

BAIL BASICS

Future First Criminal
Law

I. WHAT IS BAIL?

“Bail” is the legal term for the conditions upon which a person charged with a crime (a “defendant”) will be released from custody, pending trial or other resolution of the charges. In general, two types of bail are available: (1) release on bond; and (2) release on conditions.

Release on Bond

A bond is a form of debt security. The defendant’s “debt” is his promise to return to court to face the charges against him; if he fails to do so, then the amount of the bond is forfeited.

There are two types of bonds – unsecured and secured.

With an **unsecured bond**, the defendant is released on his own recognizance or on a bond with a face amount, but requiring no cash deposit and no collateral except for the defendant’s signature.

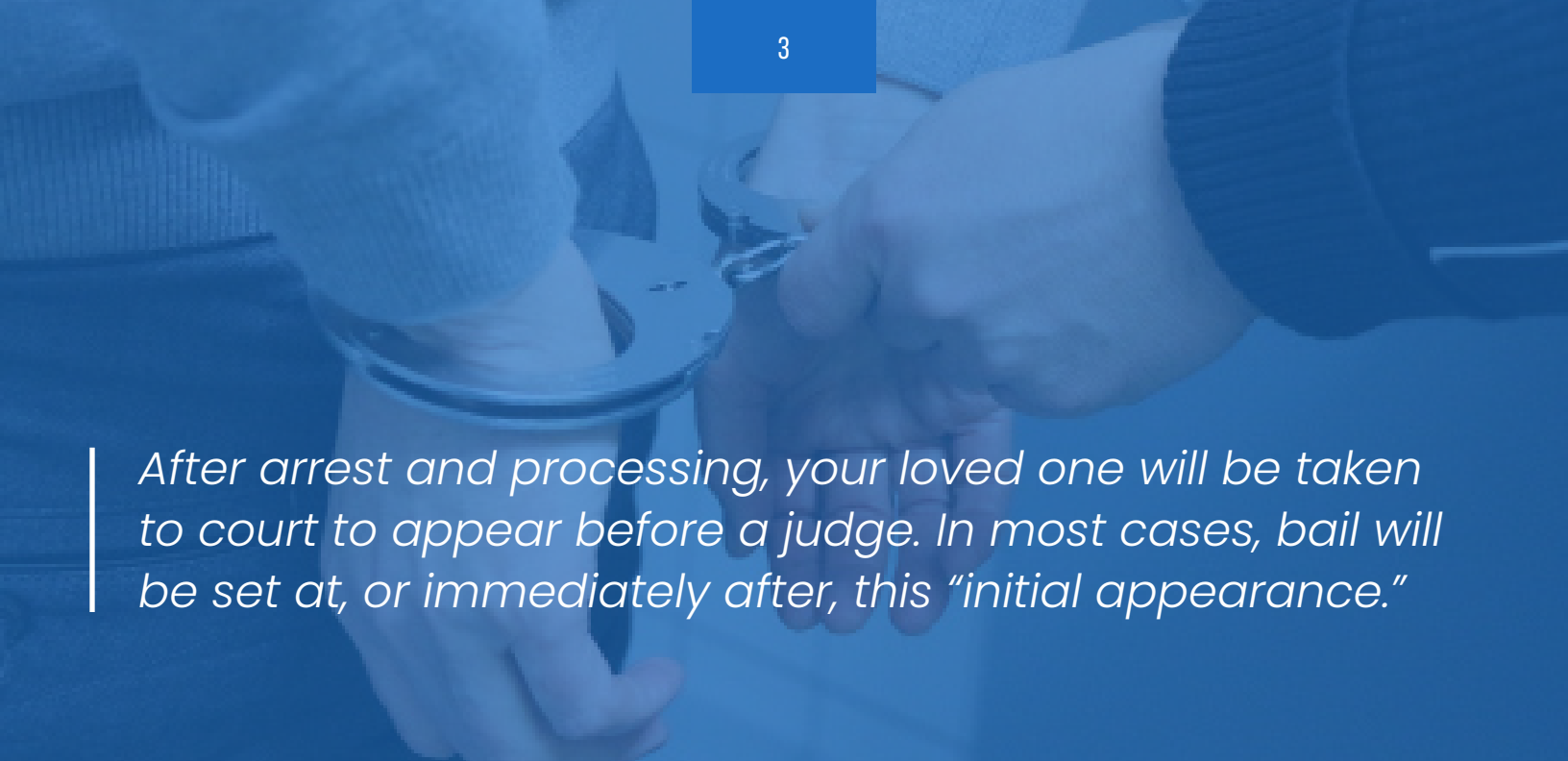
A **secured bond** may be supported by cash, real property, or other collateral:

