May 20, 2021

The Honorable Barbara Richardson
Commissioner of Insurance
Nevada Division of Insurance
1818 East College Parkway, Suite 103
Carson City, Nevada 89706

Re: LCB File No. R153-20 – Business of Bail

Dear Commissioner Richardson:

We are members of the Columbia Law School community interested in proposed rule R153-20 ("Proposed Rule"). Professor Kellen Funk is a legal historian whose scholarship focuses on civil procedure, juridical processes of religious groups and courts, and the American bail system. Sherwin Nam is a graduate of the Class of 2021 who, at the time of writing, was enrolled in Professor Funk's course on the law of bail. We appreciate the opportunity to submit this comment to the Nevada Division of Insurance ("DOI" or "Division") in response to the Proposed Rule regulating the business of bail.

At any given time, Nevada incarcerates roughly 7,000 defendants in its jails,[1] about half of whom await trial and are thus presumptively innocent under law.[2] A significant portion of the state's 3,000-plus pretrial detainees were incarcerated due to an inability to post the required bond to regain their liberty.[3] But after the Nevada Supreme Court's recent decision in *Valdez-*

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[1] *Compare* NEV. DEP'T OF CORR., QUARTER II FISCAL YEAR 2019: STATISTICAL SUMMARY: POPULATION STATISTICS FOR THE PERIOD OCTOBER TO DECEMBER 2018 1 (2019), http://doc.nv.gov/uploadedFiles/docnvgov/content/About/Statistics/Quarterly_Reports_by_Fiscal_Year/SS.QII.FY19.pdf (total prison population of 13,751), *with* BUREAU OF JUST. STAT., CORRECTIONAL POPULATIONS IN THE UNITED STATES, 2017–2018 11 (Aug. 2020), https://www.bjs.gov/content/pub/pdf/cpus1718.pdf (total incarcerated population of 20,500).

[2] *See Incarceration Trends in Nevada*, VERA INST. OF JUST. (Dec. 2019), https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-nevada.pdf; Wanda Bertram & Alexi Jones, *How Many People in Your State Go to Local Jails Every Year?*, PRISON POL'Y INITIATIVE (Sept. 2019), https://www.prisonpolicy.org/blog/2019/09/18/state-jail-bookings/.

[3] The Nevada Supreme Court has long held that the only non-bailable offenses are capital crimes and first-degree murder. *See In re* Wheeler, 406 P.2d 713, 715–16 (Nev. 1965); Valdez-Jimenez v. Eighth Jud. Dist. Court in and for the Cnty. of Clark, 460 P.3d 976, 984 (Nev. 2020). Criminal defendants are otherwise entitled to bail set at reasonable amounts under the circumstances. *Valdez-Jimenez*, 460 P.3d at 984. Bail is reasonable so long as it is set to ensure the defendant's appearance at court or to protect the victim and the public. *Id.* Under the Nevada Constitution, then, all pretrial detainees who have not been charged with death-eligible crimes or first-degree murder were entitled to have bail set, even if that amount was beyond the financial means of the detainee. But in 2015, Nevada saw 178 murders, a figure that pales in comparison to the 3,780 pretrial detainees that were housed in the state's jails. *Compare* NEV. DEP'T OF PUB. SAFETY, 2015 CRIME IN NEVADA: UNIFORM CRIME REPORTING: 2015 REPORT 66 (2015), https://rccd.nv.gov/uploadedFiles/gsdnvgov/content/About/UCR/2015%20Crime%20In%20Nevada.pdf, *with Incarceration Trends in Nevada*, *supra* note 2. While some defendants may be denied bail due to flight risk or safety risk, the Nevada Supreme Court recently erected steep procedural barriers to bail amounts that are de facto detention orders, including a heightened burden of proof, a prompt hearing, and on-the-record findings of fact. *Valdez-Jimenez*, 490 P.3d at 987. And now, an unattainable bail amount requires a detention order. *Id.* Thus, pre-*Valdez-Jimenez*, it is likely that the majority of jail detainees were incarcerated due to an inability to post the

Jimenez v. Eighth Jud. Dist. Ct. in and for Cnty. of Clark,[4] these figures are certain to shrink.[5] Nonetheless, cash bail and the bail bond industry remain alive and well in Nevada.

