

Young Lawyers



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A DEFENDANT'S RIGHT TO BAIL

On September 17, 1787, the delegates to the Constitutional Convention met to sign the U.S. Constitution.¹ As of the signing of the Constitution, only 27 amendments have been proposed by the U.S. Congress, ratified by the requisite number of states and are now part of the Constitution.

The first 10 amendments make up the Bill of Rights. While each of those amendments is significant, this article is limited to discussing just one of those amendments: in particular, the Eighth Amendment as it applies to a defendant's right to bail.

The Eighth Amendment protects criminal defendants by providing that:

“[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Kaczmarek v. State*, 120 Nev. 314, 339, 91 P.3d 16, 33–34 (2004).

Nevada Revised Statutes (NRS), sections 178.4851 and 178.4853 give the court the authority to release an accused person pending trial or sentencing, in certain circumstances. Reasonable bail is a constitutional right for non-capital offenses. U.S. Constitution, Eighth Amendment, Nevada Constitution, Article 1, Section 7. In addition, NRS 178.4853 requires the court to consider a number of factors in determining whether a pretrial release without bail may be warranted. Those factors include:

1. The length of residence in the community;
2. The status and history of employment;
3. Relationships with the person's spouse and children, parents or

other family members, and with close friends;

4. Reputation, character and mental condition;
5. Prior criminal record, including, without limitation, any record of appearing or failing to appear after release on bail or without bail;
6. The identity of responsible members of the community who would vouch for the reliability of the person;
7. The nature of the offense with which the person is charged, the apparent probability of conviction and the likely sentence, insofar as these factors relate to the risk of the person not appearing;
8. The nature and seriousness of the danger to the alleged victim, or any other person or the community, that would be posed by the person's release;
9. The likelihood of more criminal activity by the person after release; and
10. Any other factors concerning the person's ties to the community or bearing on the risk that the person may willfully fail to appear.

As a criminal defense attorney, the number one question I am asked is, “When can I get out of custody?” And the follow up question is always, “When can I get a bail hearing?”

When deciding to go in for a bail hearing, it is incumbent upon the defense attorney to go through each of the factors set forth in NRS 178.4853 with his or her client to gather as much information as possible. In addition, prior to going into court, a client must be advised that, although he or she will be arguing for a bail reduction, the District Attorney can always request a bail increase or revoke a pending

offer. That said, after fully canvassing your client, if the client still wishes to move forward with the bail hearing, it is critical that you read the file, review your client's criminal history and understand the facts of the case. Ultimately, the decision to either reduce or increase bail lies within the sound discretion of the court, whose main concern is to protect the health, safety and welfare of the community, and to ensure that the person will appear at all times and places ordered by the court. *See* NRS178.484(11).

Recently, there has been a step toward implementing a new program called the Nevada Pretrial Risk Assessment (NPRAs), which has proved successful in other states. This risk assessment is completed by pretrial services staff and is designed to inform the court of the relative risk of re-offense and/or failure to appear (FTA) during the pretrial phase of the case. The defendant is given a score based upon 10 questions and is then rated as a low, moderate or high risk to reoffend or FTA. This system has been implemented as a pilot program in Nevada and is being utilized in courts across the state. In practice, courts appear to be utilizing both the NPRAs score and the other bail factors when determining bail and pretrial release. Therefore, it is best practice to consider both the NPRAs and the bail factors set forth in NRS 178.4853 when arguing for a bail reduction.

In closing, while a defendant's right to bail remains a fundamental cornerstone of our judicial system, the methods used to calculate a defendant's bail are ever-evolving and are constantly being refined. **NL**

1. It is interesting to note that of the 55 framers of the Constitution, 32 were lawyers.