

CHAPTER VI – BAIL AND SURETIES

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CHAPTER VI

BAIL AND SURETIES

6.1 SCOPE OF CHAPTER

This chapter discusses the right of an accused to bail, modification of bond conditions, forfeiture and judgment, and qualifications for various types of sureties. As the vast majority of the law in this area is contained within Missouri Supreme Court Rule 37 (2008),¹ it is discussed at some length and should be referenced while using this chapter. This chapter also discusses statutes found in Chapter 544, RSMo Supp. 2008² which concern bail and may apply to municipal courts and proceedings.³

RIGHT TO BAIL

6.2 PURPOSE OF BAIL

[Rule 37.15\(a\)](#)

Any person arrested for an ordinance violation is entitled to be released from custody while awaiting trial, after trial pending trial *de novo*, and after trial *de novo* pending appellate review. Rule 37.15(a). Upon entry of each judgment, each court shall review the conditions of release, including any condition requiring bail, and modify them as provided in Rule 37.19. *Id.*; *See* Rules 37.15(c)(3) and 37.15(c)(5) (providing that an appropriate condition of bond is requiring execution of a bond in a stated amount). The purpose of bail is not to punish the accused ahead of trial or to enrich the treasury, but to enforce the criminal laws by requiring the accused to appear in court. *State v. Hinojosa*, 271 S.W.2d 522, 524 (Mo. 1954); *Ex parte Chandler*, 297 S.W.2d 616, 616-17 (Mo. App. 1957).

6.3 DRIVER'S LICENSE AS BOND

[Section 544.045](#)

A person arrested and charged with violating a traffic law or ordinance may post his or her driver's license or chauffeur's license as security for his appearance in court in lieu a of cash bond. Section 544.045.1. This provision is applicable only to traffic offenses and does not apply to the following charges:

- (1) Driving while intoxicated;
- (2) Driving under the influence of intoxicating liquors or drugs;
- (3) Leaving the scene of a motor vehicle accident;
- (4) Driving while the license is suspended or revoked; or

¹ All references to Rules are to Missouri Supreme Court Rules (2008).

² All statutory references are to RSMo Supp. 2008.

³ Statutory sections in Chapter 544 that refer only to courts of record, associate circuit courts, or criminal proceedings indicate they do not apply to municipal courts or proceedings and, therefore, are not referenced in this chapter.

- (5) Those charges that result from a motor vehicle accident in which a death has occurred.

Íd. The posting of the license is discretionary to both the officer and the person arrested. *Íd.*

The person arrested may choose to pay fifty dollars per traffic offense allegedly committed instead of depositing his or her license as security for appearance in court. Section 544.045.2. The officer must issue a receipt for such bond and deposit the bond with the court. *Íd.*

Processing of the license or money received as security for appearance is set out in detail in section 544.045.3.

The court shall notify the director of revenue within ten days if the driver fails to appear at the proper time to answer the charge(s) placed against him or her. Section 544.045.4. The court should also notify the director of revenue when the charges against the driver have been reduced to final judgment. *Íd.*

6.4 CONDITIONS OF RELEASE AND SETTING BAIL

Rules [37.15\(b-e\)](#),¹ [37.16](#), and [37.17](#), and [Section 544.457](#)

The court shall release the accused upon written promise to appear unless the court finds: (1) that the promise alone will not reasonably assure the accused's appearance; or (2) that the accused poses a danger to a crime victim, the community, or any other person. Rule 37.15(b).

Under Rule 37.15(c), if the court determines that the imposition of conditions will assure that the accused is reasonably likely to appear and will not pose a danger to a crime victim, the community, or any other person, the court shall impose one or more of the following conditions for the release of the accused:

- (1) Place the accused in the custody of a designated person or organization consenting to supervise the accused;
- (2) Place restrictions on the accused's travel, association, and place of abode during the period of release;
- (3) Require the execution of a bond in a stated amount with sufficient solvent securities or a sum of cash or negotiable bonds be deposited with the court
- (4) Require the accused to report regularly to an officer of the court or peace officer in such way as the court directs;
- (5) Require the execution of a bond in a stated amount and a deposit with the court of up to 10% of that amount in cash or negotiable bonds; or
- (6) Impose any other condition(s) reasonably necessary to assure the accused's appearance, including a condition requiring that the accused return to custody after specified hours.

¹ Section 544.455 is applicable to municipal judges hearing and determining ordinance violations and contains many similar provisions to those found in Rule 37.15(b-e). Section 544.455.8.

