**ABA Policies related to Coronavirus**

This document seeks to identify key policy areas related to coronavirus and people in jail or other correctional facilities, summarize the relevant ABA policy and provide the actual policy citations on which the summary is based. The policy areas covered are:

* Pretrial Release
* Court Closures
* Visitation
* Conditions of Jail and Prison Facilities
* Access to Health Care
* Housing Infected Individuals
* Use of Medical Isolation and/or Segregated Housing
* Lockdown of Facilities
* Compassionate Release

**PRETRIAL RELEASE**

ABA policies have long created a presumption of release pretrial unless an individual is shown to present a danger to the public by clear and convincing evidence. ABA policy favors release on the least restrictive conditions possible and generally without imposing a financial condition. Where financial conditions (bond or bail) are imposed, those conditions should never result in the detention of an individual due to inability to pay.

**1998 A 112D (Criminal Justice, Standing Committee on Legal Aid and Indigent Defendants)**

  RESOLVED, That the American Bar Association recommends that all jurisdictions ensure that defendants are represented by counsel at their initial judicial appearance where bail is set; and

  FURTHER RESOLVED, That each jurisdiction provide adequate resources to support effective implementation of such representation by counsel for indigent defendants.

**2017 A 112C** urges jurisdictions to release defendants on their own recognizance unless a court determines “that release on cash bail or secured bond is necessary to assure the defendant’s appearance and no other conditions will suffice for that purpose”. It further urges that courts be prohibited from “imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay.”

The full policy reads:

 RESOLVED, That the American Bar Association urges federal, state, local, territorial, and tribal governments to adopt policies and procedures that:

1. favor release of defendants upon their own recognizance or unsecured bond;

1. require that a court determine that release on cash bail or secured bond is necessary to assure the defendant’s appearance and no other conditions will suffice for that purpose before requiring such bail or bond;
2. prohibit a judicial officer from imposing a financial condition of release that results in the pretrial detention of a defendant solely due to the defendant’s inability to pay;
3. permit a court to order a defendant to be held without bail where public safety warrants pretrial detention and no conditions of pretrial release suffice, and require that the court state on the record the reasons for detention; and
4. bar the use of "bail schedules” that consider only the nature of the charged offense, and require instead that courts make bail and release determinations based upon individualized, evidence-based assessments that use objective verifiable release criteria that do not have a discriminatory or disparate impact based on race, ethnicity, religion, socio-economic status, disability, sexual orientation, or gender identification.

**CJS Standards on Pretrial Release (2007)**

 Standards on Pretrial Release differ from court procedures related to the setting of bail. These standards are premised on the law that favors release over detention, and assume that most individuals accused of an offense can be safely released pending trial or sentencing in a case unless the state can prove by clear and convincing evidence that the accused will flee the jurisdiction or will pose a danger to the safety of the community or the victim.

 Standard 10-1.1 states the general purpose of these Standards:

“The purposes of the pretrial release decision include providing due process to those accused of crime, maintaining the integrity of the judicial process by securing defendants for trial, and protecting victims, witnesses and the community from threat, danger or interference. The judge or judicial officer decides whether to release a defendant on personal recognizance or unsecured appearance bond, release a defendant on a condition or combination of conditions, temporarily detain a defendant, or detain a defendant according to procedures outlined in these Standards. The law favors the release of defendants pending adjudication of charges. Deprivation of liberty pending trial is harsh and oppressive, subjects defendants to economic and psychological hardship, interferes with their ability to defend themselves, and, in many instances, deprives their families of support. These Standards limit the circumstances under which pretrial detention may be authorized and provide procedural safeguards to govern pretrial detention proceedings.”

 Standard 10-1.2 states that, not only should there be a presumption of release over detention, but that the accused should be released under the least restrictive conditions, and that diversion and alternative release options should be utilized.

 Standard 10-1.3 provides that the presumption of release favors the use of citation or summons in order to prevent individuals from unnecessarily being arrested.

 Standard 10-1.4 states that judicial officers should impose conditions of release only when the conditions are necessary to ensure that the (a) “appearance at court proceedings, to protect the community, victims, witnesses or any other person and to maintain the integrity of the judicial process.” Under (c), financial conditions should be used only when no other conditions will ensure appearance. (d) states that financial conditions should not be used to respond to concerns for public safety, and (e) states that a judicial officer must consider the accused’s ability to pay when determining a financial condition.

