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SYMPOSIUM - "WHAT IS URBAN LAW TODAY?": A SYMPOSIUM ON THE FIELD'S PAST, PRESENT, AND FUTURE IN HONOR OF THE URBAN LAW JOURNAL'S FORTIETH ANNIVERSARY

Finally Some Improvement, But Will it Accomplish Anything? An Analysis of Whether The Charitable Bail Bonds Bill Can Survive The Ethical Challenges Headed Its Way

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FINALLY SOME IMPROVEMENT, BUT WILL IT ACCOMPLISH ANYTHING? AN ANALYSIS OF WHETHER THE CHARITABLE BAIL BONDS BILL CAN SURVIVE THE ETHICAL CHALLENGES HEADED ITS WAY

Alex Petrossian[*]

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INTRODUCTION

On an unseasonably cold evening in southern Texas, Leslie Chew had trouble sleeping in the car that he called home.[1] After finally deciding that he needed something to keep warm, Mr. Chew entered a store with no money and a bad plan. Shortly after, Mr. Chew was arrested for attempting to steal four thirty-dollar blankets.[2] Later that night, a judge set bail at $3500 for Mr. Chew.[3] One hundred eighty-five nights later, Mr. Chew was still incarcerated.[4]

Mr. Chew did not spend six months in jail because he was found guilty of petit larceny. Instead, Mr. Chew was confined to a cell because he could not afford to pay either a $3500 cash deposit to the court or a nonrefundable $350 fee to a bail bondsman.[5] As a result,

1. Laura Sullivan, *Bail Burden Keeps U.S. Jails Stuffed With Inmates*, NPR (Jan. 21, 2010, 2:00 PM), http://www.npr.org/2010/01/21/122725771/Bail-Burden-Keeps-U-S-Jails-Stuffed-With-Inmates.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

Mr. Chew remained in Lubbock County Jail until he ultimately received and accepted a plea from the prosecution.[6]

Similarly, Carol Brown was recently arrested in Brooklyn when a police officer claimed that he saw her drop a crack pipe.[7] When bail was set at $1000, Ms. Brown realized it would be impossible for her to come up with the money.[8] Although the case was eventually dismissed after a lab test revealed that there was no drug residue on the pipe, Ms. Brown had already spent twelve days incarcerated, eight of which were on Rikers Island.[9]

Meanwhile, a wealthy attorney in Seattle accused of raping several massage therapists was able to preserve his liberty after posting the requisite one-million-dollar bail.[10] Even the much-maligned George Zimmerman was not detained before being tried for allegedly murdering Trayvon Martin because he was released from custody on $150,000 bail.[11]

Bail is a distinctive component of the United States' legal system in that it provides wealthy individuals with the opportunity to avoid pretrial detention, while making it more likely that indigent defendants will remain incarcerated before either an admission or a finding of guilt.[12] Even if bail is set at an amount that most people would view as insignificant, it could still be prohibitive for an indigent defendant. A Human Rights Watch study found that in 2008, eighty-seven percent of New York City defendants were unable to post bail when it was set for merely $1000 or less.[13] These charges were all non-felony offenses and nearly three quarters of them were for minor transgressions such as trespassing, shoplifting, theft of services

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6. Chew v. State, No. 07-06-0210-CR, 2006 WL 2080625, at *1 (Tex. App. July 27, 2006).

7. Russ Buettner, *Top Judge Says Bail in New York Isn't Safe or Fair*, N.Y. TIMES, Feb. 6, 2013, at A1.

8. *Id.*

9. *Id.*

10. Jennifer Sullivan, *Seattle Lawyer Facing Rape Charges Free on Bail*, SEATTLE TIMES: THE TODAY FILE (Nov. 1, 2012, 5:48 AM), http://blogs.seattletimes.com/today/2012/11/seattle-lawyer-facing-rape-charges-free-on-bail.

11. Matt Flegenheimer, *George Zimmerman Released After Posting Bail*, N.Y. TIMES, Apr. 23, 2012, http://www.nytimes.com/2012/04/24/us/george-zimmerman-released-after-posting-bail-in-trayvon-martin-case.html.

12. *See, e.g.*, Sullivan, *supra* note 1.

13. JAMIE FELLNER, HUMAN RIGHTS WATCH, THE PRICE OF FREEDOM: BAIL AND PRETRIAL DETENTION OF LOW INCOME NONFELONY DEFENDANTS IN NEW YORK CITY 2 (2010), *available at* http://www.hrw.org/sites/default/files/reports/us1210webwcover_0.pdf.

(turnstile jumping), or possession of marijuana.[14] To make matters worse, the accused misdemeanants spent an average of sixteen days in confinement.[15]

The vulnerability of indigent defendants is hardly a new phenomenon. In fact, when Alexis de Tocqueville visited America in the mid-nineteenth century he noticed that the system of bail was disproportionately detrimental to the poor and inherently aristocratic.

> It is evident that such a [system of bail] is hostile to the poor, and favorable only to the rich. The poor man has not always a security to produce, even in a civil case; and if he is obliged to wait for justice in prison, he is speedily reduced to distress. The wealthy person, on the contrary, always escapes imprisonment in civil cases; nay, more, if he has committed a crime, he may readily elude the punishment by breaking his bail. Thus all the penalties of the law are, for him, reducible to fines. Nothing can [be] more aristocratic than this system of legislation.[16]

Since de Tocqueville first observed that the United States' bail system unfairly discriminates against the poor, pretrial detention has only become more common.[17] Today, sixty-two percent of the country's incarcerated population is comprised of individuals waiting to be tried.[18] Being detained pretrial deprives the defendant of the most crucial stage of a criminal case and exacerbates the chances of the accused being acquitted.[19] Furthermore, defendants who are detained pretrial typically receive harsher sentences than those who are either released on their own recognizance or able to post bail.[20]

In an effort to promote judicial parity for indigent defendants, The Bronx Defenders, a non-profit organization that provides legal

14. *Id.* at 24.

15. *Id.* at 71.

16. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 49–50 (Henry Reeve trans., Barnes & Nobel World Digital Library 2000) (1835).

17. *See generally* THOMAS H. COHEN & BRIAN A. REAVES, U.S. DEPARTMENT OF JUSTICE, PRETRIAL RELEASE OF FELONY DEFENDANTS IN STATE COURTS (2007), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/prfdsc.pdf; Buettner, *supra* note 7.

18. Aimee Mayer, *For the Poor, Bail Often Means Jail*, HUMAN RIGHTS BRIEF (Mar. 11, 2011), http://hrbrief.org/2011/03/for-the-poor-bail-often-means-jail.

19. *See* Andrea Clisura, *None of Their Business: The Need for Another Alternative to New York's Bail Bond Business*, 19 J.L. & POL'Y 307, 316 (2010). The Supreme Court deemed the pretrial stage the "most critical period" of the proceeding because that is when defendants meet with counsel and develop a defense strategy. *Id.* (quoting Powell v. Alabama, 287 U.S. 45, 57 (1932)).

20. *See id.*

representation to impoverished individuals who are charged with crimes in Bronx County,[21] solicited donations to create the Bronx Freedom Fund (Freedom Fund).[22] The Freedom Fund was a non-profit corporation that was designed to preserve the liberties of the accused by using charitable donations to post bail for certain Bronx Defenders clients.[23]

Roughly 130 Bronx Defenders clients were bailed out by the Freedom Fund during its eighteen months of operation.[24] Although these defendants returned to court at a high rate,[25] the Fund was shut down in 2009.[26] In *People v. Miranda*, the Bronx Supreme Court rejected bail paid by the Freedom Fund because the Fund contravened public policy by serving as both a bail bond business and an insurance business without a valid license.[27] Because the Fund was neither registered as a charitable group nor licensed by the state to operate as a "bail bond business" pursuant to New York insurance law, the court terminated the practices of the "uninsured bail bond business."[28] In addition, the Court alluded to the possibility of ethical violations by the Bronx Defenders attorneys for their involvement with the Fund, but left the ethical questions unresolved.[29]

In 2012, New York passed *An Act to Amend the Insurance Law, in Relation to Charitable Bail Organizations* (The Charitable Bail Bonds Bill or Bill), which exempts charitable and non-profit organizations, like the Bronx Freedom Fund, from the licensing requirement that *People v. Miranda* required.[30] In signing the legislation, which came into effect in October 2012, Governor Cuomo deemed it "unacceptable for defendants to have to spend time in jail

21. *Holistic Defense, Defined*, BRONX DEFENDERS, http://www.bronxdefenders.org/our-work/holistic-defense (last visited Oct. 18, 2013).

22. *See generally* People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 5160(U) (N.Y. Sup. Ct. 2009).

23. *See* discussion *infra* Part I.D.

24. *Miranda*, 2009 N.Y. Slip Op. 51560, at *8.

25. Of the 130 individuals that the Bronx Freedom Fund bailed out from 2007 to 2009, ninety-five percent of the defendants made their court date. Jamila Pringle, *Bail Fund Aims to Free Poor Defendants*, BROOKLYN BUREAU (Aug. 13, 2012), http://www.bkbureau.org/2012/08/13/bail-fund-aims-to-free-poor-defendants.

26. *Miranda*, 2009 N.Y. Slip Op. 51560, at *15; *see also* Joel Stashenko, *Lippman Lauds Bronx Group's Nonprofit Approach to Bail Defenders*, N.Y. L.J., Feb. 11, 2013, at 1, 7.

27. *Miranda*, 2009 N.Y. Slip Op. 51560, at *10.

28. *See* Stashenko, *supra* note 26, at 1, 7.

29. *See Miranda*, 2009 N.Y. Slip Op. 51560, at *18; Stashenko, *supra* note 26.

30. *See* N.Y. INS. LAW § 6805 (McKinney 2009).

for low-level crimes they may have not committed simply because they are unable to meet the bail requirement."[31]

While the Charitable Bail Bonds Bill is certainly a valiant attempt to promote equity for indigent defendants who are vulnerable to pretrial incarceration,[32] it remains to be seen whether the Bill will accomplish anything. It is plausible that the Bill will be rendered less effective than anticipated if an attorney's involvement with the charitable organization is deemed to be unethical pursuant to New York's Rules of Professional Conduct. Although non-profit organizations that are unaffiliated with legal services organizations can post bail for indigent individuals without worrying about ethical constraints, it is unclear whether attorneys, like those at the Bronx Defenders, can abide by standards of ethics while also creating or working with a charitable organization to post bail for their clients.