The court shall consider the following factors, based on available information, to determine which conditions of release will reasonably assure the accused's appearance:

- (1) The nature and circumstances of the ordinance violation;
- (2) The weight of the evidence against the accused;
- (3) The accused's family ties, employment, financial resources, character, and mental condition;
- (4) The length of the accused's residence in the community;
- (5) The accused's record of convictions; and
- (6) The accused's record of appearance at court proceedings, flight to avoid prosecution, or failure to appear at court proceedings.

Rule 37.15(d).

Section 544.457, which appears to apply to municipal courts, provides that:

Notwithstanding the provisions of section 20 of article 1 of the Missouri Constitution to the contrary, upon a showing that the defendant poses a danger to a crime victim, the community, or any other person, the court may use such information in determining the appropriate amount of bail, to increase the amount of bail, to deny bail entirely or impose any special conditions which the defendant and surety shall guarantee.

A court is authorized to impose special conditions requiring the defendant to "obey all laws and ordinances" and "not to consume any alcohol or drugs" under section 544.457 when the conditions are rationally related to the legitimate goal of protecting the community. *See State v. Wurtzberger*, 265 S.W.3d 329, 344-45 (Mo. App. E.D. 2008) (finding that the special conditions were rationally related to the legitimate goal of protecting the community from a person charged with the crime of possession with the intent to manufacture methamphetamine).

A court releasing an accused under Rule 37.15 shall enter an order stating the conditions imposed. Rule 37.15(e). The court shall inform the accused of the conditions imposed and of the penalties applicable to violations of the conditions of release, and shall advise the accused that a warrant for arrest will be issued immediately upon any such violation. *Id.*

A court issuing a warrant for the arrest of an accused shall set the conditions for release of the accused, and those conditions shall be stated on the arrest warrant. Rule 37.16(a). The court shall impose one of the following conditions: the written promise of the accused to appear; or the execution of a bond in a stated amount under either Rule 37.15(c)(3) or Rule 37.15(c)(5). Rule 37.16(a)(1-3). The court may also impose other conditions for release as provided in Rule 37.15(c). If the arrest of the accused upon a warrant occurs in a county other than that in which the ordinance violation occurred, the peace officer making the arrest and the county having jurisdiction of the ordinance violation must act in accordance with Rule 37.16(b).

"When an arrest is made without a warrant, the peace officer may accept bond in accordance with a bail schedule furnished by the court having jurisdiction." Rule 37.17.

If a court requires bail as a condition of release, the court should keep in mind that the purpose of bail is not to punish the accused ahead of trial or to enrich the treasury, but to enforce the criminal laws by requiring the accused to appear in court. *State v. Hinojosa*, 271 S.W.2d 522, 524 (Mo. 1954); *Ex parte Chandler*, 297 S.W.2d 616, 616-17 (Mo. App. 1957). Although the amount of bail is within broad limits of the discretion of the court, *Ex parte Chandler*, 297 S.W.2d at 617, excessive bond or bail is prohibited under the Eighth Amendment to the United States Constitution and Article 1, section 21 of the Missouri Constitution. Because the only legitimate purpose in setting bail is to ensure the accused's appearance at trial, any amount in addition to that figure is excessive. *State v. Dodson*, 556 S.W.2d 938, 944 (Mo. App. 1977). Bail is not excessive merely because the accused is unable to pay it or because the cost of obtaining bail is high. *Koen v. Long*, 302 F. Supp. 1383, 1391 (E.D. Mo 1969), *aff'd*, 428 F.2d 876 (8th Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).

6.5 RE-ARRESTING THE ACCUSED

Rule 37.21

The court may order the re-arrest of an accused who has been released if it appears that: (a) there has been a breach of any condition for release; or (b) the bail should be increased, new or additional security should be required, or new conditions for release should be imposed. [Rule 37.21](#). Upon application, the accused is entitled to a hearing about the reasons for the order. *Id.*

MODIFICATION OF BOND CONDITIONS

6.6 MODIFICATION IN DIVISION

Rules [37.19](#) and [37.20](#)

Once a court has established the conditions of release, the court may modify those conditions only after notice to the parties and a hearing. Rule 37.19(a). A hearing may be conducted upon motion by the prosecutor, upon motion by the accused, or upon the court's own motion. *Id.* At the conclusion of the hearing, the conditions of release may be modified if the court finds that:

- (1) That new, different, or additional requirements for release are necessary;
- (2) That the conditions for release that have been set are excessive;
- (3) That the accused has failed to comply with or has violated the conditions for his or her release; or
- (4) That the accused has been convicted of the ordinance violation for which he or she was charged.