Cash bail is unique among criminal-justice institutions because it lies at the intersection of industry and criminal law enforcement. Legal services[6] and private prisons[7] aside, few private industries are as consequential to the operation of American criminal justice as the commercial bail bond industry.[8] Because bail bond companies often provide the only available get-out-of-jail card for indigent arrestees, arguably no other set of private actors are as much a gatekeeper to pretrial liberty than are commercial bail bondsmen.

However, the vastly unequal bargaining power between two contractual parties—here, commercial bondsmen and the indigent defendants for whom they post bond—may foster profiteering and abuse disproportionately against low-income people and people of color. The reason being, these are populations that most often come into contact with the criminal justice system.[9] And as the COVID-19 pandemic exacerbates long-standing economic inequities along racial lines,[10] the burdens of status-quo bail regulations is likely to fall most heavily on the shoulders of minority and disadvantaged communities.

This comment does not call for transformative reform in Nevada's bail system or the dissolution of the commercial bail industry. Nor does this comment presume that contractual agreements in the commercial bail setting are tainted with duress. Indeed, those arguments would more appropriately be before a legislature, a court, or in the classroom. Rather, this comment raises arguments for or against various provisions of the Proposed Rule, recognizing potential dangers

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required bond amount, even under conservative estimates.

[4] *Valdez-Jimenez*, 490 P.3d 976.

[5] COMM. TO CONDUCT AN INTERIM STUDY OF ISSUES RELATING TO PRETRIAL RELEASE OF DEFENDANTS IN CRIMINAL CASES, FINAL REPORT 31–33 (Jan. 2021), https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/16954.

[6] *Criminal Lawyers & Attorneys in the US – Market Size 2002–2026*, IBISWORLD (Sept. 21, 2020), https://www.ibisworld.com/industry-statistics/market-size/criminal-lawyers-attorneys-united-states/ (sizing the legal market for criminal lawyers as $14.2 billion).

[7] Kara Gotsch & Vinay Basti, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, THE SENTENCING PROJECT (Aug. 2, 2018), https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/ ("The largest private prison corporations, Core Civic and CEO Group, collectively manage over half of the private prison contracts in the United States with combined revenues of $3.5 billion as of 2015."). *See also* Michael Lyle, *Yes, People Sit in Jail Because They Can't Afford Bail*, NEV. CURRENT (Mar. 4, 2020), https://www.nevadacurrent.com/2020/03/04/yes-people-sit-in-jail-because-they-cant-afford-bail/.

[8] JUST. POL'Y INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE 3 (Sept. 2012), http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf ("The for-profit bail bonding industry exerts control and influence over pretrial decision-making in jurisdictions throughout the country. Despite a checkered past, for-profit bonding is now a multi-billion dollar industry backed by giant insurance companies and trade associations with the money and political power needed to maintain their place in the criminal justice system.").

[9] SENTENCING PROJECT, REPORT OF THE SENTENCING PROJECT TO THE UNITED NATIONS SPECIAL RAPPORTEUR ON CONTEMPORARY FORMS OF RACISM, RACIAL DISCRIMINATION, XENOPHOBIA, AND RELATED INTOLERANCE 1 (Mar. 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities/.

[10] *See* GUINN CTR., THE IMPACT OF COVID-19 ON COMMUNITIES OF COLOR IN NEVADA 11–17 (Sept. 2020), https://guinncenter.org/wp-content/uploads/2020/09/Guinn-Center-Impact-of-COVID-19-on-Communities-of-Color-in-Nevada.pdf.

resulting from a system of cash bail that maintains a too-asymmetrical balance of rights and duties between commercial bailors and indigent bailees. Any regulatory reform in the business of bail should limit the opportunities to engage in predatory practices while balancing the rights and interests of those who are most vulnerable to such abuse.