Part I of this Note addresses the plight of indigent criminal defendants, attorneys' efforts to reduce their vulnerability, and the Charitable Bail Bonds Bill and its effort to promote alternatives to for-profit bail bondsmen. Part II enumerates the ethical questions that are likely to arise once attorneys at legal services organizations, like those at the Bronx Defenders, begin working with charitable corporations who post bail for the attorney's clients. Part III seeks to resolve the ethical questions that are still left unanswered in the wake of *People v. Miranda* and the ratification of the Charitable Bail Bonds Bill.

I. BAIL, ITS TENDENCY TO PROMOTE AN INFERENCE OF GUILT FOR INDIGENT MISDEMEANANTS, AND ALTERNATIVES TO FOR-PROFIT BAIL BONDSMEN

A. Bail and Its Impact on Indigent Defendants

Bail is not meant to serve as a punishment to the criminal defendant.[33] In fact, the purpose of bail is not even to insure against future criminal conduct.[34] Instead, bail is a procedural mechanism that seeks to serve the dual purpose of promoting law enforcement by

31. Press Release, Governor's Press Office, Governor Cuomo Signs Legislation to Help Low-Income Defendants Meet Bail Requirements (July 18, 2012), http://www.governor.ny.gov/press/07182012-Help-Low-Income-Defendants-Meet-Bail.

32. *Id.*

33. *See* Pringle, *supra* note 25.

34. *See* United States v. D'Argento, 227 F. Supp. 596, 602 (N.D. Ill. 1964).

encouraging defendants to return to court, while simultaneously upholding the presumption of innocence that is a hallmark of the American legal system.[35] Because there has been no finding of guilt at the time bail is issued, it cannot be used as an instrument to punish the accused, but is instead "intended as a catalyst to aid the appearance of the defendant when wanted."[36]

Although the purpose of bail is not to punish the accused, it is more punitive for certain individuals. For indigent defendants, the issuance of bail poses a unique set of challenges.[37] First, indigent defendants are likely unable to post bail even when it is set exceptionally low. In 2010, for example, forty percent of Brooklyn's criminal defendants who had bail set at $500 or less were unable to come up with the money.[38] These defendants, who were all accused of minor crimes such as theft or trespassing, were incarcerated before any guilty verdict.[39] This time in jail not only impedes the defendant's opportunity to meet with counsel and construct a defense, but it also prevents the accused from going to work, attending school, or receiving any physical or mental therapy to which they may be accustomed.[40]

Because of the threat of continued confinement, indigent defendants frequently accept plea offers in order to promptly get out of jail.[41] If a detained defendant either refuses to plea out or does not receive an offer from the prosecution, she can spend weeks or even longer awaiting trial.[42] If, however, the imprisoned defendant accepts the plea, she can instantly return home with a conditional discharge, a fine, or "time served."[43] Although accepting the plea often ends the incarceration period, the conviction will likely have devastating collateral consequences for the indigent defendant.[44] The defendant's

35. *See* Patricia A. Reed, *Pretrial Bail: A Deprivation of Liberty or Property with Due Process of Law*, 40 WASH. & LEE L. REV. 1575, 1581 (1983).

36. *See* United States v. Melville, 309 F. Supp. 824, 827 (S.D.N.Y. 1970).

37. *See generally* Mayer, *supra* note 18.

38. *See* Pringle, *supra* note 25.

39. *See generally* Mayer, *supra* note 18.

40. *See generally* Clisura, *supra* note 19, at 317.

41. *See* FELLNER, *supra* note 13, at 32–33.

42. *See id.* at 31–32.

43. *See id.* at 32. When a defendant is remanded prior to trial, the "time served" incarcerated while awaiting trial is subtracted from the sentence the defendant ultimately receives upon either a plea or a guilty verdict. *See* N.Y. PENAL LAW § 70.30 (McKinney 2009).

44. *See* FELLNER, *supra* note 13, at 32.

new criminal record can completely hinder the individual's job prospects, bar the individual from receiving public housing, and also potentially cloud a judge's perception of the individual if they are arrested again.[45]

Moreover, the vulnerability of the detained indigent is exacerbated by the fact that their pretrial incarceration ultimately dictates the terms of the plea offer.[46] Unlike a detained defendant who has little bargaining power, non-felony defendants who are free pretrial have no reason to accept an offer that involves jail time.[47] As a result, they will likely fight the case rather than plead out.[48] Because the state's case typically weakens as time progresses, this strategy gives the defendant a better chance of being acquitted.[49] In fact, the New York City Criminal Justice Agency found that non-felony pretrial detainees had a ninety-two percent conviction rate, whereas non-felony defendants who were released pretrial had a fifty percent conviction rate.[50]

B. For-Profit Bail Bondsmen

Although a defendant who is unable to post bail can hire a bail bondsman to help front the cost, an indigent accused of a misdemeanor may be unable to do so.[51] Rather than paying the court once bail is set, the accused can pay a bail bondsman ten percent of the requisite bail to insure his return.[52] When bail is set low, however, it will be difficult to find a bail bondsman willing to post bond for such a nominal fee.[53] Many bondsmen deem that a profit of only $100 will not be worth the bondsman's time of potentially locating a "bail skip."[54] In fact, many bail bond businesses will only post bond for fees of $1000 or more.[55] This is troubling for accused misdemeanants who cannot afford to post bail, yet did not have bail set in an amount that

45. *See id.*
46. *See id.*
47. *See id.*
48. *See id.*
49. *See id.* at 33.
50. *See id.*
51. *See generally* Clisura, *supra* note 19, at 310–11.
52. *See id.* at 311.
53. *See id.* at 310.
54. *See id.* at 310–11.
55. *See id.* at 310.

would be enough to entice a bail bondsman. As a result, the accused is left to await trial while in jail.

While indigent defendants often have difficulty finding a for-profit bail bondsman who will post bond on their behalf, accused individuals who can afford their services view a bail bondsman as a necessary cost to avoid pretrial incarceration.[56] Acting like an insurance company, the bail bondsman posts collateral on the defendant's behalf ensuring that she will attend her next court date.[57] If a defendant fails to appear, the bail bondsman loses the collateral unless or until the "bail skip" is located and brought to court. Not only is it financially burdensome to the bail bondsman if the defendant skips bail, but it also hinders their relationship with insurance underwriters.[58] Insurance companies require bail bond businesses to create and maintain "buildup funds" in the event that a bail skip occurs.[59] The funds, which are comprised of the nonrefundable fees that the bail bondsman has acquired over the years, will be tapped into whenever a defendant fails to appear.[60] In order to continue operating as a bail bond business, the bondsman is required by their insurance company to have a "buildup fund" that surpasses a certain dollar threshold.[61] If a "buildup fund" is routinely dipped into to post bond for bail skips, then the insurance company will likely prevent the bondsman from bailing out future defendants.[62] It is imperative, therefore, that the bail bondsman promptly locates the bail skip and returns her to the state's custody.[63]

Initially, the bondsman hopes that the police are able to find the defendant.[64] In reality, however, the police lack the time and resources to locate every bail skip.[65] As the time limit for returning the defendant draws nearer, which is usually ninety to 180 days after

56. *See* Ralph Thomas, *The Bail Bond Recovery Business*, BAIL ENFORCEMENT RESOURCE CENTER, http://pimall.com/nais/n.bailrec.html (last visited Oct. 18, 2013).

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.*

61. *See id.*

62. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

the defendant fails to appear,[66] the bondsman may hire a bounty hunter to locate the bail skip and return her to the state's custody.[67] While the cost for hiring a bounty hunter is steep, a bail bondsman's incentive to locate and return the bail skip often compels them to pay the fee.[68] Not only is there a monetary incentive for the bail bondsman to return the defendant, but his insurance company will forbid him from running his business if he continues to post bail for defendants who ultimately warrant.[69]

C. Attorneys Posting Bail for Their Clients and Attendant Ethical Concerns

Criminal defense attorneys recognize the disadvantages their clients face when they are unable to post bail[70] and, as a result, often seek to post bail on their behalf. By bailing out their clients, attorneys inherit "a financial interest in the outcome of a case" that will only end when their client has either attended all of her court dates or is returned to the state's custody.[71] Although the Ethics Committee has stated that it is possible for an attorney to ethically post bail for a client when she reasonably believes that a conflict of interest will not arise, the Committee acknowledges that "[o]ther than in relatively unusual circumstances"[72] a conflict of interest will exist:

> [A] lawyer may post, or arrange for the posting of, a bond to secure the release from custody of a client whom the lawyer represents in the matter with respect to which the client has been detained, but only in those rare circumstances in which there is no significant risk that her representation of the client will be materially limited by her personal interest in recovering the amount advanced.[73]

These "rare circumstances" include when (1) the amount of money is so nominal that it is of no consequence to the attorney, (2) the lawyer posting bail is a close friend of the clients, and reasonably

66. *See* Alex Tabarrok, *The Bounty Hunter's Pursuit of Justice*, WILSON Q., Winter 2011, at 56, *available at* http://www.wilsonquarterly.com/sites/default/files/articles/WQ_VOL35_W_2011_Article_05_2.pdf.

67. *See id.*

68. *See id.*

69. *See* Thomas, *supra* note 56.

70. *See* discussion *supra* Part I.A.

71. *See* Dayla S. Pepi & Donna D. Bloom, *Take the Money or Run: The Risky Business of Acting as Both Your Client's Lawyer and Bail Bondsman*, 37 ST. MARY'S L.J. 933, 961 (2006).

72. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-432 (2004).

73. *Id.*

expects to be reimbursed, (3) the lawyer agrees in writing that she will not exercise her right to legal recourse against the client, and (4) the lawyer reasonably believes that the client will almost certainly make her court date.[74] If the situation fails to fall neatly into one of the enumerated circumstances, it is still possible that an attorney may ethically post bail for a client.[75] When determining whether it is unethical for an attorney to do so, the ABA examines "the particular facts surrounding the lawyer-client relationship; the lawyer contemplating posting a bond on behalf of a client is permitted to take into account the totality of circumstances in deciding whether a conflict of interest will arise should the lawyer so act."[76]

Although several states do not explicitly preclude attorneys from posting bail for their clients, state Bar associations typically condemn the practice and insist that attorneys should avoid acting as their client's bondsman.[77] While there is no express ban on the practice in New York, attorneys in the state are not allowed to profit from posting bail for their clients.[78] Other states such as Wisconsin, North Carolina, and Michigan, on the other hand, have statutes that unequivocally bar attorneys from providing bail for their clients, and even punish perpetrators of the law for misconduct.[79]

Even though the practice of an attorney doubling as her client's bondsman is viewed unfavorably by both the ABA and most states, some jurisdictions make an exception for indigent defendants.[80] In fact, even jurisdictions that explicitly prohibit attorneys from posting bail for their clients, such as Michigan, recognize an exception for indigent clients: "[b]ecause a lawyer representing an indigent client does not expect the client to repay him, the conflict of interest concern that is usually at issue when a lawyer posts a bond on behalf of a client does not arise."[81] By posting bail for an indigent client, the

74. *See id.*

75. *See id.*

76. *See* Deborah Markowitz, *The Attorney's Query: May a Lawyer Ethically Post a Bond or Serve as a Surety on Behalf of a Client?*, 18 GEO. J. LEGAL ETHICS 959, 969 (2005).