Id.

If the conditions for release are modified to make them more stringent, the accused shall be remanded to the custody of the corrections official until compliance with the modified conditions occurs. Rule 37.19(b). If the accused is not in custody, the court may order an arrest warrant setting forth the new conditions for the release of the accused in accordance with Rule 37.16, which is set out above. *Id.*

Any person for whom conditions of release are imposed and who after 24 hours from the time of the release hearing continues to be detained as a result of his inability to meet the conditions of release shall, upon application, be entitled to have the conditions reviewed by the court that imposed them. Rule 37.20; *See* section 544.455.4. The court shall determine the application promptly. *Id.* The court should act in accordance with Rule 37.19 if modifying any of the conditions of release.

6.7 MODIFICATION BY "HIGHER COURT"

Rules [37.22](#), [37.23](#) and [37.28](#)

The conditions for release set by the court may be reviewed by a "higher court" upon application filed by the accused or by the prosecutor. Rule 37.22(a). A copy of the application and notice of the time when the application will be presented to the court shall be served on all parties. *Id.* Whenever the "higher court" finds that the accused is entitled to be released and no conditions have been set, or finds that the conditions set are excessive or otherwise inadequate, the court shall enter an order setting or modifying the conditions for release of the accused. Rule 37.22(b). It is unclear from the Rule which court is a "higher court" for purpose of reviewing the conditions of release. Because the municipal court is a division of the circuit court, [See Rule 37.06](#)(e), another division of the same circuit court may or may not be a "higher court."

Should a "higher court" set or modify conditions for the release of the accused, the accused shall file with the clerk a signed and acknowledged written instrument in which he shall specify the address to which all notices in connection with his case thereafter may be mailed. Rule 37.22(c). The definition section of Rule 37 provides that the word "clerk" means the municipal division clerk, not the clerk of the "higher court." [See Rule 37.06](#) (b), (e) and (i); *See also* [Rule 37.01](#). Rule 37.22(c) provides some safeguard for the court where the case is pending so that contact with the accused will be possible. If the accused fails to file an instrument in accordance with Rule 37.22(c) so that he can be notified of future appearance requirements, and the accused subsequently fails to appear at a hearing, a court may declare forfeiture of the accused's bond under [Rule 37.26](#), which is set out below.

When a person is released by a court other than the court in which the person is required to appear, the clerk of the releasing court shall immediately transmit a record of the release, together with any conditions imposed, to the clerk of the court in which the person released is required to appear. [Rule 37.23](#). This requirement on the clerk of the "higher court" ensures that the clerk of the court where the charges are pending will have a record of the conditions of release.

[Rule 37.28](#) is related only to the extent that it requires a released person, and any surety for such person, to give written notice to the clerk of the court in which the case is pending of any change of address. Again, the purpose here is to ensure that an accused can be located when necessary.

FORFEITURE AND JUDGMENT

6.8 DECLARING FORFEITURE, SETTING ASIDE FORFEITURE, AND PENALTY FOR FAILURE TO APPEAR

Rule 37.26 and Sections [374.770.1](#), [544.640](#) and [544.665.1\(4\)](#)

In *State v. Echols*, the Missouri Supreme Court discusses the history and distinction between cash bonds and surety bonds. 850 S.W.2d 344, 346-47 (Mo. banc 1993). In a cash bond, the depositor of cash bail does not have any obligation for the custody or appearance of the defendant. *Id.* at 347. In contrast, a surety in a surety bond has the responsibility for insuring the defendant's appearance. *Id.* at 346. The concept of forfeiture of bonds was developed to assess a financial penalty against the surety if he failed to produce the accused. *Id.* Courts should be aware that "forfeiture of a bond is a taking of property which raises due process considerations under Article I Section 10 of the Missouri Constitution and the Fifth and Fourteenth Amendments to the United States Constitution." *State v. Wurtzberger*, 265 S.W.3d 329, 346 n.6 (Mo. App. E.D. 2008).

In general, if the accused fails to appear at the hearing or there is any other breach of a condition of release, the court in which the case is pending may declare a forfeiture of the bond. Rule 37.26. Section 374.770.1 creates an exception to this rule when a surety informs the court that the defendant is incarcerated in the United States. 544.640, which may apply to municipal courts, directs that the court must enter in its record the reason for the forfeiture.

The court may set aside a forfeiture upon such conditions as the court may impose, if it appears that justice does not require enforcement of the forfeiture. Rule 37.26.