 These general principles are expanded upon in the Standards. It’s also important to note that an accused should have a release hearing whenever circumstances change, per Standard 10-5.12. The request for a new hearing may be brought by the defendant, the prosecutor or court services.

 An accused has a right to counsel at a release hearing, per Standard 10-5.10(a)(i).

 The “clear and convincing” standard for detention is stated in Standard 10-5.10(f) and (g)(ii).

 Standard 10-5.11 states that an accelerated trial is required for all detained persons, consistent with the CJS Standards on Speedy Trial, below.

**COURT CLOSURES**

Where courts are “closed” or operating on limited schedule/availability, this has the potential to prolong pretrial detention. In such circumstances the presumption of release is heightened. After making an effort to minimize pretrial detention, courts should prioritize hearings for those who remain detained pretrial.

**CJS Standards on Speedy Trial (2006)**

 Standard 12-1.2: Specific time limits on the time within which a defendant must be brought to trial or case resolved through non-trial disposition

1. (iii) establishes that appropriate consequences will occur when speedy trial is denied.

Standard 12-1.3: Differentiates between those in detention and those on release, with

shorter time limits for those in custody.

 Standard 12-2.7: Denial of speedy trial has the following consequences:

1. (i) If the defendant is in custody, release of the defendant in accordance with Standards on Pretrial Release on conditions that best minimize the risk of flight or danger to the community, and reset trial within time period for those on release;

(ii)If risk of flight or danger to the community is too great, then prioritize trial so that it is initiated as soon as possible or within 15 days, whichever is shorter, or no later than 45 days if requested by the defendant.

1. If the defendant is on release, and, even considering the interests of justice and other factors, trial cannot begin within 30 days following the time limit, then case should be dismissed with prejudice.
2. Court should make a record
3. Dismissal with prejudice means prosecution is forever barred for offense and any other offense that would be joined with it.

Appropriate use of the Standards on Pretrial Release helps to prevent coercive plea bargaining. It prevents detainees from admitting to guilt in order to be released from jail; most often this occurs in misdemeanor cases where the detainee has already served the sentence that would be meted out by a guilty plea, but it also occurs in felony cases where a detainee has served the jail time that would be imposed as a condition of probation.

**VISTITATION**

ABA policy provides that prisoners should never be barred from counsel visits, clergy visits or written communication with family members.

Standard 23-3.7 Restrictions relating to programming and privileges

(a) In no case should restrictions relating to a prisoner’s programming or other privileges, whether imposed as a disciplinary sanction or otherwise, detrimentally alter a prisoner’s:

* (ix) counsel or clergy visits, or written communication with family members, except as provided in subdivision (d) of this Standard.

(d) Correctional authorities should be permitted to reasonably restrict, but not eliminate, counsel visits, clergy visits, and written communication if a prisoner has engaged in misconduct directly related to such visits or communications.

**CONDITIONS OF JAILS AND CORRECTION FACILITIES**

Under ABA policy, jails, prisons and other correctional facilities must be kept in a sanitary condition, and facilities must provide appropriate and necessary materials for cleaning and maintaining appropriate hygiene at no cost.

**Criminal Justice Standards on the Treatment of Prisoners (2010)**

Standard 23-3.1 Physical plant and environmental conditions

(a) The physical plant of a correctional facility should:

* (i) be adequate to protect and promote the health and safety of prisoners and staff;
* (ii) be clean and well-maintained;
* (iii) include appropriate housing, laundry, health care, food service, visitation, recreation, education, and program space;
* (iv) have appropriate heating and ventilation systems;
* (v) not deprive prisoners or staff of natural light, of light sufficient to permit reading throughout prisoners’ housing areas, or of reasonable darkness during the sleeping hours;
* (vi) be free from tobacco smoke and excessive noise;
* (vii) allow unrestricted access for prisoners to potable drinking water and to adequate, clean, reasonably private, and functioning toilets and washbasins; and
* (viii) comply with health, safety, and building codes, subject to regular inspection.