77. *See*, John Caher, *Lawyer's Offer to Cover Client's Bail Raises Ethical Concerns*, N.Y. L.J., Mar. 15, 2012, at 2.

78. N.Y. INS. LAW § 6804(c) (McKinney 2009).

79. *See* Caher, *supra* note 77, at 2 (citing State Bar of Wis. Comm. on Prof'l Ethics, Formal Op. E-96-1 (1996); N.C. State Bar Ethics Comm., Op. 173 (1994); State Bar of Mich. Prof'l Ethics Comm. RI-65 (1990)).

80. *See* Markowitz, *supra* note 76, at 963 n.24.

81. *Id.*

attorney "acquiesces in having the amount used to pay the costs and agrees either not to be reimbursed at all or to look only to the proceeds of the recovery for reimbursement."[82] Devoid of a financial interest that they expect to attain, the attorney is thereby not conflicted between representing her client and reacquiring her collateral. In addition, New York, New Jersey, and several other states[83] explicitly allow attorneys to pay court costs and expenses of litigation, which bail is frequently considered,[84] for indigent clients.

D. The Bronx Freedom Fund: The Bronx Defenders' Alternative to "For-Profit" Bail Bondsmen

Critics of New York's bail system insist that bail essentially "serves as a de facto sentence before trial" for indigent defendants.[85] As opposed to upholding the country's firm commitment to "innocent until proven guilty," bail "reflexively reflect[s] a presumption of guilt."[86] By effectively detaining indigent individuals for extended periods of time prior to a finding of guilt, the bail system is "essentially sentence first, disposition second."[87] As a result, adversaries of the current bail system, including Chief Judge Jonathan Lippman of the New York Court of Appeals, have encouraged the state to adopt alternatives to "for-profit" bail bondsman.[88]

In an effort to provide bail for indigent clients who would otherwise be subjected to pretrial detention, The Bronx Defenders created the Bronx Freedom Fund, a non-profit corporation, in 2007.[89] The Freedom Fund, which was comprised of grant money and charitable donations,[90] was "formed for the purposes of supporting indigent clients of the Bronx Defenders . . . and helping them avoid the cost of short jail sentences"[91] by posting bail for certain clients.[92]

82. State Bar of Mich. Prof'l Ethics Comm., Op. RI-91 (1991).

83. *Financial Assistance to Clients*, 51 Laws. Man. On Prof. Conduct (ABA/BNA) 801 (2012), *available at* http://apps.americanbar.org/litigation/litigationnews/top_stories/docs/ABA_Manual_Financial_Assistance.pdf.

84. *Id.*

85. Buettner, *supra* note 7.

86. *Id.*

87. *Id.*

88. *See id.*

89. *See* People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U), at *4 (N.Y. Sup. Ct. 2009); Jarrett Murphy, *Awaiting Justice: The Punishing Price of NYC's Bail System*, CITY LIMITS, Fall 2007, at 4, 29.

90. *See Miranda*, 2009 N.Y. Slip Op. 51560(U), at *3.

91. *Id.* at *4.

In order to tap funds from the Freedom Fund, attorneys at the Bronx Defenders first referred their client's case to Zoe Towns, a non-lawyer who was the sole employee of the charitable organization. Ms. Towns then screened the referred individual and determined whether the Fund would post bail on the client's behalf.[93]

The Freedom Fund listed four factors that ought to be considered when making this determination: (1) the individual must first be a client of the Bronx Defenders; (2) bail must be set in an amount no greater than $1500; (3) the top charge on the accusatory instrument must be a misdemeanor or a non-violent felony; and (4) the CJA score, which is a report filed with the court that uses a number of factors to determine the defendant's "flight risk," must be at least three.[94] While the four factors helped guide Ms. Towns' determination of whether the defendant should qualify for bail

92. *See id.* at *3.

93. *See id.* at *5.

94. *See id.* at *4. At arraignments, New York City courts use a point system (CJA form) to help predict whether a defendant exhibits a heightened risk of flight. QUDSIA SIDDIQI, N.Y.C. CRIMINAL JUSTICE AGENCY, AN EVALUATION OF THE NEW PRETRIAL RELEASE SYSTEM IN NEW YORK CITY: PHASE II OF THE POST-IMPLEMENTATION RESEARCH 1–3 (2005), *available at* http://www.cjareports.org/reports/june05.pdf. If the defendant receives a score of seven points or higher, she is recommended for release. *Id.* at 10. If the arrestee's score is between three and six, the defendant is at a moderate risk of flight. *Id.* Finally, if the defendant scores anywhere from negative twelve, the lowest possible score, to two, she is not recommended for release. *Id.* Although the judge is not obligated to follow the CJA form, *see id.* at 1, it serves as a quick and potentially helpful indication of whether the defendant is likely to appear. The recommendation system is largely based on a defendant's ties to the community. *See id.* at 4. The six factors that the court utilizes to determine the defendant's flight risk include:

1. Does defendant report a NYC area address?
2. Does defendant have a working telephone in his or her residence or a cellular phone?
3. Is defendant employed, or in school, or training program (or a combination of these) full time?
4. Does defendant expect someone at arraignment?
5. Does the prior bench warrant count equal zero?
6. Does the open case count equal zero?

Id. at 7. If the defendant's response to questions one, three, and four are accurate and verified by the court, the defendant receives one point. *See id.* at 8–9. If the defendant does not have the requisite information or provides false information, the defendant receives negative points. *See id.* The defendant receives either positive three points if she has a NYC address, or negative two if she does not. *See id.* If the defendant previously warranted (failed to appear to a court date), she receives negative five points. *See id.* If the defendant was either never arrested or attended all of her court dates when she was, she receives positive five points. *See id.* at 8. Lastly, if the defendant has another open criminal case, she will lose a point. *See id.*

assistance, she had permission from the Fund's Board of Directors to post bail in excess of $1500 in certain situations so long as she reasonably believed it to be appropriate.[95] Despite her level of discretion, she did not tap into the Freedom Fund's resources every time a Bronx Defenders attorney referred a client.[96] Instead, she used the CJA report and any information that the attorney gathered from working with the defendant to determine if the client qualified for bail assistance.[97] When she agreed to use the Fund's resources, she strived to maintain contact with the defendant and periodically inform the accused that if she did not show up for her court date, the bail money would be forfeited and thus be unavailable for future clients.

Of the 130 individuals that the Bronx Freedom Fund bailed out from 2007 to 2009, ninety-five percent of the defendants made their court date.[98] None of the 130 defendants were ultimately sentenced to jail, and nearly fifty percent of the defendants had their cases dismissed or adjourned.[99] While the data accentuates that "[w]ithout access to bail, poor people who would otherwise go free were pleading guilty and filling jail cells,"[100] the legality of the Bronx Freedom Fund was eventually scrutinized in *People v. Miranda*.

In *People v. Miranda*, the Bronx Supreme Court held that by acting as both a bail bond business and an insurance business, the Fund contravened public policy because it was neither properly licensed nor supervised by the Commissioner of Insurance.[101] The court underscored that the Bronx Freedom Fund did not qualify for an Insurance Law exemption that would have enabled the Fund to continue their practices without a license.[102] Instead, by avoiding all oversight, the Freedom Fund undermined the need to "strict[ly] control and overs[ee]" the country's bail bond business.[103]

While the court ultimately accepted the District Attorney's argument that the Fund violated public policy, they failed to issue a ruling on whether the close connection between the Bronx Defenders

95. *See Miranda*, 2009 N.Y. Slip Op. 51560(U), at *8.
96. *See id.*
97. *See id.*
98. *See* Pringle, *supra* note 25.
99. *See id.*
100. Nick Pinto, *Making Bail Better*, VILLAGE VOICE (Oct. 10 2012), http://www.villagevoice.com/2012-10-10/news/making-bail-better/.
101. *See Miranda*, 2009 N.Y. Slip Op. 51560(U), at *15.
102. *See id.*
103. *See id.* at *12.

attorneys and the Freedom Fund elicited an ethical violation.[104] In arguing for the Fund to be shut down, the Bronx District Attorney alleged that the close legal ties between Ms. Towns and the Bronx Defenders attorneys, which included Ms. Towns' unchecked access to legal files for Bronx Defenders clients, violated standards of ethics.[105]

Although the presumption is that attorneys can ethically provide bail for their clients in only unusual circumstances,[106] the court stated that there is "no ABA opinion that forbids an attorney from being involved in the posting of bail where no financial interests are implicated."[107] Unlike other attorneys who use their own funds to bail out their clients, the Bronx Defenders attorneys relied on donations from third parties to post bail for their clients.[108] Without a tangible financial loss at stake, it is plausible that the attorneys were not conflicted between recovering their collateral and representing their client. Similarly, the New York State Bar Association Committee on Professional Ethics does not provide an explicit answer on whether this practice is ethical.[109] Without either an ABA or a New York Ethics opinion directly addressing the issue, the court left the ethical concerns unresolved.

E. The Charitable Bail Bonds Bill

Three years after the Bronx Freedom Fund was deemed unlawful, New York legislatures ratified the Charitable Bail Bonds Bill.[110] The Bill empowers charitable organizations to provide bail for indigents accused of misdemeanors provided that bail is set at no more than $2000, the charitable group is registered as a 501(c)(3) organization, and that the organization does not charge a fee for its services.[111] The purpose of the law is to provide accused indigents with the opportunity to avoid pretrial incarceration by enabling charitable

104. *See generally id.* at *19 ("Since there is no clear legal precedent covering the unique and limited facts revealed in this bail hearing, this Court cannot issue a ruling on the ethical question raised by the People.").

105. *Id.* at *16.

106. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-432 (2004).

107. *Miranda*, 2009 N.Y. Slip Op. 51560(U), at *18.

108. *Id.* at *21.

109. *See* discussion *supra* Part I.C.

