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**REPORT BY THE CRIMINAL JUSTICE OPERATIONS COMMITTEE,
CRIMINAL COURTS COMMITTEE AND
CORRECTIONS AND COMMUNITY REENTRY COMMITTEE**

**RECOMMENDATIONS CONCERNING THE BAIL BOND INDUSTRY
IN THE STATE OF NEW YORK**

The New York City Bar Association applauds the United States Department of Justice’s March 2016 condemnation of bail and bond practices that disproportionately harm the poor¹ and Governor Andrew Cuomo’s State of the State addresses which decried the corruption and predatory practices that plague New York’s bail bond system.² In 2015, former Chief Judge Jonathan Lippman lamented that, in New York, “far too many people are trapped in pretrial detention simply because they are poor,” and pledged measures to ensure that more people would be released while they await trial.³ Nowhere is the affront to justice more apparent than in the commercial bond industry. The for-profit surety system discriminates against and disproportionately harms poor defendants, creating the perception that different rules apply to rich and poor defendants in the criminal justice system.⁴ The City Bar joins the American Bar

¹ See Letter from Vanita Gupta, Principal Deputy Assistant Attorney Gen., Civil Rights Div., and Lisa Foster, Director, Office for Access to Justice, U.S. Dep’t of Justice 2, 7-8 (Mar. 14, 2016), <https://www.justice.gov/crt/file/832461/download>; see also Matt Apuzzo, *Justice Dept. Condemns Profit-Minded Court Policies Targeting the Poor*, N. Y. TIMES, Mar. 14, 2016, at A12, available at <https://www.nytimes.com/2016/03/15/us/politics/justice-dept-condemns-profit-minded-court-policies-targeting-the-poor.html> (all websites last visited April 24, 2017).

² Andrew M. Cuomo, *New York State: Built to Lead: 2016 State of the State*, 190-91 (2016), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2016_State_of_the_State_Book.pdf (“Currently, bail bondsmen [sic] are subject to little regulation, and as a result some bad actors engage in predatory pricing and contracting practices. These issues have a disproportionate negative impact on low-income people”). See also, *New York State: Excelsior Ever Upward: 2017 State of the State*, 179-81 (2017), <https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/2017StateoftheStateBook.pdf> (“Many sit in jail for weeks, months, or even years, with their lives disrupted and their work and family situations tossed aside—primarily because they lack the financial means to post bail. That is not justice”).

³ See, James C. McKinley Jr., *State’s Chief Judge, Citing ‘Injustice,’ Lays Out Plans to Alter Bail System*, N. Y. TIMES, Oct. 2, 2015, at A23, available at <https://www.nytimes.com/2015/10/02/nyregion/jonathan-lippman-bail-incarceration-new-york-state-chief-judge.html>.

⁴ AMERICAN BAR ASSOCIATION [hereinafter ABA], ABA STANDARDS FOR CRIMINAL JUSTICE: PRETRIAL RELEASE 45 (3rd ed. 2007), available at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pretrial_release.authcheckdam.pdf (“the compensated surety system discriminates against poor and middle-class defendants, who often cannot afford the non-refundable fees required”).

Association,⁵ the National Association of Pretrial Services Agencies,⁶ and the New York City Criminal Justice Agency⁷ in recommending the elimination of for-profit commercial bail bonds in New York.

For-profit bail bonds are legal in only two countries throughout the entire world: the United States and the Philippines.⁸ Even within the United States, the for-profit bail bond industry has been banned in Illinois, Kentucky, Oregon, Wisconsin, and the District of Columbia.⁹ In New York, however, for-profit bail bonds are on the rise, and their continued use creates discriminatory standards of release in New York's notoriously problematic bail system.¹⁰

The American Bar Association (ABA) sets forth three relevant reasons why compensated sureties should be abolished.¹¹ 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. In fact, the ABA's recommendation to abolish compensated sureties is so adamant 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."¹²

⁵ *Id.*

⁶ NAT'L ASS'N OF PRETRIAL SERVS. AGENCIES [hereinafter NAPSA], STANDARDS ON PRETRIAL RELEASE 16, 18 n. 16 (3d ed. 2004), <http://www.pretrial.org/download/performance-measures/napsa%20standards%202004.pdf> (citing the ABA pretrial release standards and making practice recommendations "pending abolition of compensated sureties"; listing sources that "document[] the abuses of the compensated surety system").