(b) Governmental authorities in all branches in a jurisdiction should take necessary steps to avoid crowding that exceeds a correctional facility’s rated capacity or adversely affects the facility’s delivery of core services at an adequate level, maintenance of its physical plant, or protection of prisoners from harm, including the spread of disease.

Standard 23.3.3(c) states that “authorities should provide sufficient access to showers at an appropriate temperature to enable each prisoner to shower as frequently as necessary to maintain general hygiene.”

Standard 23-3.5 Provision of Necessities

1. “Correctional authorities should maintain living quarters and associated common areas in a sanitary condition. Correctional authorities should be permitted to require prisoners able to perform cleaning tasks to do so, with necessary materials and equipment provided to them regularly and without charge.”
2. Addresses provision of clothing and regular laundry services
3. “Correctional authorities should provide prisoners, without charge, basic individual hygiene items . . .”

**ACCESS TO HEALTH CARE**

Corrections facilities have an obligation to screen each prisoner as soon as possible to identify potentially communicable diseases. Incarcerated individuals must receive appropriate health care, including appropriate testing and preventative care, free of charge. Screenings and treatment must be provided by qualified health care professionals. Voluntary consent must be obtained from the prisoner for all testing and treatment. However, a prisoner who refuses testing or treatment for a serious communicable disease may be subject to involuntary testing or treatment if there is a significant risk of spread of the disease.

**Criminal Justice Standards on the Treatment of Prisoners (2010)**

Standard 23-2.1 Intake screening

Correctional authorities should screen each prisoner as soon as possible upon the prisoner’s admission to a correctional facility to identify issues requiring immediate assessment or attention, such as illness, communicable diseases, mental health problems, drug or alcohol intoxication or withdrawal, ongoing medical treatment, risk of suicide, or special education eligibility. Medical and mental health screening should:

(i) use a properly validated screening protocol, including, if appropriate, special protocols for female prisoners, prisoners who have mental disabilities, and prisoners who are under the age of eighteen or geriatric;

(ii) be performed either by a qualified health care professional or by specially trained correctional staff; and

(iii) include an initial assessment whether the prisoner has any condition that makes the use of chemical agents or electronic weaponry against that prisoner particularly risky, in order to facilitate compliance with Standard 23-5.8(d).

Standard 23-6.1 General principles governing health care

(a) Correctional authorities should ensure that:

(i) a qualified health care professional is designated the responsible health authority for each facility, to oversee and direct the provision of health care in that facility;

(ii) prisoners are provided necessary health care, including preventive, routine, urgent, and emergency care;

(iii) such care is consistent with community health care standards, including standards relating to privacy except as otherwise specified in these Standards;

(iv) special health care protocols are used, when appropriate, for female prisoners, prisoners who have physical or mental disabilities, and prisoners who are under the age of eighteen or geriatric; and

(v) health care that is necessary during the period of imprisonment is provided regardless of a prisoner’s ability to pay, the size of the correctional facility, or the duration of the prisoner’s incarceration.

(b) Prisoners should not be charged fees for necessary health care.

(d) Prisoners should be provided timely access to appropriately trained and licensed health care staff in a safe and sanitary setting designed and equipped for diagnosis or treatment.

(e) Health care should be based on the clinical judgments of qualified health care professionals, not on non-medical considerations such as cost and convenience. Clinical decisions should be the sole province of the responsible health care professionals, and should not be countermanded by non-medical staff. Work assignments, housing placements, and diets for each prisoner should be consistent with any health care treatment plan developed for that prisoner.

(f) Prisoners should be provided basic educational materials relating to disease prevention, good health, hygiene, and proper usage of medication.

Standard 23-6.2 Response to prisoner health care needs

(a) Correctional authorities should implement a system that allows each prisoner, regardless of security classification, to communicate health care needs in a timely and confidential manner to qualified health care professionals, who should evaluate the situation and assess its urgency. Provision should be made for prisoners who face literacy, language, or other communication barriers to be able to communicate their health needs. No correctional staff member should impede or unreasonably delay a prisoner’s access to health care staff or treatment.

(b) A prisoner suffering from a serious or potentially life-threatening illness or injury, or from significant pain, should be referred immediately to a qualified medical professional in accordance with written guidelines. Complaints of dental pain should be referred to a qualified dental professional, and necessary treatment begun promptly.