110. Press Release, *supra* note 31.

111. *Id.*

organizations to post bail on their behalf.[112] In doing so, the Bill exempts charitable bail organizations from certain licensing requirements.[113]

Even though the Charitable Bail Bonds Bill became law in July 2012, its effectiveness is yet to be determined.[114] As of January 2013, Robin Steinberg, executive director of the Bronx Defenders, "said the Bronx fund is gearing up to begin providing bail money again for indigent defendants once the state completes promulgating rules under the 2012 law."[115]

Although it will take some time before we can discern how indigent defendants are affected by the legislation,[116] it is possible that the Bill will be less effective than anticipated. While it is not the focus of this Note, it remains possible that criminal justice concerns will compel judges to simply reject bail posted by the charitable organization. More likely, though, is the possibility that the practice will be regarded as unethical. If the New York State Bar Association deems that attorneys at legal services organizations violate their ethical responsibilities when they create or team-up with charitable organizations that provide bail for their clients, then the practice will soon be halted. If ethical concerns preclude legal services organizations from implementing charitable funds or working with an existing one, then how else will an indigent defendant benefit from the new Bill?

While ethical concerns will not prevent charitable groups that are not affiliated with legal services organizations from posting bail for certain indigent defendants, at this point it is unclear whether non-legal charitable organizations will commit the time, energy, and resources to implement a fund that either solicits donations or uses the organization's resources to bail out an individual they may know nothing about. In fact, despite the Bill's ratification nearly six months earlier, Robin Steinberg acknowledged that "she knew of no other charitable organization that plans to offer bail."[117] Unlike non-legal charitable groups, legal services organizations similar to the Bronx

112. *See* Cindy Rodriguez, *Charities to Play Bail Bondsman Role*, WNYC NEWS (July 23, 2012), http://www.wnyc.org/articles/wnyc-news/2012/jul/23/charities-now-allowed-post-bail-poor-new-york-state/.

113. Press Release, *supra* note 31.

114. S. S07752, 2012 Senate, Reg. Sess. (N.Y. 2012).

115. Stashenko, *supra* note 26, at 7.

116. *See generally id.*

117. *Id.* at 7.

Defenders are likely eager to implement their own bail fund.[118] Public defense attorneys are undoubtedly aware of the harsh consequences their clients face when they are detained pretrial,[119] and will likely pursue any opportunity that lawfully gives their client a better chance of being acquitted.[120] As a result, forecasting the effectiveness of the Bill is largely based on whether it is ethical for attorneys at legal services organizations, like those at the Bronx Defenders, to either implement their own charitable fund or work closely with another organization that has their own.

F. Attorney-Client Privilege

A central tenet of the American legal system is that attorneys are afforded the right to withhold information about their client pursuant to the attorney-client privilege.[121] In order to facilitate full and honest interaction between attorneys and their clients, it is imperative that certain communications are kept confidential.[122] While this privilege is frequently recognized as valid only between an attorney and her client, New York law extends the privilege to communications between attorneys and their non-attorney colleagues and employees in certain situations.[123]

Although Ms. Towns was not an attorney, she was provided with unfettered access to legal files for all clients that were referred to the Fund for bail assistance. In addition, the attorneys handed Ms. Towns information about the defendant that was gathered during attorney-client conversations.[124] As a result, she may be able to invoke the attorney-client privilege to "prevent[] any fact-finding about what the individuals who sought the legal advice told. . . other [Bronx Defenders] lawyers."[125]

118. *See* Pinto, *supra* note 100. Shortly after the Bill was passed, the Brooklyn Defender Services began preparing for the creation of their own Bail Fund. *Id.*

119. *See* Clisura, *supra* note 19, at 317; *see also* discussion *supra* Part I.A.

120. Being detained pretrial drastically impedes the misdemeanant's potential for obtaining an acquittal. *See* FELLNER, *supra* note 13, at 33–34.

121. *See* Delta Fin. Corp. v. Morrison, 15 Misc. 3d 308, 315 (N.Y. Sup. Ct. 2007).

122. *See* Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys' Loyalty to Clients*, 40 ST. MARY'S L.J. 909, 923 (2009).

123. N.Y. C.P.L.R. 4503 (McKinney 2007); *see also* People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U), at *17 (N.Y. Sup. Ct. 2009) (quoting People v. Osorio, 549 N.E.2d 1183, 1185–86 (N.Y. 1989)).

124. *Miranda*, 2009 N.Y. Slip Op. 51560(U), at *17.

125. *Id.* at *13.

If the attorney-client privilege applies to Ms. Towns, the employee cannot be compelled to testify about certain communications the client had with her attorney.[126] More importantly, if the Bronx Defenders attorneys treated Ms. Towns as if she was governed by the privilege, then she was likely an agent of the Bronx Defenders.[127] Non-lawyers who are agents of either the attorney or the client must uphold a duty of confidentiality to the client, just as attorneys are required.[128] Pursuant to Rule 5.3 of the Model Rules of Professional Conduct, attorneys must hold their agents to the professional obligations of the lawyer. [129] If the Bronx Defenders attorneys did not want the non-attorneys to be bound by the obligations of the lawyer, then they should not have shared the client's file with them.[130] In fact, if the attorneys revealed the client's confidential information to a non-agent, they likely breached their duty of confidentiality to the client.[131]

From an ethical perspective, it is of great benefit to the client if the non-legal employee is an agent of the attorney because otherwise the client's confidential information would be at risk.[132] That agency relationship, however, may not be conducive to the responsibilities of a bail bondsman, who must disclose all information, even if it is contrary to the defendant's interests, in order to properly perform her job. Although it is necessary to establish whether Ms. Towns was an agent of a Bronx Defenders attorney, this determination is a matter of contract and agency law, and thus not the focus of this Note. But, as the court held in *People v. Miranda*, if there was no such agency relationship in place between the attorneys and Ms. Towns, disclosing the client's file to the non-attorney would likely cause an ethical problem.[133] As a result, Part II and Part III examine whether non-legal employees working for charitable organizations, like Ms. Towns, could ethically post bail for certain individuals if they are considered agents of the attorney.

126. N.Y. C.P.L.R. § 4503 (McKinney 2007).

127. *See generally Miranda*, 2009 N.Y. Slip Op. 51560(U), at *17.

128. *See* Delta Fin. Corp. v. Morrison, 15 Misc. 3d 308, 316–17 (N.Y. Sup. Ct. 2007).

129. *See* MODEL RULES OF PROF'L CONDUCT R. 5.3 (2009).

130. *See id.*

131. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

132. *See id.*

133. People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U), at *17 (N.Y. Sup. Ct. 2009).

II. ENUMERATING THE ETHICAL CONCERNS THAT EXIST WHEN ATTORNEYS AT LEGAL SERVICES ORGANIZATIONS WORK CLOSELY WITH CHARITABLE BAIL FUNDS

Although the Charitable Bail Bonds Bill enables charitable organizations to implement funds that provide bail for certain criminal defendants, attorneys' involvement with bail funds will continue to be scrutinized because ethical questions still loom. The practice of serving as both a bail bondsman and an attorney for a criminal defendant raises ethical questions in four areas: (1) the potential "conflict with the client involving the lawyer's own potentially adverse pecuniary [or personal] interest; (2) protection of client confidentiality; (3) improper solicitation of clients; and (4) financial relationships between a lawyer and his client."[134] If charitable bail funds run afoul of any of these ethical concerns, the practice could soon be halted.

A. Conflict of Interest

Although the New York State Bar Association Committee on Professional Ethics has only explicitly precluded attorneys from posting bail for their clients when they profit from doing so,[135] there is a presumption that posting bail for one's own client creates a conflict of interest for the attorney pursuant to Rule 1.7 of the Model Rules of Professional Conduct.[136] When an attorney posts bail for a client, she contracts with the state to guarantee the appearance of her client at future court dates.[137] If the client fails to appear, the attorney turned bail bondsman must forfeit the money.[138] The contract, therefore, "provides a financial obligation where the lawyer's interests could potentially conflict with the interests of the client."[139]

An attorney's "basic duty . . . is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."[140] An attorney's ability to do so, however, could be tempered by a desire to recover their pecuniary interest.

134. Pepi & Bloom, *supra* note 71, at 976–77.

135. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 647 (1993).

136. *See* discussion *supra* Part I.C. *See generally* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004).

137. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004).

138. *Id.*

139. Pepi & Bloom, *supra* note 71, at 978.

140. *Id.* at 983 (quoting JOHN M. BURKHOFF, CRIMINAL DEFENSE ETHICS 754 (2d ed. 2005)).

The South Carolina Ethics Advisory Committee, for example, opined that "by obtaining a financial stake in the handling of a particular case, an attorney might be tempted to push his client into accepting a settlement offer which the attorney would ordinarily advise be turned down."[141] By encouraging her client to accept the settlement, the attorney is assured that her collateral is returned, but is shunning her responsibility to act in the best interest of the client. Occupying both roles, therefore, could serve as a challenge for the attorney and as a detriment to the client.

An attorney's pecuniary interest is not the only interest that is capable of hindering her ability to diligently represent her client. An attorney's unyielding loyalty to her client serves as both a cornerstone of the attorney-client relationship[142] and as the "most fundamental of all fiduciary duties the legal profession owes to its clients."[143] "This loyalty can only be properly carried out," however, "if a lawyer fully comprehends that any other interest of the lawyer, whether personal or professional, has the potential to compromise, if not destroy, the lawyer's necessary dedication to vindicating the client's legal position."[144] Therefore, anything that dilutes the attorney's loyalty to her client should not be permitted. When evaluating whether an attorney's representation could be adversely affected, it is necessary to examine whether the attorney's personal interests, and not just those that are pecuniary, could impede with her ability to diligently represent her client.[145]

B. Duty of Confidentiality

Distinct from the attorney-client privilege is an attorney's ethical obligation to uphold her duty of confidentiality to her client.[146] The duty of confidentiality applies not merely to matters communicated in confidence by the client, but also to all information relating to the client's representation, whatever its source.[147] The ethical obligation

141. S.C. Bar Ethics Advisory Comm., Op. 90-02 (1990).

142. *See* Wald, *supra* note 122, at 911.

143. Lawrence Fox, *The Gang of Thirty-Three Taking the Wrecking Ball to Client Loyalty*, 121 YALE L.J. ONLINE 567, 570 (2012), *available at* http://yalelawjournal.org/images/pdfs/1063.pdf.

144. Pepi & Bloom, *supra* note 71, at 975 (internal quotation marks omitted).

145. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.7(a)(2) (2013).

146. *Id.* r. 1.6.