Sec. 4. New Section: Prohibitions
A licensee:
1. Is not acting for or on behalf of this State or any of its political subdivisions.
2. May not wear any uniform or badge, or display insignia or logos which purport to represent law enforcement, peace officers, or otherwise implies any other official government representation at any time.
3. May not engage an unlicensed person to act in the business of bail.

Laudably, Nevada imposes stringent licensing requirements for bail enforcement agents through a mandated educational program,[11] certification exams,[12] and background checks,[13] among other qualifications. However, neither the Nevada Administrative Code ("NAC") nor the Nevada Revised Statutes ("NRS") impose continued training requirements or restrictions on the use of force incident to an arrest.

Commercial bail agents and surety companies have an undeniable interest in securing the appearance of their bailees at their court dates. When a defendant unjustifiably fails to appear at court, these industry actors are on the hook when the court consequently orders forfeiture of the bond.[14] Indeed, bail agents would view this power to apprehend and cause surrender as a necessary prophylactic to a tangible risk that the bailee will violate a release condition, including missing a court date.

However, granting bail enforcement agents the power of arrest, a traditionally state-law power,[15] can be a recipe for violent disaster. Defendants are not under any legal obligation to obey the commands of a bail enforcement agent seeking their arrest, and those bailees who exercise their right to be free from interference might flee or exert force of their own onto the bail-enforcing agent. Indeed, in a 2017 hearing before the Assembly Judiciary Committee for Senate Bill 18, the DOI brought to light specific cases of violence resulting from predatory and abusive practices by bail enforcement agents.[16] This Division recognized the need "to target abuses" in that context and should continue to apply that broad principle to provisions in the Proposed Rule.[17]

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[11] NEV. REV. STAT. § 697.177 (2020).
[12] *Id.* § 697.200.
[13] *Id.* § 697.173.
[14] *Id.* §§ 178.506–09.
[15] Brooks v. Clark Cnty., 828 F.3d 910, 914 (9th Cir. 2016) (describing Nevada Revised Statute ("NRS") 178.526, the statute authorizing sureties to arrest defendant through the services of bail enforcement agents, as "a surety's state-law power").
[16] *Hearing on S.B. 18 Before the A. Comm. on Judiciary*, 2017 Leg., 79th Sess. 9–13 (Nev. 2017) (testimony of Alexia M. Emmermann, Insurance Counsel, Division of Insurance, Department of Business and Industry) [hereinafter "Emmermann Testimony"]; *see also* ALEXIA M. EMMERMANN, BAIL STORIES (2017), https://www.leg.state.nv.us/Session/79th2017/Exhibits/Assembly/JUD/AJUD1130J.pdf.
[17] Emmermann Testimony, *supra* note 16, at 3.

As the prohibition on wearing any governmental insignia shows, bail enforcement agents do not enjoy full state power despite their authority to apprehend bailees in limited contexts where good cause is shown. As the Proposed Rule suggests, even apparent governmental authority could empower bail enforcement agents to deploy greater and more forceful measures when causing a defendant's surrender.

Moreover, the appearance of governmental authority falsely signals to bailees that those bail enforcement agents will conduct themselves in adherence to the oaths and duties constraining law enforcement agents. Bail enforcement agents are under no such oaths or duties. Thus, they should have independent constraints imposed on them by the DOI, the principal agency charged with regulating the activity of bail enforcement agents.[18]

While bail enforcement agents may be constrained in the use of force under tort law and criminal law, those constraints on violent behavior are imposed on all people, independent of their licensure as bail enforcement agents. To rely exclusively on tort- and criminal-law duties of ordinary civilians would ignore the reality that these agents enjoy state-like power. Choosing not to regulate their power of arrest would fail to provide any independent restraint on harmful or abusive conduct by bail enforcement agents who act under legal and regulatory authority to arrest their bailees.