- A **cash bond** requires the deposit of cash as collateral to secure the defendant's release. The judge will announce whether the bail is "straight" (requiring deposit of the whole amount) or whether a deposit of some percentage (typically ten-percent) will suffice.
- A **real property bond** requires someone (e.g., the defendant or a family member or friend) to put up real estate as collateral for the defendant's release. Typically, that real estate is the family home.
- A **surety bond** requires the signature of a third party (e.g., a friend or relative of the defendant, or a bonding company); the judge also may require the third party to post collateral to secure the defendant's release.

Release on Conditions

If the court is reluctant to release a defendant on a bond, or if a bond is not practical (due to a lack of funds or collateral), then the defendant may be released on conditions. Common conditions for release include:

- **Travel restrictions**, e.g., prohibiting the defendant from leaving the state or the judicial district.
- **A curfew.**
- A requirement that the defendant immediately **notify the court of any change in his address or phone number.**
- **A prohibition against the use of drugs and/or alcohol, along with monitoring or testing.** For example, the defendant may be required to wear a SCRAM (Secure Continuous Remote Alcohol Monitor) device, which straps onto the ankle and takes periodic readings through the skin of blood-alcohol levels. The defendant may be required to submit to blood, breath or urine tests, and to check in regularly with a monitoring agency, such as the pre-trial release unit of the local probation department.
- **Random searches of the defendant's person and home.** Drug-testing will reveal if the defendant is using drugs, but will not reveal any other criminal activity. A home search, on the other hand, may uncover contraband, such as guns or pornography, or may expose evidence (e.g., drug paraphernalia) that suggests other criminal activity. A home search also will be disruptive to those living in the home and will be noticed (and discussed) by the neighbors. These are onerous and risky conditions, but if your loved one has an obvious drug problem that makes the judge reluctant to grant bail, these conditions may be necessary to secure his release.
- A requirement that the defendant **turn over firearms** and refrain from possessing any dangerous weapons.



After arrest and processing, your loved one will be taken to court to appear before a judge. In most cases, bail will be set at, or immediately after, this “initial appearance.”

- **Psychiatric evaluation and/or treatment.** As a condition of release, the defendant may be required to undergo a psychiatric evaluation to ensure that he is not a danger to the community. This condition usually is limited to defendants charged with certain types of violent offenses (e.g., homicide, arson, kidnapping, crimes against children, sex offenses). Release conditions also may include psychiatric treatment, including drug and alcohol dependency treatment.
- **A prohibition against contacting witnesses or the victim.**
- **Electronic monitoring** (e.g., if house arrest or a travel restriction is imposed).
- **A third-party custodian.** This is, essentially, a court-ordered babysitter. The defendant is ordered to live with a third-party custodian, who is responsible for monitoring the defendant's compliance with any bail conditions and informing the court of any violations.

II. WHEN IS BAIL SET?

After arrest and processing, your loved one will be taken to court to appear before a judge. In most cases, bail will be set at, or immediately after, this “initial appearance.” This generally occurs within 48 hours of arrest. If, however, your loved one was arrested for a minor offense, the arresting officer may have discretion to set a minimal bail and release your loved one from the stationhouse, without a trip to the courthouse. This is sometimes called “stationhouse bail.”

III. WHY IS BAIL IMPORTANT?

Aside from the obvious reason of getting your loved one out of custody, release on bail is important because it makes it easier for your loved one's defense attorney to do his or her job and, therefore, improves the odds of your loved one obtaining a favorable outcome in the case. When your loved one is free on bail, he can assist in his defense; he can help his lawyer locate witnesses; and meet with his lawyer, in private, to review the evidence against him and develop a defense strategy. In contrast, when your loved one is incarcerated, there is little privacy, even in interview rooms; reviewing evidence, especially audio- and/or videotapes, is awkward at best; and, with limited phone access, there are few opportunities to communicate with counsel.

IV. HOW IS BAIL DETERMINED?

Bail is determined at a hearing in open court (the defendant's "initial appearance," referenced above). At the hearing, the judge will set bail with these considerations in mind:

- Can the defendant be trusted to return to court, even if it is almost certain that he will be convicted and incarcerated? In other words, is your loved one a flight risk?
- Can the defendant be trusted to refrain from further criminal activity? In other words, if your loved one is released, will the safety of the community-at-large be at risk?
- Can the defendant be trusted to leave possible witnesses alone?
- Can he be trusted to abide by any conditions of release?

