.

[51] National District Attorneys Association (NDAA) National Prosecution Standard 4- 4.4.

Potential Conflicts of Interest

Judges, court administrators, and defense attorneys have expressed concern about whether first appearance attorneys might face client conflicts that interfere with their day-to-day practices. To date, the Indiana Supreme Court has not addressed whether *State v. Taylor*, 49 N.E.3d 1019, 1021 (Ind. 2016), requires representation by counsel at an initial hearing, but the IPDC standards encourage public defender offices to do so. In larger Indiana counties, attorney conflicts will be minimized (if they exist at all) because the first appearance attorney's representation at this stage is limited to release purposes only. For counties with fewer public defenders, it may be less plausible to provide one attorney for limited representation at first appearance and then another to cover the remainder of the case to completion. Under these circumstances counsel could obtain written, informed consent from both co-defendants at initial hearings under Ind. Prof. Conduct R. 1.7(b)(4).

Indigency Determination

Determining indigency at first appearance hearing cannot be made on a superficial examination of the accused's income and property. It must be based upon a thorough examination of the total financial situation, including balancing of assets against liabilities and consideration of disposable income and other resources reasonably available to the accused after payment of fixed obligations. In making this determination, the court shall consider the accused's assets, income, and necessary expenses.[52] The court may consider that a person's eligibility for federal need-based public assistance programs constitutes sufficient evidence to establish that a person is indigent.[53]

The fact that the defendant can post bond does not determine non-indigency but is merely a factor to consider in making the determination.[54]

Criteria for Deciding Pretrial Release and Conditions

Criminal Rule 26 exempts certain classes of potentially dangerous, recidivist defendants from its beneficent presumption: those already on pretrial release for another offense and anyone on "probation, parole or other community supervision."[55]

Trial courts may consider collateral information, such as probable cause affidavits or substance abuse screeners, in making pretrial release decisions.[56] The content of the information—not its source—is what matters.

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[52] Ind. Code § 35-33-7-6.5(a) (2020).

[53] Ind. Code § 35-33-7-6.5(b) (2020).

[54] See, e.g., *Reese v. State*, 953 N.E.2d 1207 (Ind. Ct. App. 2011) (trial court erred in denying defendant's request for court-appointed counsel where it was apparent from the record that he lacked the resources to employ an attorney); *Shively v. State*, 912 N.E.2d 427 (Ind. Ct. App. 2009) (trial court erroneously failed to give required careful consideration of defendant's financial situation in either of the pre-trial hearings in which it denied appointment of counsel).

[55] Crim. R. 26(A)(3).

[56] Pretrial Practices Manual at 62-63.

The plain language of Criminal Rule 26 requires the State present evidence of a substantial risk of danger to persons or the public, which goes beyond simply arguing about the evidence to support the offense. For example, in an appropriate case the State might offer evidence that a defendant threatened to "finish the job when I get out." Simply offering evidence to prove a criminal charge does not meet the bar. "Guilt or innocence is not a factor at all in the bail decision."[57]

The State may offer character evidence of defendants for instability and violence in an effort to prove danger to a person or community. Bail hearings are expressly exempted from evidentiary rules' protections.[58] In most cases such character evidence does not exist, and defendants can and should be released with appropriate conditions imposed. But if such evidence exists outside the face of a probable cause affidavit, prosecutors should produce it at a hearing at which defendants can cross-examine and offer their own evidence countering a risk to persons or the community. This is a minimal burden considering the stakes—a presumed-innocent defendant spending months in jail awaiting trial.

The sample Pretrial Release and Supervision Matrix Template included in the Pretrial Practices Manual offers a useful illustrative example. Although it distinguishes between non-violent misdemeanors, non-violent felonies, and violent offenses, each category (unlike murder and treason in the fourth column) is entitled to bail.

In conjunction with a determination to release pretrial with or without a financial obligation, the court must determine what pretrial supervision conditions, if any, to impose on each defendant. These conditions are set forth in Ind. Code § 35-33-8-3.2(a). The goals of pretrial supervision are to increase the likelihood of appearance at future court hearings and public safety. The risk principle dictates that fewer or no resources should be utilized on lower risk defendants and more resources used on moderate- and high-risk defendants.[59]

Trial courts must make an individualized determination that the accused is likely to use drugs while on bail before it is reasonable to place restrictions on the individual based on that contingency.[60] Of the research conducted on the effectiveness of drug testing defendants as a condition of pretrial release, no empirical evidence has been found to show deterrence or a reduction of pretrial failure, even when a system of sanction is imposed. Failure to appear and rearrest rates are not reduced according to the research conducted on using electronic monitoring as a condition of pretrial release. However, the availability of electronic monitoring may increase release rates for those high-risk defendants who may not otherwise be released if not for the availability of this alternative. "Pretrial GPS supervision is no

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[57] *Fry v. State*, 990 N.E.2d 429, 440 (Ind. 2013).

[58] Ind. Evidence Rule 101(d)(2).

[59] Pretrial Practices Manual, 5 (citing Milgram, A., Holsinger, A. M., VanNostrand, M., & Alsdorf, M. (2015). Pretrial risk assessment: Improving public safety and fairness in pretrial decision making. *Federal Sentencing Reporter, 27,* 216–21. Retrieved from: https://doi.org/10.1525/fsr.2015.27.4.216).

[60] *Steiner v. State*, 763 N.E.2d 1024, 1027-28 (Ind. Ct. App. 2002) (trial court erred by imposing random drug testing as a condition of bail where no evidence indicated that the defendant would use drugs while admitted to bail).

more or less effective than traditional, non-technology based pretrial supervision in reducing the risk of failure to appear to court or the risk of rearrest."[61]

Violations of Pretrial Release

Once conditions of release have been determined, then responses to pretrial violations must be established pursuant to policy and procedure. The risk principle is the barometer by which courts should determine how to respond to violations based on the severity of the violation and risk level of the defendant. Responses to violations should be proportional and designed to promote appearance at court hearings and public safety.

The National Institute of Corrections has developed the Essential Elements of an Effective Pretrial System and Agency to assist courts implement evidence-based pretrial practices.[62] Indiana has developed a list of pretrial expectations adapted from NIC's Essential Elements of an Effective Pretrial System and Agency.

[61] Pretrial Practices Manual, 6 (citing Grommon, E., Rydberg, J. & Carter, J.G. J Exp Criminol (2017) 13: 483. Retrieved from: https://doi.org/10.1007/s11292-017-9304-4).

[62] *Id*., 7 (citing National Institute of Corrections (February 2017). *A Framework for Pretrial Justice: Essential Elements of an Effective Pretrial System and Agency*. Retrieved from https://s3.amazonaws.com/static.nicic.gov/Library/032831.pdf).