Further, abuses by bail enforcement agents may go largely unreported. As the District of Nevada noted, a victimized bailee may be "unlikely to report [a bail enforcement agent's] criminal acts because of her own trouble with the law."[19] Indeed, victims may not want to risk further exposure to the criminal justice system by reporting violent bail enforcers. Or, they may fear retaliation for pressing charges. Given bailees' reluctance to report violence, any duty of reasonableness may be rendered all but ineffectual.[20] The DOI's confidential complaint process would help fill this enforcement gap by providing an anonymous administrative avenue to reporting violent abuses by bail enforcement agents.

Under the Commissioner's broad authority to adopt reasonable regulations,[21] the DOI should restrict bail enforcement agents' unreasonable use of weapons in the course of arresting a bailee. Consistent with Section 4's prohibition on bail enforcement agents even appearing like law enforcement, a regulation could prohibit the use of firearms, Tasers, and batons, weapons commonly commissioned to police officers. Indeed, the DOI recognized at a 2017 Nevada Assembly hearing that bail enforcement agents have been known to hold bailees at gunpoint[22]

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[18] NEV. REV. STAT. §§ 679B.120–30, 697.020 *et seq.*

[19] United States v. Benzer, No. 2:13-CV-18 JCM (GWF), 2013 WL 5603590, at *3 (D. Nev. Oct. 11, 2013).

[20] There is a paucity of reported tort judgments and criminal verdicts from Nevada. While more than 90% of criminal cases end in a plea bargain, Erica Goode, *Stronger Hand for Judges in the 'Bazaar' of Plea Deals*, N.Y. TIMES (Mar. 22, 2012), https://www.nytimes.com/2012/03/23/us/stronger-hand-for-judges-after-rulings-on-plea-deals.html, bounty hunters have enjoyed use-of-force authority since at least the late 1800s, *see* Taylor v. Taintor, 83 U.S. 366, 371–72 (1872). Given the long history of fugitive recovery, it is surprising—and telling—that Westlaw research yields no reported state or federal cases arising out of conduct in or the law of Nevada.

[21] *Id.* § 679B.130.

[22] EMMERMANN, *supra* note 16, at J-3, J-12–13.

and deploy Tasers on bailees.[23] Alternatively, a regulation could justifiably sweep more broadly and prohibit the unreasonable use of any weapon in the course of arresting a bailee.

By restricting only the *unreasonable* use of weapons, this amendment to the Proposed Rule will better protect the well-being and safety of both parties in an arrest. An arrest is inherently a forceful act, but it need not be a violent or excessive one. Where a defendant chooses to deploy a weapon to defend himself or herself, bail enforcement agents could be within their rights to meet force with force to defend themselves. But an unbridled guns-blazing approach will allow bail enforcement agents to continue harming and intimidating their bailees without consequence from the DOI if the Division's regulations do not provide such an explicit restriction. The DOI should restrict the use of weapons to the limited circumstances where a bail enforcement agent reasonably requires the use of a weapon for self-defense. In other words, a regulation should prohibit bail enforcement agents from using weapons as a tool for attack while allowing the defensive use of a weapon. Thus, we recommend adding the following paragraph to Section 4:

"***4. May not use any weapon in the course of his or her employment, unless the use of such weapon is reasonably necessary to defend the licensee from serious injury or death.***"

Sec. 13. NAC 697.240 Discipline for act of one partner. (NRS 679B.130)
The license of each member of a partnership is subject to suspension or revocation for the failure of the partnership or of any member of the partnership to comply with all laws and regulations governing the conduct of the bail business or acts incidental thereto, if the failure occurred with the member's knowledge, consent, ratification, collusion or deliberate failure to make a reasonable inquiry.

Imposing a duty of inquiry is grounded in the sound policies of weeding out unlawful conduct and promoting better business practices. And by limiting the inquiry to a "reasonable" one, this amendment will not impose undue or unfair burdens on commercial bail partnerships while increasing the likelihood of compliance with governing laws and regulations.

But the Proposed Rule, in practice, is not likely to expand the DOI's regulatory reach beyond conduct that is already regulated under NAC 697.240. Deliberate failure occurs when a commercial bail partner intentionally or knowingly fails to investigate an instance of non-compliance.[24] There are four ways deliberate or intentional failure will play out. First, a partner has no reason to suspect non-compliance and makes the affirmative choice not to inquire. Second, a partner suspects—or has reason to suspect—a violation but chooses not to investigate whether or not that suspicion is founded. Third, a partner is certain that a violation has occurred but pushes that knowledge under the rug. And fourth, a partner categorically refuses to investigate regardless of any prior knowledge or suspicion.

