

CONTACT

POLICY DEPARTMENT

MARIA CILENTI

212.382.6655 | mcilenti@nycbar.org

ELIZABETH KOCIENDA

212.382.4788 | ekocienda@nycbar.org

**WRITTEN TESTIMONY OF THE CRIMINAL JUSTICE OPERATIONS COMMITTEE
AND CIVIL RIGHTS COMMITTEE**

**NYS BAIL BOND REFORM LISTENING SESSION
NYS DEPARTMENT OF FINANCIAL SERVICES
ONE STATE STREET PLAZA, 6TH FLOOR
NEW YORK, NY 10004**

June 11, 2018

The Criminal Justice Operations Committee and Civil Rights Committee of the New York City Bar Association¹ appreciate the opportunity to provide feedback and recommendations concerning the operation of the commercial bail bond industry in New York State. While the Committees believe that there are modest steps the State can take to help curtail predatory practices within the industry, ultimately we recommend the elimination of for-profit commercial bail bonds in New York.² Interim steps recommended by the Committees include:

- The Chief Judge should issue an order instructing New York judges to set unsecured and partially secured bonds instead of commercial bail bonds in the absence of clear and convincing evidence that those forms will not ensure the accused's return.
- The State should crack down on abusive industry practices such as onerous conditions in contracts and charging hidden or illegal fees; possible solutions include requiring that bail bondsmen provide the court or another regulatory body with a reason for bond revocation and greater fee disclosures.
- Look to legislation pending in the New York City Council for ways to curtail the industry while educating and protecting consumers who contract with bail bond agents.

Ultimately the Committees urge the Governor to support legislation currently pending in the Legislature to eliminate the commercial bail bond industry in New York.

¹ The Criminal Justice Operations Committee addresses issues relevant to New York State penal law and procedure and the functioning of the courts with regard to criminal cases. The Civil Rights Committee addresses both civil rights and civil liberties matters, including issues affecting racial, ethnic and religious minorities.

² See Recommendations Concerning the Bail Bond Industry in the State of New York, April 28, 2017, http://s3.amazonaws.com/documents.nycbar.org/files/201744-BailBondIndustryNYS_FINAL_4.26.17.pdf (all websites last visited June 8, 2018).

New York Does Not Need the Commercial Bail Bond Industry.

Only two nations in the world have a commercial bail bond industry: the United States and the Philippines.³ Even within the United States, jurisdictions including Illinois, Kentucky, Oregon, Wisconsin, and the District of Columbia have all banned commercial bail bonds.⁴ And for good reason: even when it operates completely within the bounds of the law, the commercial bond industry extracts an incredible amount of wealth from people, particularly loved ones and relatives of the accused, caught up in the criminal justice system—many of whom are already experiencing poverty—and transfers it “to the pockets of opportunistic bail bond agents.”⁵ New York’s reliance on profit-driven actors to make decisions about the pretrial release of presumptively innocent people hurts consumers and is inconsistent with New York’s progressive values.

It is also completely unnecessary. New York courts could eliminate the use of commercial bail bonds today with a simple shift in their bail-setting practices. In order to provide judges with “flexible bail alternatives,”⁶ the Criminal Procedure Law includes nine different forms of bail to choose from. Judges must set at least two.⁷ Historically, however they set only cash and insurance company bail bonds, two of the most onerous forms of bail, ignoring the readily-available and more affordable partially secured and unsecured bonds.⁸ These bonds are backed by a promissory note wherein the accused or a third-party surety pledges to pay the full amount of the bond in the event of non-appearance in court, and are secured by a payment of 10% or less of the bond amount.⁹

These so-called “alternative forms” hold no lesser status than cash bail or bail bonds under the law, and they are effective at ensuring return to court: research shows that “unsecured bonds, because they still require payment if the defendant fails to appear in court, are just as

³ Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N. Y. TIMES, Jan. 29, 2008, at A1, available at <http://www.nytimes.com/2008/01/29/us/29bail.html>.

⁴ The Marshall Project, *When Freedom Isn’t Free* (Feb. 23, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/23/buying-time#.QBLGtAkcI>; Justice Policy Institute, *For Better or for Profit: How the Bail Bonding Industry Stands in the Way of Fair and Effective Pretrial Justice 4* (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/for_better_or_for_profit_executive_summary.pdf.

⁵ Office of the New York City Comptroller [hereinafter “Comptroller”], *The Public Cost of Private Bail: A Proposal to Ban Bail Bonds in NYC*, Jan. 17, 2018, <https://comptroller.nyc.gov/reports/the-public-cost-of-private-bail-a-proposal-to-ban-bail-bonds-in-nyc/>.

