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COLUMNS

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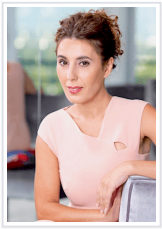
Defense counsel's elevated role under no cash bail law

For defense attorneys, a new GPS system might be in order. We need to rethink and refresh the way we've historically represented our clients as it has become outdated in this brave new legal world.



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Governor Jerry Brown changed the legal landscape for California defense attorneys at the end of September when he signed a series of criminal justice bills impacting everything from juvenile prosecutions to felony murder prosecutions, photographic lineups, police privacy rules and mental health considerations. For defense attorneys, a new GPS system might be in order. We need to rethink and refresh the way we've historically represented our clients as it has become outdated in this brave new legal world.

Senate Bill 10 is the most significant of these changes. Commencing Oct. 1, 2019, California will be the first state in the country to completely eliminate the cash bail system. Defense attorneys, whose job has historically been to appear in court following a client's arrest and argue for a reduction in bail or release on own recognizance, now will need to be on board and on their toes immediately. The stakes for the defendants are higher, and the system is more complicated. The role of defense lawyers will become truly critical in the early stages of representation.

The legislative intent of the bill is to eliminate the two-tier justice system in which those with money could pay their way out of detention while poorer defendants remained incarcerated. It adds new Chapter 1.5, Pretrial Custody Status, to Title 10 of Part 2 of the Penal Code. This new legislation creates a system of pretrial assessments that classify suspects as "low risk,"

"medium risk" and "high risk" using algorithms that have yet to be developed. It defines "pretrial risk assessment" at Section 1320.7, subsection (f) as "an assessment conducted by Pretrial Assessment Services" using a "validated risk assessment tool" that determines "the risk of a person's failure to appear in court" or "the risk to public safety" if the person is released before the adjudication of the criminal case.

The new legislation further defines "Pretrial Assessment Services" in subsection (g) of Section 1320.7 as "an entity, division, or program" responsible for assessing and determining risk levels, reporting results to the court, and making recommendations for conditions of release. Pretrial Assessment Services will do this assessment through a "risk score" that "may include a numerical value or terms such as "high," "medium" or "low" risk" as defined in subsection (i) of Section 1320.7.

Government Code Section 27771, subsection (a)(9) delegates the duty of preparing these reports and of making recommendations to the probation department, thus giving probation officers tremendous discretion and power in the risk assessment process. The pretrial risk assessment has to be conducted within 24, sometimes 36, hours of booking. Individuals will not be released from custody prior to the completion of the risk assessment. Once the risk assessment is completed, only "low" and "medium" risk individuals will be released from custody prior to seeing a judge. Note that individuals arrested for misdemeanors are not subject to the risk assessment requirement and, subject to a few exceptions, will be booked and released from custody.

Arresting officers and prosecutors have always had discretion to determine how a crime will be classified at booking or filing, respectively, but bail has allowed even those charged with serious crimes to avoid detention pending trial. With the new legislation, officers and prosecutors will continue to have wide discretion in crime classification through their booking or charging decisions, but with more serious ramifications for a detainee or arrestee.

Risk assessments will completely replace bail amounts as measures of what is necessary to ensure public safety and the arrestee's or detainee's appearance in court but, unfortunately, there is no clarity as to how risk scores will be calculated. We can be certain that a numerical point system will not be capable of reflecting all factors relevant to determining risk in any particular case. More important, there are too many variables in the risk assessment process that law enforcement, prosecutors and probation officers can easily manipulate.

This is why defense attorneys must be involved from the outset. We must have the opportunity to provide information to Pretrial Assessment Services for consideration in the risk assessment process. Without this intervention, defendants charged with some crimes, including certain low level crimes, would be jailed for a couple of days until they appear before a judge. If the prosecution files a motion seeking a pretrial detention order, jail time can increase by at least an additional three days. Pretrial Assessment Services, without court intervention, is not authorized to release an individual it believes was convicted of a serious

or violent felony within the past five years. If they have inaccurate information about the detainee's or arrestee's priors, only a defense attorney involved as soon as the individual is detained or arrested will have an opportunity to refute the information and ensure the release of the client prior to seeing a judge. A client booked for a third DUI or a first time DUI with .20 or more blood alcohol content -- misdemeanors -- could be relegated to a jail cell not only for two days but possibly longer, since these crimes make the client ineligible for pretrial release by Pretrial Assessment Services.

Without bail, defense counsel must proactively attack the pretrial assessment in court and introduce evidence or supplemental factors that justify a lower risk profile and/or release. Defense counsel also must be ready to immediately provide the court with alternatives to detention that will protect public safety and ensure appearance at trial. Judges focused on reducing jailhouse populations may embrace programs such as alcohol or drug counseling, anger management classes, psychiatric counseling, and electronic monitoring.

The higher likelihood of detention could increase pressure on defendants to agree to onerous plea bargains much earlier in the process to avoid jail. A defendant facing detention is in no position to fully appreciate the long-term implications of a plea agreement. Counsel's advocacy at that stage is particularly critical.

Although the end of cash bail was intended to level the playing field, the risk assessment system does not adequately accomplish that purpose. In some instances, it will in fact continue to favor those with means. Indigent defendants unable to hire counsel cannot fight for lower risk scores before detention. They will end up in jail awaiting the court appearance at which their public defender will be assigned.

Given the high stakes, it will soon become a critical part of our job to educate prospective clients and their families of the need to retain counsel as soon as they're arrested.

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