



WISCONSIN LEGISLATIVE COUNCIL STUDY COMMITTEE MEMORANDUM

TO: MEMBERS OF THE STUDY COMMITTEE ON BAIL AND CONDITIONS OF PRETRIAL RELEASE

FROM: Katie Bender-Olson and David Moore, Senior Staff Attorneys

RE: Topics for Committee Discussion

DATE: October 9, 2018

This memorandum summarizes potential topics for committee discussion at the October 16, 2018 meeting of the Study Committee on Bail and Conditions of Pretrial Release. The items summarized below are largely drawn from the August 16, 2018 presentation by the National Conference of State Legislatures summarizing pretrial release legislation and policy initiatives in other states.

The memorandum is intended to prompt discussion by the committee and is not intended to be a comprehensive list of policy options. Committee members may have additional issues they wish to present for consideration that are not described in this memorandum. The memorandum does not address changes to the pretrial detention procedure because that topic is discussed in more detail in a separate memorandum.

RISK ASSESSMENT TOOLS

Law and legislation in other states address use of a pretrial risk assessment tool for evaluating the risk that an arrested individual will fail to appear for court proceedings or commit a new offense while on pretrial release. Current Wisconsin law does not reference use of a pretrial risk assessment tool, but individual counties have implemented use of such tools.

The following are examples of policies from other states regarding risk assessment tools that the committee may want to discuss or consider:

- **Explicitly Allowing Use of Risk Assessment Tools.** Montana legislation states that a court “may” use a validated pretrial assessment tool in determining whether a defendant should be released or detained, in addition to taking into account other available information.

- **Establishing a Statewide Risk Assessment Tool.** Illinois law authorizes the Illinois Supreme Court to establish a statewide risk assessment tool to assess a defendant's likelihood of appearing at future court proceedings or the threat posed by a defendant to the physical safety of others.
- **Establishing Criteria a Risk Assessment Tool Must Meet.** Illinois law requires the Supreme Court, in establishing a risk assessment tool, to ensure that the tool does not discriminate on the basis of race, gender, educational level, socio-economic status, or neighborhood.
- **Creating a "Risk Assessment Tool" Definition.** Rhode Island legislation defines a "risk screen" to mean a validated, empirically-based pretrial risk tool composed of a brief set of questions that may be answered without interviewing the defendant and are designed to predict failure to appear and risk to re-offend.

CONSIDERATIONS IN SETTING RELEASE CONDITIONS

Laws in other states require a court to impose the least restrictive release conditions on a defendant that are necessary to assure public safety and the defendant's appearance in court. Speakers and committee members also discussed the "over conditioning" of defendants, which may lead to technical violations and accumulation of potential bail jumping charges.

Current Wisconsin law provides that "reasonable" release conditions may be imposed on a defendant to assure appearance in court, protect members of the community from serious bodily harm, or prevent the intimidation of witnesses, but does not otherwise limit the number or type of release conditions that can be imposed.¹ [Wis. Const. art. I, s. 8 (2); s. 969.01 (4), Stats.]

Current Wisconsin law makes it a crime for an accused to violate any condition of his or her bond or to fail to appear in court. This is the crime of "bail jumping" under s. 946.49, Stats., and is punishable as either a Class H felony or Class A misdemeanor, depending upon the underlying offense with which the defendant is charged.

The following are examples of policies from other states regarding considerations in setting release conditions that the committee may wish to discuss or consider:

- **Requiring the Least Restrictive Release Conditions.** New Jersey law provides that a court must impose the least restrictive release condition or combination of conditions that will reasonably assure the defendant's appearance in court and the safety of any other person or the community.

¹ Though Wisconsin law enumerates specific release conditions that a court may impose, the list is not limiting because it includes "any other condition deemed reasonably necessary" to achieve the purpose of assuring the defendant's appearance, protecting members of the community against serious bodily harm, or preventing intimidation of witnesses. [ss. 969.02 (3) (d) and 969.03 (1) (e), Stats.]

- **Redefining Bail Jumping as Non-Appearance Only.** State law in the majority of states criminalizes only a defendant's non-appearance at a court proceeding, and does not criminalize a violation of release conditions.

For example, Tennessee law creates a crime called "Failure to Appear," which criminalizes, among other acts, knowingly failing to appear after being issued a citation in lieu of arrest or being released with or without bail on condition of subsequent appearance at an official proceeding. Tennessee law also creates an affirmative defense for a defendant who had a reasonable excuse for failure to appear at the specified time and place.