147. *Id.* r. 1.6(a)(3). An attorney has an obligation not to disclose "any information that is likely to be embarrassing or detrimental to the client . . . or information that the client has requested be kept confidential." *Id.*

of a lawyer not to disclose the client's confidential information "not only facilitates the full development of facts essential to proper representation of the client but also encourages non-lawyers to seek early legal assistance."[148] If attorneys freely revealed their clients' confidences, the public's trust in the legal system would surely wane.[149]

A bail bondsman is a licensed agent of the state who is contractually obliged to satisfy a number of responsibilities.[150] First and foremost, the bondsman must make sure that her client attends all of her court dates.[151] In the event of a bail skip, the bondsman must actively assist in locating the defendant or else forfeit her collateral, and eventually her license if her clients continue to warrant.[152] Although an arrest warrant is often issued for the defendant after she fails to appear, police officers typically do not attempt to locate and detain the defendant, especially for minor offenses.[153] Instead, it is typically left to the bondsman to find the defendant and subsequently return her to the state's custody.[154]

Because the bondsman is not constrained by the same ethical limitations as an attorney, the bondsman may freely disclose the client's personal information. Unlike a licensed bail bondsman, whose main responsibility is to insure that the defendant returns to court, an attorney who posts her client's bail must also uphold her duty of confidentiality to the client. But because the "rule of confidentiality is generally thought to prohibit a lawyer from revealing information concerning the whereabouts of his client,"[155] an attorney may be precluded from revealing personal information about a client who recently jumped bail.

In addition, if the court orders that the bondsman disclose the whereabouts of the defendant, they must do so.[156] Because no privilege attaches to communications between a non-attorney bail bondsman and an arrested individual, the court can compel a bondsman to provide information regarding the defendant and her

148. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 405 (1975).

149. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2009).

150. *See* N.Y. INS. LAW § 6805 (McKinney 2009).

151. *See id.*

152. *See* Thomas, *supra* note 56.

153. *See id.*

154. *Id.* While the bondsman typically tries to locate the defendant herself, she has the option of hiring a bounty hunter to do the job for her. *Id.*

155. State Bar of Ariz. Ethics Comm., Op. 95-02 (1995).

156. *See* discussion *infra* Part III.B.3.

whereabouts. An attorney, on the other hand, initially may not be compelled by the court to reveal her client's confidential information.[157] This could pose a problem for the court, who may immediately need information from the charitable organization in order to locate and return the bail skip. Thus, issues of client confidentiality could put an attorney serving as a client's bondsman in an ethical quandary. Must an attorney remain loyal to her client, or can she ethically reveal privileged information about her client in the event of a bail skip?

C. Improper Solicitation of Clients

Attorneys who also serve as their clients' bail bondsmen may act unethically if they use their practice of posting bail for their clients as a means to acquire business.[158] Because posting bail is entirely unrelated to the legal services that an attorney can provide,[159] the New York State Bar Association held that a bail bond business operated by an attorney "may not be used to solicit clients for the lawyer's law practice."[160] The Ethics Opinion determined that an attorney committed an ethical violation when he sought to induce clients by paying for a billboard that read "Why pay for a Bondsman when you can get a Lawyer? 'I will get you out of jail and defend you' All Bail Bond Fees Apply to Attorney Fees."[161]

Furthermore, the rule against providing financial assistance to a client[162] was designed in part to prevent clients from selecting attorneys based on which lawyers are willing to provide the most financial assistance to the client.[163] Although financial assistance from an attorney to a client is sometimes permissible in New York,[164] as soon as the practice becomes widely known by the public and is seen as a tool to acquire new clients, then it may be deemed unethical. By routinely posting bail for their clients, an attorney could be improperly soliciting clients to seek her services simply because of the

157. *Id.*
158. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 7.1 (2013).
159. Pepi & Bloom, *supra* note 71, at 983.
160. *Id.* (citing N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 647 (1993)).
161. *Id.* at 989.
162. *See* discussion *infra* Part II.D.
163. MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (2009).
164. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.8(e)(1)–(2) (2013).

attorney's willingness to offer financial assistance.[165] These attorneys are then able to enjoy a competitive advantage over other lawyers for reasons that are distinct from the quality of service that they provide.

The bar has typically viewed competitive advantages that are unrelated to the attorney's quality of service unfavorably.[166] In ABA Opinion 288, for example, the Committee held that financial assistance to benefit an injured client was unethical once the practice was publicized because it "constitutes a holding out by the lawyer of an improper inducement to clients to employ him."[167] Similarly, in *Carroll*, a lawyer was disciplined for purchasing a vehicle for a destitute client in advance of litigation because "naturally a client will retain the lawyer who makes advances without regard to quality."[168]

The practice of attorneys posting bail for their clients could be unethical, therefore, if viewed as a tool to woo individuals to retain their services. In Texas, for example, where there is no express prohibition against acting as both a client's bondsman and attorney, the Bar was nonetheless "particularly concerned with the potential for the business of acting as surety on criminal bonds to easily become a feeder to the attorney's practice of law."[169] Consequently, it is imperative that attorneys in Texas clearly accentuate that the practice of posting bail for their clients is not "at all motivated by a desire to advertise or solicit."[170]

D. Improper Financial Assistance and Entering into a Business Transaction with the Client

Rule 1.8(e) of the New York Rules of Professional Conduct prohibits attorneys from providing financial assistance to a client in connection with pending or contemplated litigation.[171] This restriction on providing financial assistance to a client could be particularly devastating for indigent clients. An attorney, for example, is forbidden from making or guaranteeing loans to her clients for living

165. James Moliterno, *Broad Prohibition, Thin Rationale: The "Acquisition of an Interest and Financial Assistance in Litigation" Rules*, 16 GEO. J. LEGAL ETHICS 223, 235 (2003) (citing Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Op. 391 (1936)).

166. *See id.*

167. *Id.* (internal quotation marks omitted).

168. *Id.* at 251 (citing *In re* Carroll, 602 P.2d 461, 467 (1979)).

169. Pepi & Bloom, *supra* note 71, at 991–92 (quoting State Bar of Tex. Comm. on Interpretation of the Canons of Ethics, Op. 347 (1969)).

170. *Id.* at 992.

171. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.8(e) (2013).

expenses, and from "indemnify[ing] the client for the client's failure to meet her own obligation[s]."[172] This restriction is especially problematic if a defendant becomes aware of the fact that the plaintiff is impoverished. As a litigation strategy, the defendant could intentionally delay trial, thereby increasing the cost of the litigation for the poor plaintiff. The increased cost could then preclude the plaintiff from paying for certain living expenses. And because the plaintiff is forbidden from acquiring a loan from her attorney, she may be compelled to terminate the litigation altogether in order to save money.[173]

Recognizing the vulnerability of both indigent plaintiffs and defendants, the ABA maintains that, even in the absence of repayment upon recovery, "a lawyer representing an indigent client on a pro bono basis may pay court costs and reasonable litigation expenses on behalf of the client."[174] Although this carve-out enables attorneys to provide financial assistance in certain situations, identifying a "court cost" or "reasonable litigation expense" leads to some disagreement. While bail, for example, is not an expense of litigation in Maryland, it is viewed as such in Oregon.[175] Similarly, the ABA has explicitly held that "a client's bail can be considered among 'court costs and expenses of litigation.'"[176] The New York State Bar, though, has not addressed whether bail is considered a litigation expense.[177]

Determining whether attorneys violate their ethical responsibility under Rule 1.8(e), therefore, likely comes down to whether posting bail is considered a litigation expense. Another related concern is whether attorneys enter into a business transaction with their clients

172. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 852 (2011).

173. *See generally* Hope Todd, *Helping the Indigent Client: A Threat to Lawyer Independence?*, D.C. BAR (Nov. 2010), http://www.dcbar.org/for_lawyers/resources/publications/washington_lawyer/november_2010/ethics.cfm.

174. MODEL RULES OF PROF'L CONDUCT R. 1.8(e)(2) (2013).

175. *Financial Assistance to Clients*, *supra* note 83.

176. Clisura, *supra* note 19, at 344 (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004); *see id.* at 344 n.244 ("[A] lawyer may post, or arrange for the posting of, a bond to secure the release from custody of a client whom the lawyer represents . . . in those rare circumstances in which there is no significant risk that her representation of the client will be materially limited by her personal interest in recovering the amount advanced." (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 04-432 (2004)). The jurisdictions that have addressed whether bail is a litigation expense are split. *See id.*

177. *See* People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U), at *18 n.25 (N.Y. Sup. Ct. 2009).

pursuant to Rule 1.8(a) by working closely with the charitable bail fund.

Rule 1.8(a) states that only in a few rare circumstances can an attorney "enter into a business transaction with a client if they have differing interests therein and if the client expects the lawyer to exercise professional judgment therein for the protection of the client."[178] Although Rule 1.8 does not explicitly define "business transaction," the comments state that business transactions do not include "standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others."[179] The Committee makes this distinction because "[i]n such transactions, the lawyer has no advantage in dealing with the client, and the restrictions are . . . unnecessary and impracticable."[180] If agreeing to post bail for certain clients is considered a "business transaction," the practice will soon be halted.

III. ANTICIPATING HOW ETHICS COMMITTEES WILL RESOLVE THE ETHICAL CONCERNS

A. Does a Conflict of Interests Exist when Attorneys at Legal Services Organizations Work Closely with a Charitable Corporation that Posts Bail for the Attorney's Clients?

When attorneys post bail for their clients, the most obvious concern is that the attorney's ability to act in the best interest of the client will be compromised by the attorney's desire to recoup their financial investment.[181] Although the prevailing view is that attorneys should refrain from acting as bondsmen for their clients in order to avoid a conflict of interest,[182] "this view rests almost entirely on the financial relationship that exists when an attorney posts his or her own funds as bail for a client, and the risk that the attorney's personal financial interests will conflict with his or her ability to act in the client's interests."[183] Attorneys working at non-profit legal services organizations, like those at the Bronx Defenders, are able to circumvent that conflict by using the charitable donations in the

178. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.8(a) (2013).

179. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 1 (2009).

180. *Id.*

181. *See generally* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 04-432 (2004).

182. *See* discussion *supra* Part I.C.