⁶ *McManus v. Horn*, 18 N.Y.3d 660 (2012).

⁷ C.P.L. § 520.10.

⁸ Vera Institute of Justice, *Against the Odds: Experimenting with Alternative Forms of Bail in New York City’s Criminal Courts 2* (Sept. 2017), <https://www.vera.org/publications/against-the-odds-bail-reform-new-york-city-criminal-courts>.

⁹ C.P.L. § 500.10.

effective at guaranteeing court attendance as paying the full bail amount up front.”¹⁰ In New York, the only legitimate purpose of bail is to ensure the accused’s return to court. Bail bonds are not necessary to achieve that goal.

We recommend that the Chief Judge issue an order instructing New York judges to set unsecured and partially secured bonds instead of commercial bail bonds in the absence of clear and convincing evidence that those forms will not ensure the accused’s return. Massachusetts courts adopted a similar practice thirty years ago and eliminated consumer reliance on the industry well before the state legislature abolished it for good.¹¹ The Mayor’s Office,¹² the Office of Court Administration,¹³ and non-profits like the Vera Institute¹⁴ have all trained judges in and promoted these “alternative forms” of bail, yet cash and bail bonds remain the norm. A clear imperative from the state’s highest court is needed.

Even a Properly Functioning Commercial Bail Bond Industry Exploits Low-Income New Yorkers and Improperly Inserts Private Interests in Court Operations.

The American Bar Association’s (ABA) recommendation to abolish compensated sureties is so unequivocal that in the third edition of *The Standards for Pretrial Release*, the ABA removed the second edition’s recommendations for regulating the bail bond industry pending abolition, so “as to leave no doubt of the imperative nature of the recommendation that they be abolished.”¹⁵ The ABA sets forth three relevant reasons why compensated sureties should be abolished.¹⁶ First, decisions regarding who actually gets released are taken from the court and given to the bondsman. Second, the bondsmen make unregulated, unsupervised decisions regarding who gets released on a bond and what conditions defendants must obey after their release, with no accountability to the court or any other body. And third, compensated sureties discriminate against the poor and middle class. Despite the clear and steadfast recommendations

¹⁰ Independent Commission on New York City Criminal Justice and Incarceration Reform, *A More Just New York City* 44 (2017), <https://static1.squarespace.com/static/577d72ee2e69cfa9dd2b7a5e/t/58e0d7c08419c29a7b1f2da8/1491130312339/Independent+Commission+Final+Report.pdf>.

¹¹ Between the 1980s and 2011, when a landmark decision by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Ray*, 435 Mass. 249 (2011) essentially eliminated the bail bond industry there, judges began setting cash bail at an amount equivalent to that which a bondsman would charge, which incentivized defendants to pay the cash amount rather than lose their deposit by paying a bondsman. This practice “effectively killed the bail bondsman” without any change in the law. *See* Fred Contrada, *Bail Bonds are a Thing of the Past in Massachusetts*, *Mass Live* (March 25, 2014), http://www.masslive.com/news/index.ssf/2014/03/bail_bondsmen_are_a_thing_of_t.html.

¹² “Working with Judges to Use Alternatives to Money Bail,” Mayor’s Office of Criminal Justice, <http://bail-lab.nyc/using-alternatives/>.

¹³ Vera Institute, *supra* n. 8, at 26.

¹⁴ *Id.*

¹⁵ AMERICAN BAR ASSOCIATION [hereinafter ABA], *ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE* 44 (3rd ed. 2007).

¹⁶ *Id.* at 45.

of criminal justice experts to end the for-profit bail bond industry, the industry enjoys a central role in New York’s bail system.¹⁷

In New York, it is not uncommon for bail bondsmen to include onerous conditions in their contracts with the accused and to fine defendants or revoke the bail if there is the slightest violation.¹⁸ Further, it is entirely legal for a bail bondsman to revoke an accused person’s bond, keep the premium already collected, and deliver the accused to custody even though he has made all the court dates required.¹⁹ Bondsmen are under no obligation to provide the court or any other regulatory body with a reason for the bond revocation, and judges cannot override their decision to do so.²⁰ In addition, the New York Criminal Justice Agency has documented instances of bail bond agents filing false paperwork in order to obtain illegally high fees from customers and leaving financial information out of their bond paperwork so that the fees are not disclosed at all.²¹ These frauds are not “easily spotted by the courts,” though bondsmen have faced both criminal and administrative charges stemming from illegal fees and other abuses.²²