(c) When appropriate, health care complaints should be evaluated and treated by specialists. A prisoner who requires care not available in the correctional facility should be transferred to a hospital or other appropriate place for care.

Standard 23-6.4 Qualified health care staff

(a) Each correctional agency should employ or contract with a sufficient number of qualified medical, dental, and mental health professionals at each correctional facility to render preventive, routine, urgent, and emergency health care in a timely manner consistent with accepted health care practice and standards.

(b) Health care providers in a non-federal correctional facility should be fully licensed in the state in which the facility is located; health care providers in a federal correctional facility should be fully licensed in the United States. No health care provider should be permitted to practice in a correctional facility beyond the scope permissible for that individual provider outside of a correctional facility, given the provider’s particular qualifications and licensing.

(c) Regardless of any training a prisoner may have had, no prisoner should be allowed to provide health care evaluation or treatment to any other prisoner.

Standard 23-6.6 Adequate facilities, equipment, and resources

(a) Health care areas in a correctional facility should be safe and sanitary, should include appropriately private areas for examination and treatment, and should be designed so that prisoners can hold confidential discussions with health care personnel.

(b) A correctional facility should have equipment necessary for routine health care and emergencies, and an adequately supplied pharmacy. Specialized equipment may be required in larger facilities and those serving prisoners with special medical needs. Smaller facilities should be permitted to provide for prisoners’ health care needs by transferring them to other facilities or health care providers, but should have equipment that is reasonably necessary in light of its preexisting transfer arrangements.

(c) Hospitals and infirmaries operated by or within correctional facilities should meet the licensing standards applicable to similar, non-prison hospitals or infirmaries.

(d) Vehicles used to transport prisoners to and from medical facilities should be adequately equipped with emergency medical equipment and provisions for prisoners with special needs.

Standard 23-6.12 Prisoners with chronic or communicable diseases

(a) Correctional officials should provide for the voluntary medically appropriate testing of all prisoners for widespread chronic and serious communicable diseases and for appropriate treatment, without restricting the availability of treatment based on criteria not directly related to the prisoner’s health.

(b) Correctional authorities should not discriminate against a prisoner in housing, programs, or other activities or services because the prisoner has a chronic or communicable disease, including HIV or AIDS, unless the best available objective evidence indicates that participation of the prisoner poses a direct threat to the health or safety of others. When medically necessary, correctional authorities should be permitted to place a prisoner with a readily transmissible contagious disease in appropriate medical isolation or to restrict such a prisoner in other ways to prevent contagion of others.

(c) Any accommodation made to address the special needs or risks of a prisoner with a communicable disease should not unnecessarily reveal that prisoner’s health condition.

Standard 23-6.14 Voluntary and informed consent to treatment

(a) Correctional officials should implement a policy to require voluntary and informed consent prior to a prisoner’s health care examination, testing, or treatment, except as provided in this Standard. A prisoner who lacks the capacity to make decisions consenting or withholding consent to care should have a surrogate decision-maker designated according to applicable law, although that decision-maker’s consent should not substitute for the protections specified in Standard 23-6.15. A competent prisoner who refuses food should not be force-fed except pursuant to a court order.

(b) Prisoners should be informed of the health care options available to them. If a prisoner refuses health care examination, testing, or treatment, a qualified health care professional should discuss the matter with the prisoner and document in the prisoner’s health care record both the discussion and the refusal; the health care professional should attempt to obtain the prisoner’s signature attesting to the refusal. Any claim that a prisoner is refusing treatment for a serious medical or mental health condition should be investigated by a qualified health care professional to ensure that the refusal is informed and voluntary, and not the result of miscommunication or misunderstanding. If a prisoner refuses care in such a situation, health care staff should take steps to involve other trusted individuals, such as clergy or the prisoner’s family members, to communicate to the prisoner the importance of the decision.

(c) A prisoner who refuses testing or treatment for a serious communicable disease should be housed in a medically appropriate setting until a qualified health care professional can ascertain whether the prisoner is contagious. Involuntary testing or treatment should be permitted only if:

(i) there is a significant risk of the spread of disease;

(ii) no less intrusive alternative is available; and

(iii) involuntary testing or treatment would accord with applicable law for a non-prisoner.