183. Clisura, *supra* note 19, at 343.

Fund, rather than their own finances, to post bail for their clients.[184] Without a pecuniary interest at stake, the attorney's ability to ardently represent her client is not hindered by a desire to reacquire her money. But even though none of the attorney's own financial interests are implicated, an attorney's involvement with a charitable bail fund could still be unethical if an attorney's personal interests hinder her ability to diligently represent her client.[185]

Although the Bronx Defenders attorneys did not have a monetary interest at stake, Rule 1.7(a)(2) is not limited to those attorneys whose representation is tempered by a pecuniary interest. Under Rule 1.7(a)(2), "a concurrent conflict of interest exists when a reasonable lawyer would perceive a significant risk that the representation will be materially limited or that the lawyer's independent professional judgment on behalf of a client will be adversely affected . . . by the lawyer's own financial, business, property or personal interests."[186] So long as the arrangement is "adverse to the interests or [is] to the disadvantage of present or former clients," the arrangement will be deemed to impermissibly conflict with the interests of the attorney.[187]

Even though the Bronx Defenders attorneys are likely interested in the continued operation of the Bronx Freedom Fund, there is little that suggests that their ability to diligently represent their clients would wane. When an attorney with a pecuniary interest forfeits bond, the attorney suffers a tangible financial loss.[188] If a client who qualifies for assistance from the Fund skips bail, the "loss" is felt by a third party who has implicitly agreed not to be reimbursed by donating to the Freedom Fund. Unlike the tangible loss that attorneys who post bail surely seek to avoid, the third-party donators will not have any indication whether their donation is returned to the Freedom Fund or forfeited to the court. In addition, the Bronx Defenders did not have either an express or informal policy in place that compelled attorneys to do whatever was necessary to insure that

184. *See* People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U), at *7 (N.Y. Sup. Ct. 2009).

185. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2009).

186. *Id.*

187. Ramon Mullerat, Lawyer's Conflict of Interest 1, 9 (Nov. 26, 2003) (unpublished manuscript), *available at* http://www.fbe.org/IMG/pdf/Lawyers_conflicts_of_interest.pdf.

188. *See generally* S.C. Bar Ethics Advisory Comm., Op. 90-02 (1990).

the collateral was returned to the Freedom Fund.[189] Without a commitment to the third-party donators to make sure that the clients attended their court dates, the Bronx Defenders attorneys would not be "conflict[ed] between the client's interests and those of third parties to whom the lawyer owes obligations."[190]

Furthermore, if the client's appearance is absolutely vital to the continued operation of the Bronx Freedom Fund, then it is likely that the attorney has committed an ethical violation. A Bronx Defenders attorney, for example, might feel compelled to act adversely to her client's interests[191] if the provisions governing the Bronx Freedom Fund held that once the first client missed her court date, the Fund would be shut down. For the eighteen months that the Freedom Fund was operating, however, five percent of the clients subsequently failed to make their court date.[192] But rather than terminating the Freedom Fund or sanctioning the attorneys for recommending a client who subsequently failed to appear, the Freedom Fund remained in operation.[193] This suggests that neither the Bronx Defenders attorneys nor Ms. Towns were under any undue pressure to make sure that their clients made their court dates. Similarly, an attorney may act unethically if she knew that the Fund was financially limited, and thereby needed to reacquire the collateral in order to provide bail for future clients. As of May 2009, however, the Fund had over $70,000 available for bail, and there was no indication that the Bronx attorneys were compelled to preserve the resources in the Fund.[194]

Without either a financial relationship between the attorneys and their clients, or an express or implied obligation compelling the attorneys to ensure that the Fund's resources were reacquired, the Bronx Defenders attorneys were not involved in an arrangement that would lead them to act without regard to their clients best interest.[195] It is likely, therefore, that those involved with the Bronx Freedom Fund conducted themselves ethically pursuant to Rule 1.7(a)(2).

189. *See generally*, People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U) (N.Y. Sup. Ct. 2009).
190. Mullerat, *supra* note 187, at 9.
191. MODEL RULES OF PROF'L CONDUCT R. 1.7 (2009).
192. *See* Pringle, *supra* note 25.
193. *See id.*
194. *Miranda*, 2009 N.Y. Slip Op. 51560(U), at *8.
195. *See generally* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 10 (2009).

B. Can an Attorney Uphold Her Duty of Confidentiality While Serving as Her Client's Bondsman?

When a criminal defendant fails to appear, a judge may press the defendant's attorney about why her client did not appear and where she is staying. While the attorney is certainly precluded from making knowingly false statements to the judge pursuant to the attorney's duty of candor,[196] the attorney must uphold her duty of confidentiality to her client even in the wake of the judge's questioning.[197] If a for-profit bail bondsman posted bail on the defendant's behalf, the court may contact the bondsman and ask for certain information about the defendant.[198] When a bondsman posts bail for a defendant, she asks for personal information that would help locate the defendant in the event that she skips bail.[199] Because there is no privilege between these communications, a bondsman can freely provide this information to anyone, including a bounty hunter, a police officer, or the court.[200] This disclosed information may be helpful to the court when deciding whether to issue a warrant or to provide the defendant with another opportunity to appear in court. The information could also be helpful to law enforcement, who may be instructed to locate the defendant and return her to the state's custody.

Attorneys serving as a client's bondsman, on the other hand, may be unable to voluntarily disclose this information to anyone other than their agents.[201] Generally, information about a client's whereabouts should not be disclosed by a lawyer: "information respecting a client's whereabouts 'gained in the professional relationship that the client has requested be held inviolate' squarely falls within the general ethical obligation of preserving the confidentiality of client secrets."[202] The court, therefore, may be unable to receive information about the client that they normally attain from a for-profit bondsman. As a result, it is necessary to determine the breadth of the duty of confidentiality in order to

196. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 3.3(a) (2013).

197. MODEL RULES OF PROF'L CONDUCT R .1.6 (2009).

198. Tonya Page, *What Happens if Someone Fails to Appear in Court?*, FAMILY BAIL BLOG (Apr. 5, 2010), http://www.familybailbonds.com/blog/2010/04/what-happens-if-someone-fails-to-appear-in-court.

199. *Frequently Asked Questions*, ALL COUNTY BAIL BONDS, LLC, http://www.bailthejail.com/index.html (last visited Oct. 21, 2013).

200. *See generally* Thomas, *supra* note 56.

201. *See* discussion *supra* Part II.B.

202. N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 95-702 (1995).

predict whether an attorney can uphold her ethical responsibilities under Rule 1.6 of the Model Rules of Professional Conduct, while also being affiliated to a Fund that posts bail for her clients.

1. Voluntarily Revealing Information Related to a Client's Whereabouts Under 1.6(a)

Rule 1.6(a) limits what an attorney may disclose by instructing her that she may not reveal confidential information about a client to the client's disadvantage.[203] It is "difficult to imagine, [however] a greater disadvantage than one's own attorney playing a significant part in returning her to confinement."[204] Not only will the disclosed information assist law enforcement in locating the bail skip, but it will also likely cause the defendant to relinquish trust in her attorney, and potentially even the legal system.[205] A client's sense of fairness is compromised when he "senses that his attorney's loyalties are divided" between the client and law enforcement.[206] To ensure that the legal system has any legitimacy, it is necessary that clients believe that they have diligent attorneys on their side who will not leave them out to "fend for. . . themselves."[207]

Furthermore, an attorney is precluded from revealing confidential information about the client for the advantage of the lawyer or a third person.[208] When an attorney acts as a client's bondsman and later "submits his affidavit to the court detailing his cause for surrendering the principal, he is most likely relying on privileged information he acquired in the course of his representation."[209] In doing so, the attorney is utilizing the information obtained from the client as a tool to better herself.[210] In other words, the attorney "has gained the fee negotiated at the initial execution of the bail bond and has used the protected information to relieve himself of any further liability."[211] By placing her responsibilities as a bondsman ahead of her duty of

203. N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.6(a) (2013).
204. Pepi & Bloom, *supra* note 71, at 988.
205. *See id.* at 983.
206. Timothy Miller, Note, *The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582, 594.
207. *Id.*
208. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.6(a).
209. Pepi & Bloom, *supra* note 71, at 989.
210. *See id.*
211. *Id.*

confidentiality to her client, the attorney has likely run afoul of New York's ethical rules.

Although Rule 1.6(a) seems to preclude both the attorney and her agent from voluntarily disclosing the client's whereabouts, Rule 1.6(b) carves out exceptions detailing when attorneys can ethically breach their duty of confidentiality.[212] While there is nothing explicitly allowing an attorney to voluntarily disclose confidential information about a client who committed bail jumping, there are several opinions that highlight the scope of 1.6(b).[213]

2. Revealing Information Related to a Client's Whereabouts Under 1.6(b)

An attorney's duty of confidentiality, which encompasses a client's admission of guilt, does not cover a client's intention to engage in future criminal conduct.[214] Rule 1.6(b)(2) permits an attorney to reveal his client's intention to commit a crime so long as the disclosure is reasonably related to preventing the crime.[215] Because bail jumping is a crime under New York Penal Law § 215.57, an attorney may reveal her client's intention to flee if information is necessary to help law enforcement prevent the crime. This is only applicable, however, if an attorney is aware of their client's intention to commit the crime.[216]

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212. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.6(b). Rule 1.6(b) provides:

> A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime; (3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud; (4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm; (5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or (ii) to establish or collect a fee; or (6) when permitted or required under these Rules or to comply with other law or court order.

Id.

213. *See, e.g.*, Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2002-1 (2002); State Bar of Ariz. Ethics Comm., Op. 95-02 (1995); N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 405 (1975).

214. Deborah A. Scalise, *Attorney Professionalism Forum*, 78-Oct. N.Y. ST. B.J. 50, 51 (2006).

215. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.6(a) cmt. 6C.

216. *See id.*

Some jurisdictions broaden the scope of the duty of confidentiality by requiring attorneys to maintain the confidentiality of all information relating to the representation of their clients even if, prior to a client's court date, an attorney has a strong inclination that her client will not appear.[217] In Arizona, for example, counsel may reveal the intention of a client not to appear only if: "(1) the attorney has actual knowledge that the client will not appear; and (2) the act is willful and not the result of mistake or inadvertence."[218] But because "it is very difficult for a lawyer to 'know' when such unlawful purpose will actually be carried out, for the client may have a change of mind," it will be rare that an attorney is sufficiently certain that her client intends not to appear.[219]

An attorney may, however, ethically breach her duty of confidentiality when a client "is continuing an ongoing criminal scheme,"[220] or is involved in the commission of a crime that is "continuing."[221] A "continuing crime" has been explained as "one which, though committed in the past has ramifications or effects that continue into the future."[222] There is considerable disagreement, however, about what constitutes as a "past crime," as opposed to a "continuing" one.[223] Some scholars argue that a literal application of "continuing crime" "obliterate[s] any meaningful distinction between past and future conduct."[224] They insist that some "criminal acts that have occurred in the past [can be] given an indefinitely contemporaneous aspect by the criminal law."[225] The past offense of theft, for example, could easily be portrayed as "possession of stolen property," while escaping from prison becomes the offense of "remaining a fugitive."[226] Focusing on the contemporaneous effects of past offenses enables attorneys to freely divulge private

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217. State Bar of Ariz. Ethics Comm., Op. 95-02 (1995).