The practice of charging hidden or illegal fees is by now well known—in 2016 Governor Cuomo called for reforming the industry, and described it as engaging in “predatory pricing and contracting practices” that have a “disproportionate negative impact on low-income people.”²³ But even when bond agents act completely lawfully—even when they charge only the premium permitted by the Insurance Law—they bleed financial resources from low-income neighborhoods unnecessarily. For example, posting a \$20,000 bond allows a bond agent to pocket a nonrefundable \$1,460 fee in addition to the collateral he charges to secure the bond. A \$20,000 partially secured surety bond, on the other hand, requires the deposit of 10% or less with the court with no nonrefundable fee, and that deposit is returned if the accused appears when required. This transfer of wealth is completely legal. While the State can take steps to crack down on the abusive practices discussed here, the bail bond industry does not have to break to the law to take advantage of and extract wealth from vulnerable people and low-income communities—its by-the-book operation still profits from families trying to buy their loved ones’ freedom. And that is why it must be abolished.

¹⁷ See Mary T. Phillips, *N.Y. Criminal Justice Agency, Commercial Bail Bonds in New York City: Characteristics and Implications* 3 (Apr. 2011).

¹⁸ See John Eligon, *For Poor, Bail System Can Be An Obstacle To Freedom*, N. Y. TIMES, Jan.10, 2011, at A15, available at <https://www.nytimes.com/2011/01/10/nyregion/10bailbonds.html>.

¹⁹ C.P.L. § 530.80.

²⁰ *Id.*; Eligon, *supra* n. 18.

²¹ See Phillips, *supra* n. 17, at 34, 58-59.

²² *Id.* at 58-59 (describing arrests of various bondsmen who filed fraudulent paperwork in an apparent effort to gain higher fees from defendants); see also Eligon, *supra* note 18 (detailing administrative charges against George Zouvelos, head of Spartan Bail Bonds).

²³ Governor Andrew Cuomo, *2016 State of the State Book* 191 (2016), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2016_State_of_the_State_Book.pdf.

NYC is Already Acting to Rein in the Industry. Albany Must Do the Same.

In 2018 alone, both the New York City Council and the Comptroller's Office have taken public stands against this exploitative industry. In May, the City Council held hearings on two bills that would educate and protect consumers who contract with bail bond agents.²⁴ One of the bills requires bond agents to post clear and complete information wherever they do business, so that consumers know the limits on nonrefundable fees and where they can file complaints about unscrupulous bond agents. The other creates a complaint mechanism at the Department of Consumer Affairs and requires that the Department refer illegal fee collections to law enforcement. Meanwhile, Comptroller Stringer has called for the elimination of the industry altogether.²⁵ Moreover, grassroots advocates like the Urban Justice Project and VOCAL-NY have been fighting for the rights of consumers who were defrauded or over-charged by bond agents. These local efforts are necessary to curtail the industry's abuses while it still exists, but the only way to eliminate that abuse is to abolish bail bonds legislatively.

Legislation is currently pending in the Legislature to eliminate the commercial bail bond industry in New York.²⁶ We urge the Governor support this bill. Bail reform was one of Governor Cuomo's premiere issues during the budget session this year; however, no reforms were ultimately passed.²⁷ New York must stop detaining people because they lack the money for cash bail. Until those much-needed legislative changes are made, the accused and their loved ones will be forced to rely on the exploitative bail bond industry to buy their freedom. If Albany will not eliminate wealth-based detention, it must at a minimum eliminate the industry that profits from it.

Criminal Justice Operations Committee
Sarah J. Berger, Chair

Civil Rights Committee
Phil Desgranges, Chair

²⁴ See Int. 510-2018, N.Y. City Council (2018) (creating a complaint mechanism at the Department of Consumer Affairs for consumers of bail bond services to report violations of the maximum allowed bail bond premiums and requiring the Department to refer violations to the police department); Int. 724-2018, N.Y. City Council (2018) (providing consumers of bail bonds with information on their rights); see also Matthew Chayes, *Bail Bonds 'Bill of Rights' Considered to Protect NYC Consumers*, AMNY, May 2, 2018, 7:17 pm, <https://www.amny.com/news/bail-bonds-nyc-1.18364371>.

²⁵ See Comptroller, *supra* n. 5.

²⁶ See A.10394 (AM Blake) / S.8146 (Sen Benjamin), N.Y.S 2018.

²⁷ The City Bar provided comments on the proposal and offered recommendations for comprehensive bail reform; see <http://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/support-for-comprehensive-bail-reform-2019-nys-executive-budget>.