- **Considering Pretrial Supervision Before Imposing Monetary Conditions.** North Carolina law provides that if the court determines that release on personal recognizance or unsecured appearance bond is not appropriate, then the court must next consider release under supervision of a person or organization. The court may only consider other conditions, including financial bond or house arrest, if the court first concludes that supervision will not reasonably assure appearance or safety.
- **Waiving Fees Related to Nonmonetary Conditions.** New Jersey law allows a court to order pretrial home supervision with or without GPS monitoring, but also allows the court to waive associated supervision fees for a defendant who is unable to afford them.

JUDICIAL REVIEW WHEN DEFENDANT IS UNABLE TO MEET RELEASE CONDITIONS

Laws in other states require judicial review of a defendant's pretrial release conditions when the defendant cannot meet those initial conditions and remains in custody. Speakers raised the issue of a defendant remaining in custody solely because of inability to pay the bail amount or to meet other pretrial release conditions, such as payment of GPS monitoring fees.

Current Wisconsin law requires a judge to review an accused's release conditions if the accused remains detained after 72 hours because of inability to meet the conditions. Judicial review is not automatically triggered under Wisconsin law, but instead, a judge must review a defendant's release conditions "upon application." [s. 969.08 (1), Stats.]

The following are examples of policies from other states regarding review of pretrial release conditions that the committee may wish to consider or discuss:

- **Reviewing Release Conditions After 24 Hours.** South Dakota law requires a court to review release conditions for a defendant who continues to be detained after 24 hours as a result of inability to meet conditions of release, if requested.
- **Requiring or Allowing the Court to Initiate Review of Release Conditions.** New Mexico Supreme Court Rules require review of a defendant's release conditions, on either the court's own motion or on motion of the defendant, if the defendant remains in custody 24 hours after the issuance of the order setting conditions of release as a result of the defendant's inability to meet the conditions.

- **Reviewing Court Commissioner's Decision Immediately.** Maryland law provides that a defendant who is denied pretrial release by a court commissioner or who remains in custody after a court commissioner determines conditions of release must be presented to a judge immediately, if court is in session, or at the next session of the court if court is not in session.

PRETRIAL SERVICES AGENCY

Laws in other states require the creation of a state pretrial services agency or local pretrial services agencies. These state or local agencies are typically tasked with developing and administering a pretrial services program and may be authorized to distribute funds for pretrial services to counties or nonprofit organizations. Current Wisconsin law does not create a statewide pretrial services agency, nor does it address development of local pretrial services agencies.

The following are policies from other states regarding pretrial services agencies that the committee may wish to consider or discuss:

- **Creating a Statewide Pretrial Services Agency.** New Jersey law requires the Director of Courts to establish and maintain a Statewide Pretrial Services Program that must provide pretrial services to defendants.
- **Requiring Local Pretrial Services Agencies.** Illinois law requires each circuit court (covering one or more counties) to establish a pretrial services agency to provide the court with background data regarding the pretrial release of individuals charged with felonies and with supervision of compliance with release conditions.

PRESUMPTION OF CITATION IN LIEU OF ARREST

Laws in other states create a presumption that a person accused of a misdemeanor will be issued a citation and released, rather than taken into custody. Current Wisconsin law provides for citation in lieu of arrest for misdemeanors, but gives law enforcement officers discretion regarding whether to cite and release or take an accused into custody. Wisconsin law does not contain a presumption in favor of citation in lieu of arrest. [s. 968.085 (2), Stats.]

The following are policies from other states regarding a presumption of citation in lieu of arrest that the committee may wish to consider or discuss:

- **Requiring Misdemeanor Citation Instead of Arrest if Person is Likely to Appear in Court.** Kentucky law provides that an officer must issue a citation instead of making an arrest for a misdemeanor committed in his or her presence, if there are reasonable grounds to believe the person will appear to answer the charge. However, an officer is required to make an arrest for a violation of a domestic violence or abuse restraining order or protective order.

- **Creating Presumption of Citation, but Allowing Officer Discretion Under Certain Circumstances.** Kentucky law creates a presumption of citation, but allows an officer discretion to issue a citation if the offense is one of the following:

- An assault offense, a sexual offense, a weapons or firearms offense, giving false information to an officer, or certain burglary, theft, or trespass offenses.
- One in which the defendant poses a danger to self or others.
- One in which the defendant refuses to follow the officer's reasonable instructions.

An officer also has discretion to issue a citation if the officer has probable cause to believe the person committed a misdemeanor outside of the officer's presence, if there are reasonable grounds to believe the person will appear in court.

Please contact us at the Legislative Council staff offices if you have questions prior to the October 16, 2018 meeting of the study committee.

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