NYAPSA | New York Association of Pretrial Service Agencies

Pretrial Services Standards 2020

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Pretrial Service Standards

The New York Association of Pretrial Service Agencies (NYAPSA) is an organization of professionals who are dedicated to the advancement of pretrial-release services and community-based, non-incarcerative alternatives for the disposition of criminal cases.

NYAPSA is advancing these standards to pretrial service agencies to provide guidance and promote uniformity in the management of individuals consistent with the law and sound professional practice.

FOREWORD

On April 1, 2019, New York State passed criminal justice reform legislation that eliminates money bail and pretrial detention for individuals charged with nearly all misdemeanor and non-violent felony crimes. In conjunction with bail reform, these Standards define how pretrial services should operate in providing judges with best practice alternatives to money bail or other forms of financial surety to ensure the defendant's appearance in court. They refer to the laws of New York State that direct the use of pretrial release in accordance with the defendant's likelihood of appearance in court and their capacity to satisfy court-imposed conditions of release. These Standards show that pretrial programs, based upon universal best practices, assure fair and equitable consideration of due process.

Toward that end, every jurisdiction should establish a pretrial services agency or program to help ensure equal, timely, and just administration of the laws governing pretrial release. The pretrial services agency should collect and provide information on the individual's likelihood of making future court appearances, which in turn will assist the court in making release decisions for those defendants arrested and held for arraignment and those arrested but given a desk appearance ticket by the police. They should also make release recommendations for held persons, provide

notification of upcoming court appearances, provide monitoring and supervisory services where such supervision is determined to be the least restrictive means to assure court appearance, and perform other functions consistent with the law and these Standards for individuals arrested and released during the pretrial period.

The need for pretrial standards that address important operational and criminal justice issues and identify best practices has been the focus of several workgroups of pretrial practitioners since the mid-1980's.[1] Their common goal has been to examine procedures, best practices, and related issues confronting pretrial service delivery, and create standards of important pretrial principles and procedures. NYAPSA is committed to work collaboratively with its pretrial stakeholders to regularly revise the standards.

The first draft of Pretrial Standards was distributed in July 1995, and there was considerable ongoing review by various state agencies as to content. In December 2002, NYAPSA and DPCA established a Pretrial Standards Committee to review the Standards and include certain concepts in other contemporary national and state association documents, with an eye toward addressing criminal history concerns and the need for best practices that reduce unnecessary dependence on money bail.

In November 2003, The *Pretrial Release Services Standards* were released embracing best practices to provide guidance and promote uniformity in the management of individuals consistent with law and sound professional practice.[2] A Committee would meet periodically to review and discuss the issues that may be of consequence since the last edition of the Standards.

In 2006, NYAPSA and DPCA reconvened the Pretrial Release Standards Committee to update the Standards and promote greater consistency and clarity in practice. Much of the work concentrated on the last revised Standards as an agenda and guide for internal discussion. It was found that New York State's Pretrial Standards follow much of what was promulgated by both the American Bar Association (ABA) (2002) and National Association of Pretrial Services Agencies (NAPSA) (2004) Standards. The 2007 *Pretrial Release Services Standards* supported the importance of having pretrial services in all jurisdictions, promoted statewide utilization, and continued to incorporate laws, rules, and sound local practices enacted or adopted in recent years relative to release decision-making and public safety. The 2007 Standards offered expanded commentary to provide greater guidance to pretrial programs in New York State, achieve more uniformity in the management of defendants and enhance sensitivity to victim and safety issues consistent with law

[1] This was done with the aid and assistance of Division of Criminal Justice Services' (DCJS) Division of Probation and Correctional Alternatives (DPCA) now Office of Probation and Correctional Alternatives (OPCA).

[2] The 2003 version was spearheaded by DCJS' OPCA. They had a vested interest in pretrial services since many probation departments had pretrial programs and DPCA oversaw state funding. Pretrial agencies under the new 2019 Criminal Justice Reform Legislation are now certified and reviewed by Office of Court Administration (510.45.)

and sound professional practice. The revision has been, and is now, useful to pretrial policy makers in fashioning programs that are vital to the administration of justice.

This current version of the Standards (2020) defines how pretrial services will operate using best practices under the sweeping criminal justice reform legislation passed by New York State eliminating money bail and pretrial detention for nearly all misdemeanor and non-violent felony defendants. The presumption of release, especially Release on Recognizance, or release with least-restrictive, non-monetary conditions to assure return to court, is an underlying principle. As in the past, a working group of pretrial practitioners will continue to examine procedures for best practices and issues involving pretrial service delivery and periodic standards reviews. This will be done with the approval and support of OCA and DCJS.

With new legislation that requires each jurisdiction to have a pretrial services program, these standards will be useful in helping existing programs audit their pretrial administration, program delivery and use of up-to-date technology and data collection. Likewise, jurisdictions establishing new pretrial programs will find these standards valuable for focusing on essential elements and best practices for fair and just program delivery. Finally, these standards can be a center point to bring jurisdictions together to discuss planning protocols and possibly shared resources in service delivery.

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I. OVERVIEW

These Standards embrace the expectation that most individuals will be released on their own recognizance (ROR) or released under supervision (RUS) by operation of law. Most counties in New York State operate some form of pretrial release program; these programs facilitate release without financial conditions by identifying appropriate individuals for ROR or RUS. Additionally, pretrial release programs provide supervision for individuals directed to them by the court.

As used here, ROR refers to the release of an individual on his or her promise to appear at court. RUS refers to the release on a promise to appear with the least restrictive non-monetary condition(s), which reasonably assure the individual's return to court. Individuals may be required to maintain contact with the Certified Pretrial Services Agency or be under supervision of the Certified Pretrial Services Agency/ Program as a non-monetary condition of release.

Pretrial release programs interview individuals and provide information to judges to determine if they are appropriate candidates for non-monetary release. Historically, these programs were based on the principle that the money bail system imposes a disadvantage upon the poor, the socio-economically disadvantaged, and related adverse dispositional outcomes for persons incarcerated pending trial. This became the impetus for New York's statutory Bail Reform. Research indicates that non-monetary conditions can be as effective as money bail in ensuring the appearance in court.[3] Though the specifics of the programs vary, most pretrial release efforts recognize a positive correlation between meaningful community ties and high court appearance rates. Typically, programs seek to strengthen this correlation through various additional services, including notification to individuals of pending court dates, periodic reporting requirements, or more extensive supervision and monitoring of release conditions where authorized by the court.

These Pretrial standards, first published in 1995, have been revised to reflect statutory changes and best practices. Revisions have included input consistent with DCJS statutory authority to regulate, assist and fund community corrections programs, and OCA's statutory authority to certify Pretrial Service Agencies. These standards are for pretrial release activities and provide a model for program operations consistent with state laws and constitutional principles that impact this area of criminal justice decision-making. In establishing these Standards, NYAPSA seeks to promote consistency in delivery of these services, which enhances pretrial services staff effectiveness, maximizes effectiveness of overall pretrial services, and increases fairness and equity with regard to pretrial release while ensuring public safety.

Pretrial release services are intended to accomplish at least the following goals:

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[3] *Aubrey Fox, Stephen Koppel, Ph.D., Pretrial* ***Release Without Money: New York City, 1987-2018****,* New York City Criminal Justice Agency, 2019, www.nycja.org.
Mary T. Phillips, Ph.D., ***A Decade of Bail Research in New York City***, New York City Criminal Justice Agency, (2012), www.nycja.org.

- To help facilitate judicial release decisions by screening and providing the courts with standardized information about individuals in the most timely manner possible;

- To facilitate the release of an individual under the least restrictive terms, reduce unnecessary reliance on incarceration and associated costs;

- To maximize court appearances of individuals released to these programs.

A. Important Principles:

1. Individuals are entitled to the presumption of innocence and should not be precluded from pretrial screening based on the current charge.

2. New York State law does not authorize the imposition of non-monetary conditions of release or preventive detention based on predictions of future dangerousness. Therefore, pretrial services agencies programs should provide assessments and recommendations to the courts based solely on the individual's likelihood to appear in court.