218. *Id.*

219. *Id.*

220. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2002-1 (2002); *see* COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.6(b)(2).

221. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 405 (1975).

222. Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177, 243 (1985) (internal quotation marks omitted).

223. *Id.* at 242–43.

224. *Id.* at 243.

225. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2002-1 (2002).

226. *See* Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2002-1 (2002); Moore, *supra* note 222, at 244–45.

information about their client's conduct without any ethical restraints.[227] "[T]o better accomplish the aims of both the client confidentiality provisions in the Code and of protecting innocent victims of a client's criminal conduct,"[228] these scholars insist that "the mere continuation of the harmful effects of an otherwise completed client wrong" does not render a crime as "continuing."[229] Instead, a client charged with a crime should be able to freely communicate and admit guilt to an attorney without any apprehension that the attorney will subsequently reveal that information.[230]

Determining whether bail jumping is a "past crime" or a "continuing crime" impacts whether an attorney serving as a client's bondsman may freely reveal information related to the crime. Based on the New York City Bar's commitment to protecting a lawyer's duty of confidentiality,[231] it is unlikely that "bail jumping" will be deemed a continuous crime. In fact, the New York City Bar has been reluctant to allow attorneys to breach their duty of confidentiality even when they have identified a "continuous crime."[232] In 2002, the Bar interpreted Disciplinary Rule 4-101(C)(3), which was the precursor to Rule 1.6 of the Model Rules of Professional Conduct, as forbidding attorneys from disclosing information "based on the client's 'continuous crime' where the client has already completed conduct which satisfies all elements of the crime and has sought to engage the lawyer to defend the client against the criminal charges relating to that conduct."[233]

In an earlier Opinion, the New York State Bar Association Committee on Professional Ethics shed light on what type of crime "bail jumping" is likely to be considered.[234] The question the Committee sought to resolve was whether it was ethical for an attorney to reveal the whereabouts of her client after she had missed her court date.[235] After failing to show up for trial, the defendant sent

227. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2002-1 (2002).

228. *Id.*

229. Moore, *supra* note 222, at 244.

230. *See generally id.*

231. Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2002-1 (2002) (an attorney's duty of confidentiality is "the bedrock of the adversary system").

232. *Id.*

233. *Id.*

234. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 405 (1975).

235. *Id.*

her lawyer a letter with information regarding her whereabouts, but instructed the attorney to keep the contents of the letter confidential.[236] As a result, the attorney was left in an ethical bind; should she reveal the location of her client, or keep the information confidential and uphold her duty of confidentiality? The Opinion directed the attorney to follow a three-step procedure:

> 1. He should notify the defendant that he cannot represent him so long as he remains a fugitive. He should further urge him to surrender to the proper authorities.
>
> 2. He should not voluntarily seek out the public authorities and inform them of the address of the defendant.
>
> 3. If a police officer, investigator, or prosecutor should approach the attorney for the address of the defendant, he should refrain from furnishing this information, which has been vouchsafed to him by a client who requested that it be kept confidential.[237]

While the Opinion does not unambiguously state that bail jumping is a "past crime," it can be inferred that the Committee did not view bail jumping as a "continuous crime." Even though the attorney became aware that her client had committed bail jumping, the Opinion explicitly instructed the attorney that she still could not breach her duty of confidentiality to her client.[238]

Although doing so less blatantly, the ABA also seems to view bail jumping as a "past crime." In 1930, the Ethics Committee vowed that an attorney is not compelled to reveal the location of a bail skip when she acquires knowledge of her client's whereabouts from confidential communications with relatives of the client.[239] By determining that knowledge of the client's criminal conduct does not enable the attorney to ethically breach her duty of confidentiality, the ABA seemed to be inferring that bail jumping is a "past crime."[240]

Furthermore, the ABA withdrew an opinion that required an attorney to either relinquish communication with her client, or reveal the client's location if she refused to surrender herself to authorities.[241] The withdrawn opinion maintained that by continuously communicating with her client, the attorney was

236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*
241. *Id.*

implicitly encouraging her not to return.[242] Although withdrawing the opinion does not entail that the ABA now forbids attorneys from disclosing confidential information about a client who refuses to surrender, it underscores the ABA's reluctance to explicitly allow attorneys to reveal confidential information about a client after they know that the client committed bail jumping.

The above opinions present situations that are distinct from the circumstances at play with clients who receive bail assistance from a charitable fund, such as the Freedom Fund. While the attorneys above acquired information related to their client's location from either the client herself or from her family members, the charitable fund may not have any contact with either the client or someone who knows of her whereabouts. Instead, the Fund might only have the information they initially acquired from the client's attorney, which could include details about where the client spends her free time, where her family is located, and who to call if she cannot be contacted. But if attorneys are precluded from voluntarily disclosing their clients' whereabouts even when the client reveals her location to her attorney, then nothing suggests that an attorney can ethically provide personal information about the client when it is merely tangentially related to her whereabouts.

To remit a bail forfeiture in the event of a bail skip, the bondsman must, among other things, "expend money and effort in an effort to produce the defendant."[243] In an effort to locate the defendant, the bondsman may be compelled to reveal the defendant's private information that received when he was hired.[244] Because communications between a bondsman and their client is not privileged, a bondsman can freely disclose the confidential information without any ethical constraints. An attorney, on the other hand, is likely precluded from doing so. Because information related to the client's whereabouts certainly qualifies as confidential information pursuant to Rule 1.6,[245] and none of the exceptions under 1.6(b) seem to apply, an attorney who bails out her client is likely precluded from revealing confidential information about a client who committed bail jumping.

Although the attorney's duty of confidentiality makes it unlikely that an individual will be able to fully satisfy her obligations as a

242. *Id.*
243. People v. Mfrs. Cas. Ins. Co. 144 N.Y.S.2d 282, 283 (N.Y. Cnty. Ct. 1955).
244. *See* Page, *supra* note 198.
245. N.Y. Cnty. Lawyers' Ass'n Comm. on Prof'l Ethics, Op. 702 (1995).

bondsman while abiding by her ethical duties as an attorney, a legal services organization can implement the charitable fund in a manner that easily eliminates the possibility of an ethical violation. While the general rule is that "[A lawyer] may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations,"[246] an attorney is authorized to reveal her client's confidential information if the client gives her "informed consent."[247] If, at the onset of the representation, attorneys were required to receive their client's permission to breach their duty of confidentiality in the event of a bail skip, then legal services organizations would avoid the ethical dilemma that the duty of confidentiality poses. The attorney must not merely receive her client's consent, but must also make sure that she "has communicated information adequate[ly] . . . [about] the material risks of the proposed course of conduct and reasonably available alternatives."[248] In doing so, the attorney must make sure that her client is not simply consenting because of her inherent vulnerability as a recent arrestee. If the client freely consents to the disclosure, attorneys and their agents will be able to uphold their ethical responsibilities pursuant to Rule 1.6, while simultaneously satisfying their obligations as a bail bondsman. Without a procedure in place that ensures that the clients have provided their attorneys with authorization to breach their duty of confidentiality, legal services organizations may act unethically by either implementing a charitable bail fund or working with a charitable group that already has one.

3. Can a Court Compel an Attorney to Reveal Information that Would Cause the Attorney to Breach Her Duty of Confidentiality to Her Client

An attorney's duty to her client is "qualified by [her duty] of candor to the court" and "the performance of the attorney's duty to present her client's case with persuasive force, while maintaining the

246. ABA Comm. on Prof'l Ethics and Grievances, Formal Op. 40-202 (1940).

247. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.00 r. 1.6(a)(1) (2013).

> "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.

Id. r. 1.0(j).

248. *Id.* r. 1.0(j).

confidences of the client, is qualified by the advocate's duty of candor to the court."[249] Thus, "Rule 3.3(c) makes crystal clear that the disclosure duty applies" even when doing so would cause the attorney to violate her duty of confidentiality under Rule 1.6.[250]

It is sometimes difficult to determine, however, when the duty of candor applies to an attorney. Determining precisely when an attorney must disclose information to the court is important when deciphering if an individual can ethically act as both an individual's attorney and her bondsman. By compelling lawyers to reveal their client's confidences when the court demands, the attorney's ability to act as a bondsman will not be compromised. But if the attorney can ignore or delay providing this information to a tribunal, the attorney might be shunning her responsibilities as a bail bondsman.

Rule 1.6(b)(6) states that a lawyer may reveal her client's confidential information "when permitted or required under these Rules or to comply with other law or court order."[251] New York has interpreted "required by law" as applying "only to court orders which are not the subject to further review."[252] Although failing to comply with a subpoena, for example, can lead to criminal punishment, attorneys who receive a subpoena or other formal request are precluded in some jurisdictions from revealing their client's confidences or secrets without the client's consent.[253] The Nassau County Bar Association stated that in the absence of a court order directing the disclosure, an attorney may not breach her duty of confidentiality to her client.[254]

The New York State Bar Association, on the other hand, did not preclude attorneys from disclosing their clients' confidences upon a formal request from the court, but instead provided the attorneys with the ability to delay doing so.[255] The state held that when "the order is subject to good faith challenge, the lawyer should be free to postpone giving the court ordered testimony pending appropriate review."[256] In doing so, the attorney may move to quash the subpoena and inform the court that her ethical duties dictate that she cannot

249. *Id.* r. 3.3 cmt. 2.
250. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 837 (2010).
251. COMP. CODES R. & REGS. tit. 22, § 1200.00 r. 1.6(b)(6).
252. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 528 (1981).
253. Nassau Cnty. Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 98-5 (1998).
254. *Id.*
255. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Formal Op. 528 (1981).
256. *Id.*

voluntarily reveal the requested information.[257] If the court rejects the attorney's motion, and thereby orders the attorney to disclose the requested information, the attorney must reveal her client's confidences pursuant to Rule 1.6(b)(6).[258]

Although Rule 1.6(b)(6) does not explicitly state that an attorney *must* reveal her client's confidential information after being ordered to by the court, Rule 3.4(a)(6) provides that in her representation of a client, a lawyer shall not "conceal or knowingly fail to disclose that which [he] is required by law to reveal."[259] The Rule thus provides a clear responsibility for the attorney to disclose her client's confidences after a final order by the court. Much like a bail bondsman, attorneys working with the Fund and non-legal employees of the organization are compelled to reveal private information about the defendant upon court order. If the charitable bail organizations comply with the court orders, then the court would not be devoid of information they would normally acquire from a non-attorney, for-profit bondsman.