If your loved one is represented by a criminal defense attorney, his attorney will try to answer these questions by presenting facts which demonstrate that your loved one is reliable and trustworthy, and has strong family ties and ties to the community. On the issue of whether your loved one is a flight risk, facts that will weigh in his favor include:

He has resided in the community where the case is being prosecuted for a long period of time;

- He has a home and family living in the community;
- He has a steady job in the local community;
- Members of the community are willing to vouch for him; and
- He has been released on bail in a prior case(s) and has not missed a court date.

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On the issue of community safety, these factors will shape the judge's decision:

- The nature of the alleged crime;
- Whether your loved one has a record of violent criminal convictions;
- Whether your loved one has made specific threats to members of the community; and
- Whether he has access to deadly weapons.

V. DO'S AND DON'TS

Now that you know the basic "what, when, why and how" of bail, here are a few practical suggestions to keep in mind as you and/or your loved one navigate the bail process:

1. DO make sure you understand the consequences of posting a bond.

If you post a cash bond and your loved one fails to return to court, you will forfeit the entire amount of the bond – even if you only paid a percentage of the bond to secure his release. Posting a real property bond exposes you and your family to the real risk that you could lose your home.

2. DO make sure your loved one understands the consequences of failing to comply with the conditions of his release.

Regardless of how your loved one is released, serious consequences will ensue if he fails to return

to court. First, a bench warrant will be issued for his arrest. When he is ultimately brought to court (and he will be), the judge is unlikely to release him again prior to trial. In addition, failure to appear is a separate crime with its own penalties, which can include imprisonment. Even if the failure to appear is not prosecuted, the judge is sure to consider that behavior when determining your loved one's sentence for the underlying offense.

Likewise, if your loved one fails to comply with any other conditions imposed on his release (e.g., if he fails to report periodically, as directed; fails to attend court-ordered counseling; fails a drug test; or flees the jurisdiction), then his bail may be revoked. He can be returned to custody to await trial. In addition, some bail violations, such as contacting the alleged victim or witnesses, may be criminal offenses in and of themselves, subject to a separate criminal prosecution.

3. *DON'T expect to get your money back.*

If you post a cash bond, think of it as a gift to your friend or loved one. Do not plan on getting that money back. Bond may be forfeited for failure to appear for future court dates; it may be assigned your loved one's attorney; or it may be used to pay your loved one's fines and court costs. Only if there is any bond left over after the resolution of the case will that sum be refunded to you, less an administrative fee, usually around 10%.