3. Every jurisdiction should establish and maintain a pretrial services agency or program consistent with these Standards.

    - The Office of Court Administration shall certify and regularly review for recertification pretrial services agencies in each county to monitor principals released under non-monetary conditions. Such Office shall maintain a listing on its public website identifying by county each pretrial services agency so certified in the state.

    Pretrial services agencies/ programs should conduct screening and interviewing using a standardized format that should be transparent and made available upon request and an objective approach to determining the type of release, and any non-monetary conditions which may be recommended. Information collected through the interview should be verified, and together with the program's recommendation or eligibility determination, should be provided to the court of jurisdiction in an expeditious manner.

    Individuals who appear to require greater supervision/monitoring to facilitate their court appearances should be considered for RUS. RUS may involve additional investigatory steps and recommendation. The conditions recommended to the Court should only be the least restrictive as needed to achieve court appearance.

II. STATUTORY AUTHORITY

Various articles of the Criminal Procedure Law (CPL)[4] authorize criminal courts to release individuals on their own recognizance during the pendency of the criminal action or proceeding, upon the condition that they appear whenever attendance is required and render themselves amenable to the orders and processes of the court. These Articles also establish other legal parameters, prerequisites, and limitations governing criminal court jurisdiction and authority to release certain principals. Specifically, Section 510.30 of the CPL requires the court impose the least restrictive kind and degree of control or restriction that is necessary to secure the individual's return to Court.

Article 510 provides the legal parameters which a judge should employ in determining whether to release a principal on his/her own recognizance, or to set bail. The following is a summary of the statutorily recognized factors which a court must consider in determining the nature of the control necessary to ensure a principal's attendance at court:

1. Character, reputation, habits and mental condition;

2. Employment and financial resources;

3. Family ties and the length of residence in the community;

4. Prior criminal record: information about the principal that is relevant to the principal's return to court including:
    - The principal's activities and history
    - If the principal is a defendant, the charges facing the principal
    - The principal's criminal conviction record if any;

5. The principal's record of previous adjudication as a juvenile delinquent, as retained pursuant to Section 354.2 of the Family Court Act, or of pending cases where fingerprints are retained pursuant to Section 306.1, or a youthful offender, if any;

6. The principal's previous record (if in any responding to court appearances when required or) with respect to flight to avoid criminal prosecution;

7. If money bail is authorized, according to the restrictions set forth in this title, the principal's ability to post bail without posing undue hardship, as well as his/her ability to obtain a secured, unsecured, or partially secured bond;

[4] See Criminal Procedure Law, Articles 510, 530 and 540.

8. Where the principal is charged with a crime or crimes against a member or members of the same family or household as the term is defined in subdivision 4 of Section 530.11 of this title, the following factors:

    - Any violation by the principal of an order of protection issued by any court for the protection of a member or members of the same family or household, and whether such order of protection is currently in effect;

    - The principal's history of use or possession of a firearm;

9. If the principal is a defendant, the weight of the evidence against him/her in the pending criminal action and any other factor indicating probability or improbability of conviction; or in the case of an application for bail or recognizance a securing order pending appeal, the merit or lack of merit of the appeal;

    - Where the principal is a defendant-appellant in a pending appeal from a judgement or conviction, the court must also consider the likelihood of ultimate reversal of the judgement. A determination that the appeal is palpably without merit alone justifies but does not require, a denial of the application, regardless of any determination made with respect to the factors specified;

10. The sentence which may be or has been imposed upon conviction;

    - When bail or recognizance is ordered, the court shall inform the principal, if the principal is a defendant charged with the commission of a felony, that the release is conditional and the court may revoke the order of release and may be authorized to commit the principal to the custody of the sheriff in accordance with provisions of subdivision 2 of section 530.60 CPL.

<u>Commentary</u>

Criminal history includes any known violation(s) of Orders of Protection.

In a pending appeal from a judgment of conviction, the court must also consider the likelihood of ultimate reversal of the judgment.

All persons released by the court are expected to appear as required by the court, and to avoid criminal activity. The factors mentioned above are to be considered by the court in estimating the likelihood of the individual's appearance and in setting the least restrictive conditions to assure it. A

court is not authorized to weigh the likelihood of an individual engaging in criminal activity in determining his/her release status. The court can revoke an order of bail or recognizance for an individual charged with a felony, if there is reasonable cause to believe that the individual has committed one or more specified Class A or Violent Felony Offenses while at liberty. The court may also revoke bail if an individual has intimidated a victim or witness in violation of applicable Penal Law provisions. Further, where bail or recognizance is ordered, the court must inform any individual charged with a felony that the release is conditional and that the court may revoke the order of release upon commission of a subsequent felony. The court must order recognizance or bail when an individual is charged with an offense that is not specified in CPL 530.20.[5]

A pretrial release program has the responsibility to provide objective, relevant, factual information on the individual obtained through the course of the interview, which relates to these statutory factors. It is common practice that pretrial release programs routinely collect information relating to statutory factors including character, reputation, habits, employment and means of support, family ties, and length of residence in the community. Additionally, programs may consider prior criminal record and related history of appearance solely for the purpose of predicting the likelihood of his/her return to court.

The decision to release an individual on his/her recognizance or to grant or deny bail rests solely with the judiciary with respect to qualifying offenses. The pretrial services agency shall remain independent from, and avoid bias toward, either defense or prosecution in conducting program operations.

[5] A city court, town court, or village court cannot order recognizance or bail when an individual is charged with a Class A felony or if it appears that the individual has two previous felony convictions. The local criminal court cannot order recognizance or bail when an individual is charged with a felony unless and until the district attorney has been afforded a reasonable opportunity to be heard or he/she waived the right to do so, and the court has been furnished with the individual's criminal case history if any, or with a police department report with respect to prior arrest record. Where neither is available, the court, with consent of the district attorney, may dispense with this requirement. When a criminal action is pending in a local criminal court, other than one consisting of a superior court judge sitting as such, a judge of a superior court holding a term in the county may order recognizance or bail when the local criminal court lacks authority to issue such an order, has denied release, or has fixed bail which is excessive.

III. OVERSIGHT AUTHORITY

There is a statewide oversight system[6] for local Pretrial Services Agencies/programs and Alternative To Incarceration programs. The system's responsibilities vary but generally include the following:

- Maintenance of program standards through monitoring of local program performance;
- Assessment, refinement, development and monitoring of statewide standards;
- Provision of technical assistance to local programs.

[6] See 243 of the Executive Law and Criminal Procedure Law, Articles 510, 530 and 540.

IV. PROGRAM OBJECTIVES

Pretrial services agency programs shall strive to achieve the following objectives:

1. Provide relevant, objective information to assist courts in their obligation to impose the least restrictive non-monetary conditions deemed necessary to ensure court appearance;

2. Maximize the number of individuals released under non-monetary conditions and ensure speedy release from custody and conduct notification of upcoming court appearance if applicable;

3. Promote timely court appearance and prevent the issuance of warrants for failure to appear;

Programs should assess specific policies and procedures to determine if program objectives are being achieved and to make appropriate modifications.

V. PROCEDURAL STANDARDS

A. Notifications

1. Programs shall ensure a system of court appearance notifications by the court or where resourced, by a designated pretrial services agency.

2. Programs should collaborate with their local court to establish a procedure that all individuals can follow (e.g., a telephone number to call) in case of a question or problem regarding court appearance.

3. Programs shall provide to all individuals released through program efforts or receiving notifications as required, a procedure to follow in case a question or problem regarding court appearance arises.

Commentary

Pretrial services agencies/programs should ensure notice of all pending court dates to each individual released, or if designated by the Office of Court Administration, notifications should be provided to all individuals released under non-monetary conditions and on recognizance of all court appearances. Notification may be accomplished by the program, or the court through a combination of efforts by letter, telephone, other electronic means, or by written notice given to the individual. Where courts do not provide notice of the next court date, the program should establish a procedure of notifications.