"Where the undertaking of the bond has clearly been violated and the defendant remains at large without reasonable excuse or explanation, there is no abuse of discretion in failing to set aside the forfeiture." *Echols*, 850 S.W.2d at 348 (applying rule similar to Rule 37.26). But, if a surety can prove that the defendant is incarcerated in the United States, the bond forfeiture shall be set aside and the surety is responsible for the defendant's return. Section 374.770.1.

In *Wurtzberger*, although the defendant never failed to appear at any court proceedings, he allegedly violated special conditions imposed under section 544.547 which required him to "obey all laws and ordinances" and "not to consume any alcohol or drugs." 265 S.W.3d at 339-41, 346 n.7. The purpose of these conditions was to protect the community or any other person from the dangers posed by the defendant. *Id.* at 346. The majority opinion found that the court abused its discretion in forfeiting the bond under a rule similar to Rule 37.26 because: (1) the court made no findings of fact regarding the alleged violations of the conditions; (2) the court made no findings to support its conclusion that "justice requires" a bond forfeiture; and (3) forfeiture of the defendant's bond occurred after the defendant had been sentenced and was no longer a threat to the community or any other person. *Id.* As an aside, the concurring opinion in that case would have held that: "where the defendant never failed to appear as required but violated only special conditions of his release on bond, 'justice' cannot require – or allow – the forfeiture of a cash bond." *Id.* at 348.

In addition to having their bond subject to forfeiture, any person arrested for the violation of a municipal ordinance who willfully fails to appear before a court as required shall be guilty of an offense and punished by a fine not to exceed five hundred dollars; provided that the fine imposed shall not exceed the maximum fine which could be imposed for the offense for which the accused was arrested. Section 544.665.1(4).

6.9 JUDGMENT ON BOND

Rule 37.26

The order of forfeiture is interlocutory (provisional) and must be reduced to judgment to be enforceable. *State v. Wynne*, 181 S.W.2d 781, 783 (Mo. App. 1944).

After the court has ordered a forfeiture, and if the forfeiture has not been set aside, the prosecutor may enforce the forfeiture by filing a motion for judgment of default and execution on the bond and a notice of hearing with the clerk. Rule 37.26. (See form 6-01 and 6-02 following this chapter.) Obligors, by entering a bond, submit to the jurisdiction of the court in which the accused is required to appear and irrevocably appoint the clerk as their agent for service of process. Rule 37.26. Thus, the clerk shall mail the prosecutor's motion for judgment on the bond and the notice of hearing to each obligor. *Id.*

On the date set for hearing on the motion for judgment on the bond, if the forfeiture has not been set aside previously, the court may enter a judgment of default on the bond and execution may be issued to enforce that judgment. Rule 37.26. (See form 6-03 following this chapter.) This proceeding was historically known as a writ of *scire facias*. See Section 544.640.

6.10 SURRENDER OF ACCUSED BY SURETY

Rule 37.25

Under Rule 37.25, the surety may surrender the accused to a peace officer and be released from its bond prior to rendition of judgment upon the forfeiture. After the court has ordered a forfeiture of a bond for the failure of the accused to appear, a surety is released from its bond and has a legal right to have the bond forfeiture set aside if: (1) the surety surrenders the accused prior to the rendition of judgment upon the forfeiture; and (2) the surety pays all costs and expenses associated with the accused's failure to appear. *Id.*; See *State v. Siemens*, 12 S.W.3d 776, 780 (Mo. App. W.D. 2000) (discussing rule similar to Rule 37.25). If the accused is captured or brought before the court through the efforts of the sheriff or others rather than through the efforts of the surety, the court is not required to set aside the order of forfeiture and may do so only if justice so requires. See *id.* (discussing rules similar to Rules 37.25 and 37.26).

If the surety surrenders the accused to a peace officer, the surety and peace officer must act in accordance with the procedures outlined in Rule 37.25. Any accused person surrendered by a surety may be conditionally released pursuant to Rule 37.15, which is set out above. Rule 37.25.

6.11 ADMINISTRATIVE ENFORCEMENT OF JUDGMENT

As a practical matter, it is seldom necessary to enforce judgment on a bond. In each judicial circuit, the presiding judge or the judge's designee maintains a list of sureties authorized to write bonds within the circuit. Statewide, the Office of State Courts Administrator maintains such a list. If a judge has ordered a bond forfeited, has entered a judgment on it, and if the judgment remains unsatisfied for any appreciable period of time, the judge or clerk should notify the presiding judge of the circuit. The presiding judge may then remove that surety from the list of approved sureties to do business in the circuit. Usually, merely advising the surety that such steps are about to be undertaken will bring immediate satisfaction of the judgment.