[23] *Id.* at J-3.
[24] *Deliberate*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/deliberate (last visited Mar. 10, 2021) (defining "deliberate" as characterized "by or resulting from careful and thorough consideration" or "by awareness of the consequences").

The first scenario (no reason to suspect) is not the kind of conduct that the DOI should regulate. Such heavy-handed regulation would impose the substantial burden of requiring incessant inquiry into non-compliance and would foster suspicion-less investigations. The third scenario (certain that a violation occurred) is already covered by "member's knowledge" because the partner already knew of the non-compliance and thus failed the mandate of NAC 697.240. The fourth scenario (categorial refusal) clearly constitutes "deliberate failure," but a categorical refusal to inquire is better described as fringe conduct that would violate any interpretation of the Proposed Rule or our proposed amendment.

It is the second scenario of suspected non-compliance—conduct that occupies the gray area between categorical indifference and knowledge of a violation—that the Proposed Rule might not adequately cover. When one partner is suspicious of a violation of law, he or she does not necessarily know that the other partner has failed to comply with the law. Thus, the suspicious partner may not be required to conduct a reasonable inquiry under the "member's knowledge" language. "Deliberate failure" may not impose a duty to inquire when a partner is suspicious because it is unclear whether "failure" would be interpreted as the "omission of occurrence or performance" or "a falling short."[25] "The omission of occurrence or performance" simply connotes that the partner did not inquire, while "a falling short" would strongly imply that the partner *should have* inquired but did not. Under the "omission" interpretation, bail agents could interpret the Proposed Rule as simply being aware that they are not making an inquiry.

If the DOI intends on interpreting "failure" as the falling short of a duty to inquire, it should amend the Proposed Rule to be more explicit in its regulatory command.

We recommend amending the Proposed Rule to:

"The license of each member of a partnership is subject to suspension or revocation for the failure of the partnership or of any member of the partnership to comply with all laws and regulations governing the conduct of the bail business or acts incidental thereto, if the failure occurred with the member's knowledge, consent, ratification, collusion, or ***if a member failed to inquire when that member reasonably should have known of a failure to comply with any law or regulation governing the conduct of the bail business or acts incidental thereto.***"

Sec. 30. NAC 697.475 Certain agreements prohibited. (NRS 679B.130)
It is unlawful for any licensee to:
5. Threaten to surrender a defendant to influence a person's decision to agree to add or amend a bail agreement or form.

The careful wording of Paragraph 5 will foster fairer bail agreements by removing liberty as a bargaining chip in contractual negotiations. Often, co-signors to a bail agreement might include family members, friends, or unacquainted Good Samaritans such as a community bail fund or a crowd-funded source.[26] Expanding contractual protections to *each and every* party to a bail

[25] *Failure*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/failure (last visited Mar. 10, 2021).
[26] COLOR OF CHANGE & ACLU, $ELLING OFF OUR FREEDOM 32 (May 2017), https://www.aclu.org/sites/default/files/field_document/059_bail_report_2_1.pdf.

agreement recognizes that, especially for lower-income defendants, scrounging enough money or collateral for the bail agent's premium often requires all hands on deck. And because each contractual party is so clearly invested in the bailee's freedom—indeed, personal indemnitors would not risk their economic resources if they were not invested enough to secure the bailee's freedom—the threat of the bailee's reincarceration will weigh heavily on any decision to amend the bail agreement.