**USE OF MEDICAL ISOLATION AND/OR SEGREGATED HOUSING**

ABA policies provide that prisoners with readily transmissible contagious disease may be placed in medical isolation and/or segregated housing. Such prisoners must still be provided with opportunity for programming and exercise, as well as all services necessary for the maintenance of psychological and physical well-being.

**Criminal Justice Standards on the Treatment of Prisoners (2010)**

Standard 23-6.12 Prisoners with chronic or communicable diseases

(b) Correctional authorities should not discriminate against a prisoner in housing, programs, or other activities or services because the prisoner has a chronic or communicable disease, including HIV or AIDS, unless the best available objective evidence indicates that participation of the prisoner poses a direct threat to the health or safety of others. When medically necessary, correctional authorities should be permitted to place a prisoner with a readily transmissible contagious disease in appropriate medical isolation or to restrict such a prisoner in other ways to prevent contagion of others.

(c) Any accommodation made to address the special needs or risks of a prisoner with a communicable disease should not unnecessarily reveal that prisoner’s health condition.

Standard 23-3.2 Conditions for special types of prisoners

(a) Correctional agencies and facilities should provide housing options with conditions of confinement appropriate to meet the protection, programming, and treatment needs of special types of prisoners, including female prisoners, prisoners who have physical or mental disabilities or communicable diseases, and prisoners who are under the age of eighteen or geriatric.

Standard 23-3.8 Segregated housing

(a) Correctional authorities should be permitted to physically separate prisoners in segregated housing from other prisoners but should not deprive them of those items or services necessary for the maintenance of psychological and physical wellbeing.

(b) Conditions of extreme isolation should not be allowed regardless of the reasons for a prisoner’s separation from the general population. Conditions of extreme isolation generally include a combination of sensory deprivation, lack of contact with other persons, enforced idleness, minimal out-of-cell time, and lack of outdoor recreation.

(c) All prisoners placed in segregated housing should be provided with meaningful forms of mental, physical, and social stimulation. Depending upon individual assessments of risks, needs, and the reasons for placement in the segregated setting, those forms of stimulation should include:

(i) in-cell programming, which should be developed for prisoners who are not permitted to leave their cells;

(ii) additional out-of-cell time, taking into account the size of the prisoner’s cell and the length of time the prisoner has been housed in this setting;

(iii) opportunities to exercise in the presence of other prisoners, although, if necessary, separated by security barriers;

(iv) daily face-to-face interaction with both uniformed and civilian staff; and

(v) access to radio or television for programming or mental stimulation, although such access should not substitute for human contact described in subdivisions (i) to (iv).

(d) Prisoners placed in segregated housing for reasons other than discipline should be allowed as much out-of-cell time and programming participation as practicable, consistent with security.

(e) No cell used to house prisoners in segregated housing should be smaller than 80 square feet, and cells should be designed to permit prisoners assigned to them to converse with and be observed by staff. Physical features that facilitate suicide attempts should be eliminated in all segregation cells. Except if required for security or safety reasons for a particular prisoner, segregation cells should be equipped in compliance with Standard 23-3.3(b).

(f) Correctional staff should monitor and assess any health or safety concerns related to the refusal of a prisoner in segregated housing to eat or drink, or to participate in programming, recreation, or out-of-cell activity.

Resolution **2018 MY 108A** states that, for adults, solitary confinement should only be used as a measure of last resort, less restrictive settings are insufficient, and for no longer than is necessary to address the specific reason for placement, typically not to exceed 15 consecutive days. It further prohibits solitary confinement for “individuals whose medical conditions will be exacerbated by such confinement.”

**LOCKDOWN OF FACILITIES**

ABA policies contemplate the use of lockdown to prevent serious contagion. Lockdowns should not result in the suspension of medical or food services, or interrupt the provision of necessities. Lockdown should last no longer than necessary and special precautions must be invoked in the event a lockdown extends beyond 7 days.

Standard 23-3.9 Conditions during lockdown

(a) The term “lockdown” means a decision by correctional authorities to suspend activities in one or more housing areas of a correctional facility and to confine prisoners to their cells or housing areas.

(b) A lockdown of more than one day should be imposed only to restore order; to address an imminent threat of violence, disorder, or serious contagion; or to conduct a comprehensive search of the facility.

