

SUGGESTED ROADMAP
BAIL BEST PRACTICES

TENNESSEE GENERAL SESSIONS JUDGES CONFERENCE

MARCH 1, 2022

The Education Committee of the Tennessee General Sessions Judges Conference requested that a more specific guideline be drafted for courts to reference using the Bail Best Practices Guide published on July 1, 2021.

Note: Public Chapter 409, effective July 1, 2021, made certain changes in the bail statutes, which changes are reflected herein.

The following suggestions and concepts may be used by our state's Sessions courts to fashion appropriate procedures in addressing the initial setting of bail.

1. The setting of bail in the first instance ex parte (by judges or magistrates) is acceptable, so long as the defendant is granted an individualized hearing.
2. All defendants are eligible for bail except: defendants indicted; defendants facing VOP; defendants facing bond revocation; defendants facing capital offense.
3. The use of a bail schedule is not permitted.
4. To the extent practicable, the judge or magistrate must consult the bail factors when setting bail in the first instance.
5. The twin purposes of bail are: assessing flight risk and safety of the public.
6. The defendant must be given an individualized hearing promptly.
7. Best practice would be for the hearing to be held within 48 hours of detention; this deadline is aspirational (as of now) but, in any event, should be held as promptly as possible.
8. Application by the defendant for a hearing is not required.
9. Attributes of the hearing include:
 - a. right to counsel (to the extent possible);
 - b. right to present proof;
 - c. right to cross examine;
 - d. right to notice;
 - e. preponderance of the evidence standard of proof (as of now);
 - f. presentation of case by DA (to the extent possible);
 - g. findings (better if written, at least oral).
10. The statute requires a tiered analysis, with ROR without conditions being the first consideration, then ROR with conditions, then monetary bail.
11. There are 4 types of monetary bail: (1) cash; (2) real estate security; (3) agreement of 2 sufficient sureties; (4) professional bondsman.

12. The defendant cannot be limited to any of the 4 types of monetary bail.

13. In assessing pre-trial release on ROR (first step), a validated risk assessment (if available), the defendant's financial resources, and the factors in 40-11-115 must be considered as to flight risk and safety of the public.

Factors:

- a. Defendant's length of residence in the community;
- b. Defendant's employment status;
- c. The defendant's prior criminal record, including prior releases on recognizance or bail;
- d. Whether, at the time of being charged with the offense, the defendant was on release pending trial, sentencing, or appeal in connection with another offense;
- e. Nature of the offense and apparent probability of conviction and likely sentence, insofar as these factors relate to risk of nonappearance;
- f. Any substance use or mental health issues that would be better addressed in a community-based treatment program; and
- h. Any other factor indicating the defendant's ties to the community or bearing on risk of willful failure to appear.

14. If ROR without conditions does not satisfactorily address flight risk and/or safety of the public, the conditions in 40-11-116 may be considered.

Conditions:

- a. Release into the care of a qualified person or organization responsible for supervising the defendant and assisting the defendant to appear in court;
- b. Reasonable restrictions on the activities, movements, associations and residences of the defendant;
- c. Any other reasonable restriction designed to assure the defendant's appearance, including monetary bail.

15. An acceptable condition under 40-11-116 is the setting of monetary bail.

16. If ROR with conditions does not satisfactorily address flight risk or safety of the public, monetary bail may be set using the factors in 40-11-118.

Factors:

- a. Defendant's length of residence in the community;
- b. Defendant's employment status and history and financial condition;
- c. Defendant's family ties and relationships;
- d. Defendant's reputation, character and mental condition;
- e. Defendant's prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings;
- f. The nature of the offense and the apparent probability of conviction and the likely sentence;
- g. The defendant's prior criminal record and the likelihood that because of that record the defendant will pose a risk of danger to the community;
- h. The identity of responsible members of the community who will vouch for the defendant's reliability; however, no member may vouch for more than 2 defendants while charges are pending or a forfeiture is outstanding;

i. Any other factors bearing on flight risk.

17. Ability to pay (defendant's "financial condition") must be considered as a factor.

18. In considering "nature of the offense," the magistrate should NOT question the defendant directly about the facts but should rely on the affidavit.

19. Conditions, including monetary bail, must be the least onerous to satisfy flight risk and safety of the public.

20. If the defendant has an FTA, the statute requires monetary bail.

21. If the defendant is arrested while out on bail, the new bail must be at least twice the amount which would have been customary otherwise.

22. Citations in lieu of arrest for misdemeanors committed in the officer's presence (40-7-118) and for traffic offenses (55-10-207) must be considered.

23. Certain driving offenses, including DUI and vehicular assault and homicide, require special conditions under 40-11-118(d) and 40-11-148(b).

24. Certain assaultive offenses, such as domestic violence, violation of OP, and elderly abuse, require special conditions under 40-11-150.

25. Certain Driving on Suspended/Revoked require an OR bond under 40-11-115.

Other Observations:

1. A good bondsman can assist the court in mitigating flight risk; even the best bondsman is ill-equipped to mitigate the risk of danger to the public.

2. Accurate criminal histories are key to making an informed bail decision. The more data, the better.

3. For certain low-level, non-violent offenses, when flight risk is present but slight, a cash bond option may be considered.

4. Counsel may be appointed for bond hearings and then relieved, thus encouraging (or not discouraging) attorneys to participate.

5. Certain alternatives to incarceration, such as GPS monitors and alcohol monitoring devices, can be useful but quite expensive.

6. A good pre-trial reporting/monitoring program can be helpful, especially in mitigating repeat drug/alcohol offenses. Resources vary.

7. Periodic meetings with judicial commissioners to refresh bond principles may be a good idea.