Moreover, such a bargaining tactic will likely either be unlawful under applicable law or do little to affect the bail bondsman's bottom line. For one, a licensee could lie about wielding the legal authority to surrender the defendant under NRS 178.526 or NAC 697.550. Nevada contract law may even invalidate such a contractual amendment because the licensee materially misrepresented that he or she had the authority to surrender the defendant to induce the party to amend.[27]

But even when the licensee possesses the legal authority to surrender the defendant, the licensee should be economically indifferent as to whether the defendant returns to custody or remains free because the bond amount is forfeited absent some legally cognizable excuse.[28] The true economic incentive would be to try to ascertain the defendant's justification for violating a release condition in order to secure non-forfeiture of the bond. Allowing bail agents to use even lawful surrender as a bargaining chip would also allow them to reap the reward of non-forfeiture without incurring any risk because even when facing forfeiture, they could hedge that risk by extracting more money from their bailees and personal indemnitors. And as shown in Section 34 of the Proposed Rule, which would prohibit bail agents from collecting a second premium for bailing out defendants whom they surrender to custody, the DOI has recognized that bail agents should be foreclosed from using arresting authority as a source of additional revenue.

Paragraph 5 recognizes that the threat of reincarceration is a sensitive pressure point on defendants and their indemnitors, while ensuring that bail agents will not unfairly and inhumanely leverage a bailee's liberty for monetary gain. Paragraph 5 should be promulgated as written.

Sec. 34. NAC 697.550 Early surrender of defendant. (NRS 679B.130; NRS 697.330)

1. No surety or bail agent may cause the surrender of a defendant back into custody without good cause before the time specified in the bond for the appearance of the defendant.

Paragraph 1 aptly closes one potential end run-around for industry actors to arrest defendants without good cause. Under the current, unamended text of NAC 697.550, a bail enforcement agent can technically arrest a bailee without good cause if a surety or third party ordered the arrest rather than a bail agent. Bail agents could notify their surety companies or some third party in coded, noncommittal language that a particular bailee has stirred trouble for the bail bond company. Taking the hint, representatives from the surety company or third parties could then contact bail enforcement agents to cause the surrender of defendants without even an

[27] *See, e.g.*, Awada v. Shuffle Master, Inc., 173 P.3d 707, 713 (Nev. 2007).
[28] NEV. REV. STAT. §§ 178.512, 178.509 (2020).

inquiry as to good cause. By imposing the restriction on sureties in addition to bail agents, bail enforcement agents would be unable to bypass the strictures of NAC 697.550 in this way.

However, a loophole remains open in the Proposed Rule: rogue bail enforcement agents acting without the command or consent of a surety or bail company could arrest a bailee without good cause and still avoid facing discipline from the DOI. Section 2, Paragraph 7 of the Proposed Rule might define when a bail enforcement agent may arrest or cause the surrender of a bailee.[29] But the restriction imposed in Section 2 of the Proposed Rule is much narrower: the Proposed Rule only limits who can order the arrest of a defendant *on behalf of a surety*. There are technically no restrictions on whether bail enforcement agents can arrest or surrender a bailee on their own accord or on the orders of some other party. The Proposed Rule should close this loophole.

Paragraph 1 could instead read:

"1. No surety or bail agent may cause the surrender of a defendant back into custody without good cause before the time specified in the bond for the appearance of the defendant. ***A bail enforcement agent may not surrender a defendant back into custody without the written authorization or written authority provided by a surety or bail agent. Such authorization must comply with NRS 178.526.***"

Sec. 34. NAC 697.550 Early surrender of defendant. (NRS 679B.130; NRS 697.330)
2. "Good cause" includes:
(b) Materially false information provided by the defendant in writing intended to mislead the bail agent or surety which materially affects the underwriting assessment.

Imposing an intent requirement in Paragraph 2(b) appropriately tailors the inquiry to the economic harm that materially false information poses onto industry actors. Without an intent requirement, bailees could be subject to draconian applications of NAC 697.550. Under the current rule, "materially false information" is undefined and could sweep far too broadly. The current rule also allows for sureties and bail bond companies to cause the surrender of a bailee who, by honest mistake or lapse of memory, faultlessly enters incorrect information to bail agents when entering into their bail agreements. The intent requirement carefully limits unlawful conduct to what makes material misrepresentation so irksome: intentional fraud. And by further limiting unlawfulness to information material to the underwriting assessment, it protects what sureties and bail bond companies consider paramount: the bottom line.