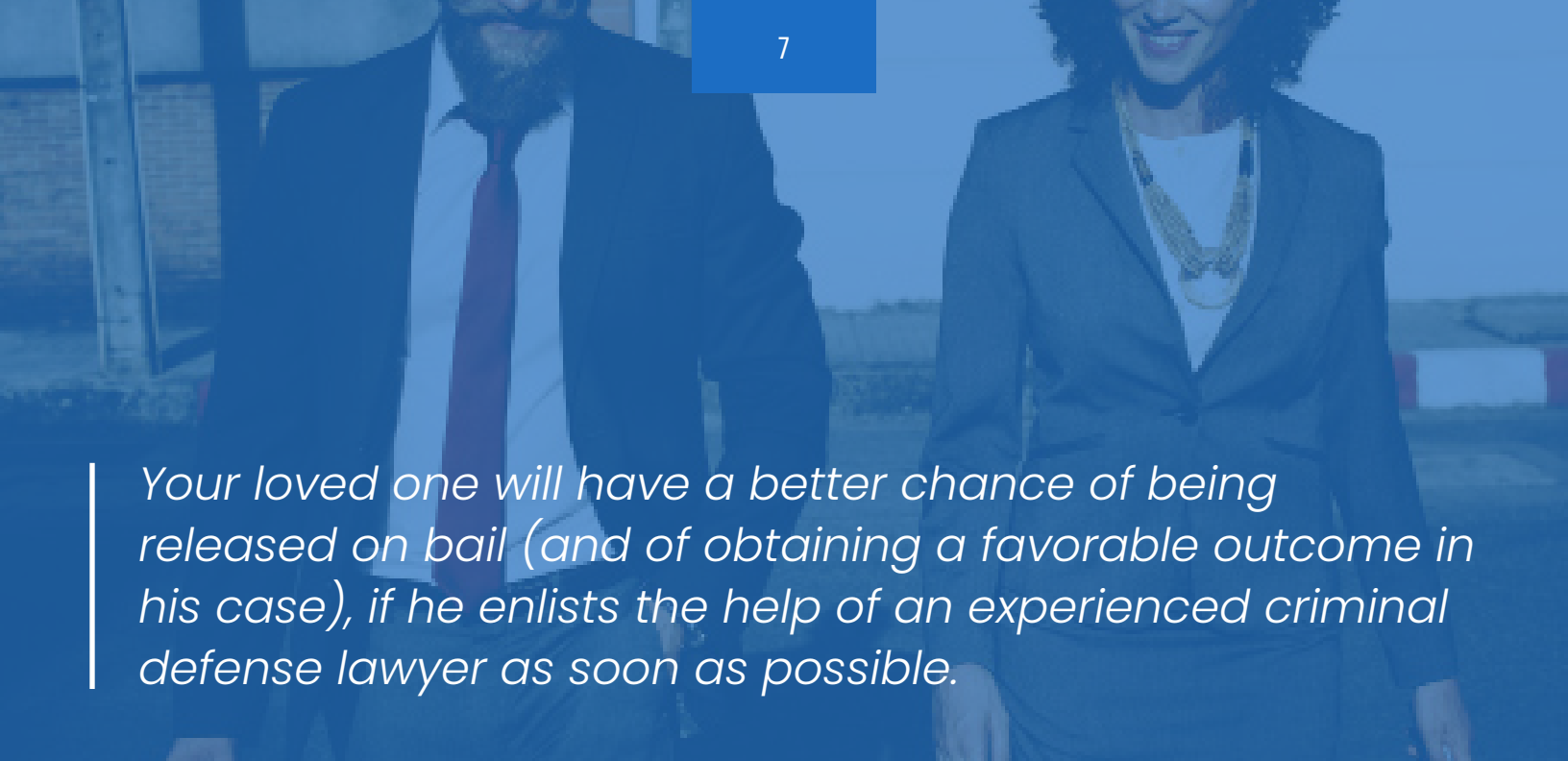
4. *DON'T leave your loved one stranded upon his release.*

Many police stations and county jails are located in less-than-the-safest neighborhoods, and your loved one may be released in the middle of the night. Don't leave him stranded. Plan to be there or arrange a ride for your loved one upon his release on bond.

5. *DO understand the risks of contacting a bail bond agency.*

When you hear the desperation in your loved one's voice when he calls from jail, you may be tempted to approach a licensed bonding company about posting a cash bail. There are pros and cons to this arrangement. On the plus side, a licensed bonding company will know the local court system and, once bail is posted, likely will be able to obtain your loved one's release rather quickly.

On the negative side, working with a bail bond agency can be costly, both financially and personally. When a bonding agency deposits money with the court to satisfy a cash bail, it will charge you a fee for this service (which can be substantial), and that fee is not refundable. In addition, using a bonding agency exposes your loved one to the very real risk that a bounty hunter may come looking for him. The law authorizes a bounty hunter to arrest a defendant who skips bail and return him to the jurisdiction without any court hearing or protection—conduct that otherwise



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would be a criminal kidnapping and detention. Bounty hunters lack the professional training and accountability of the police, and there is a very real possibility that your loved one (or you) could be harmed in dealing with these individuals.

6. DO encourage your loved one to enlist the help of an experienced criminal defense attorney.

Your loved one will have a better chance of being released on bail (and of obtaining a favorable outcome in his case), if he enlists the help of an experienced criminal defense lawyer as soon as possible.

Because the bail hearing will take place shortly after your loved one's arrest, the prosecutor and the judge won't know much about him other than the charges against him; his criminal history; whether he previously has been released on bail and then failed to appear; his parole/probation status; and whether other charges are pending. This barebones information does not do much in the way of answering the key questions on the judge's mind about your loved one's trustworthiness and the safety of the community. An experienced criminal defense lawyer can help your loved one make his best case for bail by:

- Interviewing your loved one and gathering relevant information regarding where he lives, where he works, his family situation, and his ties to the community.
- Presenting this information to the judge at the hearing, so that the judge gets a sense of your loved one as a real person, not just another defendant or a series of statistics in the court and

police records.

- Putting together a creative bail proposal with a set of conditions that (a) your loved one can meet and (b) will satisfy the judge.

Finally, and not insignificantly, a criminal defense lawyer can provide reassurance. When your loved one makes his initial appearance in court, he is likely to be tired and anxious in the unfamiliar environment of the courtroom. Having an experienced criminal defense lawyer on his side to advocate for his interests and speak on his behalf, will be comforting and will let your loved one know he is not alone.