Unlike an attorney, however, a bondsman who is subpoenaed cannot invoke a privilege to postpone disclosure of the requested information. As a result, there is hardly a delay between when the court requests the information and when the bondsman discloses it. A court order, though, may require the immediate disclosure of certain information to properly serve the needs of the criminal justice system. By delaying the disclosure of their clients' confidences, the attorneys could frustrate the urgent needs of law enforcement. This concern, however, is a criminal justice issue rather than an ethical one.

C. Is Implementing a Charitable Bail Fund Just a Way For Legal Services Organizations to Solicit Clients?

Some may argue that by making it well-known that they will post bail for certain clients, organizations like the Bronx Defenders improperly solicit clients. This argument, however, holds no weight. First, non-profit legal services organizations, unlike private law firms, have no financial incentive to solicit business. Because the attorneys' salaries are the same regardless of how busy they are, it is not

257. *See, e.g.*, *Answering Your Questions About Legal Ethics,* VA. ST. BAR ASS'N, http://www.vsb.org/profguides/FAQ_leos/LegalEthicsFAQs.html (last visited Oct. 21, 2012).

258. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 1.6(b)(6) (2013).

259. *Id.* r. 3.4(a)(6).

reasonable to view their practice of posting bail for certain clients as a means of feeding business into the attorney's practice. More importantly, the Bronx Defenders' ability to post bail for their clients cannot be viewed as an improper attempt to solicit business because defendants cannot simply *choose* to acquire their services. Instead, a defendant must first be arrested in Bronx County and subsequently be assigned to a public defender.[260] To be assigned to a public defender, the arrestee must first be eligible for one.[261] "[E]ligibility determination[s] must be made on a case-by-case basis, and therefore must not be premised solely on any single factor."[262] Consequently, the determination of whether the arrestee can utilize the services of a public defender rests with the Court, rather than with the defendant herself. As a result, the practice of providing bail assistance to certain clients can hardly be construed as an improper attempt to solicit business if the only clients they work with have no say in whether they can acquire their services.

Finally, even if a non-profit legal services organization advertises its ability to act as both a client's attorney and bondsman, which could be unethical pursuant to Rule 7.1,[263] it would not raise any ethical questions. Advertisement is defined in Rule 1.0(a) of New York's Rules of Professional Conduct as "any public or private communication made by or on behalf of a lawyer or law firm about that lawyer or law firm's services, the primary purpose of which is for the retention of the lawyer or law firm."[264] Non-profit legal services organizations, like the Bronx Defenders, however, are not compensated based on the amount of work they do. Furthermore, their clients must qualify for their services, as opposed to having the ability to hire them. It is not plausible, therefore, that the advertisements would be utilized as a means to acquire clients. Instead, the advertisements would likely be used as a means to encourage other charitable groups to team-up with legal services organizations and fight to abate the vulnerability of indigent defendants.

260. *Holistic Defense, Defined*, *supra* note 21.

261. PUB. DEF. BACKUP CTR., DETERMINING ELIGIBILITY FOR APPOINTED COUNSEL IN NEW YORK STATE 7–8 (1994), *available at* http://www.nysda.org/docs/PDFs/Pre2010/%5B335%5D%20Determining%20Eligibility%20for%20Appointed%20Counsel%20in%20NYS%20(NYSDA).pdf.

262. *Id.* at 7.

263. COMP. CODES R. & REGS. tit. 22, § 1200.0 r. 7.1.

264. *Id.* r. 1.0(a).

D. Do Attorneys Provide Improper Financial Assistance to Their Clients or Enter into a Business Transaction with Them by Agreeing to Work with a Charitable Organization that Posts Bail on Their Behalf?

In *People v. Miranda*, the Bronx District Attorney argued that the Bronx Defenders attorneys improperly provided financial assistance to their clients by working with an organization that agreed to post bail on their clients' behalf.[265] Although the New York State Bar has not directly addressed whether bail is a litigation expense,[266] which would conclusively answer the question of whether the conduct is indeed unethical under Rule 1.8(e), the circumstances dictate that the attorneys did not improperly provide financial assistance to their clients. The purpose of Rule 1.8(e) is both to avoid encouraging a client to pursue litigation that might not otherwise be brought and to avoid giving the "lawyer[] too great a financial stake in the litigation."[267] Viewing the bail assistance as improper financial assistance ignores what the Rule actually sought to prevent. First, the beneficiaries of the financial assistance are criminal defendants who are using the resources from the Fund to avoid pretrial incarceration, not pursue litigation. Second, by relying on private donations to post bail for the clients, the Bronx Defenders attorneys did not inherit any financial stake in the litigation. While it seems clear that attorneys do not violate 1.8(e) by working with a charitable organization that posts bail for its clients, another related concern is whether attorneys enter into a "business transaction" pursuant to Rule 1.8(a) by agreeing to provide bail assistance to certain clients.

Ethics opinions that address whether an attorney enters a business transaction when she agrees to serve as her client's bondsman have focused on the attorney's inherent advantage in bargaining power. The State Bar of Texas, for example, stated that an attorney enters into an improper business transaction with her client when the attorney posts bail for her client, but is authorized to plead "no contest" on behalf of the client if she fails to appear.[268] Because the "added provision is of no benefit to the client but has [instead] been added by the lawyer solely to protect the financial interest of the

265. People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U), at *16–17 (N.Y. Sup. Ct. 2009).

266. *See*, *e.g.*, COMP. CODES R. & REGS. tit. 22, § 1200.00.

267. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 10 (2009).

268. Prof'l Ethics Comm. for the State Bar of Tex., Op. 599 (2010).

lawyer," the terms of the agreement are not "fair and reasonable" to the client."[269] Similarly, the Virginia Bar Association held that "loans made to clients for assistance with living expenses during the course of litigation constitute the lawyer's entering into . . . a business transaction that would allow his professional judgment to be affected by his own financial interest."[270] But even though this was deemed an improper business transaction, the attorney could advise his clients "of the potential conflicts of interest," and ethically enter into the agreement "provided that the transaction is not unconscionable, unfair or inequitable when made."[271] Thus, it is essential to examine both the conduct of the defense attorneys and their relationship with their clients when determining if the attorneys entered into an improper business transaction pursuant to Rule 1.8(a).

Unlike the attorneys in the ethics opinions above, Ms. Towns of the Bronx Freedom Fund did not enter into a business transaction with the Bronx Defenders clients. First, the clients who received bail assistance did not purchase anything from the attorney or her agent; rather than purchasing a bail bond from an attorney, the clients simply received bail assistance because their file dictated that they were not flight risks. Moreover, the prospect of being bailed out by the Freedom Fund was available to all Bronx Defenders clients so long as their attorneys referred their file to Ms. Towns for review.[272] In that regard, it could be viewed as just a "standard transaction"[273] between the Bronx Defenders and its clients. Finally, Ms. Towns did not capitalize on any inherent advantage in bargaining power over her client. Not only did Ms. Towns not acquire anything from the clients, but she did not even communicate with them when deciding whether to post bail on their behalf.[274] Instead, she relied on information provided to her by the client's attorney.[275]

CONCLUSION

Although the Charitable Bail Bonds Bill "takes an important step toward leveling the playing field for working people and creating a

269. *Id.*
270. Va. State Bar Ass'n Standing Comm. on Legal Ethics, Op. 1269 (1989).
271. *Id.*
272. *See generally* People v. Miranda, No. 012208C2009, 2009 N.Y. Slip Op. 51560(U) (N.Y. Sup. Ct. 2009).
273. MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 1 (2009).
274. *See generally*, *Miranda*, 2009 N.Y. Slip Op. 51560(U).
275. *Id.*

more just bail system,"[276] the practice that the Bill seeks to promote will soon be halted if the New York State Bar deems such conduct to be unethical. Consequently, this Note set out to anticipate and resolve the potential ethical concerns that will arise once charitable bail funds, like the Freedom Fund, are implemented. In doing so, it becomes clear that legal services organizations can satisfy their ethical duties as attorneys even after teaming-up with charitable groups who serve as bondsmen for their clients.

First, without either a pecuniary or otherwise personal interest at stake, the Bronx Defenders attorneys and Ms. Towns did not violate Rule 1.7(a).[277] If legal services organizations, however, are not careful about how they implement a bail fund, there is a risk that a conflict of interest will arise. To avoid such conflicts of interest, it is necessary to make sure that there is no policy in place sanctioning attorneys who recommend a client who ultimately fails to appear.[278] If such a policy exists, an attorney's ability to represent her client could be compromised by the attorney's desire to avoid monetary sanctions or other forms of punishment. Furthermore, to make sure that attorneys are not disproportionately motivated to preserve the resources of the Fund for future clients, there should be a considerable amount of money already invested in the Fund before it begins providing bail assistance to criminal defendants.[279]

Moreover, the implementation of the Bronx Freedom Fund can hardly be construed as an attempt by the Bronx Defenders to improperly solicit clients.[280] Similarly, the attorneys will not run afoul of Rule 1.8(e) by improperly providing financial assistance to a client, or 1.8(a) by entering into a "business transaction" with the client, so long as the attorneys and the non-legal staff are neither capitalizing on any inherent advantage over the clients, nor disproportionately benefiting from the agreement.[281]

There are clearly circumstances, however, where the attorney or her agent must abandon her ethical responsibilities in order to satisfy the obligations of a bail bondsman.[282] Attorneys working with charitable bail funds, for example, may be unable to uphold their

276. Press Release, *supra* note 31.
277. *See* discussion *supra* Part III.A.
278. *See* discussion *supra* Part III.A.
279. *See* discussion *supra* Part III.A.
280. *See* discussion *supra* Part III.C.
281. *See* discussion *supra* Part III.D.
282. *See* discussion *supra* Part III.B.

commitment to protecting their client's confidentiality while faithfully fulfilling the responsibilities of a bondsman. This situation leaves the attorney turned bondsman in an ethical quagmire: should she breach her duty of confidentiality to her client and voluntarily disclose information related to her whereabouts, or should her commitment to her client supersede her responsibilities as a bondsman?

Fortunately, legal services organizations can circumvent the challenges that the duty of confidentiality poses. If at the onset of the representation attorneys are required to get their clients' "informed consent" to breach the duty of confidentiality in the event of a bail skip, then they will be able to satisfy their obligations as their clients' bondsmen while fulfilling their ethical responsibilities as attorneys.[283]

If implemented correctly, charitable bail funds can help reduce the pervasiveness of pretrial incarceration for poor and indigent defendants. Ever since Tocqueville first visited America, the country has struggled to foster judicial parity for indigent criminal defendants. While the battle for promoting equity for indigent defendants is certainly far from over, the Charitable Bail Bonds Bill should serve as a good first-step in ameliorating their inherent vulnerability.

283. *See* discussion *supra* Part III.B.