4.4 Pretrial Advocacy Strategies

A. Enter the Case at the Earliest Possible Opportunity

Defendants achieve better pretrial release outcomes when they are represented by an attorney at the earliest possible opportunity. *See supra* § 4.2E, Other Factors that May Contribute to Racial Disparities in Bail Determinations. In North Carolina, while defendants with retained counsel are typically represented at their first appearance before a judge (and potentially at their initial appearance before a magistrate), the point at which appointed counsel enters a defendant's case varies around the state. Indigent defendants usually are not represented by counsel at initial appearances or first appearances. Some districts have experimented with assigning a "bond attorney" from the Public Defender's office to represent defendants at first appearances, but this practice appears to be relatively uncommon. Even when appointed counsel is present for a defendant's first appearance, counsel may have had little opportunity to obtain information in support of a motion to modify bond. If the appearance is conducted via audio-video feed between the courtroom and jail, counsel's ability to obtain needed information may also be limited (although counsel must be given an opportunity to communicate with the client in confidence). *See* G.S. 15A-532 (during the video transmission, "[i]f the defendant has counsel, the defendant shall be allowed to communicate fully and confidentially with his attorney during the proceeding"). If release is not obtained at the first appearance, counsel should try to set the matter for the first possible court date for a bond hearing or ask the judge to leave the matter open until an afternoon session of court so that counsel (or an intern or investigator) can learn more about the client and confirm information such as place of residence and ties to the community. Where appointed counsel does not represent defendants at first appearances, it is especially important to return to court for a bond reduction hearing as soon as possible after entering the case.

When client is detained pretrial, consider moving for a speedy trial. When counsel is unable to secure a client's pretrial release, it may be advantageous to move for a speedy trial. The United States Supreme Court has held that a defendant's incarceration before trial is a relevant consideration in determining whether a defendant has been afforded his constitutional right to a speedy trial. *Barker v. Wingo*, 407 U.S. 514 (1972). Violation of the constitutional right to a speedy trial results in the dismissal of all charges. Although North Carolina no longer has a speedy trial statute, there is an older statute prohibiting lengthy pretrial incarceration. *See* G.S. 15-10. If a defendant is incarcerated in jail on a felony warrant and demands a speedy trial in open court, the defendant must either be indicted during the next term of court or released from custody, unless the State's witnesses are not available. *Id*. Similarly, if an incarcerated person accused of a felony demands a speedy trial and is not tried within a statutorily set period (two terms of court, provided the two terms are more than four months apart), the person is entitled to release from incarceration. *See id.*; *State v. Wilburn*, 21 N.C. App. 140 (1974). *See also generally* 1 NORTH CAROLINA DEFENDER MANUAL §7.1F (Pretrial Release) (2d ed. 2013).

Practice note: Pretrial diversion provides an opportunity for defendants to avoid both conviction and the "broad array of social and economic outcomes associated with felony

convictions, including [negative] employment, income, family stability, and mental health [consequences]." Traci Schlesinger, *Racial Disparities in Pretrial Diversion: An Analysis of Outcomes Among Men Charged with Felonies and Processed in State Courts*, 3 RACE & JUST. 210, 211 (2013). Counsel should investigate the availability of local pretrial diversion programs and, where available, coordinate with any pretrial services program in the district as early as possible both to explore the possibilities of pretrial diversion and to increase the likelihood of an early, favorable decision on pretrial release. *See* North Carolina Dep't of Public Safety, *County Resource Guide*, NCDPS.GOV (last modified June 3, 2014). A pretrial services program may interview the defendant before the first appearance and may provide the defender with a copy of the report and recommendations, which will furnish some basic information at first appearance.