SURETIES

6.12 UNCOMPENSATED SURETIES

[Rule 37.29](#)

Pursuant to Rule 37.29, an uncompensated individual may act as a surety if that person:

- (a) Is reputable, at least 21 years of age, and a resident of the State of Missouri;
- (b) Has net assets with a value in excess of exemptions at least equal to the amount of the bond subject to execution in Missouri;
- (c) Has not, within the past 15 years, been found guilty of or pleaded guilty or nolo contendere to: (1) a felony of any state or of the United States; or (2) any other crime of any state or the United States involving moral turpitude, whether or not a sentence was imposed; and
- (d) Has no outstanding forfeiture or unsatisfied judgment entered upon any bail bond in any court of Missouri or of the United States.

No lawyer, elected or appointed official, employee of the State of Missouri or any county or other political subdivision thereof can act as a surety on any bail bond except for bonds where the principal is the spouse, child, or family member of the surety. *Id.* Additionally, "[i]f there is more than one surety, the aggregate net worth of the sureties in excess of exemptions shall be at least equal to the amount of the bond." *Id.*

6.13 COMPENSATED SURETIES

[Rule 37.30](#)

Anyone who charges or receives compensation for signing a bond is a compensated surety. *See* Rule 37.30. In addition to all the qualifications of an uncompensated individual surety required by Rule 37.29, the compensated surety must, by appropriate affidavit, maintain approval to write bonds in each circuit in which the surety does business. *See* Rule 37.30; Rule 37.10; Form 37.K

in the Missouri Supreme Court Rules. Unless a jurisdiction requires that the municipal division of the circuit court approve and maintain its own qualified list of compensated sureties, it is advisable to utilize the list of approved compensated sureties maintained by the presiding judge of the circuit or by the judge's designee.

If a municipal division must maintain its own list of qualified compensated sureties, the court must require each surety to file, prior to the first day of each month, an affidavit under oath. Rule 37.30. The affidavit for the individual compensated surety, referred to as an Affidavit of Justification and set forth in Form 37.K of the Missouri Supreme Court Rules, must include the recitations that the surety is acceptable as required by Rule 37.29. The affidavit also must describe with particularity all real estate proposed to justify the surety's sufficiency to meet bond, including: an accurate legal description of the property, a description of the improvements located thereon, the location of the property by street address if it is located in a city or town, and the latest assessed value of such property. Rule 37.30(a) and (b). If personal property is proposed to justify the surety's sufficiency to meet the bond, then that personal property should be described with particularity and its reasonable market value should be stated. Rule 37.30(c). The affidavit should include a list of all undischarged bail bonds for which the surety is responsible, the amount of each bond, the name of the principal of the bond, the ordinance violation charged, and the court in which the bond is pending. Rule 37.30(d). In addition, the affidavit should set forth the consideration or security promised or received for suretyship for each bond, including the nature and amount thereof, and the name of the person by whom such promise was made or from whom such security or consideration was received. Rule 37.30(e).

The judge, clerk, or officer to whom an affidavit is submitted may investigate the qualifications of the surety. Rule 37.30.

6.14 SURETY CORPORATIONS

Rule 37.32

A surety corporation may be approved to act as a surety under Rule 37.32 if it submits evidence to the court showing that it is qualified under the provisions of [Section 379.010](#). Rule 37.32(a). An agent acting on behalf of such a corporation must:

- (1) Be a reputable person, at least 21 years of age, and a resident of Missouri;
- (2) Have not, within the past 15 years, been found guilty of or pleaded guilty or nolo contendere to: (a) a felony of any state or of the United States; or (b) any other crime of any state or the United States involving moral turpitude, whether or not a sentence was imposed;
- (3) Have no outstanding forfeiture or unsatisfied judgment entered upon any bail bond in any court of Missouri or of the United States; and
- (4) Be licensed as a bail bond agent as required by law.

Rule 37.32(b); Rule 37.29(a), (c), and (d).

6.15 AFFIDAVIT OF JUSTIFICATION

Rule 37.31

When a surety is accepted upon a bond, the surety shall execute an affidavit of justification, *See* Form 37.K of the Missouri Supreme Court Rules, shall attach the affidavit to the bond, and file the affidavit and bond with the clerk of the court in accordance with the provisions of Rules 37.24. Rule 37.31. The clerk of the court shall preserve the file as set forth in Rule 37.31. *Id.*