B. Screening/Interviewing

Centralized Arraignment/ Arraignment

1. Ideally all individuals held for arraignment should be given the opportunity to be interviewed by pretrial program staff to aid the court in determining the least restrictive options for release. This may take place at a centralized arraignment or in court

2. Pretrial services agencies/programs may also be asked to interview individuals whom the Court has requested a pretrial assessment prior to

the arraignment date indicated on the desk appearance ticket. In these instances, all individuals should be interviewed by pretrial program staff to aid the court in determining the least restrictive options for release.

In Custody

1. All individuals in custody should be screened by pretrial services programs to identify those eligible by law for release.

2. All individuals eligible for release shall be given the opportunity to be interviewed by pretrial services program to aid the court in determining the least restrictive options for release.

3. Individuals eligible for release consideration shall not be excluded from the interview process merely because of factors such as instant charge or prior criminal history. Reasonable accommodation shall also be made to interview individuals with mental or physical disabilities or language barriers.

Commentary

Following the screening process, all eligible individuals shall be afforded the opportunity to be interviewed by the pretrial services program. Exclusions shall not be made based upon charge alone. All individuals shall be deemed eligible for a pretrial release interview except those over whom the court has no jurisdiction to effect release (e.g., federal detainees, boarding inmates, state parole violators, and Interstate Compact violators who are detained pending retaking by the sending state).[7] Pretrial services programs should continue to review that the least restrictive conditions are employed and advise the courts accordingly.

[7] See Interstate Compact for Adult Offender Supervision Rule 5.111. Page 11

C. Timely Intervention

1. Screening and interviewing individuals should take place at the earliest possible time after arrest. If the program has access to individuals before arraignment, the interview should take place before the initial court appearance to provide information to affect the earliest possible release decision. Absent such ability, interviews shall take place within twenty-four hours of detention on weekdays and within seventy-two hours of detention on weekends.

2. Verification and reporting to the courts should occur as soon as possible after the initial interview.

3. Programs should deploy staff and services in a manner consistent with achieving the earliest possible intervention and release.

Commentary

Effective delivery of pretrial services requires that every possible effort be made to intervene and determine release eligibility at the earliest possible time in the court process.

Pretrial interviewing, verifying, and utilizing a validated risk assessment where available should occur between arrest and arraignment so that the judicial officer making the first release decision has the most complete and relevant information concerning each individual. However, it may be necessary to conduct the pretrial release interview only after the individual has had the initial court appearance.

These Standards call for daily interviews of all newly detained individuals so that individuals confined during the past twenty-four hours are contacted by the program. Since staff may not be available to conduct interviews on weekends, the Standards indicate that individuals arrested from Friday through Sunday will be contacted no later than Monday morning (hence within seventy-two hours after detention). Legal holidays are excluded from the calculation.

In seeking the most efficient means to deploy staff and intervene at the earliest possible time, each pretrial services program should undertake a careful examination of arraignment caseloads in the various courts within its jurisdiction. This analysis will assist programs in maximizing early intervention. For example, in many jurisdictions a single court may handle most of the arraignments. Consequently, the pretrial services programs may deploy staff so that

pre-arraignment interviewing is conducted for the high-volume court, while all other individuals are interviewed post-arraignment, but within the time periods specified by these Standards.

Early intervention requires more than interviews and verifications at the earliest possible time following arrest. It must include expeditiously communicating the information gathered and the program's eligibility determination to the court. Pretrial services agencies and/or programs should be developed, and arrangements be made to communicate the results of the pretrial investigation to the decision-making court promptly following completion of the interview and verification phases.[8] Some programs communicate the information by telephone, fax or other electronic communications directly to the judge. Other programs hand-deliver their report and recommendation to the court. The sole use of mail to convey this vital information, or waiting until the next formal court appearance, are unsatisfactory methods, resulting in unnecessary delays in effecting release.

D. The Interview

1. Program staff should conduct a structured interview and where available, use a validated risk assessment. The risk assessment tool must be promptly made available to the principal and the principal's counsel upon request and the blank form questionnaire shall be made available to any person promptly upon request. [9]

2. Through a structured interview format, programs should collect objective and verifiable information that is directly related to the criteria for release eligibility.

3. The interview of the individual should not include any direct questions concerning the alleged instant offense or the arrest.

4. The introduction to the interview, the content of the interview, and the manner in which the interview information is used will be consistent with the confidentiality provisions as set forth in Section VI of these Standards.

Commentary

Structured interviews should be conducted using a validated assessment tool, where available, to help ensure that eligibility determinations are based on clearly identified criteria which are uniformly applied to all individuals. Such an approach prevents interviewer bias from

[8] Procedures for maintaining prompt communications with the court should be part of the program's adopted Policies and Procedures.
[9] See CPL 510.45 (3).

contaminating the basic purpose of the pretrial investigation, which is to identify those individuals who are likely to return to court when required.

The use of a structured interview format by pretrial release programs is common practice across the country, though the specific elements of the interview may vary by jurisdiction. This approach provides pretrial services programs with a rapid, routine and easy-to-apply method for collecting relevant information. It also serves to simplify verification. The information gathered through the structured interview must address factors directly related to the likelihood of appearance. Insofar as these factors are statistically valid predictors of appearance, they provide the rationale for the program's eligibility determinations. Finally, structured interview formats can provide pretrial services programs with a convenient form with which to report findings to court and a reference for judicial officers to those factors deemed important by the program in making its determinations.

The structured interview shall not include direct questions or discussions concerning the alleged instant offense or the arrest. Such questions may cause individuals to incriminate themselves. Such questions or discussions may also impede the program's ability to conduct an impartial inquiry regarding release. Finally, gathering such information may subject the program to unanticipated and unintended court actions (e.g., prosecutorial subpoenas). This practice may also result in individuals declining to participate in the interview.

E. Verification

1. Individuals shall be informed that the program will seek to verify the information obtained during the interview. The individual shall be asked to provide the name, relationship and phone number of reliable verification sources.

2. At a minimum, program staff shall seek to verify the following information;[10]

- Address;
- Length of time in the community;
- Family ties;
- Employment or schooling;
- Prior failure to appear;
- Prior performance in any pretrial release programs and;

[10] See CPL 510.30

- Criminal convictions.

3. Program staff shall seek to verify any other information directly affecting the program's determination of eligibility for release.

4. Verification may be achieved through interviews with third party contacts (e.g., relatives or friends) and need not require direct contact with employers, schools or other primary sources.

5. Program staff shall respect the individual's wishes not to contact certain potential verification sources (e.g., employers and schools).

6. Program staff shall continue to seek verification of information in those instances where release is not secured due to the absence of verification.

7. Inability to verify information shall not necessarily result in a negative eligibility determination. Programs shall establish policies and procedures governing the reporting of unverified information to court.

Commentary

The rationale for verifying pretrial release interviews is based on the following:

▪ it allows the interviewer to check the accuracy of information gathered from the individual;

▪ it may serve as a notification to family and/or friends of the arrest, answer their questions regarding time and place of arraignment or future court appearances, and gain their assistance in returning the individual to court;

▪ it may also provide useful information to the court (e.g. possible misidentification, mental or physical illness that may require immediate attention by the court and/or jail personnel);

▪ it adds credibility to the interview information;

▪ it better enhances the program's ability to contact the individual should he or she fail to appear.

Effective verification and reconciliation of information can be accomplished by phone or in person. Program staff needs to explain the purpose of the inquiry. "Blind interviews", which do not reveal the answers already given by the individual, are preferable since they are the most efficient and effective tools for verification. This method involves asking the same questions in the same manner as was used in the interview with the individual. This is a quick informative procedure and does not require presentation of official documents (e.g., birth certificates, pay stubs, etc.). Careful, non-directive, non-judgmental questions asked of both the individual and verification source minimize the possibility of discrepancies. Skillful interviewing ensures that the responding person is not giving answers that he/she thinks are expected by the program.