⁷ Mary T. Phillips, *N.Y. City Criminal Justice Agency, Commercial Bail Bonds in New York City: Characteristics and Implications* 61 (Apr. 2011), [http://www.pretrial.org/download/infostop/Commercial%20Bail%20Bonds%20in%20New%20York%20City-%20Characteristics%20and%20Implications%20\(New%20York%20Criminal%20Justice%20Agency%20Inc.-%20April%202011\).pdf](http://www.pretrial.org/download/infostop/Commercial%20Bail%20Bonds%20in%20New%20York%20City-%20Characteristics%20and%20Implications%20(New%20York%20Criminal%20Justice%20Agency%20Inc.-%20April%202011).pdf) ("Any reduction in the use of commercial bail bonds in New York City would be in the interest of defendants and the criminal justice system . . . and would bring the city into closer compliance with the standards of the American Bar Association and the National Association of Pretrial Services Agencies").

⁸ 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>.

⁹ The Marshall Project, *When Freedom Isn't Free* (Feb. 23, 2015, 7:15 AM), <https://www.themarshallproject.org/2015/02/23/buying-time#.QBLGtAkcl>; 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.

¹⁰ Phillips, *supra* note 7 at 3.

¹¹ ABA, *supra* note 4. The ABA states a fourth reason to eliminate the bail bond industry: because it takes away the factor of public safety when determining whether an accused should be released. While danger to the community is not a statutorily-enumerated factor that the bail hearing court currently considers in New York, see C.P.L. § 510.30(2), a bill was introduced in 2013 to amend the Criminal Procedure Law to include this factor. N.Y. Assembly 06799, 2013-14 Reg. Sess. (Apr. 18, 2013).

¹² ABA, *supra* note 4 at 44.

In a 2011 report, the New York City Criminal Justice Agency (CJA) also recommended omitting insurance company bail bonds from the authorized forms of bail and thereby eliminating bail bond companies from New York State.¹³ The report noted that, without the for-profit bond industry, pretrial release would be based on “empirically assessed risk rather than commercial profit.”¹⁴ While eliminating for-profit bonds does reduce the number of bail forms available to defendants, the statute already provides for eight other forms of bail—forms that both CJA and former Chief Judge Lippman have already called on courts to use more frequently.¹⁵ The City Bar supports that recommendation, particularly in the context of eliminating the for-profit bond industry. These eight remaining bail forms include surety and appearance bonds, wherein a surety or the defendant him or herself posts the collateral or bond amount directly to the court.¹⁶

Indeed, although it is routine for judges to set a cash amount and an insurance bond amount, the current statute requires only that the court set any two of the nine statutory forms of bail. Thus, under the current statute, a judge could set a cash amount and, for example, a partially secured bond amount—a practice that would effectively obviate the need for the for-profit bond industry without a change in the law.¹⁷ The City Bar encourages judges who are eager to decrease the exploitation of indigent defendants and their families by the for-profit bond industry to utilize the existing alternative forms in this manner. CJA also recommends that courts that insist on setting an insurance company amount and a cash amount do so in amounts that make the cash bail equally or more affordable than the cost of a bond to incentivize the posting of cash bail.¹⁸ When judges set a bond amount with a cash alternative that is much higher than the collateral that for-profit bondsmen require to post the bond, defendants and their families have an incentive to seek out a bond rather than post the cash bail.¹⁹ Eliminating this disparity in court-ordered bail and bond amounts would eliminate reliance on the bail bond industry.

The successful use of charitable bail bonds, credit card bail, and supervised release programs have already illustrated the efficacy of alternative, non-commercial bail practices. Charitable bail funds pay cash bail for certain accused persons, pending a screening process based on charges, warrant history, and bail amount. Non-profit bail funds such as the Brooklyn

¹³ Phillips, *supra* note 7 at 61.

¹⁴ *Id.* at 61.

¹⁵ See McKinley Jr., *supra* note 3; see also C.P.L. § 520.10 (listing nine authorized forms of bail).

¹⁶ C.P.L. § 520.10(b)-(h).

¹⁷ 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*, http://www.masslive.com/news/index.ssf/2014/03/bail_bondsmen_are_a_thing_of_t.html.

¹⁸ Phillips, *supra* note 7, at 61. See also *Commonwealth v. Ray*, 435 Mass. 249, *supra* note 17; Contrada, *supra* note 17.

¹⁹ Phillips, *supra* note 7, at 52-56 (comparing costs of cash and bail bonds and noting that “given an effective cash discount, defendants would make the cost-effective choice and post cash rather than buying a commercial bond”).