B. Counter Potential Racial Stereotypes in Pretrial Release Arguments

Studies have found that, where discretion is greatest and information limited, implicit and explicit biases are most likely to have an impact on decision-making. *See supra* § 1.3E, Discretionary Decision-Making and the Cumulative Nature of Disparities. Judicial officers enjoy wide discretion in setting pretrial release conditions and often must make decisions with limited information about the evidence and the defendant. In recent years, researchers have found that negative stereotypes about Black and Latino defendants can play a role in pretrial release decisions. *See, e.g.*, Traci Schlesinger, *Racial and Ethnic Disparity in Pretrial Criminal Processing*, 22 JUST. Q. 170 (2005). In North Carolina, pretrial decisions can be based on such subjective considerations as "character" and a catch-all for "any other evidence relevant to issue of pretrial release." G.S. 15A-534(c). Judicial district policies may include other subjective factors, such as "negative attitude or lack of cooperation by the defendant." *See* Administrative Order Setting 10th Judicial District Pretrial Release Policies in the Race Materials Bank at www.ncids.org (select "Training & Resources").

The argument on pretrial release is counsel's first opportunity to distinguish the client from possible stereotypes that may influence a judge in his or her exercise of discretion. Accordingly, you should be aware of stereotypes that may be in operation and be prepared to present information countering potential preconceptions about your client. *See generally* 1 NORTH CAROLINA DEFENDER MANUAL Ch. 1 Appendix 1-1 (Interview Checklist for Bond Hearing) (2d ed. 2013); *see also* NORTH CAROLINA COMMISSION ON INDIGENT DEFENSE SERVICES, PERFORMANCE GUIDELINES FOR INDIGENT DEFENSE REPRESENTATION IN NON-CAPITAL CRIMINAL CASES AT THE TRIAL LEVEL 2–6 (2004). In your first interview with your client, ask questions aimed at discovering the realities of her life. For example, if you ask your client whether she is employed, she may say no, but, on further questioning, may reveal that she takes care of her niece after school or cares for her elderly grandmother. Such information allows you to present a picture of your client's life beyond impersonal statements about, for example, her county of residence and how long she has lived there. Information gathered by any pretrial services program in your district may also be useful in this regard; counsel should make an effort to review any materials prepared by pretrial services in preparing a request to modify pretrial conditions.

While defense counsel usually presents the information rather than offering testimony, counsel can tender relatives, employers, teachers, clergy members, or friends to the court and prosecutor for questioning. The presence of supportive family or community members can have a powerful influence even if they do not intend to speak. Counsel also can present documentary evidence to help the court see the client as a complex individual. For example, counsel may tender report cards, performance reviews, or reference letters from community leaders. (The rules of evidence do not apply at pretrial release hearings. *See* G.S. 15A-534(g).) When possible, have the client dress in his or her own neat, clean clothing for the bond hearing rather than appear in a jail jumpsuit, which will aid the judge in seeing the client as a fully dimensional individual. *See* Jenny Montgomery, *Dressing Defendants*, THE INDIANA LAWYER (May 23, 2012) (quoting former president of the National Association of Criminal Defense Lawyers who indicated that "the bottom line is we know people judge a book by its cover," and these judgments influence "the fundamental fairness [of the] process").

C. Present Findings about Race at Bond Hearings

Evidence of racial disparities in pretrial decisions or outcomes, even when insufficient to meet the legal standard of an equal protection claim, may be persuasive when representing a client at a first appearance or on a bond reduction motion. Counsel can make the court aware of the growing body of scholarship finding that African American and Latino defendants receive less favorable treatment at the pretrial release stage than their White counterparts. *See supra* § 4.2, Overview. Counsel should inform the court of any disparity applicable to the case—for example, a codefendant who received more favorable conditions, was similarly situated to the defendant, and was White. *See supra* "Case study: A judge reflects on implicit bias" in § 1.3D, Implicit Bias.

Either independently or in partnership with other attorneys or researchers, you may be able to conduct research into pretrial release decisions in your geographic area broken down by race. *See infra* § 4.5A, Policies, Forms, Practices, and Criteria Influencing Pretrial Decisions. This may involve information obtained from databases, or simply an observational study of first appearances and bond modification hearings, whereby observers note the outcomes of such hearings and then pull the files associated with each of the cases observed to compile a record of pretrial release decisions. If such a study has been conducted in your district, or if you have the ability to conduct one, the data may persuade the court of the importance of guarding against bias in pretrial release decisions.