Verification inquiries to employers or schools may needlessly jeopardize an individual's job or enrollment. Permission to make these inquiries should come from the individual. Under most circumstances, family and friends can verify these facts satisfactorily. Verification through victims and/or complainants should be avoided where practical.

F. Unverified Information

Pretrial Services Agencies and/or Programs release procedures and policies regarding unverified information may vary. Common practices include:

1. Providing notice to the court that interview information provided by the individual after preliminary efforts, could not be verified.

2. Finding an individual eligible for release based on interview information but requiring such individual to provide proof of unverified information to the program.

3. Continuing verification efforts if the individual is detained and immediately reporting to the court once the information is verified.

4. Developing separate statistical categories for individuals released without verified information.

G. Release Eligibility Determinations and the Assessment Instrument

1. Criteria for release eligibility shall be based on valid, reliable predictors of the individual's return to court.

2. Age, race, creed (e.g. religion), color, national origin, gender, sexual orientation, disability, or marital status shall not be used as predictors because such use is considered unconstitutional or unlawful discrimination.

3. A system for objectively assessing risk of flight should be established in each jurisdiction and reviewed periodically. In seeking predictors that would be valid for its jurisdiction, a pretrial services program should consider factors which research has shown to be related to failure to appear.

4. Programs shall establish policies and procedures consistent with these Standards for cases where the assessment instrument is overridden.

5. Reasons for deviating (i.e., overrides) from the assessment shall be recorded in each case.

Commentary

Criteria for release eligibility should be well-defined in order to promote consistent and equitable application. Studies reveal that a prior record of failure to appear is a strong predictor of risk of flight and/or non-appearance in court, although no longer a bail factor. Best practices also support the use of an empirically validated risk assessment instrument.

The use of objective, statistically valid assessment instruments, where available, is recommended because:

- objective measures provide the judiciary with standardized criteria as an aid in the decision-making process;
- by basing predictions on actual past performance, assessment instruments help to reduce biases in the pretrial release process; and
- validated instruments predict group responses (i.e., return-to-court behavior) rather well.

Although objective assessments have proven to be valuable tools in the pretrial screening process, it is important to understand their limitations so that their proper use is assured. They

do not predict individual behavior. Rather, they classify an individual according to a group (i.e., "good risk" or "bad risk"), and then predict how members of that group will behave. Prediction of future behavior is based on past group experiences. Because they are based on past group experiences, these instruments do not provide an absolute prediction regarding individual behavior. Rather, they simply indicate that an individual is similar in some respects to others who have performed well (i.e., appeared in court) or poorly (i.e., failed-to-appear) and therefore, the individual should be considered for release based on these similarities.

Consequently, the potential for overriding the predicted outcome should exist in each system. To ensure that such overrides are based upon reasonable grounds, each program should establish clear criteria for those instances where an override is to be considered, and the reasons for each should be explicitly recorded in the case record. Policies regarding override procedures should be reviewed periodically to guard against arbitrary application. Moreover, frequent and valid overrides are a sign that the validity and reliability of the risk assessment instrument should be re-examined. Occurring reasons for overrides should be subjected to statistical validation. If a reason is not validated, its use should be discontinued; if it is, it should be incorporated into the risk assessment system.

H. Release Recommendations and Report

1. It is recognized that the release of most principals will be determined by operation of law. Programs shall establish a format for reporting recommendations that include, at a minimum, the following categories:

- recommendations based on verified information;
- recommendations based on unverified (qualified) information; and
- not recommended

2. The program shall report its release recommendation to the court in a timely manner, in accordance with these Standards.

3. The report should include all verified and unverified information received relevant to release recommendation criteria as specified in these Standards.

4. Any information relevant to the release criteria that is unavailable at the time of the report shall be specified as such.

5. When appropriate, the report should include information about special circumstances concerning the individual's situation that result in an override.[11]

Commentary

Each program shall provide the courts with explicit recommendations based upon the programmatic release criteria. Program recommendations may be expressed through different terminologies. For example, some programs have indicated that the defendant has been found "eligible" for release; some report that the defendant is "qualified" for release; and others "recommend" defendant for release. Programs may utilize whatever language or terminology is more suitable to their locality, provided that the explicit statement regarding the recommendation is clearly communicated. This should be incorporated into the procedures for each program.

The determination shall be communicated to the court. Such reports may include the release recommendation determination matrix and a failure to appear risk level.

[11] Responsible circumstances that may be considered "special" are those that assess or are related to the individual's failure to appear, that is, risk of flight. This may include; information is not available such as the NYSID report, the inability of the interviewer to perform an interview, the individual speaks a language where an interpreter is needed to collect the information, the category of charge is such that the court has determined that the recommendation is not necessary, such as individuals charged with committing a crime while incarcerated, the category of individual is such that the validated assessment instrument does not include them at this time (i.e., juveniles being processed as adults); or there is a conflict between the information that the individual gives, and the information that a verifier (family member, friend or employer) provides. "Special Circumstances" that are not reportable would include those related to: incriminating evidence or statements proffered by the individual, individual-supplied facts surrounding the instant charge, physical or medical conditions not related to the ability of the court to properly arraign the person or fashion a Release Under Supervision (RUS) or Alternative to Incarceration option, where an interpreter is needed to collect the information, the category of charge is such that the court has determined that the recommendation is not necessary, such as individuals charged with committing a crime while incarcerated, the category of individual is such that the validated assessment instrument does not include them at this time (i.e., juveniles being processed as adults); or there is a conflict between the information that the individual gives, and the information that a verifier (family member, friend or employer) provides. "Special Circumstances" that are not reportable would include those related to incriminating evidence or statements proffered by the individual, individual-supplied facts surrounding the instant charge, physical or medical conditions not related to the ability of the court to properly arraign the person or fashion a Release Under Supervision (RUS) or Alternative to Incarceration option.

I. Types of Release

1. There should be a presumption in favor of Release on Recognizance (ROR), and programs shall adopt procedures to maximize the number of eligible ROR defendants.

2. Where the initial eligibility determination was not acted upon favorably or the individual does not initially qualify for release, then the program should be prepared to make recommendations for the least restrictive non-monetary release conditions reasonably necessary to assure the individual's appearance in court.

3. The recommendations for imposition of conditions should be the least restrictive related to the principal's appearance in court.

4. When conditions are imposed, the pretrial services program should monitor the individual's compliance with the non-monetary conditions and make reports to the court concerning such compliance.

5. When money bail is imposed and the individual is unable to post a required money bail amount at first appearance, the pretrial services program should make attempts to contact the individual's family and personal associates to expedite the posting of such an amount as soon as possible.

6. For those cases where release was not obtained or the individual was initially found ineligible, a system of monitoring and review should be established. The circumstances of the pending criminal matter may change, specifically relating to eligibility for pretrial release and the program should respond accordingly.

7. Conditions of release are imposed by the court and may not be altered without court authorization. This may include the use of certain technologies, including electronic monitoring, where available and as authorized per CPL 500.10 (21). The court may include adherence to the terms and conditions of court approved programs.

Commentary

Continuous review for release as the criminal matter progresses is desirable, as the initial determination of ineligibility was dependent upon data that was obtained at a fixed point in time and much of that data is of a dynamic nature. Circumstances such as availability of a suitable residence, additional positive information about the individual's background or the accessibility of family members, unavailable at the initial screen, who can verify information relevant to the individual's appearance in court. Additionally, circumstances should be re-evaluated regularly as the dynamics of the pending legal matters may change.

J. Monitoring/Failure to Appear

1. Programs shall establish a system to monitor court appearances of those individuals released through program intervention.

2. Programs shall establish procedures to assist individuals released through their intervention to comply with release conditions, including orders of protection, and to keep court appearances.

3. Programs shall establish procedures to monitor and report the compliance of individuals released under supervision of the program.

4. Programs shall communicate with clients who fail to appear in court on a scheduled court date and attempt to avoid the issuance of a bench warrant.