Community Bail Fund and the Bronx Freedom Fund post bail for poor defendants charged with misdemeanors whose bail is \$2,000 or less.²⁰ The funds' beneficiaries return to court at rates as high as 96 percent.²¹ Likewise, the CJA has shown that defendants who pay bail with a credit card return to court at the same rates as defendants who are released through other means.²² Supervised release programs allow an accused person to stay at home and continue working during the pendency of their case without the use of bail. After the success of supervised release pilot programs, New York City has committed \$17.8 million to implement supervised release programs throughout the city.²³

For-profit bail bond companies are also vulnerable to corruption and abuse due to the lack of regulation.²⁴ It is not uncommon for bail bondsmen to require several onerous conditions to their contract with the accused that do not bear obvious relation to securing court attendance, and then fine defendants or revoke the bail if there is the slightest violation.²⁵ For instance, it is entirely legal for a bail bondsman to revoke a defendant's bond, keep the entire collateral posted for the bond, and deliver the defendant to custody even though the accused has made all of the required court dates.²⁶ 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.²⁷ The Brooklyn Community Bail Fund has conducted extensive outreach to individuals who have used commercial bondsmen. Respondents consistently reported gross misconduct, including overcharging of fees above statutorily allowed amounts and the illegal retention of collateral after the disposition of a case.²⁸ In addition, CJA 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

²⁰ The Bronx Freedom Fund, <http://www.thebronxfreedomfund.org/our-work/>; Brooklyn Community Bail Fund, <https://brooklynbailfund.org/how-it-works/>.

²¹ The Bronx Freedom Fund, <http://www.thebronxfreedomfund.org/our-work/>.

²² See Mary T. Phillips, *N.Y. City Criminal Justice Agency, New York's Credit Card Bail Experiment* 41 (Sept. 2014), available at <https://issuu.com/csdesignworks/docs/creditcardbail14/1?e=2550004/9230440> (noting that providing defendants with the option to pay bail with a credit card has "no significant effect on FTA [failure to appear rates]" and results in "more release [and] less detention time").

²³ See Press Release, Office of the Mayor, Mayor de Blasio Announces \$17.8 Million to Reduce Unnecessary Jail Time for People Waiting for Trial (Jul. 8, 2015), <http://www1.nyc.gov/office-of-the-mayor/news/471-15/mayor-de-blasio-17-8-million-reduce-unnecessary-jail-time-people-waiting-trial>; see also Rick Rojas, *New York City to Relax Bail Requirements for Low-Level Offenders*, N. Y. TIMES, Jul.9, 2015, at A21, available at <https://www.nytimes.com/2015/07/09/nyregion/new-york-city-introduces-bail-reform-plan-for-low-level-offenders.html>.

²⁴ See Phillips, *supra* n. 7, at 58-59.

²⁵ See John Eligon, *For Poor, Bail System Can Be An Obstacle To Freedom*, N. Y. TIMES, Jan.10, 2011, at A15, available at <http://www.nytimes.com/2011/01/10/nyregion/10bailbonds.html>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ Interview with Peter Goldberg, Executive Director, Brooklyn Community Bail Fund, in Brooklyn, NY (Jun. 19, 2016).

all.²⁹ 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.³⁰

Despite the clear and steadfast recommendations of criminal justice experts to end the for-profit bail bond industry, the industry enjoys a central role in New York’s bail system.³¹ The commercial bond industry is a powerful lobbying force,³² and bringing an end to it will take time and political will. However, statewide and national momentum is building to end for-profit bond practices that disproportionately harm poor people.³³ The City Bar joins Governor Cuomo in condemning for-profit policies that target the poor, and urges the legislative changes recommended by CJA and the ABA to eliminate commercial bonds in New York.³⁴

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²⁹ See Phillips, *supra* n. 7, 34, 58-59.

³⁰ Phillips, *supra* note 7, 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 25 (detailing administrative charges against George Zouvelos, head of Spartan Bail Bonds).

³¹ Phillips, *supra* note 7, at 3.

³² See generally *Facts and Positions: The Truth About Commercial Bail Bonding in America*, ADVOCACY BRIEF (Nat’l Ass’n of Pretrial Servs. Agencies, Washington, DC), Aug. 2009, <http://www.pretrial.org/download/pji-reports/Facts%20and%20Positions%201.pdf>.

³³ Senator Gianaris and Assembly Member O’Donnell sponsor a bill to eliminate cash bail entirely in New York. S.3579/A.5033, 2017-18 Leg. Sess. Doing so would also eliminate the reliance on for-profit bondsmen, a goal the City Bar shares.

³⁴ See ABA, *supra* note 4; Phillips, *supra* note 7; Cuomo, *supra* note 1; Gupta, *supra* note 2.