Sec. 34. NAC 697.550 Early surrender of defendant. (NRS 679B.130; NRS 697.330)
2. "Good cause" includes:
(e) Commission of another crime, other than a minor infraction, such as a traffic violation, by the defendant while on bail, if such crime reasonably changes the underwriting assessment.

[29] Only a licensed bail agent may: on behalf of a surety, cause a defendant to be apprehended or surrendered by a bail enforcement agent. Proposed Rule § 2(7).

Paragraph 2(e) is also an appropriate amendment. By expanding the number of allowable offenses to all minor infractions, rather than exclusively minor traffic violations, the Proposed Rule is better tailored to bail's underlying purpose of ensuring public safety,[30] as minor infractions do little by way of endangering the community. The current rule allows industry actors to arrest a bailee all the same for jaywalking, littering, or aggravated assault. Allowing the surety or bail agent to surrender a bailee for non-traffic-related infractions just the same as for violent crimes would offend notions of justice and fairness. Moreover, tailoring the surety's and bail agents' early surrender rights to crimes that affect their underwriting assessments will prevent sureties and bail agents from serving a law-enforcement function and removes one incentive for industry actors to overbearingly monitor and surveil their bailees while out on bail.

Sec. 34. NAC 697.550 Early surrender of defendant. (NRS 679B.130; NRS 697.330)
2. "Good cause" includes:
(f) Failure by the defendant to appear in court at the appointed time if the defendant's failure to appear was unjustifiable or unreasonable.

Paragraph 2(f) is a fair amendment to NAC 697.550 and is consistent with NRS 178.508, which similarly allows the defendant to provide an excuse for non-appearance before a court orders forfeiture of bail. A failure to appear is not always a black-and-white occurrence where a defendant is always at fault for his or her absence. The defendant may have been unable to miss a shift at work, unable to reasonably secure transportation, or required to attend to ailing family members. In short, life happens. Allowing a bailee to justify his or her failure to appear accounts for the unpredictability of life and the pressing personal and professional responsibilities that may outweigh the need to appear for a court date. The Proposed Rule recognizes this reality and appropriately carves out this exception.

But Paragraph 2(f) as it stands may be difficult to administer because the bailee might not have the opportunity to justify his or her failure to appear until after a bail enforcement agent arrests the bailee. Bail agents and sureties causing the bailee's arrest will likely be quick to surrender the defendant to mitigate the risk of forfeiture. So in many (or most) cases, arrest and surrender will have already occurred before the opportunity for the bailee to explain the failure to appear. As the Proposed Rule stands, there is no mechanism to sift out the unjustified non-appearances from the justified ones. Thus, we propose the following amendment:

"(f) Failure by the defendant to appear in court at the appointed time, if the defendant's failure to appear was unjustifiable or unreasonable. ***A surety or bail agent causing the early surrender of the defendant must reasonably ascertain any justification or excuse, if any, for the defendant's failure to appear before causing such surrender.***"

[30] Valdez-Jimenez v. Eighth Jud. Dist. Court in and for Cnty. of Clark, 460 P.3d 976, 984 (Nev. 2020).

Sec. 34. NAC 697.550 Early surrender of defendant. (NRS 679B.130; NRS 697.330)

3. If a surety or bail agent causes the surrender of a defendant before the time specified in the bond, the surety or bail agent shall, within 10 days after the surrender, file with the Commissioner a verified statement concerning the surrender, including the information required on the Early Surrender Verification Form available from the Division's website www.doi.nv.gov. The form submitted must include a copy of the surety's or bail agent's authorization to early surrender the defendant, as well as any documents submitted to the court or jail related to the early surrender. Failure to submit the form and supporting documents within 10 days after the surrender deems the surrender to be without good cause, and the bail agent shall refund the premium.