Commentary

In order to determine whether the pretrial services program is operating effectively, it is essential for the program to monitor individuals' court appearances. Monitoring court appearances does not require daily program attendance in court. Rather, programs are expected to establish an efficient method for obtaining information regarding the scheduled and actual appearances of those released through program intervention. Programs should make good faith efforts to follow up with individuals who have failed to appear in court to avoid the issuance of a warrant or to voluntarily clear a warrant once issued.

Absent such monitoring, programs cannot determine whether individuals released through program intervention are appearing in court. The program's failure-to-appear (FTA) rate that is generated through such monitoring is one of the most important measures of program effectiveness and serves to demonstrate the viability of non-monetary conditions of release.

In computing failure to appear rates, two approaches are most common. Appearance-based FTA rates are computed by dividing the number of failures to appear by the number of scheduled appearances for the program population. Individual-based FTA rates are computed by dividing the number of individuals who failed to appear (at any time during their case) by the total number of individuals released through program intervention. Because most cases involve multiple appearances, appearance-based FTA rates will always be lower than individual-based rates.

Research indicates that many individuals who miss court appearances are not demonstrating contempt for the authority of the court. Reasons for non-appearance range from changes in the appearance date that are not communicated to the individual to medical emergencies that prevent his or her appearing as scheduled. In fact, research indicates that only one-third of the missed appearances are due to the individual's intentional decision not to appear. Another third is due to system failures to effectively communicate the required time and place, and the last third is due to unavoidable events that prevent the individual from appearing. While the first third may be deemed willful failures, the other two-thirds are clearly not willful.

It is important for pretrial services programs to distinguish between willful and non-willful failures in order to: educate the court and other stakeholders on the real nature of failures-to appear; identify strategies which the program might use to reduce the non-willful FTA rate; and offer the system and the public more accurate and realistic information to account for the program's effectiveness.

K. Non-Compliance

1. Programs shall attempt to contact individuals who are released through program intervention and who are not complying with court ordered conditions of release in order to encourage compliance before the court is notified.

2. Programs shall establish procedures to inform courts of individuals' non-compliance with court-ordered conditions of release, including orders of protection.

Commentary

Programs shall develop procedures to inform the courts of non-compliance with court-ordered conditions of release. Program procedures should include notification to the individual of any non-compliance issues and provide an opportunity for the individual to respond to such issues. It is the court's responsibility to establish and impose appropriate responses to such non-compliance. Court-ordered conditions of release include Orders of Protection. Alleged violations of Orders of Protection should be brought immediately to the attention of the court, without notifying the individual because such notification may imperil the victim and/or complainant. A distinction should be made between court-ordered release conditions and the routine requirements of participation in a court-ordered program. Routine program requirements are not court imposed but are utilized by the program to maximize court appearances. Consequently, an individual's failure to strictly adhere to the program's requirements should not be grounds for a negative report if the individual appears in court as scheduled. However, in instances where an individual exhibits a continued disregard for, or is unable to fulfill program requirements, the program should inform the court of these failures.

VI. CONFIDENTIALITY STANDARDS

These standards provide a framework for pretrial services agencies and programs to address difficult issues about the confidentiality of information in agency files. These standards build on the basic approach that calls for a general policy of confidentiality regarding information about arrested individuals, with exceptions to be made only in limited circumstances.

Because the information gathered by pretrial services agencies can be valuable to other justice system agencies for varying purposes, there are strong arguments for encouraging some sharing of information. However, because much of the information about the individual's employment, living situation, substance abuse history, physical and mental health, and prior criminal history is personal and of a highly sensitive nature and may be statutorily protected, it is important to build-in safeguards against misuse. Much of the information is collected initially from individuals who can be emotionally distraught and have had no contact with a lawyer prior to the interview. Many arrested individuals would probably be uncooperative if they knew that the information would be readily available to others. Therefore, it is important for pretrial services agencies to develop policies that will ensure appropriate confidentiality and establish limits on information sharing.

A. Policy

Pretrial services agencies/ programs should maintain by policy, rule, standards, and guidelines that information about individuals acquired by the pretrial services agency/program should be treated as confidential. Such information should not be subject to use in the current case to establish guilt and should not be subject to disclosure by the pretrial services agency/program except for limited purposes as set forth in the following subsections.

Commentary

Each jurisdiction should establish written policies and guidelines about access to information about individuals that the pretrial services agency has in its files, including both written and automated files. Developing agency guidelines about confidentiality is essential to provide practical guidance to agency staff. The basic approach suggested for these guidelines is to provide that all information

obtained both prior to and while the individual is on release, is to remain confidential, subject to disclosure only under very limited circumstances. VI (F) sets forth exceptional circumstances in which disclosure should be permissible unless prohibited by federal, state, or local law or regulation.[12]

These confidentiality standards call for written policies and procedures that define confidentiality protections and limitations. Such confidentiality is essential for pretrial services agencies to function effectively and avoid being perceived by individuals as an arm of the police, prosecutor, or defense attorney. Under this standard, information collected by the pretrial services agency is not meant to establish guilt or innocence. The interview information obtained by pretrial services programs is valuable for release/detention decision-making by the judicial officer, and individuals should be encouraged to provide accurate information. To obtain useful information it is important for the pretrial services staff to assure the individual who is being interviewed by pretrial without benefit of counsel, the information will be used solely for the purpose it was collected, and not subsequently used to establish guilt. It should be communicated to the arrested individual that the information he or she gives will be given to the court, prosecutor, and defense counsel for determining pretrial court appearances and it is important that they be truthful in responding.

HIPAA[13]: There may be some instances where collected pretrial information, especially during the supervisory period, is deemed confidential under federal HIPAA law. Such information should not be made public or recorded on documents distributed to the court during the regular course of business and generally accessible to the public. A major goal of the HIPAA Privacy Rule is to ensure that the individual's health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the individual's health and well-being. The Rule strikes a balance that permits important uses of information, while protecting the privacy of people who seek care and healing. Given that the health care marketplace is diverse, the Rule is designed to be flexible and comprehensive to cover the variety of uses and disclosures that need to be addressed.[14]

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[12] For example, federal regulations place limitations on disclosing criminal history information obtained through the National Crime Information Center (see 28 CFR Part 20, esp. Sections 20.21 and 20.33) and on disclosure of alcohol and drug abuse patient record (see 42 CFR Part 2) and medical and mental health patient records (see, e.g., 42 CFR Part 51) . State laws or regulations may impose additional limitations. Pretrial Services Agencies should be familiar with laws and regulations that may affect their operations, including the acquisition and sharing of information. It is extremely important that agencies be cognizant of federal HIPAA regulations, and identify protected information that may be asked by the program and requested by outside sources, both governmental and non-governmental.

[13] https://www.hhs.gov/sites/default/files/privacysummary.pdf

[14] See summary explanation of HIPAA laws in Code of Federal Regulations (C.F.R.) at https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html. "The Standards for Privacy of Individually Identifiable Health Information ("Privacy Rule") establishes a set of national standards for the protection of certain health information. Established by the Department of Health and Human Services, it addresses the use and disclosure of individuals'

Agencies should consult with their General Counsel and their Data Share Committee (see, VI D,H) in determining when medical data should be legally shared. The following key points should be considered in determining agency obligation in identifying, collecting and sharing HIPAA-protected data.

- Who in the individual population is covered by the Privacy Rule. This includes identified arrested individuals, contracted health professionals, and identification of what pretrial records are covered.

- What are "required disclosures". According to HIPAA, a covered entity must disclose protected health information in only two situations: (a) to individuals (or their personal representatives) specifically when they request access to, or an accounting of disclosures of, their protected health information; and (b) to Health and Human Services (HHS) when it is undertaking a compliance investigation or review or enforcement action.[15]

- What constitutes a "permitted disclosure," or an "authorized disclosure" of protected health information.[16] A central aspect of the Privacy Rule is the principle of "minimum necessary use and disclosure." A covered entity must make reasonable efforts to use, disclose, and request only the minimum amount of protected health information needed to accomplish the intended purpose of the use, disclosure, or request.[17]

- Programs should have in place practices and procedures for training and management of employee use; maintain reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of protected health information in violation of the Privacy Rule; and have a "Documentation and Record Retention" policy according to the timeframe specified in the act.