(c) During any lockdown, correctional authorities should not suspend medical services, food service, and provision of necessities, although necessary restrictions in these services should be permitted. Prisoners should continue to have unrestricted access to toilets, washbasins, and drinking water. Except in the event of an emergency lockdown of less than [72 hours] in which security necessitates denial of such access, prisoners should be afforded access to showers, correspondence, delivery of legal materials, and grievance procedures.

(d) In the event of a lockdown of longer than [7 days], a qualified mental health professional should visit the affected housing units at least weekly to observe and talk with prisoners in order to assess their mental health and provide necessary services.

(e) A lockdown should last no longer than necessary. As the situation improves, privileges and activities for the affected area should be progressively increased. Procedures should exist for identifying individual prisoners who did not participate in incidents that led to the lockdown and whose access to programs and movement within the facility may be safely restored prior to the termination of lockdown status. In the extraordinary situation that a lockdown lasts longer than [30 days], officials should mitigate the risks of mental and physical deterioration by increasing out-of-cell time and in-cell programming opportunities.

(f) Correctional officials should not use a lockdown to substitute for disciplinary sanctions or for reclassification of prisoners.

**COMPASSIONATE RELEASE**

ABA policy favors early release of prisoners in exceptional circumstances, which are defined to include serious illness. When prisoners are released, corrections facilities should make reasonable efforts to ensure a smooth transition of health care services and help prisoners to apply for appropriate healthcare benefits.

Standard 23-8.9 Transition to the community

d) When a prisoner with ongoing medical or mental health care needs is released to the community, correctional authorities should make reasonable efforts to:

* (i) identify and arrange for community-based health care services, including substance abuse treatment; and
* (ii) ensure that all health care treatment and medications provided to the prisoner during the term of imprisonment will continue uninterrupted, including, if necessary, providing prescription medication or medical equipment for a brief period reasonably necessary to obtain access to health care services in the community; providing initial medically necessary transportation from the correctional facility to a community health care facility for continuing treatment; or otherwise addressing the prisoner’s serious immediate post-release health care needs.

(e) Correctional authorities should provide each convicted prisoner being released to the community with:

(i) specific information about when and how to contact any agency having supervisory responsibility for the prisoner in the community;

(ii) general information about the collateral sanctions and disqualifications that may apply because of the prisoner’s conviction, and where to get more details; and

(iii) general information about the process for obtaining relief from such sanctions and disqualifications, and contact information for government or nonprofit organizations, if any, offering assistance to individuals seeking such relief.

(g) When public safety and the interests of justice would not be compromised, governmental authorities should provide judicial and administrative mechanisms to accomplish the early release of prisoners in exceptional circumstances, such as terminal illness, permanent disability that substantially diminishes the ability of the prisoner to provide self-care within a correctional facility, or exigent family circumstances.

(h) Governmental authorities should implement policies that allow government benefits, including health benefits, to be restored to prisoners immediately upon release, and correctional officials should ensure that correctional authorities or community service providers assist prisoners—especially prisoners with mental disabilities or significant health care needs—in preparing and submitting appropriate benefits applications sufficiently in advance of their anticipated release date to meet this objective and facilitate continuity of care.

**RESOLUTION 109 (AM96) (Individual Rights and Responsibilities)**

RESOLVED, that the American Bar Association supports compassionate release of terminally ill prisoners and endorses adoption of administrative and judicial procedures for compassionate release consistent with the "Administrative Model for Compassionate Release Legislation" and the "Judicial Model for Compassionate Release Legislation," each dated April 1996; and

FURTHER RESOLVED, that the American Bar Association supports alternatives to sentencing for non-violent terminally ill offenders in which the court, upon the consent of the defense and prosecuting attorneys, and upon a finding that the defendant is suffering from a terminal condition, disease, or syndrome and is so debilitated or incapacitated as to create a reasonable probability that he or she is physically incapable of presenting any danger to society, and upon a finding that the furtherance of justice so requires, may accept a plea of guilty to any lesser included offense of any count of the accusatory instrument, to satisfy the entire accusatory instrument and to permit the court to sentence the defendant to a non-incarceratory alternative. In making such a determination, the court must consider factors governing dismissals in the interest of justice.