Requiring the prompt filing of the DOI's Early Surrender Verification Form under penalty of the return of premium incentivizes industry actors to quickly justify any early surrender of bailees. The current version of the form, M-8C, requires a signed attestation that the entered information is true and complete.[31] While requiring an attestation and supporting documents might deter material misrepresentations, there is no independent restriction on industry actors falsifying the supporting documents they submit. The Proposed Rule has imposed on bailees an explicit regulatory duty of truthful entry of information in Section 34, Paragraph 2(b). This section should similarly impose an explicit requirement on bail agents and sureties to truthfully complete the Early Surrender Verification Form. Thus, we propose the following amendment:

"If a surety or bail agent causes the surrender of a defendant before the time specified in the bond, the surety or bail agent shall, within 10 days after the surrender, file with the Commissioner a verified statement concerning the surrender, including the information required on the Early Surrender Verification Form available from the Division's website www.doi.nv.gov. The form submitted must include a copy of the surety's or bail agent's authorization to early surrender the defendant, as well as any documents submitted to the court or jail related to the early surrender.

(a) The Division will deem the surrender to be without good cause and order the return of the premium if the surety or bail agent:

(1) Fails to submit the form and supporting documents within 10 days after the surrender, or

(2) Provides materially false information intended to mislead the Division."

Sec. 34. NAC 697.550 Early surrender of defendant. (NRS 679B.130; NRS 697.330)

4. If a bail agent causes a defendant to be surrendered pursuant to this section, then re-posts a bond on the defendant for the same case, the bail agent may not collect premium again.

Paragraph 4 is of sound policy. Bail agents are already strongly incentivized by Nevada's bail forfeiture laws to secure the arrest of their bailees and cause their surrender to the court. By allowing bail agents to post another bond on the defendant's behalf and collect premiums thereafter, Nevada law would in effect allow bail agents to double dip and impose heavy financial burdens on a class of bailees who are more likely to be indigent than those who can

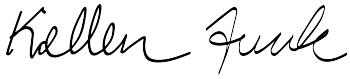
[31] DIV. OF INS., Form M-8C, *available at* https://doi.nv.gov/uploadedFiles/doinvgov/_public-documents/Bail/NDOI-717_Early_Surrender_of_Defendant.pdf.

afford to post bond amounts on their own. It is one thing to protect against the risk of forfeiture, but it is entirely another thing to profiteer. Paragraph 4 recognizes this conflict of interest when a bail agent is able cause the early surrender of a defendant and directly profit from that surrender. The Proposed Rule rightly forecloses that window of opportunity.

* * *

Our system of bail is distinctly American.[32] No other country besides the Philippines allows even the existence of a commercial bail bond company.[33] Whatever its faults or merits, an industry that trades on dollars and liberty should be subject to tight controls to prevent abuse. In Nevada, the Division of Insurance is tasked with the duty of promulgating regulations that rein in industry actors' impulses for profiteering and predation against bailees who may be most vulnerable to such abuse: those who were too poor to post bail without financial assistance. We hope this comment clarified how the Proposed Rule may or may not fully account for the power dynamics between commercial bail agents and indigent bailees and the myriad legal interests at stake in a commercial system of bail. Thank you.

Sincerely,



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[32] Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), https://www.nytimes.com/2008/01/29/us/29bail.html.
[33] *Id.*

Sue Bell

From: Sherwin J Nam <sjn2127@columbia.edu>
Sent: Monday, June 7, 2021 3:21 PM
To: Insurance Regulation
Cc: Sue Bell; Kellen R. Funk
Subject: Comment to Proposed Rule R153-20
Attachments: Comment to R153-20.pdf

Hello,

My name is Sherwin Nam; I'm a 2021 graduate of Columbia Law School. I received this email address from Ms. Sue Bell earlier this year in view of submitting a comment to the Nevada Division of Insurance's Proposed Rule R153-20 regulating the business of bail. This administrative comment is signed by myself and Professor Kellen Funk, a legal historian who writes extensively on bail. We hope this comment will provide a useful perspective on the regulation of bail agents and surety companies in the state of Nevada.

If you have any follow-up questions or concerns, please do not hesitate to reach out to me. Thank you!

Best,
Sherwin

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Sherwin Nam, J.D. '21
Columbia Law School