In general, State laws that are contrary to the Privacy Rule are pre-empted by the federal requirements, which mean that the federal requirements will apply.[18] The Privacy Rule provides exceptions to the general rule of federal preemption for contrary State laws that (1) relate to the privacy of individually identifiable health information and provide greater privacy protections or

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health information—called "protected health information" by organizations subject to the Privacy Rule — called "covered entities," as well as standards for individuals' privacy rights to understand and control how their health information is used. Within HHS, the Office for Civil Rights ("OCR") has responsibility for implementing and enforcing the Privacy Rule with respect to voluntary compliance activities and civil money penalties.

[15] 45 C.F.R. § 164.502(a)(2)

[16] 45 C.F.R. § 164.502(a)(1).

[17] 45 C.F.R. § 164.502(a)(1).

[18] 45 C.F.R. § 164.504(f).

privacy rights with respect to such information, (2) provide for the reporting of disease or injury, child abuse, birth, or death, or for public health surveillance, investigation, or intervention, or (3) require certain health plan reporting, such as for management or financial audits.

Sometimes a court may issue a subpoena for protected health information. A HIPAA-covered health care provider or health plan may share protected health information if it has a court order. This includes the order of an administrative tribunal. However, the provider or plan may only disclose the information specifically described in the order. A subpoena issued by someone other than a judge, such as a court clerk or an attorney in a case, is different from a court order.[19]

Information gathered on pretrial individuals by a HIPAA-covered provider or plan may disclose information to a party issuing a subpoena only if the notification requirements of the Privacy Rule are met. However, before responding to the subpoena, the pretrial services agency or program should receive evidence that there were reasonable efforts to:

- Notify the person who is the subject of the information about the request, so the person has a chance to object to the disclosure, or
- Seek a qualified protective order for the information from the court.[20]

B. Court Reporting

All pretrial services agency reports prepared for the Court should be provided to the Court and, as provided by law, the prosecutor, and the attorney for the individual.

Commentary

These Standards simply clarify that any verbal or written report prepared by the pretrial services agency or program to assist the court in deciding about the release or detention of the individual should be provided to the court, the prosecutor, and the defense counsel. The pretrial report and recommendation provide an amount of transparency to the court, defense and, prosecutor starting from the first court appearance.

Standard VI (B) provides for one of the essential components of an effective first-appearance proceeding: the conduct of a pretrial process by the jurisdiction's pretrial services agency or

[19] See, https://www.hhs.gov/hipaa/for-individuals/court-orders-subpoenas/index.html.
[20] See, 45 C.F.R. § 164.512(e) and OCR's (Office of Civil Rights) Frequently Asked Questions.

program. The investigation should lead to the preparation of a written, or verbal, report that can be used by the judicial officer, the prosecutor, and the defense counsel in the process of arriving at a decision concerning pretrial release or detention of the individual. The timeframe for the interview, verifying the information, and preparing the report is narrow, since the work can only begin after the arrest and must be completed and communicated to the court in advance of the first appearance proceeding. It is important that the pretrial services agency be allowed to collect and record the information under circumstances that would be most beneficial to the court in making a just and reasonable decision concerning the individual's liberty. This includes optimal conditions for collecting such information to protect privacy and confidentiality.

C. Agency Files

The pretrial services agency/program should have written policies regarding access to the arrested individual's information contained in the agency's files. These policies should require that information obtained during the pretrial process, monitoring, and supervision should remain confidential and not be subject to disclosure, unless authorized by these standards, New York State statute or federal law, or regulation. Subject to applicable legal requirements, policy should provide for disclosure:

- to the Court, the prosecutor, and defense for pretrial release or detention determination, reviewing compliance with conditions of pretrial release, and sentencing
- to other agencies or programs to which the individual has been referred by the Court or the pretrial services agency
- to a corrections department or jail to classify individuals in custody
- to law enforcement agencies, upon a reasonable belief that the information will help apprehend a specific individual for whom:
    - a warrant has been issued for failure to appear or for commission of a crime.
    - there is reasonable suspicion that the individual has been involved in new criminal behavior.

- to a probation department or other criminal justice supervisory agency for a court-ordered investigation or in the supervision of an individual on probation; and

- to individuals or agencies designated by the individual, upon specific written authorization of the individual.

Commentary

As specified in VI (A), the pretrial services agency should have policies and procedures that protect the confidentiality and use of the individual's collected data. The court will most likely be the principal user of the information. Usually, the relevant information is contained in the written report provided to the court, but sometimes the judicial officer may want to know additional information available to the agency's staff but not included in the report. As stated in VI (A), the information acquired by pretrial services agency staff may be very relevant to sentencing decisions including these made during the individual's first court appearance and, in the consideration of release/detention decisions. For individuals on pretrial release for an extended period prior to sentencing, their record of compliance with conditions maintained by the pretrial services agency can help the judge in determining what sentence to impose. Where the probation department does not prepare a presentence investigation report (which is often the case regarding misdemeanor convictions), the pretrial services agency can provide valuable information not otherwise available to the sentencing judge from any other source.

Diversion programs and social service providers (e.g., drug treatment programs, mental health providers) will often find the information gathered by pretrial services agencies useful in deciding program eligibility and in designing programs that will address the needs and risks posed by individuals referred to them. For example, information provided by the individual or references may flag particular types of substance abuse or other medical problems that need attention if the individual is released.

At some point relatively early in the arrest-to-first appearance process, the local corrections department or sheriff's office will conduct a risk assessment or classification of individuals admitted to the jail following arrest. The process generally involves collecting much of the same information typically collected by staff of the pretrial services agency, including identification data (name, address, date of birth), prior record information, language(s) spoken, employment information, and information about possible need for services. It makes sense for the pretrial services program and local jail staff to share information developed during initial contacts, to avoid duplication of effort

and speed the delivery of services (especially detoxification or medical services) that may be needed during the period prior to the first court appearance.

Law enforcement agencies will often be interested in the information in the files of pretrial services agencies not only information provided by the individual's interviews, but also information acquired through contacting references and other sources. The standard calls for limiting disclosure to law enforcement agencies to situations in which access to the information is needed to help apprehend someone for whom a warrant has been issued for failure to appear or for the commission of a crime. This is an especially difficult area because, while information in the files of the pretrial program may be useful to law enforcement agencies for a wide range of investigative and database development purposes, making the information readily available could undermine the pretrial services agency's ability to obtain useful information from individuals, and third-party contacts for verification. Pretrial services agencies and programs should be familiar with laws and regulations that may affect their operations, including the acquisition and sharing of information.

Two types of information collected by pretrial services agencies can be useful to probation departments and other programs that provide RUS services. First, basic information collected in the interview (e.g., information about the individual's residence, family situation, employment, physical and mental health, use of drugs and/or alcohol, and prior criminal record) is the same information typically collected by probation departments in preparing presentence investigation reports and developing plans for supervision. While the probation department staff may need to update the information and contact additional sources, the information initially gathered by the pretrial services agency can provide a foundation for the presentence report and for supervision planning. Second, information about the individual's performance while on pretrial release. For example, the record in making required court appearance and in complying with conditions of release such as participation in a drug treatment program should be useful in the probation department staff's preparation of a report and recommendations to the sentencing judge and in developing and implementing plans for supervision.

As specified below in VI (d), information about an individual in the files of the pretrial services agency should only be available to other entities or persons where specific written authorization has been provided.

Due to the importance of confidentiality policies and practices, pretrial services agencies should make sure that agency staff members are familiar with the policy guidelines. Just as with HIPAA policies, these written guidelines should be distributed to staff and should be covered in staff training sessions. It may be desirable for agencies to utilize committees or other mechanisms to

review periodically the types of information requests being received by the agency, and the agency's responses, given the policy guidelines.

D. Access to Information

The individual or their attorney should have access to information in the individual's file upon request. The pretrial services agency may provide for exceptions to such disclosure, including denial of access to information received upon a promise of confidentiality where disclosure could endanger the life or safety of any person or would constitute an unwarranted invasion of privacy.

Commentary

The exceptions to the general policy of full disclosure to the individual should protect against possible retaliation towards a person who provided information about the individual in the pretrial program's initial interviewing or post-release monitoring and supervision.[21]

E. Third Party Access

An individual's information generated, collected or maintained by a third party under written agreement with the pretrial services agency shall be the sole property of the pretrial services agency/program. The pretrial services agency/program should provide information in accordance with these standards and by existing laws, policy and by provisions in written agreements with agencies or individuals to whom the information is disclosed. The information received from the pretrial services agency may not be re-disclosed except as needed to achieve the purpose for which such information was disclosed by the pretrial services agency/program.

[21] Because third parties are not a party to an arrest, the Agency should not retroactively release (i.e., after dissemination through arraignment) any identifying information about a third party for any record, sealed or unsealed, except by subpoena for a copy of the agency interview/or data-collection form, which may contain such information.

Commentary

Confidentiality standards calls for jurisdictions and pretrial programs to establish policies that prohibit "re-disclosure" of information received from the pretrial services agency/program. Re-disclosure is permitted when necessary to achieve the purpose for which the information was originally disclosed. For example, if the law enforcement agency requires this information for the execution of an arrest warrant. Re-disclosure should not be used for the development of data bases unrelated to the purposes of disclosing information.

Information generated under written agreement may only be released to other parties by the pretrial services agency. This pertains to Diversion programs and social service providers using data gathered by pretrial services agencies useful in deciding program eligibility and treatment. In addition, these protections extend to researchers who have obtained federal, state, or jurisdictional grants to conduct research or collect additional data from pretrial individuals and use the offices and resources of the pretrial services agency to collect and compare data (see VI (C)). Sharing such data with researchers should be under guidelines explained in VI (E) & (F). [All data remains the property of the pretrial services agency/program and, as such, it is incumbent upon the pretrial services agency to only share relevant data requested by third parties to be used in compliance with these standards.] Contractors or researchers may not share such data without the consent of the pretrial services agency/program.

F. Research

Information from a pretrial services agency's files may be provided for research to qualified personnel, under a written agreement that sets forth the terms of the research and addresses:

- the purpose of the research;
- the type of data sought and how the agency or researcher will select cases for research;
- the specific data sought from the agency files and;
- procedures to ensure that individuals' identities are not disclosed to researchers' other parties;

- sealed record information shall never be provided as part of a research agreement;

- case records that are subsequently sealed will be removed from the research sample.

Commentary

These Standards favor the use of information in the files of a pretrial services agency for legitimate research purposes.

Any research agreement concerning access to information in the files of a pretrial services agency should ensure that the identity of any individual is not revealed in research publications, reports, or any materials distributed to anyone who is not a member of the research team. The agreement should describe the procedures to be used by the researchers to protect the security and confidentiality of all personally identifiable data.

It should be agency policy that a signed and dated data-sharing written agreement is necessary for every release of records (identified or de-identified, sealed or unsealed), detailing the items and records to be released, and the restrictions on use.[22] However, requests or subpoenas for an individual record do not require a data-sharing agreement, but do need a viable explanation according to the Standards for such information.

Data-sharing agreements for releasing records should include the following:

- the recipient must explain the purposes for which the data will be used;

- guarantee that the use of the data will be limited to those purposes;

- provide the agency with the names or job titles of all staff members who will have access to the records;

- guarantee that there will be no secondary disclosure of the information provided without the express written consent of the pretrial services agency;

- and state how the security and confidentiality of the records will be protected through

[22] See Attachment A ***Definitions of Terms Related to the Release of Data***, New York City Criminal Justice Agency, 2018.

passwords or other protections.

When records are provided through ongoing electronic transmissions, recipients must certify in writing that they will not attempt to search for sealed records, and that unsealed records will not be copied or stored. In some cases, the data-sharing agreement may require that the data sharing will be time-limited; either the data given to the researcher will be destroyed after a certain time period, or the identifiers will be removed.[23] All data-sharing agreements should prohibit those who receive de-identified agency records from attempting to identify the records.

The pretrial services agency should keep electronic copies of all signed and dated data-sharing agreements (both active and completed). The agency should maintain a database listing all data-sharing agreements for data transmissions and one-time releases of records (identified or de-identified, sealed or unsealed). The agency should update the database regularly to incorporate new listings and to indicate whether each release is still active or has been completed or terminated.[24]

G. Data Sharing

The pretrial services agency/program should construct and have in its file a pretrial policy addressing the safeguarding and sharing of pretrial individual information. The policy should address the following:

- who will determine the policies that govern the sharing of the data for the Agency for example, Board of Directors, data-sharing committee (executive level);

- the definition of common terms related to the release of data for example, "identified records", "sealed" records, "agency information," "third-party" pretrial information and "non-

[23] Identifiers are pieces of an individual's information that can be used to identify the identity of a given individual (e.g., name, address, phone number, arrest or other identifying number, date of birth) or when used in conjunction with other pieces of information (date of birth, police precinct, date of arrest, etc.), can be lead to an individual individual's probable identity.

[24] The Records must be kept for the balance of the calendar year in which they were made and for six (6) additional years thereafter. (DCJS APPENDIX A STANDARD CLAUSES FOR NYS CONTRACTS)

agency information;

- a determination of what key elements should be included in each written data sharing agreement;

- an agency protocol that explains and ensures that every data-sharing agreement include arrested person's consent;[25]

- the existence of a data-sharing committee that reviews new requests for data and requests seeking changes for existing data-sharing agreements, and/or policy for reviewing requests to assure that responses to requests are consistent with policies and national standards. The policy should include titles of the appropriate personnel who will comprise the committee;

- general guidelines for release of data including the method of determining the minimum amount of information needed for the request; appropriate restrictions for safeguarding the information; whether the information to be released is court-sealed information and the reason for release is for legally compelling reasons and for limited and specific purposes only. Examples include conducting a program evaluation or to assist the state criminal justice repository in correcting criminal history records.

Commentary

To ensure consistency, transparency, and rigorous oversight of confidential data, the pretrial services program should establish and maintain a data-sharing committee to review new requests for data, requests to change existing data-sharing agreements, and to recommend how to respond to those requests. The committee should use laws, policies, national and state pretrial standards, and provisions in contractual agreements to determine an appropriate response. The review and recommendations should focus on ensuring that the response to the request is consistent with the agency's data-sharing policies and consider the work volume connected to the types and number of such requests. The committee's recommendations should be forwarded to the Agency Director for approval.

[25] This consent may be done via initial explanation through protocol and the individual's agreement to be interviewed or questioned. (See commentary below).

Appropriate agency personnel for the data sharing committee might well include the General Counsel, Director of Operations, Director of Research, and others appointed by the overall agency Director. The committee may request other agency staff to join its deliberations as necessary. The committee should meet at regular intervals and additional meetings should be scheduled for urgent requests. The committee should also conduct an annual review of the nature and extent of data requests, issues that need attention, and the volume of work. The committee will also review existing and new data sharing agreements to ensure they are compliant with agency policies.

These standards also call for an agency protocol, to be given to everyone prior to collecting personal data, explaining the use of the data being asked of him or her as well as potential uses going forward. Every data sharing agreement should have language that explains that all the information being shared includes the arrested-individuals' consent through a protocol that is consistently and uniformly administered throughout the agency.

VII. ADMINISTRATIVE STANDARDS

A. Training

1. Programs shall ensure that their employees are sufficiently trained to undertake the duties and responsibilities of the program.

2. Training shall include timely orientation of all program staff regarding these Standards and shall seek to ensure that all employees perform their duties consistent with the provisions of these Standards, applicable laws and regulations.

3. Programs shall, where feasible, initiate training to educate other members of the criminal justice system regarding the policies and practices of pretrial release programs.

B. Information Gathering and Data Collection

1. Programs shall develop and maintain an information system that will facilitate ongoing monitoring of the effectiveness of the program in relation to statewide standards.

2. Programs shall conduct periodic reviews to determine whether any pretrial program practices need to be adjusted.

3. Programs shall collect statistical information to determine failure-to-appear rates and other indicators of programmatic success.

C. Collaboration and Education

1. Programs shall take steps to ensure that the criminal justice community is informed as to pretrial services offered in their jurisdiction. This information may be disseminated through the establishment of a task force, forums, circulars or any other means which formally accomplish the goal of informing the criminal justice community of pretrial services.

2. Programs shall collaborate with the criminal justice community including their alternative to incarceration advisory boards or criminal justice coordinating councils in promoting greater usage of pretrial services, refining policies and practices with respect to program services, and expanding referral sources to assist individuals in securing release.

3. Programs shall have regular meetings with community representatives to ensure

program practices address concerns of the community on matters involving pretrial populations such as monitoring and referral of those released, handling of substance abuse treatment, health services (physical, mental health, disabilities), employment services, language barriers, and social services.

VIII. ORGANIZATIONAL STRUCTURE

A. Organization and management of the pretrial services agency or program

1. The pretrial services agency or program should have a governance structure that provides for appropriate guidance and oversight of the agency's staff in the development of operational policies and procedures and for effective internal administration of the agency or program. The governance structure should enable effective interaction of the program with the court and with other criminal justice agencies, as well as with representatives of the community served by the program. To ensure objectivity and professionalism, the agency/program should develop its own mission statement and be structured to ensure substantial independence in the performance of its core functions.

2. The pretrial services agency or program should develop and implement appropriate policies and procedures for the recruitment and selection of staff, and for compensation, management, training, and career advancement.

3. The pretrial services program should have policies and procedures that enable it to function as an effective institution in its jurisdiction's criminal justice system. In particular, the program or agency should:

- establish goals for effectively assisting the court in pretrial release decision making, where statute does not require release;
- develop and regularly update strategic plans designed to enable accomplishment of the goals that are established;
- develop and regularly update written policies and procedures describing the performance of key functions;
- develop and maintain financial management systems that enable the program to account for all receipts and expenditures, prepare and monitor its operating budget, and provide the financial information needed to support its operations and requests for funding to support future operations;
- develop and operate an accurate management information system to support the prompt identification of individuals, information collection and presentation, risk assessment, identification of appropriate release conditions, compliance monitoring and detention review functions essential to an effective pretrial services agency or program;

- establish procedures for regularly measuring the performance of the jurisdiction and of the pretrial services agency or program in relation to the goals that have been set;
- have the means to assist persons with disabilities and persons who have difficulty communicating in written or spoken English.

Commentary

This Section provides a general framework for the organization and operation of a pretrial services agency or program. The basic principles and guidelines set forth in the Standards should be applicable regardless of the size or location of the agency or program.

Regardless of where it is housed for administrative or budgetary purposes, it is important for a pretrial services agency or program to function as a neutral component of the jurisdiction's criminal justice system, and where requested or authorized by the court, convey reliable and unbiased information and recommendations.

VIII(A1) above calls for a governance structure that will provide guidance and support for the achievement of agency goals. No specific governance structure is suggested, understanding that circumstances will differ considerably across jurisdictions. The point is to have a governance structure that will help to ensure the requisite neutrality, will support the adoption and implementation of appropriate staffing policies and operational procedures, and will assist the agency or program in its work with the court, other criminal justice agencies, and the community.

VIII(A2) above recognizes that the circumstances and needs of different jurisdictions vary. These Standards, therefore, contain no specific provisions concerning the qualifications of staff. Rather, A2 calls for each agency or program to develop its own policies and procedures for staff recruitment, selection, compensation, management, training, and career advancement. In some instances, policies and procedures concerning these matters will be set by human resources management of larger probation departments, sheriff's offices, or courts. Regardless of the organizational location, the functions of recruitment, selection, training, and career advancement should be oriented to the basic principles of least restrictive and non-monetary release and the unique mission of pretrial services agencies and programs.

VIII(A3) provides a basic checklist of organizational characteristics and activities for pretrial services agencies or programs to function effectively within their jurisdictions. Subparagraphs (a) through (d) focus on aspects of operations that should be found in well-functioning organizations:

- Organizational goals – especially goals that relate directly to the functions of providing information to judicial officers, the effective monitoring and supervision of released individuals, and the agency's own operations.
- Strategic plans aimed at organizing resources to help achieve the goals that are set.

- Written operational policies and procedures to guide staff in day-to-day operations in interviewing, monitoring and supervising released individuals with conditions.[26]

    - Financial management systems for the program to manage its resources, account for expenditures and receipts, and support requests for funding of future operations.

VIII(A3) also focuses on agency or program operations that relate specifically to core functions:

- Developing and using a management information system that will help agency staff perform core functions of providing information to judicial officers about newly arrested individuals; conducting assessments, where available; crafting recommendations concerning appropriate conditions; and tracking individual compliance with release conditions.
- Developing procedures for measuring agency performance and measuring the performance of the jurisdiction concerning pretrial services programs.[27]
- Aiding persons with disabilities (e.g. visual or hearing impairments or mental illness) and persons who cannot read, speak, or understand English.[28]

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[26] For examples of operations manuals and directives concerning specific operational procedures, see the New York City Criminal Justice Agency publications entitled Completing the ROR Interview and Verification Calls (New York: NYC Criminal Justice Agency, June 2003).

[27] NIC Measuring What Matters: Outcome and Performance Measures for the Pretrial Services Field, NIC August 20, 2011.

[28] There are a variety of ways in which such assistance can be provided, including establishing linkages with persons who have the requisite knowledge and skills to provide the needed assistance (e.g., qualified interpreters, mental health specialists). In jurisdictions where there are significant populations that cannot read or understand English, the use of forms and instructions in the native language can be helpful. For discussion of the role of pretrial services agencies in interviewing and developing recommendations concerning cases involving persons with mental illness, see e.g., Council of State Governments, Criminal Justice/Mental Health Consensus Project (Lexington, KY: Council of State Governments, 2002), pp. 90-100.

Appendix A

DEFINITION OF TERMS RELATED TO THE RELEASE OF DATA[29]

A pretrial services agency's policies on the release of data address the conditions under which identified records, sealed records, agency information, third-party agency information, and non-agency information can be shared outside of the pretrial services agency.

Identified Record: An identified record is one which includes any of the following items of information about an individual: First name, Last name, date of birth, address, telephone number, e-mail address, NYSID number, Social Security number, arrest number, pretrial case number, docket number, indictment number, or any other information that could reasonably be used to determine the identity of an individual.

De-identified Record: A de-identified record is one which does NOT include any of the following items of information about an individual: First name, Last name, date of birth, address, telephone number, e-mail address, NYSID number, Social Security number, arrest number, pretrial case number, docket number, indictment number, or any other information that could reasonably be used to determine the identity of an individual.

Sealed Record: A sealed record is a criminal record that has been sealed by specific order of a court or is sealed automatically by statute. See CPL §160.50..

Pretrial Services Agency Information: This covers information collected by the agency directly from individuals or their contacts through in-person interviews, phone calls, text messages, or e-mails, as well as the agency's risk assessment and release recommendation. Pretrial information includes both individual information and third-party information.

Third-party agency information: This is information the pretrial services agency collects from individuals or their contacts that may identify the individual's personal contacts, employers, schools, training programs, treatment programs, bail sureties, crime victims, or other third parties.

Non-agency Information: This is information provided to the pretrial services agency by other agencies or organizations, including Police and other law enforcement authorities, the Office of the Court, the Correction or Sheriff's department, the local, state or federal criminal justice history (fingerprint) depository, and prosecutor's office. Non-agency information is collected through data transmissions, routine or one-time transmissions of data files or paper records, e-mails, or transcriptions from other data sources.

[29] These terms may vary according to jurisdictions, but the descriptions are accurate as to data type.